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CASES REPORTED.

	Page		Page
Abilene Live-Stock Co. v. Guinn (Tex. Civ. App.)	885	Bell v. Eddy (Ind. T.)	959
Accuman v. Barnes (Ark.)	319	Bell & Coggeshall Co. v. Kentucky Glass-Works Co. (Ky.)	180
Adams' Adm'r, Louisville & N. R. Co. v. (Ky.)	577	Belmont's Ex'r v. Talbot (Ky.)	588
Adcock, State v. (Tenn. Ch. App.)	992	Belt, Commonwealth v. (Ky.)	431
Adelsdorf, Cox v. (Ky.)	616	Belt, Robinson v. (Ind. T.)	975
Admire, Crossland v. (Mo.)	463	Benge's Adm'r v. Bowling (Ky.)	151
Ætna Fire Ins. Co., State v. (Ark.)	638	Berner's Adm'r, Schlamp v. (Ky.)	312
Ætna Ins. Co. v. Commonwealth (Ky.)	624	Bethune v. Cleveland, St. L. & K. O. R. Co. (Mo.)	465
Ætna Ins. Co., State ex rel. Crow v. (Mo.)	413	Betterton, Kahler v. (Tex. Civ. App.)	289
Ahrens & Ott Mfg. Co. v. Hoeher (Ky.)	194	Bialek v. Richmond (Tex. Civ. App.)	47
Airhart v. State (Tex. Cr. App.)	214	Biering, Jaeger v. (Tex. Civ. App.)	50
Aitken v. Lang's Adm'r (Ky.)	154	Billings, Graham v. (Tex. Civ. App.)	645
Alkire Grocery Co. v. Jackson (Ark.)	459	Binkley, Hoover v. (Ark.)	73
Allen, Craft v. (Ky.)	169	Bishop v. Lucy (Tex. Civ. App.)	854
Allison v. Cocke's Ex'rs (Ky.)	593	Black v. Black (Ky.)	456
Allison v. Preston's Ex'rs (Ky.)	593	Blackford, Westchester Fire Ins. Co. v. (Ind. T.)	978
Allison, Stewart v. (Mo.)	712	Blackman v. Schierman (Tex. Civ. App.)	886
Alumbaugh's Adm'r, Louisville & N. R. Co. v. (Ky.)	18	Black's Estate, State v. (Tex. Civ. App.)	555
Ambrose v. Noel (Ky.)	570	Blackwell v. State (Tex. Cr. App.)	919
American Cent. Ins. Co., State ex rel. Crow v. (Mo.)	413	Blackwell, Courtney v. (Mo.)	668
American Cent. Ins. Co. of St. Louis, Risler v. (Mo.)	755	Blackwell, Kurtzman v. (Tex. Civ. App.)	659
American Union Life Ins. Co., Woiten v. (Tex. Civ. App.)	1105	Blanchard, Burrell v. (Tex. Civ. App.)	46
Ames, Vittetow v. (Ky.)	1	Blaydes, Louisville R. Co. v. (Ky.)	820
Anders, Miller v. (Tex. Civ. App.)	897	Blevins v. Case (Ark.)	65
Anderson v. Sessions (Tex. Civ. App.)	874	Board, Smith v. (Tex. Civ. App.)	520
Anderson v. Silliman (Tex. Civ. App.)	1134	Board of Council of Danville v. Fiscal Court of Boyle County (Ky.)	157
Anderson, Bumpass v. (Tex. Civ. App.)	1103	Bokel, Masterson v. (Tex. Civ. App.)	39
Anderson, Lincoln v. (Tex. Civ. App.)	278	Boles v. McNeil (Ark.)	71
Antis, Campbell v. (Tex. Civ. App.)	343	Boli v. Irwin (Ky.)	444
Armstrong, Texas & P. R. Co. v. (Tex. Sup.)	835	Bolster, San Antonio & A. P. R. Co. v. (Tex. Civ. App.)	41
Arnett v. State (Tex. Cr. App.)	385	Bolton, Gulf, C. & S. F. R. Co. v. (Ind. T.)	1085
Ashland & C. St. R. Co. v. Faulkner (Ky.)	806	Boone v. Thornsby (Ky.)	563
Aultman, Miller & Co., Newman v. (Tenn. Ch. App.)	198	Boston, Lebus v. (Ky.)	609
Austin v. State (Tex. Cr. App.)	249	Bowcock, Louisville & N. R. Co. v. (Ky.)	580
Babbitt, Sanders' Adm'r v. (Ky.)	163	Bowling, Benge's Adm'r v. (Ky.)	151
Bailey v. Figeley (Ky.)	424	Bowlware, Johnson v. (Mo.)	109
Baldwin v. Farley (Ind. T.)	1077	Boyles, Hitchler v. (Tex. Civ. App.)	648
Baldwin v. Owens (Ky.)	438	Boze v. Nichols (Tenn. Ch. App.)	122
Bales, Richardson v. (Ark.)	321	Bradford v. State (Tex. Cr. App.)	379
Bambrick, St. Louis Trust Co. v. (Mo.)	706	Bradley v. Freed (Tenn. Ch. App.)	124
Bank of Nocona v. March (Tex. Civ. App.)	268	Bragassa v. People's Building & Loan Ass'n (Tex. Civ. App.)	1134
Bank of Wickliffe, Farmer v. (Ky.)	586	Branham v. Scott (Tex. Civ. App.)	38
Bank of Wickliffe, Farmer v. (Ky.)	798	Brannon, Smith v. (Ky.)	178
Banks v. Directors of St. Francis Levee Dist. (Ark.)	830	Brantley's Adm'r, Louisville & N. R. Co. v. (Ky.)	585
Banks v. Galbraith (Mo.)	105	Breathitt Coal, Iron & Lumber Co. v. Strong (Ky.)	189
Banks, Ryland v. (Mo.)	720	Brengle, Fouke v. (Tex. Civ. App.)	519
Barbour, Southern R. Co. v. (Ky.)	159	Brenham Compress Oil & Mfg. Co., Nelson v. (Tex. Civ. App.)	514
Barbour's Adm'r v. Larue's Assignee (Ky.)	5	Brey, Monarch v. (Ky.)	191
Bardmaker v. Johnson (Ky.)	452	Bridges v. McAlister (Ky.)	603
Barfield v. State (Tex. Cr. App.)	908	Bright v. First Nat. Bank (Ky.)	442
Barker, Cox v. (Mo.)	1051	Bright's Ex'rs v. Swinebroad (Ky.)	578
Barlow Co., Lawson v. (Ky.)	314	Bristol v. Fischel (Mo.)	678
Barnes, Accuman v. (Ark.)	319	Bristow v. Bristow (Ky.)	819
Bartlett v. State (Tex. Cr. App.)	918	Bristow v. State (Tex. Cr. App.)	893
Bassett v. O'Brien (Mo.)	107	Brooking, San Antonio & A. P. R. Co. v. (Tex. Civ. App.)	537
Batla v. Batla (Tex. Civ. App.)	664	Brown v. Commonwealth (Ky.)	171
Baudat, Galveston, H. & S. A. R. Co. v. (Tex. Civ. App.)	541	Brown v. Daniels (Tenn. Ch. App.)	991
Baughman, Dean v. (Ky.)	1128	Brown v. Woolsey (Ind. T.)	965
Beadles, Rulo v. (Ky.)	812	Brown, Colbert v. (Tex. Civ. App.)	521
Bean v. State (Tex. Cr. App.)	946	Brown, Muskegon Lumber Co. v. (Ark.)	1058
Becker v. Neasom (Ky.)	446	Brown, Perry v. (Ky.)	457
Bedford, Emerson v. (Tex. Civ. App.)	889	Bruce v. State (Tex. Cr. App.)	954
Beekman v. Richardson (Mo.)	689	Brunett, Tarkington v. (Tex. Civ. App.)	274
		Bryan v. Louisville & N. R. Co. (Ky.)	1128

	Page		Page
Bryant v. State (Tex. Cr. App.).....	1125	Clarke v. Seay, two cases (Ky.).....	589
Buchanan v. Edwards (Tex. Civ. App.)...	33	Clark's Committee, Cooke v. (Ky.).....	316
Buchanan, Frankfort Chair Co. v. (Ky.)...	179	Clay, Ex parte (Tex. Cr. App.).....	241
Buffington v. Mosby (Ky.).....	192	Clay v. State (Tex. Cr. App.).....	212
Buffington, Elliott v. (Mo.).....	408	Clay v. State (Tex. Cr. App.).....	370
Buford, Jones v. (Mo.).....	720	Clay City Nat. Bank v. Conlee (Ky.).....	615
Bumpass v. Anderson (Tex. Civ. App.).....	1103	Cleveland, St. L. & K. C. R. Co., Bethune v. (Mo.).....	465
Burke v. St. Louis, I. M. & S. R. Co. (Ark.)...	458	Clift v. Williams (Ky.).....	821
Burney, Morrow v. (Ind. T.).....	1078	C. M. Hapgood Shoe Co., King v. (Tex. Civ. App.).....	532
Burns v. State (Tex. Cr. App.).....	905	Coatney v. St. Louis & S. F. R. Co. (Mo.)...	1086
Burrell v. Blanchard (Tex. Civ. App.).....	46	Cock, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.).....	354
Bush v. State (Tex. Cr. App.).....	238	Cocke's Ex'rs, Allison v. (Ky.).....	593
Butler, Jackson v. (Tex. Civ. App.).....	1095	Cockrell, New Farmers' Bank's Trustee v. (Ky.).....	2
Byas v. State (Tex. Cr. App.).....	923	Cody, Galveston, H. & S. A. R. Co. v. (Tex. Sup.).....	329
Bybee, State v. (Mo.).....	470	Colbert v. Brown (Tex. Civ. App.).....	521
Cain v. Texas Building & Loan Ass'n (Tex. Civ. App.).....	879	Cole, Strait v. (Tex. Civ. App.).....	1092
Cairns, Smith v. (Tex. Sup.).....	498	Coleman County, Knight v. (Tex. Civ. App.).....	258
Caldwell v. Felton (Ky.).....	575	Coleman County, McConnell v. (Tex. Civ. App.).....	526
Caldwell's Adm'r v. Hampton (Ky.).....	174	Colgin, City Nat. Bank of Gatesville v. (Tex. Civ. App.).....	856
Callender, Nance v. (Tenn. Ch. App.).....	1025	Collins v. State (Tex. Cr. App.).....	216
Campbell v. Antis (Tex. Civ. App.).....	343	Colliver v. Taylor (Ky.).....	432
Campbell v. Cates (Tex. Civ. App.).....	268	Colonial & U. S. Mortg. Co. v. Thedford (Tex. Civ. App.).....	263
Campbell, Garrett v. (Ind. T.).....	956	Colter v. State (Tex. Cr. App.).....	945
Cannon, Ex parte (Tex. Cr. App.).....	914	Columbia Building, Loan & Savings Ass'n's Assignee, McDowell v. (Ky.).....	1013
Carlin v. Wolf (Mo.).....	679	Commonwealth v. Belt (Ky.).....	431
Carlton v. State (Tex. Cr. App.).....	213	Commonwealth v. Italy (Ky.).....	430
Carneal, Stewart's Adm'r v. (Ky.).....	900	Commonwealth, Atna Ins. Co. v. (Ky.)...	624
Carondelet Real-Estate Co., German-American Bank v. (Mo.).....	691	Commonwealth, Brown v. (Ky.).....	171
Carpenter v. State (Tex. Cr. App.).....	227	Commonwealth, Chesapeake & O. R. Co. v. (Ky.).....	160
Carpenter, Hollon v. (Tex. Civ. App.).....	1134	Commonwealth, Cincinnati, N. O. & T. P. R. Co. v., three cases (Ky.).....	568
Carr, Skinner v. (Ky.).....	799	Commonwealth, City of Newport v. (Ky.)...	433
Carson v. Houssels (Tex. Civ. App.).....	290	Commonwealth, Cooper v. (Ky.).....	789
Carter, Champion Ice-Manufacturing & Cold-Storage Co. v. (Ky.).....	16	Commonwealth, Flannery v. (Ky.).....	572
Caruthers, Thompson v. (Tex. Civ. App.).....	1093	Commonwealth, Gilbert v. (Ky.).....	590
Case v. Ingle (Ind. T.).....	958	Commonwealth, Gilbert v. (Ky.).....	804
Case, Blevins v. (Ark.).....	65	Commonwealth, Hall v. (Ky.).....	814
Cates, Campbell v. (Tex. Civ. App.).....	268	Commonwealth, Hilbert v. (Ky.).....	817
Caudle v. Williams (Tex. Civ. App.).....	560	Commonwealth, Louisville & N. R. Co. v. (Ky.).....	104, 1012
Chamberlin, West v. (Ky.).....	1181	Commonwealth, Louisville & N. R. Co. v. (Ky.).....	167
Champion Ice-Manufacturing & Cold-Storage Co. v. Carter (Ky.).....	16	Commonwealth, McNamara v. (Ky.).....	796
Chandler v. Rutherford (Ind. T.).....	981	Commonwealth, Marcum v. (Ky.).....	803
Chandler, Peters v. (Tex. Civ. App.).....	281	Commonwealth, Milstead v. (Ky.).....	451
Chavana v. State (Tex. Cr. App.).....	380	Commonwealth, Mitchell v. (Ky.).....	17
Cheek v. Grahm (Ky.).....	311	Commonwealth, Parker v. (Ky.).....	573
Cheney, Singer Mfg. Co. v. (Ky.).....	813	Commonwealth, Pence v. (Ky.).....	801
Chesapeake & O. R. Co. v. Commonwealth (Ky.).....	160	Commonwealth, Pennington v. (Ky.).....	818
Chesapeake & O. R. Co. v. Smith (Ky.)...	12	Commonwealth, Redmond v. (Ky.).....	565
Chicago, B. I. & T. R. Co. v. Langston (Tex. Sup.).....	331	Commonwealth, Spicer v. (Ky.).....	802
Chowning v. State (Tex. Cr. App.).....	946	Concho County, Edmiston v. (Tex. Civ. App.).....	353
Christian v. State (Tex. Cr. App.).....	903	Conlee, Clay City Nat. Bank v. (Ky.)...	615
Cincinnati, N. O. & T. P. R. Co. v. Commonwealth, three cases (Ky.).....	568	Conn v. Louisville & N. R. Co. (Ky.).....	617
Citizens' Nat. Bank, Rice v. (Ky.).....	454	Connelly, Goodman v. (Ky.).....	427
Citizens' R. Co., Hogan v. (Mo.).....	473	Conner v. Jacobs (Tex. Civ. App.).....	640
City Nat. Bank of Gatesville v. Colgin (Tex. Civ. App.).....	856	Connor v. Thornton (Tex. Civ. App.).....	354
City of Bethany v. Howard (Mo.).....	94	Cook v. Union Trust Co. (Ky.).....	600
City of Galveston, Weekes v. (Tex. Civ. App.).....	544	Cooke v. Clark's Committee (Ky.).....	316
City of Houston, Turner v. (Tex. Civ. App.)...	642	Cooley v. Kansas City, P. & G. R. Co. (Mo.).....	101
City of Liberty v. Paul (Tex. Civ. App.)...	657	Cooper v. Commonwealth (Ky.).....	789
City of Louisville v. Seibert (Ky.).....	310	Cooper v. Wait (Ky.).....	161
City of Louisville v. Selvaige (Ky.).....	447	Cooper, Springs v. (Tenn. Ch. App.).....	997
City of Mineral Wells v. Darby (Tex. Civ. App.).....	351	Copeland v. Holloman (Tex. Civ. App.)...	257
City of Newport v. Commonwealth (Ky.)...	433	Cornell-Tebbetts Machine & Buggy Co., Kingman & Co. v. (Mo.).....	727
City of Rockport, Moss v. (Tex. Civ. App.)...	652	Cornwall v. McFarland Real-Estate Co. (Mo.).....	736
City of Russellville, East Tennessee Tel. Co. v. (Ky.).....	308	Cotton v. Rand (Tex. Civ. App.).....	55
City of Webb City, Young v. (Mo.).....	709	Cotton v. Rand (Tex. Sup.).....	838
Clafin Co. v. Gibson (Ky.).....	439	Courtney v. Blackwell (Mo.).....	668
Clark v. Clark (Tex. Civ. App.).....	337	Cox v. Adelaide (Ky.).....	616
Clark v. State (Tex. Cr. App.).....	1120	Cox v. Barker (Mo.).....	1051
Clark v. Williams (Tenn. Ch. App.).....	130		
Clark, Galveston, H. & S. A. R. Co. v. (Tex. Civ. App.).....	276		
Clark, Gulf, C. & S. F. R. Co. v. (Ind. T.)...	962		
Clark County Nat. Bank, Winchester Bank v. (Ky.).....	815		

CASES REPORTED.

vii

	Page		Page
Crabb, Patterson v. (Tex. Civ. App.).....	870	Ernest, State v. (Mo.).....	688
Craft v. Allen (Ky.).....	169	Euclid Ave. Nat. Bank v. Judkins (Ark.)...	632
Crawford v. State (Tex. Cr. App.).....	1132	Evans v. Pace (Tex. Civ. App.).....	1094
Crawford, May v. (Mo.).....	693	Evans, Padgett v. (Tex. Civ. App.).....	513
Creech v. Davis (Ky.).....	428	Eversole v. First Nat. Bank of London	
Creighton v. State (Tex. Cr. App.).....	910	(Ky.)	169
Crenshaw v. Hubbard (Tex. Civ. App.).....	1134	Fairmount Glass Works v. Grunden-Martin	
Croft v. Smith (Tex. Civ. App.).....	1089	Woodenware Co. (Ky.).....	196
Croomes v. State (Tex. Cr. App.).....	924	Farmer v. Bank of Wickliffe (Ky.).....	586
Crosby, White v. (Tex. Civ. App.).....	350	Farmer v. Bank of Wickliffe (Ky.).....	798
Crossland v. Admire (Mo.).....	463	Farmers' Bank of Vine Grove, Smith v.	
Crothers, Lang v. (Tex. Civ. App.).....	271	(Ky.)	451
Crouch, Wetmore v. (Mo.).....	738	Farmers' Loan & Trust Co., Smith v. (Tex.	
Crow, Smith v. (Ky.).....	1130	Civ. App.).....	515
Curd, Seivers, Carson & Co. v. (Ky.).....	1129	Farmers' Savings & Building & Loan	
Custer v. Russey (Tenn. Ch. App.).....	126	Ass'n, Taylor v. (Tenn. Ch. App.).....	1008
Dallas Brick & Construction Co., Padgett v.		Farris, Baldwin v. (Ind. T.).....	1077
(Tex. Civ. App.).....	529	Faulkner, Ashland & C. St. R. Co. v. (Ky.)	
Dalwhig, International & G. N. R. Co. v.		Feese, Thomas v. (Ky.).....	150
(Tex. Sup.).....	500	Felton, Caldwell v. (Ky.).....	575
Dancy v. Skidmore (Tex. Civ. App.).....	279	Ferrell v. Grigsby (Tenn. Ch. App.).....	114
Daniels, Brown v. (Tenn. Ch. App.).....	901	Fidelity & Casualty Co. of New York,	
Danby v. United States (Ind. T.).....	1083	Standard Oil Co. v. (Ky.).....	571
Darby, City of Mineral Wells v. (Tex. Civ.		Figeley, Bailey v. (Ky.).....	424
App.).....	351	Fikes v. State (Tex. Cr. App.).....	248
Darling v. Hanks (Ky.).....	792	Fikes v. State (Tex. Cr. App.).....	1133
Davenport, Slaughter v. (Mo.).....	471	First Nat. Bank, Bright v. (Ky.).....	442
Davis v. San Antonio & G. S. R. Co. (Tex.		First Nat. Bank of Athens, Moody v. (Tex.	
Sup.).....	324	Civ. App.).....	523
Davis, Creech v. (Ky.).....	428	First Nat. Bank of London, Eversole v.	
Davis, Robinson v. (Ark.).....	66	(Ky.)	169
Davis, Sayers v. (Tex. Civ. App.).....	520	First Nat. Bank of Yoakum, Kessler v.	
Davis, Western Union Tel. Co. v. (Tex.		(Tex. Civ. App.).....	62
Civ. App.).....	258	Fiscal Court of Boyle County, Board of	
Dean v. Baughman (Ky.).....	1128	Council of Danville v. (Ky.).....	157
Dearing v. Wilcoxon (Ky.).....	159	Fischel, Bristol v. (Mo.).....	678
Deboe v. Rushing (Ky.).....	613	Fisher v. Fisher (Tenn. Ch. App.).....	987
Defee v. Defee (Tex. Civ. App.).....	274	Fitzpatrick, Yarborough v. (Ky.).....	172
De Ford v. Taylor (Tenn. Ch. App.).....	999	Flack, Waggoner v. (Tex. Sup.).....	330
Dinwiddie, Gulf, C. & S. F. R. Co. v. (Tex.		Flanigan v. State (Tex. Cr. App.).....	1116
Civ. App.).....	353	Flannery v. Commonwealth (Ky.).....	572
Directors of St. Francis Levee Dist., Banks		Fleming v. Pringle (Tex. Civ. App.).....	553
v. (Ark.)	830	Flowers v. Jackson (Ark.).....	462
District of Clifton, Campbell County, v.		Flowers v. State (Tex. Cr. App.).....	216
Schneider (Ky.).....	13	Forbes v. Thomas (Tex. Civ. App.).....	1097
Dixon, Turner v. (Mo.).....	725	Ford v. Lawrence (Tenn. Ch. App.).....	1023
Dodd, Hewitt v. (Ky.).....	795	Ford v. State (Tex. Cr. App.).....	935
Donnelly v. State (Tex. Cr. App.).....	228	Ft. Jefferson Imp. Co. v. Dupoyster (Ky.)..	310
Dotson, Tilford v. (Ky.).....	583	Ft. Worth Pharmacy Co., Mallette v. (Tex.	
Downey, Young v. (Mo.).....	751	Civ. App.).....	859
Driver v. White (Tenn. Ch. App.).....	994	Ft. Worth & R. G. R. Co. v. Kime (Tex.	
Duffield v. Spence (Tenn. Ch. App.).....	492	Civ. App.).....	558
Dulin v. Knechtel (Tex. Civ. App.).....	350	Ft. Worth & R. G. R. Co. v. White (Tex.	
Duncan v. State (Tex. Cr. App.).....	372	Civ. App.).....	855
Dunlap v. State (Tex. Cr. App.).....	392	Foster v. Vernon County (Mo.).....	725
Dunn v. Dunn (Tenn. Ch. App.).....	119	Fouke v. Brengle (Tex. Civ. App.).....	519
Dunn v. Shannon (Ky.).....	14	Fourth Nat. Bank, National Wall-Paper	
Dunn v. State (Tex. Cr. App.).....	1121	Co. v. (Tenn. Ch. App.).....	1002
Dunn, Mutual Ben. Life Ins. Co. of New-		Frankfort Chair Co. v. Buchanan (Ky.)...	179
ark v. (Ky.).....	20	Frankfort Chair Co. v. Janer's Ex'r (Ky.)...	1128
Dupoyster, Ft. Jefferson Imp. Co. v. (Ky.)	810	Frankfort Chair Co. v. Ransom (Ky.).....	1129
Duvall v. Duvall (Ky.).....	791	Frankfort Water Co. v. Gaines (Ky.).....	599
Dye, Smith v. (Tex. Civ. App.).....	858	Frankfort & C. Ry., Viley v. (Ky.).....	173
Earp, Windes v. (Mo.).....	1044	Franklin v. State (Tex. Cr. App.).....	951
Easley, Ex parte (Tex. Cr. App.).....	1132	Frazier's Ex'r, Magee v. (Ky.).....	174
Eastin, Turner v. (Ky.).....	567	Freed, Bradley v. (Tenn. Ch. App.).....	124
East Tennessee Tel. Co. v. City of Russell-		Freeman v. State (Tex. Cr. App.).....	230
ville (Ky.)	308	Frickie v. State (Tex. Cr. App.).....	394
East Tennessee, V. & G. R. Co. v. Nash-		Fulcher v. West (Tex. Civ. App.).....	342
ville, C. & St. L. R. Co. (Tenn. Ch. App.)	202	Furlow v. State (Tex. Cr. App.).....	938
Eddy, Bell v. (Ind. T.).....	959	Gaines, Frankfort Water Co. v. (Ky.)...	590
Edmiston v. Concho County (Tex. Civ.		Galbraith, Banks v. (Mo.).....	105
App.).....	353	Gallaher, Hayes v. (Tex. Civ. App.).....	280
Edmonds v. State (Tex. Cr. App.).....	393	Galveston, H. & S. A. R. Co. v. Baudat	
Edwards, Buchanan v. (Tex. Civ. App.)...	33	(Tex. Civ. App.).....	541
Elam v. Haden (Ky.).....	455	Galveston, H. & S. A. R. Co. v. Clark (Tex.	
Elkins v. State (Tex. Cr. App.).....	372	Civ. App.).....	276
Elliot v. Buffington (Mo.).....	408	Galveston, H. & S. A. R. Co. v. Cody (Tex.	
Elliott, Ledgerwood v. (Tex. Civ. App.)...	872	Sup.)	329
Elliott, Missouri, K. & T. R. Co. v. (Ind.		Galveston, H. & S. A. R. Co. v. Jackson	
T.)	1067	(Tex. Sup.)	330
Elton v. State (Tex. Cr. App.).....	245	Galveston, H. & S. A. R. Co. v. Masterson	
Emerson v. Bedford (Tex. Civ. App.).....	889	(Tex. Civ. App.).....	1001
Equitable Loan & Investment Ass'n of Se-		Gardner v. Paducah Bldg. Trust Co. (Ky.)	820
dalia, Schell v. (Mo.).....	406	Garrett v. Campbell (Ind. T.).....	956

	Page		Page
Gatewood v. Long (Ky.).....	569	Harrison v. Taylor's Adm'r (Ky.).....	193
Gay v. Missouri Guarantee Savings & Building Ass'n (Mo.).....	403	Hart, Ricketts v. (Mo.).....	825
George v. Lillard (Ky.).....	793, 1011	Hartel, Jefferies v. (Tex. Civ. App.).....	653
George v. State (Tex. Cr. App.).....	378	Hastings v. Whitmer (Ind. T.).....	967
George, Storts v. (Mo.).....	489	Hathaway, Kay v. (Tex. Civ. App.).....	663
German-American Bank v. Carondelet Real-Estate Co. (Mo.).....	691	Hauger, Smith v. (Mo.).....	1052
Gerteson, London & Lancashire Fire Ins. Co. v. (Ky.).....	617	Hawkins, Louisville & N. R. Co. v. (Ky.).....	426
Ghio, Less v. (Tex. Sup.).....	502	Hawks, Hoover v. (Ky.).....	606
Gibson, H. B. Clafin Co. v. (Ky.).....	439	Hayes v. Gallaher (Tex. Civ. App.).....	280
Giesen, Peel v. (Tex. Civ. App.).....	44	Hazeldon v. Thompson (Ky.).....	1129
Gilbert v. Commonwealth (Ky.).....	590	Hazelett v. Woodruff (Mo.).....	1048
Gilbert v. Commonwealth (Ky.).....	804	H. B. Clafin Co. v. Gibson (Ky.).....	439
Gilbert v. Richardson (Tenn. Ch. App.).....	134	Headrick, State v. (Mo.).....	99
Goldman, Texas & P. R. Co. v. (Tex. Civ. App.).....	275	Heard, Summers v. (Ark.).....	1057
Goodman v. Connelly (Ky.).....	427	Hearne v. Strahorn-Hutton-Evans Commission Co. (Tex. Civ. App.).....	807
Goodman, Weaver v. (Tex. Civ. App.).....	860	Hedrick v. State (Tex. Cr. App.).....	252
Gordon, Raatz v. (Tex. Civ. App.).....	651	Hefl v. Masden (Ky.).....	574
Grace v. Hendrix (Tex. Sup.).....	846	Hehn v. State (Tex. Cr. App.).....	1118
Graham v. Billings (Tex. Civ. App.).....	645	Heintz v. Thayer (Tex. Sup.).....	640
Grahn, Cheek v. (Ky.).....	311	Hendrix, Gracey v. (Tex. Sup.).....	846
Gray, State v. (Mo.).....	85	Herbert, Ridgeway v. (Mo.).....	1040
Grayson v. State (Tex. Cr. App.).....	246	Herbst, Heyker v. (Ky.).....	820
Grayson County, Hare v. (Tex. Civ. App.).....	656	Herring v. Herring (Tex. Civ. App.).....	865
Green, Renfro v. (Ky.).....	428	Hertzberg, S. S. White Dental Mfg. Co. v. (Tex. Civ. App.).....	355
Griffith v. Maxfield (Ark.).....	832	Hester v. State (Tex. Cr. App.).....	932
Grigaby, Ferrell v. (Tenn. Ch. App.).....	114	Hewitt v. Dodd (Ky.).....	795
Groos, Ragsdale v. (Tex. Civ. App.).....	256	Heyker v. Herbst (Ky.).....	820
Grubb, McReynolds v. (Mo.).....	822	Heyker v. McLaughlin (Ky.).....	820
Grunden-Martin Woodenware Co., Fairmount Glass Works v. (Ky.).....	196	Hibler, State v. (Mo.).....	85
Guinn, Abilene Live-Stock Co. v. (Tex. Civ. App.).....	886	Hickman, State ex rel. Burnham v. (Mo.).....	680
Gulf, C. & S. F. R. Co. v. Bolton (Ind. T.).....	1085	Highsmith v. State (Tex. Cr. App.).....	919
Gulf, C. & S. F. R. Co. v. Clark (Ind. T.).....	902	Hilbert v. Commonwealth (Ky.).....	817
Gulf, C. & S. F. R. Co. v. Dinwiddie (Tex. Civ. App.).....	353	Hill v. Jackson (Tex. Civ. App.).....	357
Gulf, C. & S. F. R. Co. v. Harris (Tex. Civ. App.).....	864	Hill v. Wertheimer-Swartz Shoe Co. (Mo.).....	702
Gulf, C. & S. F. R. Co. v. Johnson (Tex. Civ. App.).....	531	Hill, Stone v. (Ky.).....	184
Gulf, C. & S. F. R. Co. v. Mitchell (Tex. Civ. App.).....	662	Hitchler v. Boyles (Tex. Civ. App.).....	648
Gulf, C. & S. F. R. Co. v. Short (Tex. Civ. App.).....	261	Hoehner, Ahrens & Ott Mfg. Co. v. (Ky.).....	194
Gulf, C. & S. F. R. Co. v. Williams (Tex. Civ. App.).....	653	Hoffman v. Hoffman (Ky.).....	176
Haden, Elam v. (Ky.).....	455	Hogan v. Citizens' R. Co. (Mo.).....	473
Hale, Hollon v. (Tex. Civ. App.).....	900	Holden, Thummel v. (Mo.).....	404
Half, Kessler v. (Tex. Civ. App.).....	48	Hollenbeck v. State (Tex. Cr. App.).....	373
Hall v. Commonwealth (Ky.).....	814	Holloman, Copeland v. (Tex. Civ. App.).....	257
Hall v. Miller (Tex. Civ. App.).....	36	Hollon v. Carpenter (Tex. Civ. App.).....	1134
Haly, Commonwealth v. (Ky.).....	430	Hollon v. Hale (Tex. Civ. App.).....	900
Hamblin v. State (Tex. Cr. App.).....	1111	Holloway v. Shuttles (Tex. Civ. App.).....	293
Hamburger, Kosminsky v. (Tex. Civ. App.).....	53	Holman v. State (Tex. Cr. App.).....	379
Hamilton v. Hamilton's Ex'r (Ky.).....	170	Holmes v. Leathe (Mo.).....	1132
Hamilton v. San Antonio Foundry Co. (Tex. Civ. App.).....	1104	Holmes v. Sanders (Tex. Civ. App.).....	333
Hamilton v. State (Tex. Cr. App.).....	217	Holmes v. Stone (Tex. Civ. App.).....	518
Hamilton, Loud v. (Tenn. Ch. App.).....	140	Holt v. State (Tex. Cr. App.).....	907
Hamilton's Ex'r, Hamilton v. (Ky.).....	170	Homan v. State (Tex. Cr. App.).....	237
Hammond, Mutual Fire Ins. Co. of New York v. (Ky.).....	151	Hoover v. Binkley (Ark.).....	73
Hampton, Caldwell's Adm'r v. (Ky.).....	174	Hoover v. Hawks (Ky.).....	606
Hanks, Darling v. (Ky.).....	792	Hough, Kerr v. (Ky.).....	813
Hanna, Jayne v. (Tex. Civ. App.).....	296	Houssels, Carson v. (Tex. Civ. App.).....	290
Hanna, Weakley v. (Ky.).....	570	Houston, E. & W. T. R. Co. v. Summers (Tex. Sup.).....	324
Hannibal, St. J. R. Co. v. Totman (Mo.).....	412	Houston & T. C. R. Co. v. Loeffler (Tex. Civ. App.).....	536
Hape, Pritchett v. (Ky.).....	608	Houston & T. C. R. Co. v. Martin (Tex. Civ. App.).....	641
Hapgood Shoe Co. King v. (Tex. Civ. App.).....	532	Houston & T. C. R. Co. v. Smith (Tex. Civ. App.).....	506
Harbeson, Louisville Savings, Loan & Building Ass'n v. (Ky.).....	787	Houston & T. C. R. Co. v. Speake (Tex. Civ. App.).....	509
Harding, Wooldridge v. (Ky.).....	162	Howard v. State (Tex. Cr. App.).....	229
Hardy, Wells v. (Tex. Civ. App.).....	503	Howard, City of Bethany v. (Mo.).....	94
Hare v. Grayson County (Tex. Civ. App.).....	656	Howard, St. Louis Brewing Ass'n v. (Mo.).....	1046
Hargrove v. State (Tex. Cr. App.).....	1123	Howard, Whitaker v., two cases (Ky.).....	1131
Hargrove v. State (Tex. Cr. App.).....	1124	Howe Grain & Mercantile Co. v. Jones (Tex. Civ. App.).....	24
Harper v. State (Tex. Cr. App.).....	217	Hubbard, Crenshaw v. (Tex. Civ. App.).....	1134
Harper, State v. (Mo.).....	89	Hubert, Nichols & Shepard Co. v. (Mo.).....	1031
Harris, Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.).....	864	Hudspeth, State v. (Mo.).....	483
Harris, State v. (Mo.).....	481	Hulse v. Powell (Tex. Civ. App.).....	862
		Hunter, Interstate Building & Loan Ass'n v. (Tex. Civ. App.).....	530
		Hurd v. Texas Brewing Co. (Tex. Civ. App.).....	883
		Hurst v. Ingram (Ky.).....	428
		Hutcheson v. Storrie (Tex. Sup.).....	848
		Illinois Cent. R. Co. v. Nall (Ky.).....	147
		Illinois Cent. R. Co. v. Nall (Ky.).....	168

CASES REPORTED.

ix

	Page		Page
Ingle, Case v. (Ind. T.).....	958	King County Land & Live-Stock Co. v. Thomson (Tex. Civ. App.).....	890
Ingram v. Turner (Ky.).....	148	Kingman, Warwick v. (Ind. T.).....	1076
Ingram, Hurst v. (Ky.).....	428	Kingman & Co. v. Cornell-Tebbetts Machine & Buggy Co. (Mo.).....	727
International & G. N. R. Co. v. Dalwigh (Tex. Sup.).....	500	Kirby v. Woollum (Ky.).....	428
International & G. N. R. Co. v. Masterson (Tex. Civ. App.).....	644	Knechtel, Dulin v. (Tex. Civ. App.).....	350
International & G. N. R. Co. v. Rhoades (Tex. Civ. App.).....	517	Knight v. Coleman County (Tex. Civ. App.).....	258
Interstate Building & Loan Ass'n v. Hunter (Tex. Civ. App.).....	530	Kocourek, Tupy v. (Ark.).....	69
Interstate Building & Loan Ass'n v. Tabor (Tex. Civ. App.).....	300	Koerner v. Leathe (Mo.).....	96
Irwin, Boli v. (Ky.).....	444	Kosminsky v. Hamburger (Tex. Civ. App.).....	53
Jackson v. Butler (Tex. Civ. App.).....	1095	Kosminsky v. Raymond (Tex. Civ. App.).....	51
Jackson v. State (Tex. Cr. App.).....	389	Kramer, State ex rel. Crow v. (Mo.).....	716
Jackson, Alkire Grocery Co. v. (Ark.).....	459	Kurtzman v. Blackwell (Tex. Civ. App.).....	659
Jackson, Flowers v. (Ark.).....	462	Ladwig v. State (Tex. Cr. App.).....	890
Jackson, Galveston, H. & S. A. R. Co. v. (Tex. Sup.).....	330	Lafayette County, Wonderly v. (Mo.).....	745
Jackson, Hill v. (Tex. Civ. App.).....	357	Lagual v. State (Tex. Cr. App.).....	1133
Jacobs, Conner v. (Tex. Civ. App.).....	640	Lamb v. Missouri Pac. R. Co. (Mo.).....	81
Jaeger v. Blering (Tex. Civ. App.).....	50	Lancashire Fire Ins. Co., State v. (Ark.).....	633
Janer's Ex'x, Frankfort Chair Co. v. (Ky.).....	1128	Lander v. Ziehr (Mo.).....	742
Jannin v. State (Tex. Cr. App.).....	1126	Lang v. Crothers (Tex. Civ. App.).....	271
Jayne v. Hanna (Tex. Civ. App.).....	296	Langley, St. Louis Refrigerator & Wooden Gutter Co. v. (Ark.).....	68
Jefferies v. Hartel (Tex. Civ. App.).....	653	Lang's Adm'r, Aitken v. (Ky.).....	154
Jefferson County Fiscal Court, Joyes v. (Ky.).....	435	Langston, Chicago, R. I. & T. R. Co. v. (Tex. Sup.).....	381
Jennings, Southwestern Telegraph & Telephone Co. v. (Tex. Civ. App.).....	288	Larue's Assignee, Barbour's Adm'r v. (Ky.).....	5
Johnson v. Bowlware (Mo.).....	109	Lawrence, Ford v. (Tenn. Ch. App.).....	1023
Johnson v. Mason Lodge No. 33 (Ky.).....	620	Lawson v. Mills (Mo.).....	678
Johnson v. Phillips (Tenn. Ch. App.).....	990	Lawson v. S. T. Barlow Co. (Ky.).....	314
Johnson v. State (Tex. Cr. App.).....	382	Leary v. People's Building, Loan & Saving Ass'n (Tex. Sup.).....	836
Johnson v. State (Tex. Cr. App.).....	911	Leathe, Holmes v. (Mo.).....	1132
Johnson, Bardmaker v. (Ky.).....	452	Leathe, Koerner v. (Mo.).....	96
Johnson, Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.).....	531	Lebus v. Boston (Ky.).....	609
Johnson, Thompson v. (Tex. Sup.).....	23	Ledgerwood v. Elliott (Tex. Civ. App.).....	872
Jones v. Buford (Mo.).....	720	Lee, Texas & P. R. Co. v. (Tex. Civ. App.).....	351
Jones v. Roach (Tex. Civ. App.).....	549	Lees v. Ghio (Tex. Sup.).....	502
Jones v. State (Tex. Cr. App.).....	949	Lewis v. Richardson (Ind. T.).....	969
Jones v. Todd (Ky.).....	452	Liles v. Price (Tex. Civ. App.).....	526
Jones, Howe Grain & Mercantile Co. v. (Tex. Civ. App.).....	24	Lillard, George v. (Ky.).....	793, 1011
Joseph W. Moon Buggy Co. v. Perkins (Tex. Civ. App.).....	1134	Linares v. Linares (Tex. Civ. App.).....	510
Joy v. State (Tex. Cr. App.).....	933	Lincoln v. Anderson (Tex. Civ. App.).....	278
Joy v. State (Tex. Cr. App.).....	935	Little Rock & Ft. S. R. Co. v. Miller Coal Co. (Ark.).....	1064
Joyes v. Jefferson County Fiscal Court (Ky.).....	435	Loeffler, Houston & T. C. R. Co. v. (Tex. Civ. App.).....	636
Judkins, Euclid Ave. Nat. Bank v. (Ark.).....	632	London & Lancashire Fire Ins. Co. v. Gertson (Ky.).....	617
Kabelmacher v. Kabelmacher (Tex. Civ. App.).....	353	Long v. Louisville & N. R. Co. (Ky.).....	807
Kahler v. Betterton (Tex. Civ. App.).....	289	Long, Gatewood v. (Ky.).....	569
Kansas City Cable R. Co., Sweeney v. (Mo.).....	682	Loud v. Hamilton (Tenn. Ch. App.).....	140
Kansas City, Ft. S. & M. R. Co. v. King (Ark.).....	319	Louisville Bridge Co. v. Louisville & N. R. Co. (Ky.).....	185
Kansas City, P. & G. R. Co., Cooley v. (Mo.).....	101	Louisville R. Co. v. Blaydes (Ky.).....	820
Kansas City, St. J. & C. B. R. Co., State ex rel. Brumbaugh v. (Mo.).....	479	Louisville R. Co. v. Rammacker (Ky.).....	175
Kay v. Hathaway (Tex. Civ. App.).....	663	Louisville Savings, Loan & Building Ass'n v. Harbeson (Ky.).....	787
Kelly v. Telle (Ark.).....	633	Louisville & N. R. Co. v. Adams' Adm'r (Ky.).....	577
Kemery's Adm'r v. Louisville & N. R. Co. (Ky.).....	804	Louisville & N. R. Co. v. Alumbaugh's Adm'r (Ky.).....	18
Kendall v. State (Tex. Civ. App.).....	1102	Louisville & N. R. Co. v. Bowcock (Ky.).....	580
Kendrick, Marshall v. (Ky.).....	563	Louisville & N. R. Co. v. Brantley's Adm'r (Ky.).....	585
Renton Ins. Co. v. Osborne (Ky.).....	306	Louisville & N. R. Co. v. Commonwealth (Ky.).....	164, 1012
Kentucky Glass-Works Co., Bell & Coggeshall Co. v. (Ky.).....	180	Louisville & N. R. Co. v. Commonwealth (Ky.).....	167
Kerr v. Hough (Ky.).....	813	Louisville & N. R. Co. v. Hawkins (Ky.).....	426
Kessler v. First Nat. Bank of Yoakum (Tex. Civ. App.).....	62	Louisville & N. R. Co. v. McEwan (Ky.).....	619
Kessler v. Half (Tex. Civ. App.).....	48	Louisville & N. R. Co. v. Milliken's Adm'r (Ky.).....	796
Kime, Ft. Worth & R. G. R. Co. v. (Tex. Civ. App.).....	553	Louisville & N. R. Co. v. Procter (Ky.).....	591
Kimes, State v. (Mo.).....	104	Louisville & N. R. Co. v. Semonis (Ky.).....	612
King v. C. M. Hapgood Shoe Co. (Tex. Civ. App.).....	532	Louisville & N. R. Co., Bryan v. (Ky.).....	1128
King, Kansas City, Ft. S. & M. R. Co. v. (Ark.).....	319	Louisville & N. R. Co., Conn v. (Ky.).....	617
		Louisville & N. R. Co., Kemery's Adm'r v. (Ky.).....	804
		Louisville & N. R. Co., Long v. (Ky.).....	807
		Louisville & N. R. Co., Louisville Bridge Co. v. (Ky.).....	185
		Louisville & N. R. Co., Shelbyville & Eminence Turnpike Co. v. (Ky.).....	806

	Page		Page
Lubbock, Parks v. (Tex. Sup.).....	322	Missouri Guarantee Savings & Building Ass'n, Gay v. (Mo.).....	403
Lucas, Selva v. (Ky.).....	447	Missouri, K. & T. R. Co. v. Elliott (Ind. T.).....	1067
Lucy, Bishop v. (Tex. Civ. App.).....	854	Missouri, K. & T. R. Co. of Texas v. Cock (Tex. Civ. App.).....	354
Luttrell v. State (Tex. Cr. App.).....	930	Missouri, K. & T. R. Co. of Texas v. O'Connor (Tex. Civ. App.).....	511
Lyddane v. Owensboro Banking Co. (Ky.).....	453	Missouri, K. & T. R. Co. of Texas v. St. Clair (Tex. Civ. App.).....	666
Lynn, Skinner v. (Ky.).....	187	Missouri, K. & T. R. Co. of Texas v. Scarborough (Tex. Civ. App.).....	356
McAlister, Bridges v. (Ky.).....	608	Missouri Pac. R. Co., Lamb v. (Mo.).....	81
McAvoy v. State (Tex. Cr. App.).....	928	Missouri Pac. R. Co., Oglesby v. (Mo.).....	758
McCain, Webb v. (Ind. T.).....	957	Mitchell v. Commonwealth (Ky.).....	17
McCarley v. State (Tex. Cr. App.).....	373	Mitchell v. McLaren (Tex. Civ. App.).....	269
McClendon v. State (Ark.).....	1062	Mitchell, Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.).....	662
McClure v. Renaker (Ky.).....	317	Mitchell, Randolph v. (Tex. Civ. App.).....	297
McConnell v. Coleman County (Tex. Civ. App.).....	528	Molineaux, State v. (Mo.).....	462
McCormick Harvesting Mach. Co. v. Martin (Ky.).....	815	Monarch v. Brey (Ky.).....	191
McCormick Harvesting Mach. Co. v. Martin (Ky.).....	1021	Monday v. Vance (Tex. Civ. App.).....	346
McDonnell, Rutherford v. (Ark.).....	1060	Montague County v. Meadows (Tex. Civ. App.).....	556
McDowell v. Columbia Building, Loan & Savings Ass'n's Assignee (Ky.).....	1013	Monticue v. State (Tex. Cr. App.).....	236
McEwan, Louisville & N. R. Co. v. (Ky.).....	619	Moody v. First Nat. Bank of Athens (Tex. Civ. App.).....	523
McFadden, Weatherford v. (Tex. Civ. App.).....	548	Moon Buggy Co. v. Perkins (Tex. Civ. App.).....	1134
McFarland Real-Estate Co., Cornwall v. (Mo.).....	736	Moore v. New York Life Ins. Co. (Tenn. Ch. App.).....	1021
McFerran v. McFerran (Ky.).....	307	Moore v. State (Tex. Cr. App.).....	1108
McHugh, Sparks v. (Tex. Civ. App.).....	873	Moore, Pennsylvania Fire Ins. Co. v. (Tex. Civ. App.).....	878
McKee, State ex rel. Herriford v. (Mo.).....	421	Moore, Taulbee v. (Ky.).....	564
McLaren, Mitchell v. (Tex. Civ. App.).....	269	Morgan v. State (Tex. Cr. App.).....	902
McLaughlin, Heyker v. (Ky.).....	820	Morrison v. State (Tex. Cr. App.).....	358
McLaughlin, Pybos v. (Ind. T.).....	1075	Morrison v. State (Tex. Cr. App.).....	1133
McNamara v. Commonwealth (Ky.).....	786	Morrow v. Burney (Ind. T.).....	1078
McNeil, Boles v. (Ark.).....	71	Mosby, Buffington v. (Ky.).....	192
McQuery v. State (Tex. Cr. App.).....	247	Moss v. City of Rockport (Tex. Civ. App.).....	652
McQuery v. State (Tex. Cr. App.).....	1133	Mott v. State (Tex. Cr. App.).....	368
McReynolds v. Grubb (Mo.).....	822	Mozee v. State (Tex. Cr. App.).....	250
Magee v. Frazier's Ex'r (Ky.).....	174	Mundelino v. State (Tex. Cr. App.).....	235
Mallette v. Ft. Worth Pharmacy Co. (Tex. Civ. App.).....	859	Murphy v. State (Tex. Cr. App.).....	940
Malone v. State (Tex. Cr. App.).....	381	Murphy, Rulo v. (Ky.).....	312
Malone v. State (Tex. Cr. App.).....	1133	Muskegon Lumber Co. v. Brown (Ark.).....	1056
March, Bank of Nocona v. (Tex. Civ. App.).....	268	Mutual Ben. Life Ins. Co. of Newark v. Dunn (Ky.).....	20
Marcum v. Commonwealth (Ky.).....	903	Mutual Fire Ins. Co. of New York v. Hammond (Ky.).....	151
Marquez v. State (Tex. Cr. App.).....	1118	Mutual Reserve Fund Life Ass'n, Mehlin v. (Ind. T.).....	1063
Marshall v. Kendrick (Ky.).....	563	Nall, Illinois Cent. R. Co. v. (Ky.).....	147
Marshall, Farman v. (Tenn. Ch. App.).....	116	Nall, Illinois Cent. R. Co. v. (Ky.).....	168
Martin v. State (Tex. Cr. App.).....	912	Nance v. Callender (Tenn. Ch. App.).....	1025
Martin, Houston & T. C. R. Co. v. (Tex. Civ. App.).....	641	Napier, Salyer v., two cases (Ky.).....	10
Martin, McCormick Harvesting Mach. Co. v. (Ky.).....	315	Nashville, C. & St. L. R. Co., East Tennessee, V. & G. R. Co. v. (Tenn. Ch. App.).....	202
Martin, McCormick Harvesting Mach. Co. v. (Ky.).....	1021	Natho v. State (Tex. Cr. App.).....	398
Masden, Heft v. (Ky.).....	574	National Bank of Dangerfield v. Ragland (Tex. Civ. App.).....	661
Mason Lodge No. 33, Johnson v. (Ky.).....	620	National Wall-Paper Co. v. Fourth Nat. Bank (Tenn. Ch. App.).....	1002
Masterson v. Bokel (Tex. Civ. App.).....	39	Neal, St. Louis & S. F. R. Co. v. (Ark.).....	1060
Masterson, Galveston, H. & S. A. R. Co. v. (Tex. Civ. App.).....	1091	Neasom, Becker v. (Ky.).....	446
Masterson, International & G. N. R. Co. v. (Tex. Civ. App.).....	644	Nelson v. Brenham Compress Oil & Mfg. Co. (Tex. Civ. App.).....	514
Matthews v. State (Tex. Cr. App.).....	918	New Farmers' Bank's Trustee v. Cockrell (Ky.).....	2
Mattlingly, Sherley v. (Ky.).....	189	Newman v. Aultman, Miller & Co. (Tenn. Ch. App.).....	198
Maxfield, Griffith v. (Ark.).....	832	New York Life Ins. Co., Moore v. (Tenn. Ch. App.).....	1021
May v. Crawford (Mo.).....	693	Nichols, Boze v. (Tenn. Ch. App.).....	122
May v. State (Tex. Cr. App.).....	242	Nicholstone City Co. v. Smalley (Tex. Civ. App.).....	527
Maynard, Texas & P. R. Co. v. (Tex. Civ. App.).....	255	Nichols & Shepard Co. v. Hubert (Mo.).....	1031
Meadows, Montague County v. (Tex. Civ. App.).....	556	Noell, Ambrose v. (Ky.).....	570
Mehlin v. Mutual Reserve Fund Life Ass'n (Ind. T.).....	1063	O'Brien, Bassett v. (Mo.).....	107
Merchants' Life Ass'n of United States, Sieders v. (Tex. Civ. App.).....	547	O'Connor, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.).....	511
Middleton v. Shelby County Trust Co. (Ky.).....	156	Oglesby v. Missouri Pac. R. Co. (Mo.).....	758
Miller v. Anders (Tex. Civ. App.).....	897	Ojerholm, Smith v. (Tex. Civ. App.).....	37
Miller v. Somerset Cedar Post & Lumber Co. (Ky.).....	615		
Miller, Hall v. (Tex. Civ. App.).....	36		
Miller, Plotz v. (Ky.).....	176		
Miller Coal Co., Little Rock & Ft. S. R. Co. v. (Ark.).....	1054		
Milliken's Adm'x, Louisville & N. R. Co. v. (Ky.).....	796		
Mills, Lawson v. (Mo.).....	678		
Milstead v. Commonwealth (Ky.).....	451		

CASES REPORTED.

xi

	Page		Page
O'Kelleher, Texarkana & Ft. S. R. Co. v. (Tex. Civ. App.).....	54	Rhoades, International & G. N. R. Co. v. (Tex. Civ. App.).....	517
Ord, Shields v. (Tex. Civ. App.).....	298	Rice v. Citizens' Nat. Bank (Ky.).....	454
Osborne, Kenton Ins. Co. v. (Ky.).....	306	Rice v. People's Bank of Adairville (Ky.)..	441
O'Toole v. State (Tex. Cr. App.).....	244	Rice v. Ward (Tex. Sup.).....	844
Owens, Baldwin v. (Ky.).....	438	Rice, State v. (Mo.).....	78
Owensboro Banking Co., Lyddane v. (Ky.)	453	Richardson v. Bales (Ark.).....	321
		Richardson, Beekman v. (Mo.).....	689
Pace v. State (Tex. Cr. App.).....	953	Richardson, Gilbert v. (Tenn. Ch. App.)....	134
Pace, Evans v. (Tex. Civ. App.).....	1094	Richardson, Lewis v. (Ind. T.).....	969
Padgett v. Dallas Brick & Construction Co. (Tex. Civ. App.).....	529	Richmond, Bialek v. (Tex. Civ. App.).....	47
Padgett v. Evans (Tex. Civ. App.).....	513	Ricketts v. Hart (Mo.).....	825
Paducah Bldg. Trust Co., Gardner v. (Ky.)	820	Ridgeway v. Herbert (Mo.).....	1040
Parker v. Commonwealth (Ky.).....	573	Rissler v. American Cent. Ins. Co. of St. Louis (Mo.).....	755
Parks v. Lubbock (Tex. Sup.).....	322	Roach, Jones v. (Tex. Civ. App.).....	549
Parman v. Marshall (Tenn. Ch. App.)....	116	Roach, Smith v. (Tex. Civ. App.).....	292
Patterson v. Crabb (Tex. Civ. App.).....	870	Roberts v. State (Tex. Cr. App.).....	383
Paul, City of Liberty v. (Tex. Civ. App.)..	657	Robinson v. Belt (Ind. T.).....	975
Payne, Thomas v. (Ky.).....	450	Robinson v. Davis (Ark.).....	66
Pearson, Zimmerman v. (Tex. Civ. App.)..	523	Robinson v. Tenny (Ky.).....	1129
Peck v. State (Tex. Cr. App.).....	229	Robinson, Sparks v. (Ark.).....	460
Peel v. Giesen (Tex. Civ. App.).....	44	Roby v. State (Tex. Cr. App.).....	1114
Pence v. Commonwealth (Ky.).....	801	Roeback v. State (Tex. Cr. App.).....	914
Pennington v. Commonwealth (Ky.).....	818	Rogers v. Southern Pine Lumber Co. (Tex. Civ. App.).....	26
Pennsylvania Fire Ins. Co. v. Moore (Tex. Civ. App.).....	878	Rufus, State v. (Mo.).....	80
People's Bank of Adairville, Rice v. (Ky.)	441	Rulo v. Beadles (Ky.).....	312
People's Building, Loan & Saving Ass'n, Leary v. (Tex. Sup.).....	836	Rulo v. Murphy (Ky.).....	312
People's Building & Loan Ass'n, Bragassa v. (Tex. Civ. App.).....	1134	Rushing, Deboe v. (Ky.).....	613
Perkins, Joseph W. Moon Buggy Co. v. (Tex. Civ. App.).....	1134	Russell, St. Louis & K. C. R. Co. v. (Mo.)..	1030
Perry v. Brown (Ky.).....	457	Russey, Custer v. (Tenn. Ch. App.).....	126
Perry v. State (Tex. Cr. App.).....	229	Rutherford v. McDonnell (Ark.).....	1060
Peters v. Chandler (Tex. Civ. App.).....	281	Rutherford, Chandler v. (Ind. T.).....	981
Peterson, Renner v. (Tex. Civ. App.).....	867	Rutledge v. State, three cases (Tex. Cr. App.).....	1133
Phillips, Johnson v. (Tenn. Ch. App.).....	990	Ryland v. Banks (Mo.).....	720
Phillips, Polk County v. (Tex. Civ. App.)	535		
Phillips, Polk County v. (Tex. Sup.).....	328	St. Clair, Missouri, K. & T. R. Co. of Tex- as v. (Tex. Civ. App.).....	666
Phillips, Wise County Coal Co. v. (Tex. Civ. App.).....	331	St. Louis Brewing Ass'n v. Howard (Mo.)..	1046
Pickett v. State (Tex. Cr. App.).....	374	St. Louis, I. M. & S. R. Co., Burke v. (Ark.)	458
Pierson v. Sanger (Tex. Civ. App.).....	869	St. Louis Refrigerator & Wooden Gutter Co. v. Langley (Ark.).....	68
Pike v. State (Tex. Cr. App.).....	395	St. Louis Trust Co. v. Bambrick (Mo.)...	706
Piper v. State (Tex. Cr. App.).....	1118	St. Louis Type Foundry, Taylor v. (Tex. Civ. App.).....	304
Pitts v. State (Tex. Cr. App.).....	906	St. Louis & K. C. R. Co. v. Russell (Mo.)..	1030
Plotz v. Miller (Ky.).....	176	St. Louis & S. F. R. Co. v. Neal (Ark.)....	1060
Polk v. State (Tex. Cr. App.).....	909	St. Louis & S. F. R. Co., Coatney v. (Mo.)..	1036
Polk County v. Phillips (Tex. Civ. App.)..	535	Salzer v. Napier, two cases (Ky.).....	10
Polk County v. Phillips (Tex. Sup.).....	328	San Antonio Foundry Co., Hamilton v. (Tex. Civ. App.).....	1104
Powell, Hulse v. (Tex. Civ. App.).....	862	San Antonio & A. P. R. Co. v. Bolster (Tex. Civ. App.).....	41
Poyner v. State (Tex. Cr. App.).....	376	San Antonio & A. P. R. Co. v. Brooking (Tex. Civ. App.).....	537
Prather, Ralls v. (Ky.).....	318	San Antonio & G. S. R. Co., Davis v. (Tex. Sup.).....	324
Preston's Ex'rs. Allison v. (Ky.).....	593	Sanders, Holmes v. (Tex. Civ. App.).....	333
Price, Liles v. (Tex. Civ. App.).....	526	Sanders, Adm'r v. Babbitt (Ky.).....	163
Pride v. Whitfield (Tex. Civ. App.).....	1100	Sanger, Pierson v. (Tex. Civ. App.).....	869
Primore, Walton v. (Tex. Civ. App.).....	352	Saunders, Stone v. (Ky.).....	788
Pringle, Fleming v. (Tex. Civ. App.).....	553	Sayers v. Davis (Tex. Civ. App.).....	520
Pritchett v. Hape (Ky.).....	608	Scanlan, Smith v. (Ky.).....	152
Procter, Louisville & N. R. Co. v. (Ky.)..	591	Scarborough, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.).....	356
Pryor v. State (Tex. Cr. App.).....	375	Schell v. Equitable Loan & Investment Ass'n of Sedalia (Mo.).....	406
Pybos v. McLaughlin (Ind. T.).....	1075	Schierman, Blackman v. (Tex. Civ. App.)..	886
		Schlamp v. Berner's Adm'r (Ky.).....	312
Quaid v. Tipton (Tex. Civ. App.).....	264	Schneider, District of Clifton, Campbell County v. (Ky.).....	13
Raatz v. Gordon (Tex. Civ. App.).....	651	Scott, Branham v. (Tex. Civ. App.).....	38
Ragland, National Bank of Dangerfield v. (Tex. Civ. App.).....	661	Scroggins v. State (Tex. Cr. App.).....	232
Ragsdale v. Groos (Tex. Civ. App.).....	256	Searcy v. State (Tex. Cr. App.).....	1119
Ralls v. Prather (Ky.).....	318	Seay, Clarke v., two cases (Ky.).....	589
Rammacker, Louisville R. Co. v. (Ky.).....	175	Secrest, Worland v. (Ky.).....	445
Rand, Cotton v. (Tex. Civ. App.).....	55	Segars v. State (Tex. Cr. App.).....	211
Rand, Cotton v. (Tex. Sup.).....	838	Segars v. State (Tex. Cr. App.).....	238
Randolph v. Mitchell (Tex. Civ. App.).....	297	Segars v. State (Tex. Cr. App.).....	398
Ransom, Frankfort Chair Co. v. (Ky.).....	1129	Seibert, City of Louisville v. (Ky.).....	310
Raymond, Kosminsky v. (Tex. Civ. App.)..	51	Seivers, Carson & Co. v. Curd (Ky.).....	1129
Reagan v. State (Tex. Cr. App.).....	914	Selva v. Lucas (Ky.).....	447
Redmond v. Commonwealth (Ky.).....	565	Selva, City of Louisville v. (Ky.).....	447
Reeves v. Reeves (Ind. T.).....	1079	Semonis, Louisville & N. R. Co. v. (Ky.)..	612
Renaker, McClure v. (Ky.).....	317		
Renfro v. Green (Ky.).....	428		
Renner v. Peterson (Tex. Civ. App.).....	867		
Revel, Shaw v. (Ky.).....	566		
Reynolds, Willey v. (Ind. T.).....	972		

	Page		Page
Sessions, Anderson v. (Tex. Civ. App.)	874	State v. Headrick (Mo.)	99
Sessum v. State (Tex. Cr. App.)	373	State v. Hibler (Mo.)	85
Shackelford v. Williams (Ky.)	614	State v. Hudspeth (Mo.)	483
Shackelford, Staples v. (Mo.)	1032	State v. Kimes (Mo.)	104
Shannon, Dunn v. (Ky.)	14	State v. Lancashire Fire Ins. Co. (Ark.)	633
Sharp v. Wood (Ky.)	15	State v. Mollineaux (Mo.)	462
Shaw v. Revel (Ky.)	566	State v. Rice (Mo.)	78
Shaw v. State (Tex. Cr. App.)	214	State v. Rufus (Mo.)	80
Shelby County Trust Co., Middleton v. (Ky.)	156	State v. Welborn (Ark.)	829
Shelbyville & Eminence Turnpike Co. v. Louisville & N. R. Co. (Ky.)	805	State v. Williams (Mo.)	88
Sherley v. Mattingly (Ky.)	189	State v. Wolfe (Tex. Civ. App.)	657
Shields v. Ord (Tex. Civ. App.)	298	State, Airhart v. (Tex. Cr. App.)	214
Shields v. Stark (Tex. Civ. App.)	540	State, Arnett v. (Tex. Cr. App.)	385
Shilling v. State (Tex. Cr. App.)	240	State, Austin v. (Tex. Cr. App.)	249
Short, Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.)	261	State, Barfield v. (Tex. Cr. App.)	908
Shrivner v. Young (Ky.)	153	State, Bartlett v. (Tex. Cr. App.)	918
Shuttles, Holloway v. (Tex. Civ. App.)	293	State, Bean v. (Tex. Cr. App.)	946
Sieders v. Merchants' Life Ass'n of United States (Tex. Civ. App.)	547	State, Blackwell v. (Tex. Cr. App.)	919
Silliman, Anderson v. (Tex. Civ. App.)	1134	State, Bradford v. (Tex. Cr. App.)	379
Simpson v. Texas Tram & Lumber Co. (Tex. Civ. App.)	655	State, Bristow v. (Tex. Cr. App.)	393
Singer Mfg. Co. v. Cheney (Ky.)	813	State, Bruce v. (Tex. Cr. App.)	954
Skelton v. State (Tex. Cr. App.)	943	State, Bryant v. (Tex. Cr. App.)	1125
Skidmore, Dancy v. (Tex. Civ. App.)	279	State, Burns v. (Tex. Cr. App.)	905
Skinner v. Carr (Ky.)	799	State, Bush v. (Tex. Cr. App.)	238
Skinner v. Lynn (Ky.)	167	State, Byas v. (Tex. Cr. App.)	923
Slaughter v. Davenport (Mo.)	471	State, Carlton v. (Tex. Cr. App.)	213
Slough, Sweet v. (Tex. Civ. App.)	854	State, Carpenter v. (Tex. Cr. App.)	227
Smalley, Nicholstone City Co. v. (Tex. Civ. App.)	527	State, Chavana v. (Tex. Cr. App.)	380
Smith v. Board (Tex. Civ. App.)	520	State, Chowning v. (Tex. Cr. App.)	946
Smith v. Brannon (Ky.)	178	State, Christian v. (Tex. Cr. App.)	903
Smith v. Cairns (Tex. Sup.)	498	State, Clark v. (Tex. Cr. App.)	1120
Smith v. Crow (Ky.)	1130	State, Clay v. (Tex. Cr. App.)	212
Smith v. Dye (Tex. Civ. App.)	858	State, Clay v. (Tex. Cr. App.)	370
Smith v. Farmers' Bank of Vine Grove (Ky.)	451	State, Collins v. (Tex. Cr. App.)	216
Smith v. Farmers' Loan & Trust Co. (Tex. Civ. App.)	515	State, Colter v. (Tex. Cr. App.)	945
Smith v. Hauger (Mo.)	1052	State, Crawford v. (Tex. Cr. App.)	1132
Smith v. Ojerholm (Tex. Civ. App.)	37	State, Creighton v. (Tex. Cr. App.)	910
Smith v. Roach (Tex. Civ. App.)	292	State, Croomes v. (Tex. Cr. App.)	924
Smith v. Scanlan (Ky.)	152	State, Donnelly v. (Tex. Cr. App.)	228
Smith v. Sulzer Mach. Co.'s Assignee (Ky.)	449	State, Duncan v. (Tex. Cr. App.)	372
Smith, Chesapeake & O. R. Co. v. (Ky.)	12	State, Dunlap v. (Tex. Cr. App.)	392
Smith, Croft v. (Tex. Civ. App.)	1089	State, Dunn v. (Tex. Cr. App.)	1121
Smith, Houston & T. C. R. Co. v. (Tex. Civ. App.)	506	State, Edmonds v. (Tex. Cr. App.)	393
Smith, State ex rel. Ridge v. (Mo.)	713	State, Elkins v. (Tex. Cr. App.)	372
Somerset Cedar Post & Lumber Co., Miller v. (Ky.)	615	State, Elton v. (Tex. Cr. App.)	245
Southern Pine Lumber Co., Rogers v. (Tex. Civ. App.)	26	State, Fikes v. (Tex. Cr. App.)	248
Southern R. Co. v. Barbour (Ky.)	159	State, Fikes v. (Tex. Cr. App.)	1133
Southwestern Telegraph & Telephone Co. v. Jennings (Tex. Civ. App.)	288	State, Flanigan v. (Tex. Cr. App.)	1116
Spalding v. Tucker (Ky.)	2	State, Flowers v. (Tex. Cr. App.)	216
Sparks v. McHugh (Tex. Civ. App.)	873	State, Ford v. (Tex. Cr. App.)	935
Sparks v. Robinson (Ark.)	460	State, Franklin v. (Tex. Cr. App.)	951
Sparks v. State (Tex. Cr. App.)	1120	State, Freeman v. (Tex. Cr. App.)	230
Speake, Houston & T. C. R. Co. v. (Tex. Civ. App.)	509	State, Frickie v. (Tex. Cr. App.)	394
Spence, Duffield v. (Tenn. Ch. App.)	492	State, Furlow v. (Tex. Cr. App.)	938
Spicer v. Commonwealth (Ky.)	802	State, George v. (Tex. Cr. App.)	378
Springs v. Cooper (Tenn. Ch. App.)	997	State, Grayson v. (Tex. Cr. App.)	246
S. S. White Dental Mfg. Co. v. Hertzberg (Tex. Civ. App.)	355	State, Hamblin v. (Tex. Cr. App.)	1111
Stamps, Zimbleman v. (Tex. Civ. App.)	341	State, Hamilton v. (Tex. Cr. App.)	217
Standard Furniture Co. v. Stanley (Ky.)	611	State, Hargrove v. (Tex. Cr. App.)	1123
Standard Oil Co. v. Fidelity & Casualty Co. of New York (Ky.)	571	State, Hargrove v. (Tex. Cr. App.)	1124
Stanley, Standard Furniture Co. v. (Ky.)	611	State, Harper v. (Tex. Cr. App.)	217
Staples v. Shackelford (Mo.)	1032	State, Hedrick v. (Tex. Cr. App.)	252
Stark, Shields v. (Tex. Civ. App.)	540	State, Hehn v. (Tex. Cr. App.)	1118
State v. Adcock (Tenn. Ch. App.)	992	State, Hester v. (Tex. Cr. App.)	932
State v. Aetna Fire Ins. Co. (Ark.)	638	State, Highsmith v. (Tex. Cr. App.)	919
State v. Black's Estate (Tex. Civ. App.)	555	State, Hollenbeck v. (Tex. Cr. App.)	373
State v. Bybee (Mo.)	470	State, Holman v. (Tex. Cr. App.)	379
State v. Ernest (Mo.)	688	State, Holt v. (Tex. Cr. App.)	907
State v. Gray (Mo.)	85	State, Homan v. (Tex. Cr. App.)	237
State v. Harper (Mo.)	89	State, Howard v. (Tex. Cr. App.)	229
State v. Harris (Mo.)	481	State, Jackson v. (Tex. Cr. App.)	389
		State, Jannin v. (Tex. Cr. App.)	1126
		State, Johnson v. (Tex. Cr. App.)	382
		State, Johnson v. (Tex. Cr. App.)	911
		State, Jones v. (Tex. Cr. App.)	949
		State, Joy v. (Tex. Cr. App.)	933
		State, Joy v. (Tex. Cr. App.)	935
		State, Kendall v. (Tex. Civ. App.)	1102
		State, Ladwig v. (Tex. Cr. App.)	390
		State, Lagual v. (Tex. Cr. App.)	1133
		State, Luttrell v. (Tex. Cr. App.)	930
		State, McAvoy v. (Tex. Cr. App.)	928
		State, McCauley v. (Tex. Cr. App.)	373
		State, McClendon v. (Ark.)	1062
		State, McQuery v. (Tex. Cr. App.)	247
		State, McQuery v. (Tex. Cr. App.)	1133

CASES REPORTED.

xiii

	Page		Page
State, Malone v. (Tex. Cr. App.)	381	Stone v. Saunders (Ky.)	788
State, Malone v. (Tex. Cr. App.)	1133	Stone, Holmes v. (Tex. Civ. App.)	518
State, Marquez v. (Tex. Cr. App.)	1119	Storrie v. Woessner (Tex. Sup.)	1132
State, Martin v. (Tex. Cr. App.)	912	Storrie, Hutcheson v. (Tex. Sup.)	848
State, Matthews v. (Tex. Cr. App.)	915	Storts v. George (Mo.)	489
State, May v. (Tex. Cr. App.)	242	Strahorn-Hutton-Evans Commission Co., Hearne v. (Tex. Civ. App.)	867
State, Monticue v. (Tex. Cr. App.)	236	Strait v. Cole (Tex. Civ. App.)	1092
State, Moore v. (Tex. Cr. App.)	1108	Strauss v. White (Ark.)	64
State, Morgan v. (Tex. Cr. App.)	902	Strong, Breathitt Coal, Iron & Lumber Co. v. (Ky.)	189
State, Morrison v. (Tex. Cr. App.)	358	Stroube v. State (Tex. Cr. App.)	357
State, Morrison v. (Tex. Cr. App.)	1133	Stuart, Wallis v. (Tex. Civ. App.)	1134
State, Mott v. (Tex. Cr. App.)	368	Sullivan v. State (Ark.)	828
State, Mozee v. (Tex. Cr. App.)	250	Sullivan v. State (Tex. Cr. App.)	375
State, Mundelino v. (Tex. Cr. App.)	235	Sulzer Mach. Co.'s Assignee, Smith v. (Ky.)	449
State, Murphy v. (Tex. Cr. App.)	940	Summers v. Heard (Ark.)	1057
State, Natho v. (Tex. Cr. App.)	398	Summers, Houston, E. & W. T. R. Co. v. (Tex. Sup.)	324
State, O'Toole v. (Tex. Cr. App.)	244	Sweeney v. Kansas City Cable R. Co. (Mo.)	682
State, Pace v. (Tex. Cr. App.)	953	Sweet v. Slough (Tex. Civ. App.)	854
State, Peck v. (Tex. Cr. App.)	229	Swertman v. Voss (Ky.)	183
State, Perry v. (Tex. Cr. App.)	229	Swinebroad, Bright's Ex'rs v. (Ky.)	578
State, Pickett v. (Tex. Cr. App.)	374	Tabor, Interstate Building & Loan Ass'n v. (Tex. Civ. App.)	300
State, Pike v. (Tex. Cr. App.)	395	Talbot, Belmont's Ex'r v. (Ky.)	588
State, Piper v. (Tex. Cr. App.)	1118	Tarkington v. Brunett (Tex. Civ. App.)	274
State, Pitts v. (Tex. Cr. App.)	906	Taulbee v. Moore (Ky.)	564
State, Polk v. (Tex. Cr. App.)	909	Taylor v. Farmers' Savings & Building & Loan Ass'n (Tenn. Ch. App.)	1008
State, Poyner v. (Tex. Cr. App.)	376	Taylor v. St. Louis Type Foundry (Tex. Civ. App.)	304
State, Pryor v. (Tex. Cr. App.)	375	Taylor v. State (Tex. Cr. App.)	237
State, Reagan v. (Tex. Cr. App.)	914	Taylor v. State (Tex. Cr. App.)	1106
State, Roberts v. (Tex. Cr. App.)	383	Taylor, Collier v. (Ky.)	432
State, Roby v. (Tex. Cr. App.)	1114	Taylor, De Ford v. (Tenn. Ch. App.)	999
State, Roebuck v. (Tex. Cr. App.)	914	Taylor's Adm'r, Harrison v. (Ky.)	193
State, Rutledge v., three cases (Tex. Cr. App.)	1133	Tennelly, Robinson v. (Ky.)	1129
State, Scroggins v. (Tex. Cr. App.)	232	Telle, Kelly v. (Ark.)	633
State, Searcy v. (Tex. Cr. App.)	1119	Texarkana & Ft. S. R. Co. v. O'Kelleher (Tex. Civ. App.)	54
State, Segars v. (Tex. Cr. App.)	211	Texas Brewing Co., Hurd v. (Tex. Civ. App.)	883
State, Segars v. (Tex. Cr. App.)	238	Texas Building & Loan Ass'n, Cain v. (Tex. Civ. App.)	879
State, Segars v. (Tex. Cr. App.)	398	Texas Tram & Lumber Co., Simpson v. (Tex. Civ. App.)	655
State, Sessum v. (Tex. Cr. App.)	373	Texas & P. R. Co. v. Armstrong (Tex. Sup.)	835
State, Shaw v. (Tex. Cr. App.)	214	Texas & P. R. Co. v. Goldman (Tex. Civ. App.)	275
State, Shilling v. (Tex. Cr. App.)	240	Texas & P. R. Co. v. Lee (Tex. Civ. App.)	851
State, Skelton v. (Tex. Cr. App.)	943	Texas & P. R. Co. v. Maynard (Tex. Civ. App.)	255
State, Sparks v. (Tex. Cr. App.)	1120	Texas & P. R. Co. v. Truesdell (Tex. Civ. App.)	272
State, Stewart v. (Tex. Cr. App.)	907	Thayer, Heintz v. (Tex. Sup.)	640
State, Stroube v. (Tex. Cr. App.)	857	Thedford, Colonial & U. S. Mortg. Co. v. (Tex. Civ. App.)	263
State, Sullivan v. (Ark.)	828	Thomas v. Feece (Ky.)	150
State, Sullivan v. (Tex. Cr. App.)	375	Thomas v. Payne (Ky.)	450
State, Taylor v. (Tex. Cr. App.)	237	Thomas v. State (Tex. Cr. App.)	242
State, Taylor v. (Tex. Cr. App.)	1106	Thomas v. State (Tex. Cr. App.)	1109
State, Thomas v. (Tex. Cr. App.)	242	Thomas v. Thomas (Mo.)	111
State, Thomas v. (Tex. Cr. App.)	1109	Thomas, Forbes v. (Tex. Civ. App.)	1097
State, Tindale v. (Tex. Cr. App.)	373	Thompson v. Caruthers (Tex. Civ. App.)	1093
State, Turner v. (Tex. Cr. App.)	366	Thompson v. Johnson (Tex. Sup.)	23
State, Turney v. (Tex. Cr. App.)	243	Thompson, Hazeldon v. (Ky.)	1129
State, Tuttle v. (Tex. Cr. App.)	911	Thompson, State ex rel. Ziegenhein v. (Mo.)	98
State, Vick v. (Tex. Cr. App.)	1117	Thomson, King County Land & Live-Stock Co. v. (Tex. Civ. App.)	890
State, Walker v. (Tex. Cr. App.)	234	Thornsby, Boone v. (Ky.)	563
State, West v. (Tex. Cr. App.)	247	Thornton, Connor v. (Tex. Civ. App.)	354
State, Wilks v. (Tex. Cr. App.)	902	Thummel v. Holden (Mo.)	404
State, Williams v. (Tex. Cr. App.)	220	Tilford v. Dotson (Ky.)	583
State, Williams v. (Tex. Cr. App.)	224	Tindale v. State (Tex. Cr. App.)	373
State, Williams v. (Tex. Cr. App.)	904	Tipton, Quaid v. (Tex. Civ. App.)	264
State, Williams v. (Tex. Cr. App.)	1134	Todd, Jones v. (Ky.)	452
State, Wilson v. (Tex. Cr. App.)	916	Totman, Hannibal & St. J. R. Co. v. (Mo.)	412
State, Winters v. (Tex. Cr. App.)	1110	Townsend, Willoughby v. (Tex. Civ. App.)	335
State, Wood v. (Tex. Cr. App.)	235	Trueblood, Winningham v. (Mo.)	399
State, Woodward v. (Tex. Cr. App.)	1122	Truesdell, Texas & P. R. Co. v. (Tex. Civ. App.)	272
State, Woodson v. (Tex. Cr. App.)	918	Tucker, Spalding v. (Ky.)	2
State, Wuertemburg v. (Tex. Cr. App.)	944	Tunks v. Vincent (Ky.)	622
State, Wynne v. (Tex. Cr. App.)	909	Tupy v. Kocourek (Ark.)	69
State ex rel. Brumbaugh v. Kansas City, St. J. & C. B. R. Co. (Mo.)	479	Turner v. City of Houston (Tex. Civ. App.)	642
State ex rel. Burnham v. Hickman (Mo.)	680		
State ex rel. Crow v. Aetna Ins. Co. (Mo.)	413		
State ex rel. Crow v. American Cent. Ins. Co. (Mo.)	413		
State ex rel. Crow v. Kramer (Mo.)	716		
State ex rel. Herriford v. McKee (Mo.)	421		
State ex rel. Ridge v. Smith (Mo.)	713		
State ex rel. Ziegenhein v. Thompson (Mo.)	98		
S. T. Barlow Co., Lawson v. (Ky.)	314		
Stevens v. Willis (Ky.)	9		
Stewart v. Allison (Mo.)	712		
Stewart v. State (Tex. Cr. App.)	907		
Stewart's Adm'r v. Carneal (Ky.)	800		
Stone v. Hill (Ky.)	184		

	Page		Page
Turner v. Dixon (Mo.)	725	White Dental Mfg. Co. v. Hertzberg (Tex. Civ. App.)	355
Turner v. Eastin (Ky.)	567	Whitfield, Pride v. (Tex. Civ. App.)	1100
Turner v. State (Tex. Cr. App.)	366	Whitmer, Hastings v. (Ind. T.)	967
Turner, Ingram v. (Ky.)	148	Wilcoxon, Dearing v. (Ky.)	159
Turney v. State (Tex. Cr. App.)	243	Wilks v. State (Tex. Cr. App.)	902
Tuttle v. State (Tex. Cr. App.)	911	Willey v. Reynolds (Ind. T.)	972
Union Trust Co., Cook v. (Ky.)	600	Williams v. Clark (Tenn. Ch. App.)	130
United States, Dansby v. (Ind. T.)	1083	Williams v. State (Tex. Cr. App.)	220
Vance, Monday v. (Tex. Civ. App.)	346	Williams v. State (Tex. Cr. App.)	224
Vernon County, Foster v. (Mo.)	725	Williams v. State (Tex. Cr. App.)	904
Vick v. State (Tex. Cr. App.)	1117	Williams v. State (Tex. Cr. App.)	1134
Vick, Wilson v. (Tex. Civ. App.)	45	Williams, Caudle v. (Tex. Civ. App.)	560
Viley v. Frankfort & C. Ry. (Ky.)	173	Williams, Clift v. (Ky.)	821
Vincent, Tunks v. (Ky.)	622	Williams, Gulf, O. & S. F. R. Co. v. (Tex. Civ. App.)	653
Vittetow v. Ames (Ky.)	1	Williams, Shackelford v. (Ky.)	614
Voss, Swertman v. (Ky.)	183	Williams, State v. (Mo.)	88
Waggoner v. Flack (Tex. Sup.)	330	Willis, Stephens v. (Ky.)	9
Wait, Cooper v. (Ky.)	161	Willoughby v. Townsend (Tex. Civ. App.)	335
Walker v. State (Tex. Cr. App.)	234	Wilson, In re (Ky.)	149
Waller, West-Winfree Tobacco Co. v. (Ark.)	320	Wilson v. State (Tex. Cr. App.)	916
Wallis v. Stuart (Tex. Civ. App.)	1134	Wilson v. Vick (Tex. Civ. App.)	45
Walton v. Prigmore (Tex. Civ. App.)	352	Wilson, Western Union Tel. Co. v. (Tex. Civ. App.)	521
Ward v. Western Union Tel. Co. (Tex. Civ. App.)	259	Winchester Bank v. Clark County Nat. Bank (Ky.)	315
Ward, Rice v. (Tex. Sup.)	844	Windeas v. Earp (Mo.)	1044
Warwick v. Kingman (Ind. T.)	1076	Winters v. State (Tex. Cr. App.)	1110
Watson v. Watson (Tex. Civ. App.)	1105	Winningham v. Trueblood (Mo.)	390
Weakley v. Hanna (Ky.)	570	Wise County Coal Co. v. Phillips (Tex. Civ. App.)	331
Weatherford v. McFadden (Tex. Civ. App.)	548	Woessner, Storrie v. (Tex. Sup.)	1132
Weaver v. Goodman (Tex. Civ. App.)	860	Woiten v. American Union Life Ins. Co. (Tex. Civ. App.)	1105
Webb v. McCain (Ind. T.)	957	Wolfe, State v. (Tex. Civ. App.)	657
Weekes v. City of Galveston (Tex. Civ. App.)	544	Wolff, Carlin v. (Mo.)	679
Welborn, State v. (Ark.)	829	Wonderly v. Lafayette County (Mo.)	745
Wells v. Hardy (Tex. Civ. App.)	503	Wood v. State (Tex. Cr. App.)	235
Wertheimer-Swarts Shoe Co., Hill v. (Mo.)	702	Wood, Sharp v. (Ky.)	15
West v. Chamberlin (Ky.)	1131	Woodard v. State (Tex. Cr. App.)	1122
West v. State (Tex. Cr. App.)	247	Woodruff, Hazelett v. (Mo.)	1048
West, Fulcher v. (Tex. Civ. App.)	342	Woodson v. State (Tex. Cr. App.)	918
Westchester Fire Ins. Co. v. Blackford (Ind. T.)	978	Wooldridge v. Harding (Ky.)	162
Western Union Tel. Co. v. Davis (Tex. Civ. App.)	258	Woollum, Kirby v. (Ky.)	428
Western Union Tel. Co. v. Wilson (Tex. Civ. App.)	521	Woolsey, Brown v. (Ind. T.)	965
Western Union Tel. Co., Ward v. (Tex. Civ. App.)	259	Worland v. Secrest (Ky.)	445
West-Winfree Tobacco Co. v. Waller (Ark.)	320	Wuertemburg v. State (Tex. Cr. App.)	944
Wetmore v. Crouch (Mo.)	738	Wynne v. State (Tex. Cr. App.)	909
Whitaker v. Howard, two cases (Ky.)	1131	Yarborough v. Fitzpatrick (Ky.)	172
White v. Crosby (Tex. Civ. App.)	350	Young v. City of Webb City (Mo.)	709
White, Driver v. (Tenn. Ch. App.)	994	Young v. Downey (Mo.)	751
White, Ft. Worth & R. G. R. Co. v. (Tex. Civ. App.)	855	Young, Shrivner v. (Ky.)	153
White, Strauss v. (Ark.)	64	Ziehr, Lander v. (Mo.)	742
		Zimmerman v. Pearson (Tex. Civ. App.)	523
		Zimbleman v. Stamps (Tex. Civ. App.)	341

See End of Index for Tables of Southwestern Cases in State Reports.

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VITTETOW et al. v. AMES et al.¹

(Court of Appeals of Kentucky. May 18, 1899.)

USURY—FAILURE TO PLEAD—NEW TRIAL—UNEXPECTED CALLING OF CASE.

1. It is error to give judgment for a greater rate of interest than 6 per cent., though usury is not pleaded.

2. Defendant was entitled to a new trial on the ground of accident or surprise, where the case preceding his on the docket was suddenly terminated by compromise after the trial thereof began, thus causing his case to be called sooner than he or his counsel reasonably anticipated, whereby he was prevented from being present at the trial.

Appeal from circuit court, Daviess county.

"Not to be officially reported."

Action by F. A. Ames & Co. against W. T. Vittetow and another on a bill of exchange. Judgment for plaintiffs, and defendant O'Bryan appeals. Reversed.

Hill & Hill, for appellant. Birkhead & Clements, for appellees.

BURNAM, J. Appellees instituted this suit against appellant and W. T. Vittetow, as drawer and acceptor, respectively, of a bill of exchange for \$131.90, dated April 25, 1895, and due eight months after date, bearing interest at 8 per cent. per annum after maturity until paid. Judgment was rendered against Vittetow by consent. O'Bryan answered, and denied that he executed or delivered the bill sued on. At the June term in 1897 the case was called for trial in the absence of appellant, his witnesses, and his chief attorney. The trial resulted in a verdict for appellees, on which judgment was rendered for the sum sued for, with interest thereon at the rate of 8 per cent. per annum from the 7th day of April, 1896. After the trial, and on the same day, appellant appeared, and filed the affidavits of himself and his attorney, and moved the court to set aside the judgment, and grant him a new trial. The ground relied on by appellant in his affidavit is that the reason that he was not present at the time the case was called for trial was because his attorney had informed him on the night previ-

ous that a very heavy cause was then on trial, which would consume the greater part of the next day, and which, under no circumstances, could be completed before noon, and that, relying upon these representations, he did not go to the court house until the afternoon session. That, very unexpectedly, the case being tried was compromised and settled during the pendency of the trial, and that his case was suddenly called, and tried in his absence and that of his witnesses and main attorney. Appellant is corroborated by his attorney, and also by the affidavit of James O. Rudd, a party to the suit that preceded that of appellant on the docket, who says that he informed appellant and his attorney, after the adjournment of court on the evening preceding the day on which this action was tried, that it would consume the greater portion, if not all, of the day to complete the trial of the case in which he was engaged, as it did not occur to him at that time that there would be any compromise or settlement of the case except in the ordinary course. It has been frequently decided by this court that it was error to give a judgment for a greater rate of interest than 6 per cent., although the plea of usury was not made by the defendant (see *Hill v. Cornwall & Bros.*, Assignee, 95 Ky. 512, 28 S. W. 540; *Hart v. Hayden*, 79 Ky. 346; *Rudd v. Bank*, 78 Ky. 513), and it was palpable error to have given judgment for a greater rate of interest than 6 per cent. It seems to us that upon the facts presented by these affidavits the verdict and judgment should have been set aside, and the case tried upon its merits, as neither appellant nor his counsel could have reasonably anticipated that the trial of the case which preceded this upon the docket would, in the course of the trial, be suddenly terminated by compromise. The settlement of this action after the trial had begun was an accident or surprise which ordinary prudence could not have guarded against. There is no evidence of bad faith or desire on the part of appellant to delay the trial of the case, and both he and his attorney had reasonable grounds to believe that this action could not be reached before the afternoon of the day on which it was set for trial, nor would it have been reached except for the

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

unexpected compromise and settlement of the case which preceded it. We think appellant's motion for a new trial should have been sustained, and the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

SPALDING v. TUCKER.¹

(Court of Appeals of Kentucky. May 17, 1899.)

PRINCIPAL AND AGENT—NOTICE OF LIMITED AUTHORITY—LIABILITY OF SURETY.

As one who deals with an agent whose powers he knows to be limited does so at his peril, the payee in a note is not bound by the principal's unauthorized representation to a surety that the payee desired him to sign the note merely for his accommodation, to enable him to discount it in bank, and that, if not paid by the principal at maturity, he would take it up; the surety being bound to take notice of the fact that the principal's agency for the payee was a limited one.

Appeal from circuit court, Boyle county.

"Not to be officially reported."

Action by De W. C. Tucker against Clem Spalding on a promissory note. Judgment for plaintiff, and defendant appeals. Affirmed.

H. W. & R. C. Rives, for appellant. John W. Rawlings and Robert Harding, for appellee.

WHITE, J. The appellee, Tucker, brought this action on a note executed by appellee as surety of one Bland, judgment having theretofore been recovered against Bland in an action in Marion county. The appellant in his answer admitted signing the note, but pleaded that it was for the accommodation of appellee, to enable appellee to discount the note in bank, and thereby secure the money, and that the note was signed with the express understanding that, if the note was not paid by Bland at maturity, appellee would take it up, and in no event would appellant ever be called upon to pay same, and appellant asked that, as to him, the note be canceled. The reply denied this agreement, but alleged that appellant signed the note as surety of Bland, and without any representations or promises from appellee. On a trial before a jury, a verdict was rendered for appellee, and judgment was entered thereon. After reasons and motion for a new trial had been overruled, this appeal is prosecuted.

The grounds relied on for new trial are that the verdict is flagrantly against the evidence, and error of the court in refusing to instruct the jury as asked by appellant. On the issue submitted to the jury the evidence is conflicting, and it may be that the verdict is not in accord with our idea of the preponderance of the evidence, but it cannot be said to be flagrantly against the evidence, or unsupported by the evidence, and, unless it was, we are not authorized to disturb same for that reason.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

The appellant asked the court to instruct the jury: "If plaintiff, Tucker, sent to defendant, Spalding, a message by Jack Bland, to induce the signing of the note, then the rights of Spalding are to be considered with reference to the message as delivered by Bland, even though it may have differed from the one sent by Tucker." The court refused this instruction, but gave an instruction based on the theory of the message as sent; that is, appellee sent a message by Bland, who was the principal in the note, and appellant, Spalding, signed the note on the statement of Bland that appellant would still be bound by the messages as sent. In the giving of this instruction, and refusing that offered by appellant, we perceive no error. The doctrine of agency seems to be that where one deals with an agent, whose powers he knows to be limited, he deals at his peril, whether the limitation be as to the extent of the agent's powers or in the mode of their execution. This was directly held in *Craycraft v. Selva*, 10 Bush, 696. It is manifest that the agency of Bland was limited,—very limited. He was the principal in the note, and appellant was undertaking to become his surety to the appellee. This fact itself must necessarily have given appellant notice of the limited agency. There appears no error, and the judgment is affirmed.

NEW FARMERS' BANK'S TRUSTEE v. COCKRELL.¹

(Court of Appeals of Kentucky. May 13, 1899.)

ASSIGNMENTS FOR CREDITORS—PREFERRED CLAIMS—LIEN TO SECURE TRUST FUND.

Where a fund held by a bank as trustee has been mingled with the general assets of the bank, the beneficiaries of the fund have no lien upon the assets of the bank therefor, and under a general assignment by the bank for the benefit of its creditors prior to the act of March, 1894, regulating voluntary assignments, such beneficiaries are not entitled to priority in the distribution of the assigned estate.

Appeal from circuit court, Montgomery county.

"To be officially reported."

Action by B. F. Cockrell, receiver, against the trustee of the New Farmers' Bank. Judgment for plaintiff, and defendant appeals. Reversed.

Stone & Sudduth, John O. Miller, and C. P. Chenault, for appellant. Tyler & Apperson, for appellee.

DU RUELLE, J. William Mitchell filed suit in the Montgomery circuit court against the appellant, alleging that he had been appointed, by order of court in an action in said court by Anderson's administrator against Annie Dooley and others, as trustee and receiver for the Hocker children; that a large fund had come into his hands, of which he had deposited two sums, aggregating nearly

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

\$2,300, in the New Farmers' Bank, under an agreement that the bank should repay him, as such trustee and receiver, the amounts deposited, with interest; that said funds were deposited by him in his trust capacity, and were trust funds in the hand of the bank, and that he was entitled to be paid the amount of them in full before the general creditors of the bank; that the bank had made a general deed of assignment for the benefit of its creditors, and, the trustee thereby appointed having failed to qualify, the appellant was appointed by the court, and had qualified and acted as trustee; that he, Mitchell, was nominally acting as receiver and trustee of the Hocker children, but the bank was the real receiver and trustee. A demurrer having been sustained to the petition, an amended petition was filed, alleging that, at the time of Mitchell's "appointment as such receiver, said bank was desirous of obtaining the funds which had thus come to his hands, and was willing to pay the aforesaid interest thereon to obtain same as a deposit, and at its instance and for its benefit plaintiff was induced and authorized to seek said appointment as receiver, and to qualify as such; plaintiff at that time being cashier or president of the said bank. Plaintiff states that from the time that said funds were deposited in said bank as aforesaid until its assignment to R. B. Young, who failed to qualify, they were recognized by said bank and its officers as trust funds, subject to the control of this court, and said bank as the real receiver and plaintiff as nominal receiver only; that said funds were, from the time of their deposit in said bank as aforesaid to its assignment, carried on its books to his respective accounts as trustee and receiver aforesaid, separate and distinct from all other accounts, and so remain today." Mitchell having died, and appellee having been appointed in his place as receiver of the fund, the latter was substituted as plaintiff. A demurrer to the petition as amended was overruled, and, appellant standing by his demurrer, it was adjudged that appellee should recover the amounts claimed, and that they were trust funds and preferred claims against the assets of the bank.

It is not necessary to consider whether there was inconsistent pleading in the petition; nor, in the view we take of the case, is it essential to decide whether, under the averments of the petition as amended, the bank was the real trustee of the fund, though it would seem that the averments as to the deposit, taken in connection with the agreement to pay interest, would make it a loan by Mitchell to the bank, the money being placed to his credit as trustee, and showing that the bank was indebted in that sum to the trust fund. *Mills v. Swearingen*, 67 Tex. 270, 3 S. W. 268. There is no averment indicating that the loan was in violation of the trust, and so known to be by the bank. On the contrary, the presumption from the aver-

ments is that Mitchell was authorized to make an investment or loan of the fund, so as to produce an income for his cestui que trust, and would have been derelict had he not done so. But, assuming that, by virtue of the transaction stated in the petition as amended, the bank did become trustee, we shall consider the question whether this entitled the beneficial owners of the fund to subject the bank's assets to the payment of their claim, to the exclusion of the other creditors. On behalf of appellee it is urged that it is unnecessary to trace the trust fund into the hands of the assignee, it being admitted by the demurrer that the bank received it with notice of the trust; that it thereby became in fact the trustee, and its assignee occupied no better position with reference to the fund than the bank did; that, having mingled this fund with its other money and used it in its regular business, the assets of the bank were thereby increased, and the cestui que trust were entitled to have their money refunded out of the assets in the hands of the assignee, to the exclusion of the general creditors. In support of this contention counsel relies upon *Beach, Trusts*, § 689, where it is said: "In a recent case [*Banks v. Rice* (Colo. App.) 45 Pac. 515] it was held that where one mingles money of another with his own, and then expends the fund thus created in his own business for different purposes, in some of which the money cannot be traced, the law will presume such other's money—it being impossible to determine what proportion of it was used for each purpose—was all used for purposes in which it can be traced, and, when that purpose was the purchase of new stock for the business, the fact that the identity of the original stock was changed by sale and replenishment is immaterial, so long as the fund remains in the business." *Beach, Trusts*, § 700, and a number of other cases, are cited in support of this view. It is to be observed that in a number of these cases the trust fund was lent in violation of the trust, and without authority to make the loan, and with knowledge of that fact on the part of the borrower.

Especial reliance is placed upon the case of *Myers v. Board*, 51 Kan. 87, 32 Pac. 658, a case almost exactly on all-fours with the case at bar, in which the treasurer of the school funds deposited them in a bank of which he was manager. The fund had been mingled with the funds of the bank, and used in paying its creditors. The bank assigned, and neither the money nor any specific property into which it had been converted could be clearly traced in the hands of the assignee. The Kansas court, after quoting 2 Story, Eq. Jur. § 1259, said: "The modern doctrine of equity, and the one more in consonance with justice, is that the confusion of trust property so wrongfully converted does not destroy the equity entirely, but that when the funds are traced into the assets of the unfaithful trust-

tee, or one who has knowledge of the character of the fund, they become a charge upon the entire assets with which they are mingled.

* * * It would seem to be immaterial whether the property with which the trust funds were mingled was moneys, or whether it was bills, notes, securities, lands, or other assets. As the estate was augmented by the conversion of the trust funds, no reason is seen, under the equitable principles which have been mentioned, why they should not become a charge upon the entire estate." Before proceeding to consider whether this doctrine is law in Kentucky, it may be said that it is conceded by appellant that, if the money could be traced, it, or property in which it had been invested, could be subjected to the payment of appellee's claim. It is conceded by appellee that the actual money cannot be traced, but it is contended that the fund is traceable by reason of the fact that it was carried upon the books of the bank to the credit of Mitchell as trustee. In this there seems to be some confusion. From the allegations of the petition we must conclude that the money (as in the Kansas case) was used by the bank in its regular business, lent to its customers, and used in paying its debts. The fact that the account stands upon the bank's books in favor of Mitchell as trustee does not in any way identify the fund which that account shows that the bank owed to Mitchell, trustee. The fund is not thereby identified, any more than it would be if Mitchell had used the money in his own business, expending it in ways which could not be traced, but charging it to himself upon his private books. Whatever that account could be made to produce would doubtless be subject to the trust, but the keeping of such an account does not in any way identify the fund. As said by Judge Hines in *Taylor's Adm'r v. Taylor's Assignee*, 78 Ky. 471, quoting from *Williams v. Rogers*, 14 Bush, 788: "Whenever a deposit is made in a bank, the relation of debtor and creditor is established between the bank and the depositor, the identity of the particular money is lost, and the relation between the parties continues the same, whether it is an ordinary or time deposit." If Mitchell had deposited the fund to his individual credit, the bank's indebtedness to him, or whatever could be collected from the bank upon that account, if the bank were insolvent, could be subjected to the claim of the beneficiaries, provided that it could be shown that the indebtedness of the bank to Mitchell was created by the loan of their money; and so whatever is realized upon the claim of the trustee for the Hocker children can be subjected to the payment of their claim.

It is admitted by counsel for appellee that the general rule before the cases cited from Beach was as stated in 2 Story, Eq. Jur. § 1259, as follows: "The right to follow a trust fund ceases when the means of ascertainment fail, which, of course, is the case where the subject-matter is turned into money, and mix-

ed and confounded in a general mass of property of the same description." And see *Perry, Trusts*, § 841; *Pom. Eq. Jur.* 1058. The three cases from Wisconsin which support the doctrine contended for by appellee have been overruled by the supreme court of that state in *Silk Co. v. Flanders*, 58 N. W. 383. We have been cited to no Kentucky case changing the rule laid down in Story. *Ellis v. Johnson*, 4 Ky. Law Rep. 991, does not appear to do so. In that case it was held that the trust fund could be "distinctly traced," and from the abstract it would seem that it was invested in real estate. In *Beavan v. Bank* (Ky.) 43 S. W. 242, it appeared that bank stock was taken by a guardian in her own name, and paid for by check upon her personal account, to the credit of which her individual money, as well as trust funds, was indiscriminately deposited; and the court held that the trust moneys had been so intermingled with her individual money that they could not be distinguished. Said the court, through Judge Burnam: "To follow the money, however, and impress it with the trusts, as against innocent third persons, it must be distinctly traced, and clearly proven to have been invested in the security sought to be subjected; and if the trust fund has consisted of money, and has been mingled with other moneys of the trustee in one mass, undivided and undistinguishable, and the guardian has made investments generally from the money in his possession, the cestui que trust cannot claim specific lien upon the property or funds constituting the investment. *Hill, Trustees*, p. 522; *Ferris v. Van Vechten*, 73 N. Y. 118." In *King v. Noland* (Ky.) 45 S. W. 508, a trust fund of \$1,600 was distinctly traced as being invested in a house, the title to which was taken in the name of the trustee, and in a contest between the cestui que trust and an execution creditor it was held that, so far as that fund was concerned, the claim of the cestui que trust was superior to that of the creditor, but as to the remainder of the purchase money, which was paid by check upon her individual account, made up of her own funds and trust funds intermingled, the rights of the creditor were held to be superior. Said the court in that case: "If the trustee has appropriated it to his own use, and mingled it with other money belonging to him, so that it cannot be distinguished from his own funds, and made investments from such common fund, creditors are entitled to subject the property as his, and the cestui que trust can have no specific lien upon either the property or the money so invested. *Hill, Trustees*, 522; *Beavan v. Bank* (Ky.) 43 S. W. 242." And see *Robinson v. Woodward* (Ky.) 48 S. W. 1082; *Woodring v. White*, 12 Ky. Law Rep. 505.

In *Bank v. Dowd*, 38 Fed. 173, commercial paper was indorsed to the bank of which Dowd became receiver, collected, and the proceeds mingled with other moneys of the bank, instead of being forwarded. An equitable lien was claimed on behalf of the Phil-

Philadelphia bank. The court held that, when Dowd's bank mingled the money collected with its general funds, it was—if a breach of trust was committed thereby—a conversion of such money, and the plaintiff became a simple contract creditor, with no claim that had a preference at law over another simple contract debt. Said Seymour, J., delivering the opinion of the court, in reference to a number of cases cited by appellee: "I look upon these cases as introducing a new principle into the old and well-known doctrine of equity, which, with the greatest deference to the courts deciding them, I do not feel at liberty to follow, in advance of any adjudication by the supreme court." A few months later the case of *Peters v. Bain*, 133 U. S. 670 (10 Sup. Ct. 354) was decided by the supreme court. In that case it appears by the syllabus that: "The individual partners in a private bank were also directors in a national bank, and by reason of their position became possessed of a large part of the means of the national bank, which they used in their own business. They assigned all their property to trustees for the benefit of their creditors. The national bank also suspended, and went into the hands of a receiver. Held, that the receiver was entitled to the surrender of such of the property as had been actually purchased with the moneys of the bank, as he might elect, but that purchases made and paid for out of the general mass could not be claimed by the receiver, unless it could be shown that the moneys of the bank in the general fund at the time of the purchase were appropriated for that purpose." Said Chief Justice Waite, deciding the case in the circuit court: "The payments were all, so far as now appears, from the general fund then in possession and under the control of the firm. Some of the money of the bank may have gone into this fund, but it was not distinguishable from the rest. The mixture of the money of the bank with the money of the firm did not make the bank the owner of the whole. All the bank could in any event claim would be the right to draw out of the general mass of money, so long as it remained money, an amount equal to that which had been wrongfully taken from its own possession and put there. Purchases made and paid for out of the general mass cannot be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose. Nothing of the kind has been attempted here, and it has not even been shown that, when the property in this class was purchased, the firm had in its possession any of the moneys of the bank that could be reclaimed in specie. To give a cestui que trust the benefit of purchases by his trustees, it must be satisfactorily shown that they were actually made with the trust funds." When the case was appealed, the supreme court, through Chief Justice Fuller, quoted the opinion of Mr. Justice Bradley in *Frelinghuysen v. Nu-*

gent, 36 Fed. 229, 239: "Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it, the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale; but if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried. The difficulty of sustaining the claim in the present case is that it does not appear that the goods claimed—that is to say, the stock on hand, finished and unfinished—were either in whole or in part the proceeds of any money unlawfully abstracted from the bank." The court then said: "The same difficulty presents itself here, and while the rule laid down by Mr. Justice Bradley has been recognized and applied by this court (*Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 67, and cases cited), yet, as stated by the chief justice, 'purchases made and paid for out of the general mass cannot be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose.'"

The supreme court has, therefore, carried the doctrine further than it has been carried in any Kentucky case to which we have been cited. But the rule, even as there stated, does not sustain the contention of appellee. The same difficulty presents itself here. It does not appear by any averment that any of the trust fund was contained in the assets of the bank which came to the hands of the assignee. The act of March, 1894, now in force, had not been passed at the date of the bank's assignment, and does not, therefore, govern the distribution of the estate. It follows, therefore, that the court erred in overruling the demurrer to the petition as amended, and the judgment is, therefore, reversed.

BARBOUR'S ADM'R v. LARUE'S
ASSIGNEE et al.¹

(Court of Appeals of Kentucky. May 4, 1899.)

ASSIGNMENTS FOR CREDITORS—RIGHT OF ASSIGNEE
TO LIFE INSURANCE POLICY—INSURABLE
INTEREST OF CREDITOR.

1. Policies of life insurance, having no withdrawal or pecuniary value at the date of a general assignment by the insured for the benefit of his creditors, did not pass thereunder.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

2. A creditor, to whom the debtor assigns a policy of insurance on his life, acquires no interest therein beyond his debt, as he has no insurable interest beyond that.

Appeal from circuit court, Larue county.

"To be officially reported."

Action by the assignee of L. L. Larue against O. M. Barbour and others to settle the assigned estate, and to compel certain of the defendants to surrender into court certain insurance policies, or the proceeds thereof, alleged to form a part of the assigned estate. Judgment for plaintiff, and O. M. Barbour's administrator appeals. Reversed.

D. H. Smith and E. E. McKay, for appellant. I. W. Twyman, J. P. Hobson, and W. S. Pryor, for appellees.

BURNAM, J. This is the second appeal in this case. The opinion on the former appeal is reported in 96 Ky. 326, 28 S. W. 790. After reciting the allegations of the petition, the court in that opinion says: "The only question to be determined in this case is whether or not the policies of insurance passed under the deed of assignment for the benefit of the creditors, and that necessarily depends upon the intention of the assignor in taking out said policies of insurance on his life, and as expressed in said deed of assignment. The policies are not before us, nor copies of them. Their terms and conditions, and the beneficiaries thereof, are not known to us, save and except as stated in the petition and amended petition. Whether or not they were valuable as assets would depend upon the number of premiums that have been paid, the length of time they have to run, and their cash surrender value, if any; assuming that they had passed under the general deed of assignment, and that the assignor was still living. Like other choses in action, they are subjects of assignment. They are used daily in commercial transactions as a basis of credit, often being pledged as collateral securities for debt. They are not such assets as may be attached during the life of the assured, or sold under execution. We must, however, for the purpose of the demurrer, assume the facts stated in the petition and amended petition are true. The allegation therein that these policies were payable to the assignor, his order, or creditors, and that he used them as a basis of credit, stating that he had his life insured for the benefit of his creditors, coupled with the language used by him in the deed of assignment, indicated that he intended to pass them to his assignee for their benefit." On the return of the case to the lower court, issue was joined and proof taken, and upon the final hearing the court adjudged both policies to the assignee, and from this judgment this appeal is prosecuted.

The testimony shows that on the 28th day of August, 1891, Larue made an assignment to appellee for the benefit of his creditors, and that he furnished a very minute inventory of the property covered by the assignment. Nel-

ther of the policies of insurance sued on was included in that inventory, but, following the inventory, the deed provides: "If I have omitted to name any property, accounts, or claims not herein mentioned in this deed, the same is hereby assigned and transferred to my assignee for the purpose aforesaid." And this action by the assignee to recover the value of these policies is based upon this section of the deed of assignment. The policy in the Equitable Life Insurance Company of New York was assigned to Barbour & Doherty on the 18th day of September, 1891, on the back of the policy, in these words: "Whereas O. M. Barbour and William Doherty stand as my security for a large amount of money, and will evidently have to pay the same, and being unable in my financial condition to pay and keep up the premiums, and for value received, I hereby transfer and assign, to Owen M. Barbour and William Doherty the full benefit of the within policy No. 518,711. Given under my hand this 18th day of September, 1891. L. L. Larue." And a fuller assignment was made Barbour & Doherty on the 29th day of September, 1891. At the time this assignment was made Barbour & Doherty were the sureties in a note for \$2,500 of Larue. The policy was dated the 5th day of March, 1891, and reads as follows: "The Equitable Life Insurance Company, in consideration of the written and printed application of this policy, which is hereby made a part of this contract, and the payment in advance of \$167.00, and of the annual payment of \$167.00, to be made thereafter at the office of the society in the city of New York on or before the 24th day of February in every year during the continuance of this contract, does promise to pay to Lewis L. Larue, his executors, administrators, or assigns, at the office of the society in the city of New York, \$5,000.00, upon satisfactory proofs of the death of the said Lewis L. Larue, of Hodgenville, in the county of Larue and state of Kentucky." Larue died on the 14th day of February, 1892. It appears from the testimony of G. G. Gaddie, the local agent who solicited this policy, that decedent did not have the money to make the first payment in full at the time the policy was issued, but that he advanced the premium for him, which was subsequently repaid to him, except \$37, for which he took the note of Larue. This \$37 note was paid to him by the assignees, Barbour & Doherty, after the assignment of the policy to them. Gaddie testifies that he applied to the assignee, Srygley, and that he declined to pay it, referring him to Barbour & Doherty as the proper persons to pay same. The Kentucky policy was assigned to the Hayeses on the 21st day of October, 1891. This policy was issued on the 21st day of February, 1891, the contract therefor being made by one Jesse L. Talbott, as agent for the company. The amount of the premium was \$162.35, and in this case, also, Larue did not have the money to pay the premium, and it was advanced for him by the

agent of the company, who took the note of Larue therefor, payable to himself. Subsequent to the assignment the Hayses paid off this note to Talbott, and when the second premium on the policy fell due they also paid that. This policy recites "that it is issued in consideration of the sum of \$162.33, and of a like sum to be paid at the home office in the city of Louisville on or before the 2d day of February in every year thereafter." The policy provided that "if any premium, or part of premium, or any note given therefor, shall not be paid on or before the day on which it becomes due at the office of the company in the city of Louisville, or to the agent producing a receipt of the company signed by the president or secretary, the policy shall then become void, and insurance cease, without notice to the insured, or parties interested in this policy, or holders thereof: provided, however, in case of default of the payment of the third or any subsequent annual payment, then this policy, without further negotiations or stipulations, shall be binding upon the company for such amount of nonparticipating paid-up insurance as specified in the table of paid-up values indorsed hereon." This policy further recited "that it was issued and accepted upon the express conditions that the said L. L. Larue may, with the consent of the company, at any time assign it, or before assignment change the beneficiaries therein, or make any other change." At the date of the assignment of this policy to the Hayses, they were the securities of Larue for a sum largely in excess of the whole amount of the policy. On the 30th day of November, 1891, Larue made a will, which, subsequent to his death, was probated and admitted to record. In the fourth clause thereof he recites: "Under the late transfer, the estate that I now hold, and am entitled to as allotted by law, I will and bequeath the same to be disposed of as follows: First, I will to my beloved wife, Emaline Larue, all of my personal property, of every character whatever, that may belong to me at the time of my death, to become absolutely hers, and to be disposed of by her as she may deem proper. Also, I will and bequeath to her all of my right and interest in and to a homestead of \$1,000.00, to be disposed of as she may deem proper. I hereby will that H. D. Larue collect my life insurance policy in the Equitable Life Insurance Company of New York, \$5,000.00, pay to O. M. Barbour the amount of my lien on said policy, and to Miss Lizzie Dorsey \$1,000.00, the amount of her lien on the homestead property, and, after the payment of the firm debts of Larue & Son, composed of L. L. Larue and H. D. Larue, the balance to be equally divided between my two sons, H. D. Larue and W. L. Larue. I hereby name and appoint my son H. D. Larue as my executor to carry out the provisions of this my last will and testament." On the next day thereafter he made this codicil: "I hereby amend and add to my will, as made on the 30th day of November, 1891, that my in-

surance policy in the Mutual Insurance Company of Kentucky, dated February 2, 1891, for the sum of \$5,000.00, the same held by J. R. Hays and Elijah Hays under the transfer heretofore made by me, be collected by them, and the proceeds thereof equally divided between them. They having paid large amounts as my securities heretofore, and said policy having been heretofore assigned and transferred to them by me, it is my will that they have said policy for their sole use and benefit, their heirs and assigns, forever." There is evidence in the record which conduces to show that decedent, Larue, had been carrying policies of insurance on his life for a number of years before his voluntary assignment to Srygley, and that at the time he held policies, other than those in contest in this action, which were permitted to lapse by nonpayment of premiums. There is not a particle of evidence in this record which shows that he ever contracted any new indebtedness subsequent to the taking out of these policies, or that he had ever obtained any credit on the basis thereof.

The question to be determined on this appeal is whether either of the policies of insurance in contest in this action at the time of the assignment stood for a tangible, substantial, property right, having such ascertainable value as to make them an appreciable part of the estate of the decedent. It is conceded, under the terms of the policies, that they had no withdrawal cash value, which either Larue or his assignee could have realized from the companies; and it seems to us that the proof is absolutely overwhelming that neither Larue nor his assignee, Srygley, thought at the time of the assignment that they passed thereunder. This is shown by the minute inventory of the assigned property made out by Larue, which does not include the policies in contest, and by the fact that, subsequently thereto, he openly assigned these policies to appellants, and thereafter ratified by will the disposition he had made thereof, and provided for the disposition of the overplus which would belong to his estate arising from the New York policy assigned to Barbour & Doherty. He directed that a part of this surplus should be used to pay off the mortgage upon the homestead, which belonged to him as exempt property under the deed of assignment, and that the surplus, after this was done, should belong to his children. Larue did not pay all of the first premium due on either of these policies; but, as the companies received the money, and the indebtedness for the unpaid premium was due to the agents in their individual capacity, the companies had no right to cancel either of them for the nonpayment of the notes executed to their agents, Gaddie and Talbott. But it is true that the Kentucky policy would have lapsed if appellant Hays had not paid the second premium at the date of its maturity, and it cannot be contended that the assignee, Srygley, did anything, or intended to do anything,

towards keeping alive either policy. He was not a creditor or surety of Larue, or in any way related to him. He had no pecuniary interest in Larue, and, under the deed of assignment, the only duty imposed upon him was to take charge of the assigned estate, convert it into money, and distribute it among the assignor's creditors. There was nothing in the deed of assignment which authorized him to use the moneys of the estate to pay the premiums due upon these policies during the bankrupt's life, and to have done so might have kept the estate unsettled for an indefinite period, for the mere purpose of speculating upon the chances of the bankrupt's early death. Until these policies of insurance had been carried to that point where, under the terms of the policies themselves, they had a value, it does not seem to us that they can be considered as representing any real property right or interest which would pass to the assignee. Even if he had been authorized by law to use the estate assigned to him to keep alive these policies, it would have been a mere chance if the creditors profited thereby, as usually such policies, instead of being an advantage and source of profit, are a burden upon him who must pay the premium.

A very similar question was considered in *Re McKinney*, 15 Fed. 536, decided in the United States district court for the Southern district of New York. In that case the court said: "Looking at this policy as it stood at the time of the bankruptcy, it presents two different elements: (1) Its cash surrender value at that time; (2) its character as an executory contract, whereby the bankrupt or his representative was to pay an annual premium during his life, and observe numerous other conditions specified in the contract, and the company, if all these conditions were observed, was to pay the sum of \$3,000 at his death. The first of these elements, the surrender value of the policy, arises from the fact that the fixed annual premium is much in excess of the annual risk during the earlier years of the policy,—an excess made necessary in order to balance the deficiency of the same premium to meet the annual risk during the latter years of the policy. This excess in the premium paid over the annual cost of insurance, with accumulations of interest, constitutes the surrender value. Though this excess of premiums paid is legally the sole property of the company, still, in practical effect, though not in law, it is moneys of the assured deposited with the company in advance to make up the deficiency in later premiums to cover the annual cost of insurance, instead of being retained by the assured and paid by him to the company in the shape of greatly increased premiums, when the risk is greatest. It is the 'net reserve' required by law to be kept by the company for the benefit of the assured, and to be maintained to the credit of the policy. So long as the policy remains in force, the company has not practically any beneficial interest in it, except as

its custodian, with the obligation to maintain it unimpaired and suitably invested for the benefit of the insured. This is the practical, though not the legal, relation of the company to this fund. Beyond this interest in the surrender value, I think nothing passed to the assignee in bankruptcy save the naked title to the policy in order to make the interest available. As an executory contract, aside from its surrender value, the policy had no pecuniary value whatever. Assuming that the bankrupt had the average expectation of life, as a mere contract for future insurance it would be a burden, rather than a benefit, to the estate; for, whatever might be afterwards obtained from it (beyond the present surrender value), a still greater sum must presumably be paid out, in the shape of future premiums and interest, in order to keep the policy alive, since these premiums, with interest, on the average, not only equal the amount ultimately payable, but all of the company's expenses and profits in addition. As an executory contract, therefore, aside from its surrender value, the policy was not 'property' or 'effects,' but an incumbrance, which the assignee would be bound to reject, like leases at an unfavorable rent. The assignee, moreover, could have no right to use the moneys of the estate to pay the premiums during the bankrupt's life, and thus keep the estate unsettled for an indefinite period, for the mere purpose of speculating upon the chances of the bankrupt's early death. The speedy settlement of the estates of bankrupts, as contemplated by law, is incompatible with such dealings." *Bishop on Insolvent Debtors* (section 175) says: "The assignee takes only such rights as the debtor himself had or could assert at the time of making the assignment." In the second volume of *May on Insurance* the author says: "The assignment of a life policy is not affected by a prior general assignment in favor of creditors, where it appears that the policy remained in the hands of the assignor, and never came into the possession of, or was claimed by, the assignee for creditors." See, also, *Hurlbut v. Hurlbut*, 49 Hun, 192, 193, 1 N. Y. Supp. 854. And in the case of *Johnson v. Alexander* (decided by the supreme court of Indiana November 11, 1890) 9 Lawy. Rep. Ann. 600 (s. c. 25 N. E. 706), the court said: "An arrangement is not void, as a fraud on creditors, by which an insolvent debtor, soon after taking out insurance on his own life, payable at his death to his executors, administrators, or assigns, assigns the policy to certain of his creditors to secure the payment of their claims, taking from them an agreement to pay the premiums, and, after deducting the amount of such payments and of their claims from the proceeds of the policy, to pay the balance to his heirs or to his order; and if no other disposition is made by him the heirs are entitled to such balance, as against other creditors of assured, at least where there is no evidence of actual fraud, or that such cred-

itors were injured by the arrangement." The court further said: "The law favors the making of a reasonable provision by a man for his family and those who are dependent upon him, and it is not a violation of the statute, and no fraud on creditors, for a debtor, though insolvent, to contribute and pay a reasonable amount for insurance for the benefit of his family." In the case of *Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, it is held that "a man may rightfully devote a moderate portion of his earnings to insurance on his life, and thus make a reasonable provision for his family; that, though he be insolvent, such payment is not a fraudulent transfer of his property; and that, after his decease, his creditors will have no interest in the policy." In *Appeal of McCutcheon*, 99 Pa. St. 133, it is held: "When a person takes out a policy of insurance upon his own life in his own name, and subsequently assigns same to his wife, child, or other dependent relative, the mere fact that the assignor is insolvent at the time of making the assignment does not warrant the inference that the assignment was a fraud on creditors." 2 *Bigelow, Frauds*, p. 129, says: "A debtor, though insolvent, may use his earnings to pay for insurance on his life in favor of his family."

At the date of the general assignment by Larue these policies had no appreciable pecuniary value. They represented no sum for which collection could have been enforced from the insurance companies, either by Larue or his assignee. They became valuable thereafter only by reason of the failure in the health of assured. He had paid nothing on the Kentucky policy with which his estate is chargeable, and an apparently small sum upon that assigned to Barbour & Doherty; and as to this policy, after providing for the payment of the debt on which Barbour & Doherty were sureties, under the will of Larue the balance goes to discharge the mortgage debt upon his homestead and to his children. It has been the policy of this state for many years to encourage the making of a reasonable provision by men for their families, and for others interested in the preservation of their lives, by the taking out of life insurance for their benefit. As early as 1870 the legislature enacted section 655, Ky. St., which provides: "When a policy of insurance is effected by any person on his own life, or on another life in favor of some person other than himself, having an insurable interest therein, the lawful beneficiary thereof, other than himself or his legal representatives, shall be entitled to its proceeds against the creditors and representatives of the person effecting the same: provided, that, subject to the statute of limitations, the amount of any premiums for said insurance paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy,"—thus clearly authorizing any person to take out a policy on his own life for the benefit of another having an insurable interest

therein, and securing the proceeds thereof to such beneficiary: provided, however, that any premiums paid in fraud of creditors to maintain such policy should inure to their benefit from the proceeds of the policy. There is no contention here that the premiums paid on either of the policies in controversy were paid in fraud of the rights of creditors, and it would appear that there can be no valid reason why a person could not assign or transfer policies of insurance already taken out payable to his estate, which had no pecuniary value, to any other person having an insurable interest in his life. In our opinion, these policies of insurance had no withdrawal or pecuniary value at the date of the assignment, and did not pass thereunder. Barbour & Doherty acquired no interest in the policy assigned to them beyond the debt which it was transferred to secure, as beyond this they had no insurable interest in the life of the assured. For reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

HOBSON, J., not sitting.

STEPHENS, County Judge, et al. v. WILLIS et al.¹

(Court of Appeals of Kentucky. May 12, 1899.)

APPEAL AND ERROR — PAYMENT BY STOCKHOLDER
PENDING APPEAL — EFFORT OF REVERSAL.

Where a judgment dismissing plaintiff's petition, the effect of which was to discharge an attachment issued in the action, was not superseded for more than a year, a garnishee, who in the meantime had paid to defendant the amount garnished in his hands, cannot, on the reversal of the judgment, be required to account to plaintiff therefor.

Appeal from circuit court, Kenton county.
"Not to be officially reported."

Action by the Brooks-Waterfield Company against H. P. Stephens, county judge, and others, to attach certain money alleged to be due from Samuel Baker to B. E. Willis. From the judgment certain defendants appeal. Reversed.

Robert C. Simmons, for appellants. J. W. Bryan, for appellees.

BURNAM, J. In January, 1892, B. E. Willis sued Samuel Baker, alleging that he was a secret partner of Baker in a contract for building a turnpike road made by Baker with the board of commissioners of Kenton county, and alleging that there was due him as his share of the profits in the venture \$252.54, for which he sought judgment against Baker. In the same proceeding he sought to garnish in the hands of the board of county commissioners of Kenton county a fund of 20 per cent. of the contract price, which he alleged had not been turned over to Baker. The order of attachment which issued, and which

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

was served upon the defendant commissioners, only sought to attach \$171.77, and \$30, estimated costs. Baker denied the alleged partnership and grounds of attachment. The commissioners filed a separate answer, in which they said that the turnpike road had not been completed under the contract made with Baker, and the 20 per cent. retained by them for the completion of the work was not due. Upon the trial of that case judgment was rendered, in October, 1892, dismissing plaintiff's petition. An appeal was prosecuted to this court, and the judgment was reversed in March, 1895 (29 S. W. 872), and remanded with directions for settlement of the partnership. No supersedeas bond was attempted to be executed by appellant until October, 1893, about a year after the entry of the judgment in the court below. The commissioners were not made parties to the appeal, and no copy of the supersedeas was served upon them. Upon the return of the case plaintiff (Willis, appellant therein) asked for a reference to the commissioner to settle the partnership, but no steps were taken under the order previous to the institution of this suit by the Brooks-Waterfield Company, in which they seek to attach in the hands of the fiscal court of Kenton county, whom they allege to be the successors of the board of commissioners, the money due from Baker to Willis, which had been garnished in their hands in the original action to satisfy a judgment for \$300 and costs, on which execution had issued and been returned "No property found." The appellee Bryan intervened in this action, alleging that, as attorney for Willis in the suit against Baker, he had a lien upon any judgment that might be recovered from Baker for a fee of \$75. To this suit appellants answered that they owed Baker nothing at the time the original attachment was served upon them, because at that date Baker had not completed his contract, and that upon its final completion, in August, 1894, they had paid over to Baker the balance due upon that contract; alleged that they had in their hands at that date other funds belonging to Baker more than sufficient to have settled the garnishee for \$171.77 and \$30 costs served upon them, and that these funds were retained by them until after the judgment dismissing the suit of Willis against Baker; and they pleaded that this judgment was a final order determining that Willis had no claim against Baker, and no supersedeas bond was executed suspending the operation of the judgment for more than a year, and that during this interval, upon the demand of Baker, they had paid over to him the balance due him; and they rely upon that judgment as a bar to this proceeding. Several additional and supplemental petitions were filed in this action, and finally, upon submission upon the pleadings, it was adjudged that Willis recover of Baker \$252, with interest, and that the attachment be sustained. The fiscal court was adjudged to pay into court \$371.60, one-half

of which was adjudged to be the property of Willis, and that Willis had a lien upon Baker's half by reason of his attachment to satisfy his judgment. Appellee Bryan was adjudged a lien for \$75, to be paid out of the money adjudged to Willis, and the residue of the fund was adjudged to the Brooks-Waterfield Company. From that judgment this appeal is prosecuted.

The order of attachment which issued in January, 1892, in the original suit of Willis against Baker, only sought to garnish in the hands of the commissioners \$171.77, with interest, and \$30 costs, and they were, therefore, never required to retain as garnishees any greater sum. When the judgment of October, 1892, was rendered, dismissing the petition of Willis, it had the effect to discharge the attachment (see sections 228, 260, Civ. Code Prac.), and if Willis desired to suspend the operation of that judgment he could have only done so by the execution of a supersedeas bond. This he did not attempt to do for more than 12 months after the entry of the judgment, and after the commissioners had paid to Baker the fund attached in their hands. The reversal by this court of the judgment in that case upon the question of partnership between Baker and Willis does not affect appellants' liability as garnishees, and we are of the opinion that, as Willis failed to execute the supersedeas bond suspending the judgment dismissing his petition at the time his appeal was prosecuted, the commissioners were authorized to pay the balance due Baker to him, and cannot again be held liable therefor. See *Showalter v. Simmons*, 5 Ky. Law Rep. 423; *Fraser's Ex'r v. Page*, 82 Ky. 73; *Peek's Ex'r v. Peek's Ex'r* (Ky.) 50 S. W. 982. The judgment is also erroneous in other particulars; but, in view of our conclusions on this point, it will be unnecessary for us to discuss the matter further. For reasons indicated, the judgment against appellants is reversed, and the cause remanded for proceedings consistent herewith.

SALYER v. NAPIER (two cases).¹

(Court of Appeals of Kentucky. May 13, 1899.)

SPECIAL JUDGE—WAIVER OF OBJECTION—APPEARANCE—ORDER CONTROVERTING PLEADING—CLERICAL MISPRISION—COUNTERCLAIM.

1. Objection to a special judge on the ground that he was not properly selected is waived, unless made in the lower court.

2. The defendants in a counterclaim and cross petition enter their appearance by filing a demurrer thereto.

3. A pleading reciting that "now comes plaintiff, and denies the amended answer, counterclaim, and set-off and cross petition filed herein July 30, 1896," does not put in issue the averments of the pleading referred to.

4. The allowance of interest from July, 1891, when interest from July, 1896, only, was prayed for, is a clerical misprision, which may be corrected on motion at any time, and for which, therefore, there can be no reversal.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

5. Plaintiff, by replying, and putting in issue the averments of an answer and counterclaim, waived the objection that the caption did not contain the words "Answer and Counterclaim."

Appeals from circuit court, Knott county.
"Not to be officially reported."

Consolidated actions, by J. B. Fugate against Salyer & Napier and by D. W. Salyer against S. M. Napier, for a settlement of certain partnerships. Judgments for S. M. Napier, and D. W. Salyer and J. B. Fugate appeal. Affirmed.

John L. Scott & Son, for appellants. W. S. Pryor, J. M. Bailey, and J. J. C. Bach, for appellee.

HAZELRIGG, C. J. On March 11, 1895, J. B. Fugate filed his petition in the Knott circuit court, styling himself "J. B. Fugate, Assignee of the Firm of Salyer & Fugate, composed of D. W. Salyer and J. B. Fugate, Plaintiff," against Salyer & Napier, composed of D. W. Salyer and S. M. Napier, defendants. However, the plaintiff seems to have abandoned his title as "assignee," and the action proceeded to trial, without objection, as an individual action of J. B. Fugate, plaintiff, against Salyer & Napier, defendants. To this action Salyer made no defense, but issue was joined between Fugate, plaintiff, and Napier, defendant. On July 2, 1895, D. W. Salyer filed his petition in the Knott circuit court against S. M. Napier, and later the two causes were consolidated; the petitioners seeking a settlement of the partnership affairs of two firms,—one composed of J. B. Fugate and D. W. Salyer, and the other of S. M. Napier and D. W. Salyer.

Counsel for appellants contend that the special judge trying this action had no authority to do so; hence, he says, a reversal of the judgment must follow. It is true that the record fails to show that the special judge was selected according to statutory provisions, or was selected by express agreement of parties to try the action; but it is sufficient answer to say that there appears to have been no objection by any of the parties in the lower court to trial by the special judge. Appellants participated in the trial of the action, filing many pleadings and introducing much proof, and this court will not now for the first time entertain the objection as to the authority of the special judge to render judgment. *Vandever v. Vandever*, 3 Metc. (Ky.) 137.

The debts and credits the parties claim to have against each other are quite numerous, and the lower court referred the matter to its commissioner, who, after hearing all the proof, reported his findings to the court. To this report appellants filed no exceptions, but on the exceptions of appellee the court corrected the findings of the commissioner in two or three instances, and rendered judgment accordingly. While appellant Salyer and appellee, Napier, were partners in the log business, they purchased some \$16,000 or \$17,000 worth of logs, figuring at agreed prices between appel-

lant and appellee. It appears that one Hensley had furnished the firm \$10,299.67 with which to buy some of these logs, and after the purchase the firm sold the logs to Hensley for one Nicola, and they were branded with Nicola's mark. After this sale to Hensley, appellee, Napier, by written contract, at an agreed price per 100 feet, purchased the interest of appellant in all the logs the firm owned, and agreed to pay off the balance of purchase money against the firm logs, and to pay appellant balance, if any, after discharge of this purchase-money indebtedness, which was then estimated at about \$4,000. The lower court, in construing the contract between Salyer and Napier, held that Napier was entitled to a credit of one-half of the Hensley money and one-half of the \$4,000, or more, due other parties for logs, which he had paid or was bound to pay, before Salyer could receive anything on account of his contract. Appellant objects to this ruling of the lower court, and assigns as reason for reversal of judgment the court's action in allowing the charge against him and credit to appellee of the one-half of the \$10,000 Hensley money. We are of opinion that the court's ruling is correct. Appellant had received his one-half of this \$10,000 as a member of the firm of Salyer & Napier, and it went to purchase the \$16,000 or \$17,000 worth of logs sold to Hensley for Nicola, and this \$10,000 advancement was paid off or discharged by the branding and delivery of \$10,000 worth of logs to Hensley, leaving Hensley indebted to the firm of Salyer & Napier in the sum of about \$6,000 or \$7,000, or the firm owning about \$6,000 or \$7,000 worth of logs, figuring at the agreed price, under contract of sale to Hensley. Napier purchased the interest of his partner (appellant Salyer) in these logs at an agreed price, and also his interest in other logs not sold to Hensley. Napier was to pay off the debts of the firm, and one-half was to be charged on contract of sale, and, if the amount due Salyer on his one-half interest in the logs at the agreed price exceeded Salyer's part of the firm indebtedness, then Napier was to pay Salyer the balance. However, it appears that, upon a settlement of all the accounts between the partners, Salyer was indebted to Napier, and, considering all the proof and lending some weight to the finding of the chancellor below, we find the accounting in the judgment to be correct.

While this action was pending, and on July 30, 1896, appellee, Napier, filed his amended answer, counterclaim, and cross petition against appellants, D. W. Salyer and J. B. Fugate, seeking judgment for \$398.49, with interest from July 27, 1896, claiming to have paid that amount as surety for appellants. To this pleading J. B. Fugate and D. W. Salyer filed demurrer on July 31, 1896. This had the effect of entering the appearance of Salyer and Fugate to the amended answer, counterclaim, and cross petition. The demurrer should have been overruled, but, without pass-

ing on it, the court rendered judgment for the amount asked for by Napier, stating in the judgment that, appellants having entered their appearance and failing to plead, judgment was rendered. Counsel for appellants contend that this judgment was erroneous, because the parties were not before the court. As stated, the demurrer entered their appearance. However, counsel insists that, if this be true, the averments of the amended answer, counterclaim, and cross petition were denied, and the court had no right to render judgment. It is true there is an order or pleading by appellants saying they deny the averments of the amended answer, counterclaim, and cross petition. That pleading or order reads as follows: "Knott Circuit Court, July Term, Aug. 1st, 1896. D. W. Salyer et al., Plaintiffs, vs. S. M. Napier, Defendant. Now come the plaintiffs, Salyer & Fugate, and deny the amended answer, counterclaim, and set-off and cross petition filed herein July 30, 1896; and this cause, on plaintiffs' motion, is submitted to the court for its opinion and judgment, and defendant excepts." We cannot treat this as a pleading properly putting in issue the averments of Napier's pleading; hence we conclude that the court was correct in rendering judgment. The judgment on this cross petition, however, allows recovery of interest from July, 1891, when interest from July, 1896, only, is asked. This is clearly mispension, and the Knott circuit court will correct the mistake upon proper motion.

Counsel for appellants insists that appellee was not entitled to judgment against appellant Fugate, because the caption of the answer of appellee did not contain the words "Answer and Counterclaim," as required by the Civil Code. In this regard it is well settled that the plaintiff waives this defect by replying and putting in issue the averments of the answer and counterclaim. *Cason v. Cason*, 79 Ky. 558.

Perceiving no error prejudicial to the substantial rights of appellants, the judgment of the lower court is affirmed.

CHESAPEAKE & O. R. CO. v. SMITH.¹ (Court of Appeals of Kentucky. May 13, 1899.)

DISCRETION OF COURT—CONTINUANCE AFTER SWEARING JURY—INJURY TO PROPERTY FROM CONSTRUCTION OF RAILROAD—MEASURE OF DAMAGES.

1. The action of the trial court, in setting aside the swearing of a jury, and permitting an amended petition to be filed, and continuing the cause, will not be disturbed, unless there has been an abuse of discretion.

2. The measure of recovery for injury to abutting property, by the construction and operation of a railroad in a street, is such part of the difference between the present value of the property, and its value as it was before it became generally known that the railroad was to be constructed in the street, as is due to the unreasonable interference with the ingress and egress to and from the property, and the throwing of smoke and cinders by the force of steam escaping

from locomotives, and the jarring or shaking of buildings thereon by the operation of trains.

3. An instruction, telling the jury "that they cannot find for the plaintiff unless they believe, from the evidence, that her property was injured by the track complained of, over and above what it was already injured by the tracks which were in the street when said track was constructed," is sufficient to confine the jury to the consideration of the damages caused by the building and operation of the new track.

Appeal from circuit court, Boyd county.

"Not to be officially reported."

Action by Diana Smith against the Chesapeake & Ohio Railroad Company to recover damages for injuries to plaintiff's property by the construction and operation of defendant's road. Judgment for plaintiff, and defendant appeals. Affirmed.

Wadsworth & Cochran, for appellant. Dinkle & Montague, for appellee.

GUFFY, J. It is substantially alleged in the petition in this case that the appellee was the owner of three lots, fronting on Main street, in Hampton City, and that her property had been damaged to the extent of \$1,995 by the building and operation of a railroad track by appellant, in front of and so near her property as to materially deprive her of reasonable ingress and egress to and from her property, and that the cinders and smoke thrown out by cars running on said track, and the jarring of her property on account of the movement of the cars aforesaid, caused material damage to the property aforesaid. The answer is a traverse of all the averments of the petition as to any damage from any of the acts mentioned in the petition. Appellant also pleaded the statute of limitation. After the issues were fully made up, a jury trial resulted in a verdict and judgment in favor of the appellee for \$700; and, appellant's motion for a new trial having been overruled, it prosecutes this appeal.

The substance of the grounds relied on for a new trial are: First. The court erred in setting aside the swearing of the jury at a former term of this court, and in permitting plaintiff to file an amended petition, and granting plaintiff a continuance of the action. The second and third grounds complain of the admission and rejection of testimony. Fourth. Error of the court in refusing to give a peremptory instruction to find for defendant. Fifth. Error of the court in giving instructions 1, 2, 3, and 4. Sixth. Error of the court in refusing to give instructions A, B, C, D, and E. The seventh, eighth, and ninth grounds are, in substance, that the verdict is not sustained by the evidence and was the result of passion and prejudice.

It seems clear to us that appellee introduced proof conducing to show a right to recover, and, taking into consideration all the testimony, together with the further fact that the jury had a view of the premises, we are of the opinion that the verdict is sustained by the evidence; at least, the jury was au-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

thorized by the testimony to find the damages to be \$700, and, this being true, we have no power to disturb the verdict.

The trial court must necessarily have a reasonable discretion as to setting aside the swearing of the jury, and continuing the cause, as well as permitting amendments; and we are not prepared to say that the court abused its discretion in this case.

As to the instructions offered by appellant, we are of the opinion that they were properly refused.

The instructions given by the court read as follows: No. 1: "If the jury believes, from the evidence, that the houses and lots of the plaintiff, Diana Smith, were appurtenant to Main street, in Catlettsburg, and that the defendant, the Chesapeake & Ohio Railroad Company, operated the railroad track complained of so near her said property as that, by the operation of its trains upon said track, it so appropriated and obstructed said street, adjacent to said property, as to unreasonably interfere with the use of said street as a means of ingress and egress to said property, or by the force of steam escaping from its locomotives operated on said track smoke or cinders were thrown upon said property, or that said houses were injured by being jarred or shaken by the operations of trains on said track, they will find for plaintiff such damages, not exceeding \$1,995, as they shall believe, from the evidence, she has sustained thereby." No. 2: "If the jury find for the plaintiff under instruction No. 1, they will find the value of the property mentioned in said instruction No. 1 just before it became generally known that the railroad track complained of was to be built on said Main street, near said property, and then they will find what proportion, if any, of the value of said property has been taken therefrom, by reason of the operation of said track on said street so near said property, and the operation of its trains thereon, as to unreasonably interfere with the use of said street as a means of ingress and egress to and from said property, and by reason of the throwing of smoke and cinders, if any, on said house or houses, by the force with which such smoke or cinders were ejected from the engine, and by the jarring or shaking, if any, of said house or houses, by the operation of said trains on said track, and the proportion of the value, if any, so taken from said property will be the amount of plaintiff's recovery, not exceeding the sum of \$1,995." No. 3: "If the jury believe, from the evidence, that there was sufficient space between the ends of the ties and the line of the sidewalk in front of plaintiff's property, or any of it, for vehicles to pass each other in ordinary use, they will find for defendant, as to such property, as to the obstruction of the ingress and egress to and from said property; and if they shall believe, from the evidence, that the property of plaintiff was not injured by smoke and cinders thrown thereon, by the force with which they

were ejected from the engines operated on said track, or that said house or houses were not injured by being jarred or shaken by the trains operated on the track complained of, they will find for defendant, as to such smoke and cinders and as to such jarring or shaking." No. 4: "The court instructs the jury that, if they find for the plaintiff under instruction No. 1, they shall take into consideration, or in their verdict allow for, damage, if any, caused by the construction or operation of defendant's railroad, which resulted to John Smith in his use or occupancy of the premises as life tenant prior to his death, which it is admitted by the parties occurred on the 9th day of May, 1893." No. 5: "The jury are instructed that they cannot find for the plaintiff unless they believe, from the evidence, that her property was injured by the track complained of, over and above what it was already injured by the tracks which were in the street when said track was constructed; and, in case they do so believe from the evidence, they can only find for plaintiff such damages as were occasioned thereby." No. 6: "The jury are instructed that if they believe, from the evidence, that the railroad track complained of in this action was constructed and operated before March 10, 1889, they will find for the defendant." No. 7: "Nine or more of the jury, concurring, may return a verdict; but, if it be made by less than the entire jury, it must be signed by all the jurors agreeing thereto."

It seems to us that the instructions given correctly presented the law applicable to the case on trial, and confined the jury to the consideration of the damages caused by the building and operation of the new track. The word "not" was evidently left out in copying instruction No. 4. The appellant so treats the instruction. Judgment affirmed, with damages.

DISTRICT OF CLIFTON, CAMPBELL COUNTY, v. SCHNEIDER et al.¹

(Court of Appeals of Kentucky. May 17, 1899.)

MUNICIPAL CORPORATIONS — ASSESSMENT FOR STREET IMPROVEMENTS — ENFORCEMENT OF LIEN BEFORE ALL INSTALLMENTS ARE DUE.

Civ. Code, § 694, subsec. 3, providing that no sale of indivisible property shall be made until all debts that are a lien thereon are due, does not apply to a proceeding to sell property to satisfy one of several installments of an assessment for street improvements.

Appeal from circuit court, Campbell county.
"Not to be officially reported."

Action by the district of Clifton, Campbell county, against Bertha Schneider and others, to enforce a lien for the cost of street improvements. Judgment for defendants, and plaintiff appeals. Reversed.

C. L. Raison, Jr., for appellant. Simmons & Bailey, for appellees.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

WHITE, J. The appellant was created a taxing district or corporation authorized to contract for and have constructed certain street improvements, the cost thereof to be paid by the owners of property abutting thereon, to be paid, however, in 10 equal installments, together with interest, payable annually, and for the costs of this street construction a lien was given on the abutting property. The work was done, and all steps necessary under the act done to charge the property. The annual payments for the years 1895, 1896, 1897, and 1898 not being paid, this action was brought to enforce the lien and for a sale of the property to satisfy same. The case was submitted on the petition alone, and the lower court rendered judgment dismissing the petition, for the reason, as stated, the action to enforce the lien could not be maintained till all the liens fell due, under subsection 3, § 694, Civ. Code. From that judgment this appeal is prosecuted.

There being no answer, every fact stated in the petition is taken as true by confession, and the only question presented is, can a foreclosure of the liens for improvement be had till all are due? This is not made a personal obligation, and a personal judgment could not be rendered therefor. The only remedy is a sale of the property to pay this assessment. The property sought to be subjected are lots in a city, each about 25 feet in width, with a separate amount against each lot. It therefore follows that the property is not susceptible of division.

It is insisted by appellees that the judgment of the lower court should be affirmed, as subsection 3 of section 694 of the Civil Code provides that no sale of indivisible property shall be made till all debts that are a lien thereon are due. We are of the opinion that that section of the Code has no application to this case. The act under which this charge against this property was authorized and created does not authorize a personal judgment against the owner, but makes the amount of this assessment due to the appellant, and payable in annual installments, and is made a direct charge on the lots fronting on the improvement. This is not a debt due by appellees. No judgment could be rendered against them for the amount of the whole or of any annual assessment. It is a charge on the land, yet it was not provided or intended that all should be paid in any one year. It was evidently the intention of the legislature to charge this property, abutting the improvement, with an annual tax for the payment of the cost of the improvement. We are of opinion that the annual assessment, as here sought to be collected, is but a special tax on the property, and that, like other liens for taxes, may be sold for all past-due amounts, regardless of the fact that in each year, as long as it exists, a similar charge will come and be a like lien on the property. There should be, evidently, but one sale for all past-due sums, but this would not exhaust the

lien for the future years, no more than a sale by a sheriff for taxes would forever exempt that property for tax liens. The amount of this special tax that is not due and included in the judgment of sale would still be a lien on the property, and for such sums unpaid the property could be again subjected to sale, in the hands of any person, like any other tax. The material difference between this and ordinary taxation is that this exists only 10 years, and for a sum fixed per year, while taxes go on forever, and vary in amounts. For the reasons indicated, the judgment dismissing the petition is reversed, and cause remanded to overrule the demurrer to petition and for proceedings consistent herewith.

DUNN et al. v. SHANNON et al.¹

(Court of Appeals of Kentucky. May 12, 1899.)

VENDOR AND PURCHASER—ASSUMPTION OF VOID MORTGAGE BY PURCHASER—VENDOR'S LIEN.

Where land was conveyed by deed, whereby the grantee, as a part of the consideration, undertook to discharge certain mortgages executed by the grantor, specifying the amounts, the mortgagees have a lien therefor as for unpaid purchase money, though the mortgages were invalid because the mortgagor, while having the power to sell the land and dispose of the proceeds, had no power to execute a mortgage thereon.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by Edmonia B. Shannon and others against Kate J. Dunn and others to enforce a lien on land. Judgment for plaintiffs, and defendants appeal. Affirmed.

Phelps & Thum, for appellants. Pirtle & Trabue, for appellees.

PAYNTER, J. Robert Claxton and his wife, Fannie A. Claxton, executed to the appellee Edmonia B. Shannon their notes, aggregating \$500, and to secure which they executed a mortgage on a certain lot situated on Twelfth street, in Louisville. Fannie A. Claxton held the property by virtue of a deed from Jacob Nuss, in which there appears the following condition: "To the party of the second part [Fannie Claxton], with full and complete power to sell the same as if she were an unmarried woman, but not power to dispose of by last will, and to her children and descendants, if she dies without disposing of it, in equal shares." Mrs. Claxton and her husband executed other mortgages on the property. On October 19, 1891, she and her husband executed a deed to R. Lee Suter, by which they conveyed to him the property in consideration of the sum of \$110 cash, and the further consideration that he assume the settlement and discharge of certain mortgages together with the Shannon mortgage. The deed particularly stating the names of

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter

the mortgagees and amounts due each. On May 4, 1891, Suter conveyed the property to Kate L. Fleming, who has since intermarried with Dunn, and in his deed to her the recited consideration is \$1,500,—\$600 cash in hand, and the assumption by her of the settlement and discharge of all the mortgage debts which Suter had assumed, including the Shannon mortgage debt. There can be no question but what Mrs. Claxton had the authority, under the terms of her deed from Nuss, to convey the property by deed to whomsoever she pleased, and to do with the proceeds of the sale whatever she pleased. She could have taken the proceeds of the sale, and given it away, if she desired to do so. A like power existed to apply it to the payment of her debts. Counsel for Mrs. Dunn admits that the deed from Mrs. Claxton to Suter vested him with the title to the property, and that Mrs. Dunn derived a good title by the deed which Suter made her. It is insisted, however, that Mrs. Claxton had no authority, by the terms of the deed from Nuss to her, to mortgage the property, because the power to sell and convey it by deed did not give her the right to mortgage it. From the conclusion we have reached in this case, it is unnecessary to decide that question. In the deed which Mrs. Claxton made Suter the consideration of the conveyance is specifically stated, as well as the amount paid in hand and the debts which Suter assumed to pay. The deed vested Suter with the title to the property, and the debts which he assumed to pay for Mrs. Claxton were as much a part of the purchase money as was the sum paid in hand, and there was a lien created on the land therefor. Assuming, for argument, that the mortgages were invalid, still the liability of Mrs. Claxton and her husband for the debts existed, and, as we have said, she could do as she chose with the proceeds of the lot; therefore she could apply it to their payment. While the deed did not say that a lien was reserved, the mere statement of the consideration and the amount remaining unpaid created a lien upon the property therefor. Suter could not question the validity of these debts, nor that the lien existed upon the lot which had been conveyed to him; neither does he desire or attempt to do so. If we are correct in this conclusion, then, at the time the lot was sold and conveyed to Mrs. Dunn, a valid lien existed upon it for the Shannon debt. Whether she did or did not agree to pay the debt does not affect the question of the liability of the lot for it, but the deed from Suter to her obligates her to pay it. Whether or not Suter represented to her that the Shannon mortgage was invalid is wholly immaterial, so far as affecting the question between her and Edmonia B. Shannon. Mrs. Dunn does not ask to have the deed which Suter made her set aside, nor does she propose to surrender the property. Her proposition is to hold the property, and defeat the Shannon and other liens upon it,

and compel Suter to discharge the debts. So our conclusion is, if Mrs. Claxton had no power to create a lien upon the property for the mortgages which she executed, still she had the right to convey it, and apply the proceeds to the payment of her debts. Her method of making the application in this case created a lien upon the property to secure the payment of such debts as were designated should be paid by the deed which she made Suter. The judgment is affirmed.

SHARP v. WOOD et al.¹

(Court of Appeals of Kentucky. May 18, 1899.)

EXECUTION SALE—INDEMNIFYING BOND—ESTOPPEL
—HUSBAND'S OWNERSHIP OF CROP RAISED
ON WIFE'S LAND.

1. The plaintiffs in an execution, in an action upon an indemnifying bond executed by them, in which the property levied on and sold under the execution by their direction is claimed by the debtor to have been exempt, are estopped to deny that he was the owner of the property.

2. It being alleged in the petition, and not denied, that plaintiff was the owner of the property sold under the execution, the action cannot be defeated by proof that his wife owned the property.

3. Though Ky. St. § 2127, provides that the husband shall have no interest in the wife's property, it cannot be assumed that a crop raised by the husband on the wife's land is her property.

Appeal from circuit court, Mercer county.

"Not to be officially reported."

Action by W. A. Sharp against James Wood and others on an indemnifying bond. Judgment for defendants, and plaintiff appeals. Reversed.

Galther & Vanarsdale, for appellant. Bell & Bell, for appellees.

BURNAM, J. On the 3d day of September, 1882, one F. M. McAfee recovered judgment against appellant in the quarterly court of Mercer county for \$24.64, with interest from the 3d day of September, and costs, \$1.90. On this judgment execution issued in July, 1894, and was levied upon 108 bushels of wheat. The sheriff required the execution to him of an indemnifying bond, which was given by appellees, and the wheat sold; and, in this suit upon that bond, plaintiff sets out the facts of the levy and sale, and alleges that the wheat sold to satisfy the execution was his property; that he was a bona fide house-keeper, with a wife and two children dependent upon him for support; that he had at the time of the sale and levy no provisions for himself and family, except said wheat, and no provender for his live stock, which consisted of a horse and cow; that the wheat levied upon and sold was not sufficient to furnish him provision for his family and provender for his live stock for one year; that before the sale he claimed the property as ex-

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

empt, and demanded that it be set aside to him. And he claims damages. The defendants denied that plaintiff did not have the property or provision required by law, but nowhere deny his ownership of the wheat. Upon the trial the plaintiff's testimony conduced to support the averments of his petition, and also the further fact that he was living upon a small piece of land belonging to his wife, and that the wheat was raised on this land. At the conclusion of the trial the court instructed the jury that, as it appeared from the testimony of plaintiff that the wheat was raised on the wife's land under the law in force at the date of the execution of the bond sued on, the husband was not entitled to any interest in the wife's property, real or personal, and directed them, therefore, to find for the defendant; basing his instruction upon section 2127 of the Kentucky Statutes. The pleadings in this case do not raise any question as to appellant's ownership of the wheat. It was levied upon as his property, and sold to pay a judgment against him, by direction of appellees; and they are estopped from denying such ownership. But, in addition to this, he claims in his petition that it was his property, and this allegation is not denied. The fact that the wheat was raised upon his wife's land does not justify the assumption of the court that it was the property of his wife, or that appellant was not the owner thereof. It seems to us that the appellant was entitled to have the merits of his contention passed upon by the jury. For the reasons indicated the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

CHAMPION ICE-MANUFACTURING & COLD-STORAGE CO. v. CARTER.¹

(Court of Appeals of Kentucky. May 16, 1899.)

MASTER AND SERVANT — EVIDENCE AS TO PRECAUTION TAKEN AFTER INJURY — SERVANT'S OPPORTUNITY TO KNOW OF DEFECT IN APPLIANCE.

1. Where plaintiff was injured by the falling of a tank, caused by a nut slipping off the bolt by which it was suspended, evidence that, after plaintiff was hurt, the tank was placed back in position by use of the same bolt and nut, and the end of the bolt then battered down, to prevent the nut slipping off, was admissible to show that, though it had originally been fixed properly, and had worn loose, the defect might have been cured by due care.

2. As it was not a part of plaintiff's duty to inspect the appliance, the court properly refused to instruct the jury that their verdict must be for defendant if plaintiff had equal opportunity with defendant to know of the defect, it being sufficient to instruct them that plaintiff could not recover if he knew of the defect, or could have known of it by the exercise of ordinary care.

Appeal from circuit court, Kenton county.
"Not to be officially reported."

Action by John C. Carter against the Champion Ice-Manufacturing & Cold-Storage Com-

pany to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Simrall & Galoin, for appellant. J. W. Bryan, for appellee.

HOBSON, J. Appellee was a laborer in the service of appellant. His ordinary duty was to clean the condensers, and do like work as that. On the day he was hurt he was set to taking the ice out of the tanks. While engaged in this work, a tank used in getting the ice out fell upon him, causing serious injuries. The fall of this tank was due to a nut slipping off the bolt by which it was suspended, over the head. The nut worked loose, the danger not being discovered by appellant's servants in charge of the machinery. There was proof showing that, after appellee was hurt, the tank was placed back in position by the use of the same bolt and nut, and that, after the nut was screwed on, its servants then battered down the end of the bolt, to prevent its slipping off. Appellant complains of this evidence on the ground that precautions taken after appellee's injury were not proof of prior negligence. But there was no proof that the bolt was not battered down originally, or that any additional precaution was taken after appellee was hurt. It was certainly competent to prove that the proper way to secure this bolt suspending a weight over the workmen below was to batter the end down over the nut to prevent it from slipping off. Proof that it could be so secured was competent to show that the injury might have been averted by proper care. Though it was originally fixed properly, and had worn loose, the danger, if discovered, might, by due care, have been avoided, according to this evidence. The testimony being at least competent in this view, there was no error in its admission.

The instructions asked by appellant were substantially given by the court, except instruction C. That instruction would have misled the jury, and was properly refused by the court. It reads as follows: "The court instructs the jury that if they believe, from the evidence, that the plaintiff had equal opportunity with the defendant to discover the condition of the nut and bolt by which the cylinder was suspended, then their verdict must be for the defendant, even though they should believe it was defective, or in a defective condition, and that the defendant knew of it, or could have known of it by the exercise of ordinary care." This instruction would have been proper if it was part of appellee's duty to inspect the machinery, but, as he was a mere laborer, he had a right to assume that the place was safe where he was called upon to labor, and he was not required or expected to examine into the safety of the machinery. The bolt was some distance above the floor, and the nut could only be seen by appellee from below where he was

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

by standing back some feet, and looking away from his work. It was the duty of the master to furnish him a safe place to work, and he had a right to presume that this duty would be performed. If laborers should stop their work to examine into the safety of the machinery about them, they would not, ordinarily, be any wiser after the examination than they were before, and the employer's interest would suffer from their inattention to the business assigned them. There were others in appellant's employ whose duty it was to see to this machinery, and, the law not placing any such obligation on appellee, under the circumstances the court properly instructed the jury that it was the duty of appellee to use ordinary care for his safety, and that he could not recover if he knew of the defective condition of the appliance, or by the exercise of ordinary care could have known of its defective condition. Further than this the court should not have gone. Judgment affirmed.

MITCHELL v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. May 17, 1899.)

INTOXICATING LIQUORS — JAMAICA GINGER AS INTOXICANT — SUFFICIENCY OF VERDICT — MISTAKE IN CAPTION OF INDICTMENT.

1. The testimony of a druggist that the regulation requirement of Jamaica ginger is 90 per cent. alcohol and 4 per cent. ginger was sufficient to authorize the jury to conclude that it was intoxicating, if evidence of that fact was required.

2. As it is a matter of common knowledge that Jamaica ginger is an intoxicant and a spirituous liquor, it was not necessary to prove that fact.

3. A verdict which reads, "Wee the jury agree and find the defendant guilty as charged in the indite and sess his find at \$100 dollars Isaa Clouse," is good; the intention of the jury being manifest.

4. The fact that an indictment found in the Laurel circuit court is headed "Liquor Circuit Court" does not render it invalid, it not being essential for the jurisdictional facts to appear in the caption.

Appeal from circuit court, Laurel county.
"To be officially reported."

Henry Mitchell was convicted of the offense of selling intoxicating liquors in violation of a special statute, and he appeals. Affirmed.

Ewell & Smith and A. L. Reed, for appellant. W. S. Taylor and M. H. Thatcher, for the Commonwealth.

DURELLE, J. Appellant was convicted of the offense of selling intoxicating liquors in violation of a special act applicable to Laurel and four other counties. The sole proof was

of a phial of Jamaica ginger, White's brand. It is claimed that this was a variance. It was not a variance, if Jamaica ginger was a spirituous liquor. The jury found that it was. But the objection is urged that there was no evidence to support this finding, as both the vendor and vendee swore it was not intoxicating. Evidence of a druggist was introduced that the regulation requirement of Jamaica ginger was 90 per cent. alcohol and 4 per cent. ginger. If the jury believed this testimony, and believed that the phial contained Jamaica ginger (and it was bought and sold as such), they were authorized to conclude that it was intoxicating. Moreover, we think that, without the druggist's evidence, it is a matter of common knowledge that Jamaica ginger is an intoxicant and a spirituous liquor, and it is hardly more necessary to introduce testimony of that fact than it would be of whisky.

The verdict of the jury was as follows: "Wee the jury agree and find the defendant guilty as charged in the indite and sess his find at \$100 dollars Isaa Clouse." It is objected that this is no verdict. But we think it expresses—though only phonetically—the intention of the jury so that no one could be mistaken in regard to it.

The remaining objections to the procedure, with one exception, have been passed upon in *Thompson v. Com.* (Ky.) 45 S. W. 1039, 46 S. W. 492, 698, adversely to appellant's contention.

The final objection is that the caption of the indictment is headed "Liquor Circuit Court," and that, as this court judicially knows there is no such court, there was legally no indictment. Anciently, at common law, it was the custom to write the name of the county on the margin, either with or without the addition of the word "scilicet." The omission of this, however, was not fatal, when the caption or the body of the indictment showed the county. Neither the caption nor the commencement are, strictly speaking, parts of the indictment, though parts of the record (*Bish. New Cr. Proc.* § 663 et seq.); and while, in courts of limited or inferior jurisdiction, it is necessary that the facts necessary to give such courts jurisdiction should appear in the caption or commencement, the Laurel circuit court, being a court of superior jurisdiction, it is not essential for the jurisdictional facts to appear in the caption. The commencement shows the indictment to have been found by the grand jurors of Laurel county, and the indorsement of the clerk and the order of court show it to have been returned in the Laurel circuit court, in which court the appellant was tried and convicted. The error in the caption, under the circumstances, must be considered immaterial, and the judgment is affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.
51 S.W.—2

**LOUISVILLE & N. R. CO. v. ALUM-
BAUGH'S ADM'R.¹**

(Court of Appeals of Kentucky. May 12, 1899.)

**DEATH BY WILLFUL NEGLIGENCE—EVIDENCE—CON-
TRADICTION OF WITNESS—EXPLANATION OF
INCONSISTENT STATEMENTS.**

1. Where a petition filed by an administrator states a good cause of action under Ky. Const. § 241, for causing the death of plaintiff's intestate by negligence, the fact that it is alleged that the negligence was willful does not require that the action should be regarded as brought under section 3 of chapter 57 of the General Statutes.

2. What plaintiff, suing as administrator for the death of his son, said soon after his son died was inadmissible, as it did not contradict his testimony, and he had no personal knowledge of the facts.

3. As the ground on which plaintiff sought to charge defendant railroad company was that the conductor had, by putting plaintiff's intestate in fear, caused him to jump from a rapidly moving train, what plaintiff's intestate and his companion said, before getting on the train, about riding on it without pay, was inadmissible as evidence.

4. A witness cannot be contradicted by showing that he has made statements inconsistent with his testimony, unless he has first been asked as to such statements.

5. Where evidence as to statements made by a witness inconsistent with his testimony has been admitted, the court should allow him to be recalled, and to state the whole of the conversation referred to, so as to show that there was a misunderstanding, and that what he then said was not inconsistent with his testimony.

Appeal from circuit court, Clark county.

"Not to be officially reported."

Action by A. J. Alumbaugh's administrator against the Louisville & Nashville Railroad Company to recover damages for the death of plaintiff's intestate. Judgment for plaintiff, and defendant appeals. Reversed.

Breckinridge & Shelby, for appellant. J. M. Benton, Hathaway & Cardwell, and Bronston & Allen, for appellee.

HOBSON, J. Appellee, as administrator of his son, A. J. Alumbaugh, sued appellant to recover for the death of his intestate, alleging that he was compelled, by being placed in fear, and threats of violence, to jump from one of appellant's passenger trains while running at a high rate of speed, and so lost his life. The proof showed that the intestate, who was 18 years of age, and another boy, named Warren, who was 15 years of age, desiring to get from Clark county to Madison county, boarded appellant's passenger train going in that direction. They had no money. They had been out looking for work, and failed to get any, and, being unable to pay their fare, were put off by the conductor at a station called Riverside. After the train started from that station, they jumped on the steps of the rear car, and were soon seen by the brakeman standing there. As to what followed, the proof is very contradictory. The

proof for the appellee tends to show that the brakeman told the conductor of the boys being on the steps of the rear car; that he then turned abruptly from the brakeman, and, with the appearance of being quite angry, went rapidly back to where the boys were, and told them to get off; that he had something in his hand, such as a stick or poker, which he shook in a threatening manner; and, for fear of personal injury, Warren jumped off, and soon afterwards Alumbaugh fell off backwards. The train was running very rapidly. There was a rock along the side of the road, and by the fall Alumbaugh's skull was fractured. He died without regaining consciousness. The testimony for the appellant tended to show that the conductor thought the boys were in danger on the back steps, and, as it was only a short distance to the next station, he went to the door, to bring them inside the car, and when he got there, and motioned to them to come in, they both jumped off. On the evidence the court properly refused to give the peremptory instruction. The petition states a good cause of action under section 241 of the constitution, and, as has been several times held by this court under similar averments, should not be regarded as setting up a cause of action under the statute for death from willful neglect.

Charles Finny testified for appellee that he was standing on the side of the railroad, and saw the transaction between the conductor and the two boys. Appellant, to impeach his testimony, offered evidence showing that he was elsewhere at this time, and that he had made at the time other statements inconsistent with his testimony in court. Appellant then offered to show that Finny's reputation at his old home in Estill county, where he lived before moving to Riverside, about seven years prior to this, was bad for truthfulness. The evidence was excluded by the court, and of this appellant complains. But, there being no evidence that his reputation where he lived at the time of the trial, and had lived for seven years previously, was bad, the evidence should not have been admitted of bad character before he was married, and in another locality. *Mitchell v. Com.*, 78 Ky. 219.

The evidence as to what appellee said soon after his son died, or about that time, should not have been admitted, because it did not contradict anything he testified to for himself, and he manifestly had no personal knowledge of the facts. The evidence, too, as to what the boys said, before they got on the train, about riding on it without pay, was properly excluded, because it threw no light on the controversy.

R. C. Kidd, a witness for appellant, who was a merchant residing at Winchester, and a passenger on the train, stated that he noticed the conversation between the brakeman and the conductor, and, as the conductor went to the back of the car, watched him; that he only went to the door, and motioned to the boys to come in, and then turned around, and

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

came back to a gentleman, and said something to him; that he did not take his eyes off him at all, and that he did not leave the car, or have anything in his hand, and did nothing to make the boys jump off. The gentleman referred to was not looking back, but testified that, as the conductor came back from the door, he said, "Those foolish boys jumped off." If Kidd's evidence was true,—and he was wholly disinterested,—there should have been a verdict for the defendant. With a view of impeaching him, appellant's counsel asked him this question: "I will ask you if you did not state, in Mr. Goosey's saloon, in the presence of G. M. Goosey, the morning after this occurred, that the conductor ought to be mobbed; that you saw him, and that he knocked these boys off? A. I did not. Mr. French tried to get a man down there to prove that he did." G. M. Goosey was called in rebuttal, and the following evidence admitted, over appellant's objection: "Q. Did you hear him [Kidd] make this statement at that time: 'That the conductor who was in charge of the train ought to be mobbed; that he had seen him, with a poker, go back on the platform where the boys were?' A. I don't think it was exactly that. He said he ought to be taken off the train, and— Q. Did you hear him make substantially that statement? A. He said he ought to be taken and hanged. Q. Did you hear him say anything about the poker? A. He asked me if I saw him get the poker. I said I didn't." On cross-examination he said he did not know how the talk came up, and did not recollect what else Kidd said. He also stated that Kidd tried to make him believe that he did see the conductor pick up the poker, and that he could not explain why such a change of feeling had come over Kidd since that time. It will be seen that Kidd had not been asked in relation to a part of these statements, and, before the contradictory evidence should have been admitted, his attention should have been called to these matters. The testimony was peculiarly prejudicial to appellant, because it not only impeached Kidd's testimony, but was calculated to impress the jury with the conclusion that the conductor had in fact the poker in his hand, and that the witness had been induced in some way to change his statement. Goosey and Kidd were both passengers on the train. The former was a farmer, living near Ford, and the jury may have given great weight to his statements. Appellant, with a view of inquiring of Kidd, had him recalled at the conclusion of the rebuttal testimony, and the following testimony was then offered, and excluded by the court: "Q. What did you say to Mr. Goosey on that occasion? (Plaintiff's objection to this question sustained, to which defendant excepts, and avowed that witness would answer that he said to Goosey that it was an outrage that the report should have been circulated that the conductor had knocked the boys off the train, and that the man who was responsible for

such report, and for stirring up the feeling of the community by it, ought to be hung.) Q. In the conversation with Mr. Goosey relative to this action, I will ask you whether or not you said to him, 'This conductor ought to be hanged.' (Plaintiff's objection to the foregoing question was sustained, to which defendant objected, and avowed that witness would answer that he did not say the conductor ought to be hanged, but that the man who started the report that the conductor knocked the boys off ought to be hanged.) Q. I will ask you whether or not you asked Mr. Goosey if he saw the conductor pick up a poker when he went back on the rear end of the train. (Plaintiff's objection to this question was sustained, to which defendant excepted, and avowed that he would say that he did ask Goosey that question, knowing Goosey had not seen the conductor do so, and for the purpose of showing the falsity of the report in circulation.) Q. I will ask you whether or not, in that conversation, you said, 'It was an outrage that anybody should be circulating the report that the conductor who knocked these boys off ought to be hanged or mobbed.' (Plaintiff's objection to this question was sustained, to which defendant excepts, and avowed that witness would answer it in the affirmative.) Q. Now, I will ask you to state, in that conversation, what you did say to Mr. Goosey on that subject. (Plaintiff's objection to this question sustained, to which defendant excepted, and avowed that witness would answer that he had said to Goosey that it was an outrage that the report should have been circulated; that there was a good deal of excitement that morning over the report which B. F. French had circulated about the conductor having picked up a poker, and knocked the boys off; and that he [Kidd] was indignant at this, and said, 'This man ought to be hanged, and not the conductor,' and asked Goosey the question in that connection, intimating that the conductor had no poker, and the report was false.") Appellant having introduced the conversation between Kidd and G. M. Goosey for the purpose of contradicting Kidd, he should have been allowed to state what he said to Goosey, or Goosey said to him, so as to show that there was a misunderstanding, and that his statements then were not inconsistent with his testimony on the trial. In Greenleaf on Evidence (volume 1, § 462), after stating that the witness must be first inquired of in regard to the alleged contradictory statements, the learned author says: "This course of proceeding is considered indispensable from a sense of justice to the witness, for, as the direct tendency of the evidence is to impeach his veracity, common justice requires that, by first calling his attention to the subject, he should have an opportunity to recollect the facts, and, if necessary, to correct the statement already given, as well as by a re-examination to explain the nature, circumstances, meaning, and design of what he is proved

elsewhere to have said." In Whart. Ev. § 557, it is said: "On re-examination the impeached witness may be asked as to the details of the alleged contradiction." In section 560 this author says that the old practice was to confront the witnesses, and that it is to be regretted that it has fallen into disuse, as frequently, when they talked the matter over face to face, the misunderstanding became manifest. A number of other authorities might be cited. The cases are practically unanimous, and we do not see how the evidence could have been offered in this case at an earlier stage of the trial. It was very prejudicial to appellant; for, besides Kidd, the conductor was about the only witness as to what occurred at the door on behalf of appellant. The testimony for appellee was given by Finny and Warren. Warren was shown to have stated, shortly after the occurrence, in effect, that they jumped off when the conductor came to the door, without his doing anything to make them jump off, thinking that there was no danger in doing so; and, though some of these statements were made when he was under considerable mental stress, at other times it would seem that he was fully himself, and thoroughly understood what he said. Finny not only made contradictory statements for some time after the trial, but the evidence is persuasive that he was not near the scene of the injury at the time it occurred. So, if Kidd's testimony had not been impeached, the jury might well have believed him and the conductor, rather than the testimony of Finny and Warren, because the testimony of the other passengers on the train substantially confirmed their statements. The court clearly erred in rejecting the evidence offered by Kidd, and under the peculiar facts of the case it was very prejudicial to appellant's rights. In view of this and the newly-discovered evidence, we think a new trial should be granted. We see no other error in the record. The instructions seem fairly to have presented the law of the case, but on another trial the court should tell the jury that Goosey's testimony as to what took place between him and Kidd should only be considered by them for the purpose of impeaching Kidd's testimony, and not as substantive evidence in the case. Judgment reversed, and cause remanded for a new trial and further proceedings not inconsistent with this opinion.

MUTUAL BEN. LIFE INS. CO. OF NEWARK v. DUNN.¹

(Court of Appeals of Kentucky. May 17, 1899.)
LIFE INSURANCE—DEFAULT IN PAYMENT OF PREMIUM—APPLICATION OF RESERVE TO PURCHASE OF INSURANCE—WHAT CONSTITUTES "AMOUNT INSURED"—ESTOPPEL.

1. Where a policy of life insurance provides that, when the policy shall cease by the non-

payment of any premium when due, the entire net reserve value of the policy and dividend additions shall be applied, as a single premium, to the purchase of nonparticipating term insurance, "for the full amount insured by this policy," and that "the first 10 years' dividends that may be declared on this policy will be allowed only on the addition plan," upon the nonpayment of a premium when due, though within the first 10 years, the net reserve is to be applied to the purchase of term insurance for the face of the policy, and not for that amount plus the dividend additions; thus purchasing insurance for a longer term than if it were for the larger amount.

2. Where an insurance policy admits, without violence, of either of two interpretations, that interpretation will be adopted which will cover the loss, in preference to that which will defeat the claim.

3. The beneficiary named in the policy has a vested interest, not only in current insurance, but in the extended insurance purchased by the net reserve, upon the failure to pay a premium when due.

4. The beneficiary is not estopped by the act of the insured, her husband, in accepting a certificate of extended insurance for a larger amount, but for a shorter term, than that which the net reserve purchased; there being neither allegation nor proof that the insured was acting as her agent.

Appeal from circuit court, Jefferson county, law and equity division.

"To be officially reported."

Action by Ophelia A. Dunn against the Mutual Benefit Life Insurance Company of Newark, N. J., on a policy of life insurance. Judgment for plaintiff, and defendant appeals. Affirmed.

Dodd & Dodd, for appellant. F. W. Morancy and Grubbs & Morancy, for appellee.

DU RELLE, J. This suit was brought by appellee upon a policy of insurance issued by appellant upon the life of Benjamin C. Dunn for the benefit of appellee, who was his wife. The policy was for \$5,000, the annual premium of \$165.80 being payable upon the 23d of March of each year, until 20 full years' premiums should be paid, or until the death of the insured. It contained a provision that, in case of nonpayment of premium, the policy should cease and determine, "subject to the provisions of the company's nonforfeiture system," as indorsed on the policy, with an accompanying table. One of the objects secured by the nonforfeiture system referred to was the right to extended insurance for a limited period "for the full amount insured by this policy," in case of lapse by nonpayment of premium. The nonforfeiture provision now before us for construction, as indorsed upon the policy, is as follows: "When, after two full annual premiums shall have been paid on this policy, it shall cease or become void solely by the nonpayment of any premium when due, the entire net reserve value of the policy and dividend additions, by the American Experience Mortality, and interest at four per cent. yearly, less any indebtedness to the company on this policy, shall be applied by the company as a single premium at the company's rates published and in force at this

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

date, either—First, to the purchase of nonparticipating term insurance for the full amount insured by this policy; or, second, upon the written application by the owner of this policy, and the surrender thereof to the company at Newark within three months from such nonpayment of premium, to the purchase of a nonparticipating paid-up policy, payable at the time this policy would be payable if continued in force.” In a “Note” at the foot of the indorsement it is provided: “The first ten years’ dividends that may be declared upon this policy will be allowed only on the addition plan.” That is to say, the dividends declared upon the policy were not to be paid in cash or credited upon the amount of the next premium, but, as contended for by counsel for appellant, were invested in additional insurance, fully paid for by such investment, without any premium chargeable thereon, but, under the provisions of the policy, forfeitable by the nonpayment of any premium to accrue on the policy, and in that respect differing from what is called “paid-up” insurance.

The pleadings and agreed statement of fact show that there is no dispute as to the following propositions: (1) Only three premiums were paid, the last premium having been paid by money lent by the company to Dunn. (2) The net reserve value of the policy was \$263.65. (3) The dividend additions were \$163, and the net reserve thereon was \$55.98. (4) The indebtedness of Dunn to the company was \$175.75. (5) The net reserve value of the policy, together with the net reserve on the dividend additions, amounted, after deducting such indebtedness, to \$145.88. (6) The policy lapsed by nonpayment of the premium due March 23, 1894. (7) Dunn died December 19, 1896.

Appellant claims that the net reserve value should, by the terms of the contract, have been applied by the company to the purchase of nonparticipating term insurance for the sum of \$5,163, being the amount written in the face of the policy, plus the dividend additions up to the date of the lapse; because, it is claimed, that would have been the amount payable to the beneficiary had Dunn died just prior to the lapse, and was therefore “the full amount insured by this policy.” The net reserve on policy and additions, \$145.88, would, it is conceded, purchase nonparticipating term insurance for \$5,163 for 2 years and 263 days from March 23, 1894,—that is, up to and until December 11, 1896,—and such insurance would therefore expire 8 days before Dunn’s death. Appellee claims that the net reserve should have been applied as a single premium to the purchase of nonparticipating term insurance for \$5,000, thereby extending the insurance period for that amount for the term of 2 years and 297 days from March 23, 1894,—that is, up to January 14, 1897,—26 days after Dunn’s death. The question, therefore, is as to the construction of the words, “the full amount insured by this policy”; and this language should be construed and understood,

according to counsel on both sides, according to the common and approved usage of language; and it seems to us that the language of the contract should be construed as of the date when it was entered into, and that such meaning be given to it as the parties may reasonably be supposed to have had in their minds at that time. That contract insured Dunn’s life for \$5,000. That was the amount insured. No other amount was insured. It was agreed that if the company earned dividends, and if the directory declared them, they should, for 10 years, be invested in the purchase of additional insurance. Additional to what? Additional to the sum of \$5,000 insured by the policy at the time the contract was entered into between the parties.

Said the trial judge, discussing this question upon demurrer to the reply: “What was the full amount insured by the policy? Undoubtedly, the sum of \$5,000. Could language be plainer? There is no agreement or promise to pay any dividend additions as a part of the amount insured by the policy. Such dividend additions might or might not be made, being wholly dependent upon the degree of success attendant upon the business done by the company, the management of its affairs, and the losses of said company, and also upon the discretion of the directory as to whether there should or should not be a declaration of dividends at all. I cannot doubt that this is the proper interpretation and construction of the language used in the provision of the policy referred to; but, if I entertained any doubt upon the subject, then, under the well-recognized rule in the interpretation of policies, the demurrer would have to be overruled; for when words in a policy are, without violence, susceptible to two interpretations, that interpretation will be adopted which will sustain the claim and cover the loss, in preference to that which will defeat the claim. *May, Ins. 1175*. Bliss, in his excellent work on Life Insurance (section 40), says: ‘If it be uncertain, in view of the general terms of an instrument and the apparent object of the parties, whether given words were used in an enlarged or restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee. * * * If the language of the policy is capable of two interpretations, that one must be adopted which is most favorable to the assured, because the language used is that of the insurer.’”

It is agreed that, under the form of the policy sued on, the company has always, and without exception, considered and treated the dividend additions as a part of the full amount insured, under said form of policies. It is further agreed that, about a month before the lapse, Dunn made inquiry of the state agent as to what would be the cash surrender value of the policy, and was given the information. In February, 1895, he made inquiry, through the local agent, as to what was the cash surrender value and what the extension of time

upon the policy. To this inquiry the company responded that it would not, at that late date, be willing to allow any value for the policy, except in the form of extended insurance, and forwarded an extension certificate for \$5,163 for 2 years and 263 days from the date of the lapse, being until December 11, 1896, together with the canceled premium loan certificate. This extension certificate was delivered to Dunn, and found among his papers after his death.

It is claimed that the appellee is estopped "by the action of the company in issuing, without protest or objection from plaintiff, a certificate of extended insurance extending the lapsed policy on the life of Benjamin C. Dunn for the benefit of plaintiff for 2 years and 263 days from the date of the lapse thereof by nonpayment of premiums." Counsel for appellant recognizes "the law as established in the cases of *Weisert v. Muehl*, 81 Ky. 339, *Manning v. A. O. U. W.*, 86 Ky. 139, 5 S. W. 385, and *Hopkins v. Hopkins' Adm'r*, 92 Ky. 327, 17 S. W. 864, that the general rule is that the right to a policy of insurance, and the money to become due under it, vests, immediately upon its issuance, in the person named in it as the beneficiary, and that this interest, being vested, cannot be transferred by the insured to another person." But counsel claims that these authorities do not apply to the case at bar, for the reason that no vested interest of the appellee was attempted to be divested by the issuance of the extension certificate, and that it was issued in compliance with the terms of the conditional contract of insurance. It is also urged that the appellee is in the attitude of claiming a vested right in a lapsed policy. It is true that the policy had lapsed as to current insurance, but, by virtue of that lapse, the nonforfeiture proviso became operative, as the sole contract of insurance, and the wife, who was the beneficiary named in the policy, had a vested interest in the policy as then existing.

Upon the question of estoppel, also, we concur with the opinion of the trial judge: "An estoppel, to be effective, must be pleaded. The pleadings in this case do not allege any facts constituting an estoppel. There is no allegation charging that plaintiff had any knowledge of, or was ever informed of, any correspondence, or of the result of any correspondence, between her husband and the company, or the company's agents, with respect to the policy sued on; nor is there any allegation in the pleadings that Benjamin C. Dunn was the agent, or acting as the agent, of his wife, the plaintiff, in the correspondence with the company, or in receiving the certificate of extended term insurance. In the case of *Miles v. Insurance Co.*, 147 U. S. 177, 13 Sup. Ct. 275, the insured, Mr. Miles, in the course of his negotiations with the company, acted as the agent for his wife, and was treated with by the company as such agent. Not being able to pay a premium about to become due, Mr. Miles wished to give up a policy for \$5,000,

and take a paid-up policy. He was advised by the company that a plan more beneficial would be to have so much of the \$5,000 released as would enable him, with the sum allowed by the company for such release, to pay what would be due as a premium on the remaining sum under the policy. The necessary calculations being made, Mr. Miles 'procured from the company the requisite papers for the signature of his wife, and afterwards delivered such papers to the company, with her name purporting to be signed to a receipt.' Afterwards, Mr. Miles, not being able to pay the premium upon the policy as reduced, again visited the office of the company, and insisted upon taking out a paid-up policy, and 'he was given the requisite receipt, to procure the signature of his wife to it, and returned it to the company, with what purported to be her signature.' * * * Mrs. Miles testified that her name in both receipts had been written by her husband without her assent, but it also appeared that her name to the application for the \$5,000 policy was written by him, and that in his dealings with two other insurance companies he had signed her name.' In the present case the application for insurance was made by Benjamin C. Dunn, as appears from a copy of the application filed with the policy. In the present case it does not appear, from the agreed facts, that Mr. Dunn was acting as the agent of his wife, nor does it appear that the company treated with him as such in the correspondence concerning the policy, or in issuing a certificate of extended term insurance. By the agreed statement of facts, it appears that Mr. Dunn, on February 20, 1894, wrote to the company's agents asking, 'What will be the cash surrender value of policy No. 166,881, when the fourth premium has been paid, due March 23, 1894?' The letter referred to does not in any way intimate that Mr. Dunn was acting for his wife in making the inquiry. Afterwards, February 6, 1895, Mr. Dunn, through a special agent of the defendant, inquired 'as to what was the cash value of his policy at that time, and what were his rights as to extension insurance.' The answers to these letters never mention Mrs. Dunn as the owner of the policy, nor refer to Mr. Dunn as being the agent of his wife. The company, in its letter of February 12, 1895, to its agents, after referring to the lapse of the policy, and the application of the policy reserve to the cancellation of the premium loan and to the extension of the insurance, says: 'We inclose extension certificate 206,544, and canceled premium loan certificate, which you will please forward to Mr. Dunn.' It further appears from the agreed statement of facts that the certificate of extended insurance was 'delivered to Benjamin C. Dunn, and was kept by him until his death, and was found by plaintiff among his papers after his death.' It does not appear that plaintiff had any knowledge of the existence of this certificate of extended insurance until she found it among her husband's papers, after his death.

It is true, as contended by defendant's counsel, that 'no surrender of the policy was necessary, nor was the consent of the beneficiary required by the policy as a condition to granting extended insurance'; but by the very terms of the policy itself, after two full annual premiums have been paid, the insured had a vested right (in the absence of an application for a paid-up policy by the owner of the policy upon the terms and within the time specified in the nonforfeiture provision of the policy) to have the net reserve value of the policy and dividend additions applied by the company (and it is the contract duty of the company so to do) as a single premium to the purchase of nonparticipating term insurance. It is agreed as a fact that the defendant company 'has always, and without an exception, under the form of the policy sued on, considered and treated the dividend additions as a part of the full amount insured under said form of policies'; and defendant's counsel argue that 'any other construction would not be fair to a policy holder.' The question to be determined in this case is not, what would be fair to a policy holder, but what is the true construction of the contract. In construing a contract, a court will not adopt the interpretation placed upon it by one of the parties to it, unless such interpretation be obviously proper, no matter how often or how uniformly has been such interpretation of similar contracts. In this case it is not alleged in the pleadings, and it does not appear from any of the agreed statement of facts, that plaintiff was ever informed of the construction placed by the company upon the provisions of the policy now in question. From the pleadings and the proof (agreed facts) I am of the opinion that the plaintiff is not estopped from denying that such construction was ever assented to or recognized by her as binding upon her, and, there being no estoppel, plaintiff has the right to repudiate the construction placed by the company upon the provision in question, and come into court and demand that the court construe the contract." The judgment is affirmed, with damages.

THOMPSON et al. v. JOHNSON et al.
(Supreme Court of Texas. Dec. 19, 1898.)

TRIAL—FINDINGS—EVIDENCE.

Defendants offered in evidence a deed purporting to have been executed by plaintiff, which was excluded, on the objection of plaintiff, on the ground that the acknowledgment was defective. The trial court filed a finding of fact that plaintiff executed the deed, which it set forth, together with a copy of the acknowledgment, and, as a conclusion of law based thereon, decided that, if the acknowledgment was good in law, defendants should have judgment. *Held*, that the finding of fact was erroneous, as being based on excluded evidence, and that the conclusion of law based thereon must fall with it.

Error to court of civil appeals of Fifth supreme judicial district.

Trespass to try title by Susan F. Thompson

and another against John Johnson and others. A judgment in favor of plaintiffs was reversed by the court of civil appeals, and judgment entered for the defendants (50 S. W. 1055), and plaintiffs brought error. Judgment of the court of civil appeals set aside, and new trial ordered.

Chas. D. Groce, M. H. Garnett, W. C. Jones, and C. W. Merritt, for plaintiffs in error. Abernathy & Beverly, John Doyle, and Jas. M. Muse, for defendants in error.

DENMAN, J. This is an ordinary action of trespass to try title brought by Susan F. Thompson, joined by her husband, against John Johnson and others, claiming under him, to recover the lands in controversy. Defendants pleaded not guilty, improvements in good faith, and other matters not necessary to notice. The statement of facts shows (1) that the land is separate property of Susan F. Thompson, it having been allotted to her in the partition of her ancestor's estate; (2) that plaintiffs, for the sole purpose of showing common source, introduced in evidence a copy from the records of a deed purporting to have been executed by her and her husband conveying the land to Johnson; and (3) that defendants made proof of their respective improvements. The pleadings of each of the defendants show that he claimed the land under said deed, and there is nothing, other than above stated in the statement of facts, tending to show that Susan F. Thompson has ever parted with whatever title she may have had. Upon this state of the evidence, the trial court, on October 22, 1897, rendered judgment for Susan F. Thompson for the land and for defendants for their improvements. In November, 1897, at the request of defendants, the court filed conclusions of fact at some length, which, as far as they bear upon the questions we deem it proper to notice, are in substance: (1) That on January 17, 1870, the land in controversy was the separate property of Susan F. Thompson; (2) that on said date she, joined by her husband, executed to defendant Johnson, for a valuable consideration, a certain deed (here the trial court sets out the deed, including the acknowledgment, in full); (3) that Johnson, by subsequent deeds, conveyed parts of the land to the other defendants; (4) that said deed from Susan F. Thompson and husband to Johnson was offered by plaintiffs for the purpose of showing common source, and "was received in evidence for that purpose and no other." Upon these facts the court concluded, as a matter of law, (1) that said deed, on account of defective acknowledgment, is void, and that, therefore, plaintiffs should recover; (2) that, if the acknowledgment is in law good, defendants should have judgment. From the bill of exceptions contained in the record, it appears that on the trial defendants offered in evidence, as a muniment of title, said deed from Susan F. Thompson and husband to

Johnson, and that the court, upon objection of plaintiffs to the acknowledgment, excluded the same, and that defendants duly excepted to such ruling. From said judgment Johnson and others appealed to the court of civil appeals, assigning as error that the trial court erred in holding said deed void, and in refusing to render judgment that plaintiff take nothing upon said finding of fact (2). Susan F. Thompson and husband filed cross assignments of error to the effect that the trial court erred in finding its said conclusion of fact (2), in that there was no evidence admitted upon which to base same, and also erred in its said conclusion of law (2), in that defendants could not have a judgment, even if the acknowledgment was good, because the deed was not admitted in evidence. The court of civil appeals held that the trial court erred (1) in holding the acknowledgment fatally defective, and (2) in not rendering judgment that plaintiffs take nothing, and thereupon proceeded to render such judgment. From this judgment Susan F. Thompson and husband have brought the cause to this court upon writ of error, complaining that the court of civil appeals erred in holding that the certificate of acknowledgment was sufficient, and that, therefore, the trial court erred in excluding the deed. Upon this proposition, we are of opinion that the court of civil appeals were correct, and, as they have written fully upon the point, we deem it unnecessary to say more. It therefore results that we are of opinion that that court correctly reversed the judgment of the trial court.

Susan F. Thompson and husband also complain that the court of civil appeals erred in not holding, in any event, that the trial court erred in its said finding of fact (2) and in its said conclusion of law (2). We are of opinion that this point is well taken. Though the deed was correctly acknowledged, and should have been admitted in evidence, nevertheless the statement of facts and the bill of exceptions above stated show affirmatively that it was excluded, and such exclusion left the trial court without evidence before it upon which to base its said finding of fact (2), and therefore its said conclusion of law (2), based thereon, was also unauthorized. When the deed was wrongfully excluded by the trial court upon objection made by Susan F. Thompson and husband, they were not called upon and it would have been improper for them to have offered evidence to destroy the same, as they might have done had it been admitted, such, for instance, as that it was a forgery. The exclusion of the deed put it entirely out of the case, in so far as the trial court was concerned, and left to defendants Johnson and others only one right in reference thereto; that is, to assign such exclusion as error in law, upon which the judgment should be reversed and a new trial awarded. We must therefore set aside said finding of fact (2) made by the trial court, and impliedly approved by the court of civil appeals, for the

reason that it was error in law to base same upon excluded testimony. Said conclusion of law (2) must, of course, fall with it. Since the judgment of the court of civil appeals, rendering judgment that Susan F. Thompson and husband take nothing, is based upon said conclusion of fact (2), which we have set aside, it follows that it must be set aside, and the cause remanded for a new trial. If, on such trial, the issue of forgery be raised, the testimony of Enloe as to what occurred at Thompson's house, at the time he claims the acknowledgment was taken, will be admissible.

BROWN, J., not sitting.

HOWE GRAIN & MERCANTILE CO. v.
JONES et al.

(Court of Civil Appeals of Texas. April 22, 1899.)

PRIVATE CORPORATIONS—PURCHASE OF ITS OWN STOCK—BY-LAWS—VALIDITY.

1. A by-law of a private corporation, providing that on the death of any stockholder his stock shall be paid to his legal representatives, if it has remained in the company for one year, and notice of intention to withdraw has been given, is valid, and, after a compliance with the conditions, is a binding contract for its withdrawal, which may be enforced by suit, the company being solvent.

2. Rev. St. 1895, art. 665, providing that no private corporation shall employ its assets for any other purpose than to accomplish the objects of its creation, does not prevent a corporation from purchasing its own stock, since such purchase does not necessarily reduce its capital stock.

Appeal from Grayson county court; J. H. Wood, Judge.

Action by G. O. Jones and others against the Howe Grain & Mercantile Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Head, Dillard & Muse, for appellant. Wolfe, Hare & Semple, for appellees.

BOOKHOUT, J. This suit was instituted by appellees against appellant, a corporation, to require it to purchase from them 100 shares of its capital stock in compliance with one of its by-laws. A trial before the court on November 2, 1898, resulted in a judgment in favor of appellees for \$570, from which this appeal is prosecuted; notice of appeal, appeal bond, and assignment of errors having been given and filed in compliance with our statute and rules of court. The parties filed in the trial court a written agreement as to certain facts, which agreement the court made a part of its findings of fact. We find the following facts are shown by said agreement: On the 25th day of August, 1887, the Farmers' Alliance Co-operative Association was duly incorporated, with its principal office in the town of Howe, in Grayson county, Tex. The purpose for which said corporation was formed was the owning and managing of a mer-

cantile establishment, buying and selling grain and other farm products, and buying and selling such real estate as may be necessary for carrying on such business incident or appertaining thereto for the mutual profit and benefit of its stockholders and patrons who are members of the order of the Farmers' Alliance. The capital stock was \$20,000. Thereafter, on the 26th day of April, 1894, said charter was amended, wherein, among other things, its name was changed to the Howe Grain & Mercantile Company, and the purpose for which it was formed was changed to the owning and managing a mercantile establishment, and buying and selling grain and other farm products, and for the purpose of manufacturing corn and wheat into meal and flour and other products produced by the same, and for the purpose of buying and selling such real estate only as may be necessary for carrying on the business of such corporation, and for the purpose of buying and selling goods, wares, and merchandise at retail, under and by virtue of subdivision 24, art. 566, Rev. St., as amended by Acts 22d Leg. p. 162. After the company was originally chartered, by-laws were adopted, among which appear the following: Article 2, § 9: "Any white person actively engaged in agricultural pursuits may become a stockholder in this company: provided, that no stockholder who ceases to be engaged in agricultural pursuits shall forfeit the right to hold or take additional stock, in this company: and provided, that no stockholder shall be entitled to own more than \$500 in stock in said company." Article 2, § 10: "In the case of death of any stockholder, the stock, with dividend, if any, shall be paid to their legal representatives at the following annual meeting: provided, that the stock shall have remained in the company for one year: and provided, that ninety days' notice of such withdrawal of stock has been given the secretary." Article 3, § 1: "The profits of this company shall be disposed of as follows: Ten per cent. of profits may be retained as a sinking fund. The remainder shall be divided among the stockholders in proportion to the amount of their stock." Article 3, § 5: "In becoming a stockholder of this company, I hereby agree to further bind myself to assume such responsibilities, and conform to such requirements and risks, as are made incumbent upon me by the constitution and by-laws of the same." After the incorporation of said company and the adoption of said by-laws, J. C. Jones, a citizen of Grayson county, Tex., being duly qualified by the terms of the constitution and by-laws of said corporation, subscribed and paid for 100 shares of the capital stock of said corporation of the par value of \$5 each, certificates for which stock were duly issued to the said J. C. Jones. Jones died intestate in 1897, while he was the owner of said stock, and there was no administration upon his estate, nor any necessity for administration, and plaintiffs (appel-

lees) are his heirs, and became entitled to said stock. Jones had been the owner and holder of said stock and a stockholder in said corporation for more than a year previous to his death, and plaintiffs gave 90 days' notice to the defendant corporation of their desire to withdraw the amount of said stock and dividend previous to the annual meeting of said corporation held on June 4, 1898, and defendant failed and refused to comply with said request. In addition to the above, the trial court filed the following conclusions of fact, which we also find and adopt in addition to those found above: "I find the facts to be true as set forth in the written agreement between the parties, which is hereto attached, and made a part hereof; and, in addition to the facts as set forth in said agreement, I find that the stock in the defendant corporation was worth at the end of the fiscal year June 4, 1897, 12 cents on the dollar above par; at the end of the fiscal year June 4, 1898, 14 cents on the dollar above par; and on September 1, 1898, 29 cents on the dollar above par. I also find that plaintiffs are entitled to the value of said stock at the end of the fiscal year 1898, making about \$570. The value of the stock is arrived at by estimating the fair cash value of the property of the corporation on hand at each of the times named, which included the ten per cent. net profits that had been set aside each year as surplus or undivided dividends under the by-laws. I also find that the defendant, previous to the time plaintiffs made application to withdraw their stock, had on several occasions permitted other stockholders to withdraw their stock in compliance with the by-laws set forth in the agreement, such withdrawal being by living stockholders, and the defendant in each case paying the face value of the stock only. I also find that defendant is now, and ever since June, 1898, was, and has been, entirely solvent, and able to pay all creditors after paying this judgment. I find that defendant now has a surplus fund of \$1,886, and net profits undivided of \$2,000." The trial court filed the following conclusions of law, which we adopt: "(1) I conclude as a matter of law that section 10 of article 2 of the by-laws of defendant is a valid by-law. (2) I further conclude that said by-law constituted an offer on the part of the defendant to the plaintiffs, as the legal representatives of J. C. Jones, a deceased stockholder, which, when it is accepted by plaintiffs, and when the requirements specified in said by-law had been complied with on the part of plaintiffs, became a binding contract on the part of defendant to pay plaintiffs the value of said decedent's stock in the defendant company, with dividends accrued and unpaid, and that for a breach of such contract this action lies. (3) I further conclude that said by-law conferred on plaintiffs the right to withdraw the value of said stock from defendant, and receive therefor from defendant the value of said stock, with dividends accrued

and unpaid, and that this action lies against defendant for a refusal on its part to allow plaintiffs to so withdraw said value of said stock, and pay them its value, with such dividends. (4) I therefore conclude that plaintiffs are entitled to recover from defendant the sum of \$570."

There is no statute in this state expressly prohibiting a corporation from purchasing its own stock. We do not think that article 665, Rev. St. 1895, was intended to apply to such a purchase. *Bond v. Manufacturing Co.*, 82 Tex. 309, 18 S. W. 691; *Tayl. Corp. § 295*; *Curtis v. Leavitt*, 15 N. Y. 54. Nor does it appear that there is any principle of common law which prohibits such a purchase. *Bank v. Bruce*, 17 N. Y. 507. Such a purchase does not necessarily reduce its capital stock. The stock so purchased may be reissued by the corporation. *Cook, Stock & S. § 314*. In this case the corporation has on hand a surplus fund, and net profits undivided to the amount of \$2,000. It is more than solvent, and, after paying plaintiffs the amount of their stock and dividends, it will have left more assets than necessary to pay its creditors in full. Under these facts we conclude that by-law 10 of article 2 should be enforced, and that there is no error in the judgment. *Cook, Stock & S. §§ 311, 312*; *Reese, Ultra Vires, § 120*; 2 *Beach, Priv. Corp. § 395*; *Boone, Corp. p. 147, § 107*; *Association v. Paxton* (Tex. Civ. App.) 83 S. W. 389; *Association v. Biering*, 86 Tex. 476, 26 S. W. 39; *Dupee v. Water-Power Co.*, 114 Mass. 87; *Lumber Co. v. Foster*, 49 Iowa, 25; *Bank v. Bruce*, 17 N. Y. 507; *Davis v. Proprietors*, 49 Mass. 321; *Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432; *Bialock v. Manufacturing Co.*, 110 N. C. 99, 14 S. E. 501; *Eby v. Guest*, 94 Pa. St. 160; *Commissioners v. Thayer*, 94 U. S. 631; *Clapp v. Peterson*, 104 Ill. 26.

Affirmed.

ROGERS et al. v. SOUTHERN PINE LUMBER CO. et al.

(Court of Civil Appeals of Texas. March 11, 1899.)

JUDICIAL SALES—RECITALS OF DEEDS—CONCLUSIVENESS ON PURCHASERS—RES JUDICATA—AFTER-ACQUIRED TITLE—CORPORATIONS—PREFERENCES TO CREDITORS—RIGHTS OF THIRD PERSONS—MORTGAGES—RECEIVERS.

1. A receiver was appointed for an insolvent corporation, which had executed a trust deed to secure creditors, in proceedings instituted by an unsecured creditor. The trustee and the beneficiaries of the trust deed were not made parties, and the validity of the trust deed was not in issue. The property was ordered sold without prejudice to persons claiming any interest therein, and the court directed that the conveyance thereunder should be the interest which the corporation had in the property at a time subsequent to the execution of the trust deed. The conveyance under the receiver's sale stated that the sale was subject to the trust deed, but no order was made making the trust deed a lien superior to the rights of the purchaser. *Held*,

that persons claiming under the receiver's sale were not precluded from questioning the validity of the trust deed, the recitals as to the trust deed having been inserted in the orders merely to show that no issue as to its validity had been determined.

2. A judgment directing the foreclosure of a trust deed as against the beneficiary of another trust deed in an action to which he was a party, does not bar a title acquired by him by purchase at a foreclosure sale under the latter trust deed during the pendency of the proceedings to foreclose the former trust deed, but before the entry of the judgment therein, where he was not the sole beneficiary of the trust deed under which he claims, and the trustee thereunder was not a party to the suit to foreclose the former, and where the petition merely alleged that he claimed adversely to the first-named trust deed; and this, though he defaulted in the foreclosure suit against him.

3. A transfer by an insolvent corporation to prefer creditors being void, a person claiming an interest in the property attempted to be transferred may attack the conveyance though he be not a creditor of the corporation.

4. Such transfer will be set aside at the instance of one in possession of the property under a claim of ownership, though the result be that none of the creditors of the corporation will realize anything.

5. A mortgagee not being entitled to the rents or to possession of the premises under Rev. St. art. 4882, it is improper to appoint a receiver of the premises on the ex parte application of the mortgagor in an action to enjoin him from foreclosing, where the pleadings disclose the invalidity of the mortgage.

6. A mortgagee is not entitled to a receiver where the value of the property is twice the amount of the debt.

Appeal from district court, Marion county; Hiram Glass, Special Judge.

Action by T. J. Rogers, as receiver of the National Bank of Jefferson, and others, against the Southern Pine Lumber Company and others. There was judgment for defendants, and plaintiffs appeal. Reversed.

This suit was instituted by T. J. Rogers, receiver of the National Bank of Jefferson, W. B. Ward, and the Bank of Commerce of Kansas City, Mo., against the Southern Pine Lumber Company, H. P. Taylor, sheriff, and George J. Armistead; its main purpose being to enjoin the execution of an order of sale issued out of the district court of Marion county upon a judgment therein rendered in favor of the said Southern Pine Lumber Company against the Jefferson Lumber Company and others, in which personal judgment for \$4,697.27 went against the Jefferson Lumber Company, and there was a foreclosure of a mortgage lien as to it and co-defendants upon real and personal property. The trial below resulted in favor of the Southern Pine Lumber Company, and the plaintiffs have appealed. The facts and proceedings out of which the litigation arises are considerably complicated, and are, in substance, as follows:

"First. The Jefferson Lumber Company, a private corporation organized under the laws of Texas for the manufacture and sale of lumber, running sawmills, and selling lumber at wholesale, becoming insolvent and unable to proceed with its business, and with no ex-

pectation of resuming business, undertook to dispose of all of its property by the following instruments: July 1, 1891, bill of sale to the Jefferson National Bank, conveying \$54,000 worth of lumber in payment of debts to the bank. July 1, 1891, deed to Erastus Jones, conveying 14,732 acres of land in payment of debts to Jones. July 3, 1891, deed to W. B. Ward, conveying 7,652 acres of land in payment of debts to Ward. July 7, 1891, two trust deeds to W. R. Camp, trustee, conveying 7,000 acres of land, sawmills, railroads, etc., to secure, in the order named, preferred creditors of the Jefferson Lumber Company according to the following schedule: (1) Amounts due mechanics, laborers, artisans, and employes of the Jefferson Lumber Company at their several mills situated at Atlanta, Kildare, Mill No. 2, near Kildare, all in Cass county, Texas, in various amounts, aggregating the sum of \$5,367.70; (2) National Bank of Jefferson, Texas, \$20,360.63; (3) Linden Bank of Linden, Texas, \$9,896.14; (4) Atlanta Bank of Atlanta, Texas, \$7,348.62; (5) Erastus Jones, of Spencer, Mass., \$54,471.84; (6) John M. Bemis, of Buffalo, N. Y., \$35,738.10; (7) A. Weinstein, of Jefferson, Texas, \$6,169.88; (8) J. B. Alexander, of Staten Island, N. Y., \$45,000; (9) Southern Pine Lumber Company, of Texarkana, Texas, \$12,674.10; (10) Grigsby Bros., of Dallas, Texas, \$29,628.03; (11) Citizens' Bank of Jefferson, Texas, \$9,486.07; (12) Southern National Bank of New York City, \$6,000; (13) Sulphur Lumber Company, of Sulphur Station, Tex., \$9,245.84; (14) First National Bank of Milton, Pa., \$4,350.95; (15) Marshall National Bank, Marshall, Texas, \$3,500. The grantees in the above instruments immediately took possession thereunder. They purported to convey all the property of the Jefferson Company, which was of the total value of from \$150,000 to \$200,000. The liabilities of the Jefferson Company exceeded \$516,000. It will thus be observed that there were \$184,352.91 scheduled in the Camp trust deeds prior to the Southern Pine Lumber Company. While the record does not definitely show the value of the land deeded to Jones and Ward, yet, as all the assets did not exceed \$200,000 in value, including the \$54,000 worth of lumber conveyed to the Jefferson Bank, it is plain that the debts scheduled in the Camp trust deeds prior to the Southern Pine Lumber Company greatly exceeded the value of the property embraced in the trust deeds, under the terms of which the Southern Pine Lumber would therefore receive nothing whatever.

"Second. On July 21, 1891, the Galveston National Bank, an unsecured creditor of the Jefferson Company, brought suit against it in the district court of Marlon county, alleging its insolvency, and praying for the appointment of a receiver. A receiver was appointed, who took charge of all the property embraced in the transfers to the Jefferson Bank, Jones, Ward, and Camp. The precise char-

acter of this suit is not clearly shown by the record, but the record shows that the Southern Pine Lumber Company was not a party, and that there was no pleading in the suit asserting the validity of the Camp trust deed or asking an adjudication upon it.

"Third. On January 21, 1892, in this receivership suit, the court ordered all the property sold, the order providing as follows: 'And that the sale conveying the title and interest therein of the Jefferson Lumber Company as it stood on July 21, 1891, as to such as it then owned, and all the property as it now stands, and that said sale be made without prejudice to the rights of any person or persons, corporation or corporations, asserting any lien or title to said property or any of it; and whereas, at the date of the appointment of the receiver, heretofore made, the National Bank of Jefferson was claiming the title and possession of 9,200,000 feet of lumber on the yards of said company, which lumber was, upon the order of this court, heretofore made, delivered to the receiver by said bank: It is therefore ordered that the purchaser of said property at the sale here ordered shall take the lumber on hand at the date of sale subject to any claim the said bank may have, it being the intent and purpose of this court to put the lumber which may be on hand at the date of the sale in the place and stead of the lumber heretofore surrendered by said bank to said receiver: provided, the same shall not be in excess of 9,200,000. This order shall in no manner impair the rights of the National Bank of Jefferson under the order heretofore made.' On May 3, 1892, the property was sold to W. B. Ward, W. B. Chew, Elijah Robinson, and J. H. Bemis for \$13,000. On June 30, 1892, the court confirmed the sale, the order of confirmation providing as follows: 'and upon application of the Galveston National Bank the said sale is in all things confirmed and approved, and the said commissioners are hereby ordered to execute to said purchasers deeds and other property so sold, subject to all legal claims embraced in the deeds of trust made by the Jefferson Lumber Company to W. R. Camp as trustee, dated July 7, 1891, which consists of all the real and personal and mixed property and choses in action, a description of which is recorded in Minute Book M, pages 397 to 447, which is here referred to and made a part hereof; and the said receiver, H. O. O'Neal, is hereby directed to at once deliver to the purchaser the property so sold; and all the rights, titles, and interest of the Jefferson Lumber Company, and the receiver thereof, in and to any and all of said property is hereby vested in said purchasers, subject to the deed of trust heretofore made to W. R. Camp, as trustee, by the said Jefferson Lumber Company, on July 7, 1891. It is hereby decreed that the property above described be delivered to said purchasers, subject to any and all charges or liabilities of every character and kind incurred by the receiver in the manage-

ment of the same, and said liabilities so incurred by said receiver are hereby declared to be a lien upon all of said property, and that the liens shall apply to liabilities incurred by the receiver in the management of said property.' And on July 8, 1892, the commissioner made a deed to the purchaser, reciting in the deed as follows: 'It being understood that the above and foregoing property herein conveyed and transferred is sold under the order of the district court of Marion county, Texas, subject to a deed of trust executed and delivered by J. H. Bemis, president of the Jefferson Lumber Company, to W. R. Camp, trustee, July 7, 1892, and duly recorded in county clerk's office, Cass county, Texas, in Book D of Mortgages, pages 199 to 215, inclusive.'

"Fourth. In this purchase Elijah Robinson represented the National Bank of Commerce of Kansas City (hereinafter called the 'Kansas City Bank'), a creditor of the Jefferson Lumber Company. On May 3, 1892,—the day the property was sold,—and in anticipation of a confirmation of the sale, the purchasers entered into an agreement contemplating the conveyance of the property to a new corporation, to be organized as soon as the sale was confirmed. This agreement provided that the corporation to be organized should have a capital stock equal to the amount of \$185,000 of the 'preferred claims' against the Jefferson Lumber Company, and 60 per cent. of the claims of the Kansas City Bank against the Jefferson Lumber Company and J. H. Bemis & Co., and 60 per cent. of the claims of the National Bank of Jefferson against the Jefferson Lumber Company, and interest on all said claim from maturity. The remaining 40 per cent. of said bank claims was to be settled by notes of the new corporation, secured by trust deed on the property. The \$13,000 paid at the receiver's sale by the four purchasers was provided for as follows: The new company was to pay Chew his one-fourth in cash, and to give its notes to each of the other three purchasers for their respective proportion (one-fourth), also secured by trust deed on the property; all the notes provided for in the agreement to be on a parity. The agreement recited that Erastus Jones, J. M. Bemis, J. B. Alexander, Grigsby Bros., Sulphur Lumber Company, Southern National Bank of New York, and W. B. Ward, creditors embraced in the trust deeds, proposed to convey their respective interests to the new corporation. If they failed to do so, the agreement was to be of no further force and effect. By reference to the schedule in the Camp trust deeds it will be seen that this reorganization embraced \$155,570.57 of the claims prior to that of the Southern Pine Lumber Company, largely more than the property embraced in the Camp trust deeds, and \$34,873.38 of claims subsequent to that of the Southern Pine Lumber Company; in all, \$200,443.95. The agreement made no provision concerning the claims of creditors who had not agreed to go into the reorganization. J.

H. Bemis, assuming to represent the Southern Pine Lumber Company, also went into the reorganization, and stock was issued for its claim, but the jury found that this was unauthorized.

"Fifth. The Kildare Lumber Company was incorporated in accordance with the foregoing reorganization agreement, and on July 13, 1892, all the property purchased at the sale in the Galveston Bank receivership case was conveyed to the Kildare Lumber Company, which thereupon executed to L. S. Schluter, trustee, a deed of trust on all the property to secure the notes provided for in the reorganization agreement.

"Sixth. On August 28, 1893, said Kansas City Bank, complainant, brought suit in the United States circuit court for the Eastern district of Texas against the Kildare Lumber Company, J. H. Bemis, its manager, W. R. Camp, trustee in the trust deed of the Jefferson Lumber Company, L. S. Schluter, trustee in the trust deed of the Kildare Lumber Company, W. B. Ward, a creditor in the Schluter trust deed, the Atlanta Bank and Citizens' Bank, creditors in the Camp trust deed, defendants; the purpose of the suit being to foreclose the Schluter trust deed. Camp disclaimed, and the suit was dismissed as to him. T. J. Rogers answered as assignee of the Citizens' National Bank, and by cross bill sought a foreclosure of the Camp trust deed. On October 3, 1894, a decree was passed foreclosing the Camp trust deed in favor of Rogers, assignee of the Citizens' Bank, for \$9,486, and foreclosing the Schluter trust deed in favor of the Kansas City Bank for \$32,267 and W. B. Ward for \$5,099, these being the amounts respectively due. The decree gave Rogers, assignee, a priority over the Kansas City Bank and Ward. The suit was dismissed as to the other defendants. The Southern Pine Lumber Company was not a party to this suit. On September 3, 1895, the property was sold under this decree to W. B. Ward and S. J. Fitzhugh for \$45,000, Fitzhugh buying 73½ per cent. for the Kansas City Bank, and Ward buying 11½ per cent. for himself and 15 per cent. for the Jefferson National Bank. The sale was confirmed in January, 1896, and deed duly executed. Rogers, assignee, was paid in full, and, after payment of court costs, the balance of the bid was credited on the judgments in favor of the Kansas City Bank and Ward. Subsequently Rogers was appointed receiver of the Jefferson National Bank, and, as such receiver, now owns the 15 per cent. purchased by said bank in the name of Ward.

"Seventh. On August 10, 1895, subsequent to the decree, and before the sale in the Kansas City Bank case in the federal court, the Southern Pine Lumber Company filed suit in the district court of Marion county on two drafts, its alleged debts scheduled in the Camp trust deed, seeking a foreclosure of said trust deed. The defendants were the Jefferson Lumber Company, Kildare Lumber Company, W. B. Ward, Atlanta Bank, T. J. Rog-

era, assignee of the Citizens' Bank, and W. R. Camp. One draft, for \$1,834.84, matured July 23, 1891. The other, for \$1,575.90, matured August 12, 1891. Citation was issued August 12, 1895, and served a few days later. There was a judgment by default for \$4,637.27 against all the defendants on June 12, 1896, with foreclosure as prayed for. On February —, 1897, an order of sale was issued, and the property was advertised for sale.

"Eighth. March 1, 1897, the National Bank of Commerce of Kansas City, T. J. Rogers, receiver of the National Bank of Jefferson, and W. B. Ward, claiming title under the federal court foreclosure, brought this suit against the Southern Pine Lumber Company, George F. Armistead, its attorney, and H. P. Traylor, sheriff, to enjoin the sale under the Southern Pine Lumber Company foreclosure."

The temporary writ of injunction was granted, and subsequently it was, on motion of defendants, in part dissolved, conditioned upon defendants giving a refunding bond, which was not complied with by defendants. Subsequent to this the court appointed a receiver to take charge of the property at the instance of the defendants on ex parte application. Motions to discharge the receiver were made by the plaintiffs, and refused by the court. On the trial below the court submitted the case on special issues, and the jury found: (1) That the Jefferson Lumber Company received the consideration for the two drafts on which judgment was obtained on June 12, 1896. (2) That the Southern Pine Lumber Company accepted the trust deed to Camp on the next day after it received information of the same to J. H. Bemis. (3) That J. H. Bemis had no authority to release the Southern Pine Lumber Company's claim against the Jefferson Lumber Company. (4) T. L. L. Temple, for the Southern Pine Lumber Company, did not settle with Bemis for the drafts for \$1,575.90. (5) The Jefferson Lumber Company has not settled said drafts. (6) The Jefferson Lumber Company was not insolvent on the 7th of July, 1891, when it made the Camp trust deed, and was then able to continue its business, and the Camp trust deed was not made in contemplation of ceasing to do the business of operating its mills. (7) The Jefferson Lumber Company did not cease to do business after it executed the Camp trust deed, and it had intended to resume its business, and redeem the property. The plaintiff made a motion for a new trial, on which the court made the following order: "This day came on to be heard the plaintiff's motion for a new trial in the above cause. The court overrules said motion for a new trial, but does so upon the following grounds: First. The court finds that all of the findings of the jury in answer to the seventh, eighth, and ninth questions propounded to them in the charge are each contrary and against the evidence. The court finds the facts to be: (1) That the Jefferson Lumber Company was insolvent when it made the trust deed to

Camp on July 7, 1891; (2) that it was not then able to continue longer in business; (3) that the Camp trust deed was made in contemplation of ceasing to do business; (4) that the Jefferson Company conveyed all of its property between July 1 and 8, 1891; (5) that when it made the Camp trust deed it had no intention of redeeming the property and resuming the business. The court holds that the findings of the jury in answer to questions 7, 8, and 9, as above shown, are immaterial, and he sets aside their findings to those questions, and gives judgment, notwithstanding, for the defendant Southern Pine Lumber Company for foreclosure of the deeds of trust to W. R. Camp, trustee, for the amount due on the judgment in cause No. 6,365, covering the amount of the two acceptances,—one for \$1,834.84, dated April 25, 1891, due in 90 days, and one for \$1,575.90, dated May 14, 1891, due in 90 days,—because the court finds by reason of the recital in the order to sell the property made by the district court of Marion county, made in January, 1892, in the case of the Galveston National Bank against the Jefferson Lumber Company, that the recital made in the order confirming the sale made in June, 1892, bound the property in same to pay the debts set out in the Camp trust deed. I further find that the \$1,834.84 note, was not, as to the parties to this suit, barred on August 10, 1895, the day the Southern Pine Lumber Company filed suit on it, because plaintiff cannot invoke the statute of limitation on account of the recitals in the decree confirming the sale aforesaid. I find that the judgment of June 12, 1896, was and is binding on W. B. Ward as to all the title he then held, which I find to be eleven and one-third per cent. of the property in the Camp trust deed. I approve the verdict except as to the matters mentioned above, to wit, the seventh, eighth, and ninth findings. The plaintiff's motion for judgment is overruled. Plaintiff excepts to above ruling as far as against them, and gives notice of appeal. Ten days allowed to parties after court adjourns to prepare and file its statement of facts."

F. H. Prendergast and Dickson & Moroney, for appellants. Geo. J. Armistead, Smelser & Mehaffey, and Scott & Jones, for appellees.

FINLEY, C. J. (after stating the facts). The first inquiry which would logically arise, and which is presented by assignments of error, is the correctness of the holding by the trial court that the order of sale issued upon the decree in the case of Galveston National Bank against Jefferson Lumber Company, and the order confirming the sale made thereunder, bound the property to pay the debts set out in the Camp deed of trust. The proposition is that appellants' title comes through the sale made under and by virtue of the order of court issued in the receivership case of the Galveston National Bank against the Jefferson Lumber Company, and that the terms

of that order of sale and of the order of confirmation fixed upon the property sold liability for the debts sought to be secured by the Camp deed of trust, and that appellants are estopped to deny such liability, and cannot, for this reason, assert their title in hostility to the debt and lien of the appellee, arising under the Camp deed of trust. It may be readily admitted that the district court in which the receivership pended had the power, assuming that all the essential conditions to the exercise of such power existed, to fix upon the property in question primary liability to the debts sought to be secured in the Camp deed of trust, and to order the property sold subject to this liability. Do the orders of sale and confirmation manifest it to have been the purpose of the court to recognize the Camp deed of trust as a primary lien on the property, and to make the title of the purchaser at the judicial sale subordinate to the liens sought to be created by such deed of trust? In other words, did such orders have the effect to bind the property to pay the debt set out in the Camp deed of trust, so as to preclude the right of the purchaser under the judicial sale to defend against foreclosure of the Camp deed of trust and sale of the property thereunder? These orders were made in a case wherein the Galveston National Bank was the plaintiff and the Jefferson Lumber Company was the defendant. There was no party to this suit to represent the interests involved in the Camp deed of trust, and no issue in relation thereto was raised by the pleadings. The trustee and beneficiaries were strangers to this proceeding, except in the general sense in which all creditors may be required to take notice of proceedings in receiverships. Had the orders of sale and confirmation, under these conditions, contained no recitals as to the Camp deed of trust, it seems clear that the rights of the beneficiaries in such deed of trust would not have been affected by such sale. It is equally clear that the purchaser under such conditions would not be precluded from asserting his title, thus acquired in hostility to the claims of the beneficiaries in the Camp deed of trust. The order of sale directed that the sale should "be made without prejudice to the rights of any person or persons asserting any lien or title to said property." This provision in the order seems plain and clear. Here was a receivership in which an unsecured creditor and the debtor were the only parties to the record, and in granting the order to sell the property the court simply provided that the claims of others asserting title to or lien upon the property should not be cut off or concluded by such sale. As before indicated, the order would have had the effect here provided for without such express limitation, considered in relation to title or lien held by strangers to the record. The order of confirmation is fuller in its recitals as to this matter. It recites that the deeds to the purchasers shall be made "subject to all legal claims embraced in the

deeds of trust made by the Jefferson Lumber Company to W. R. Camp"; and further, "that the title and interest of the Jefferson Lumber Company, and the receiver thereof, is vested in said purchasers, subject to the deed of trust heretofore made to W. R. Camp." The deed executed to the purchasers recited that the sale was subject to said deed of trust. These recitals must be considered in connection with each other, and in the light of the record of the case in which the orders were made. There is no express language in these orders fixing the Camp deed of trust as a lien upon the property superior to the title of the purchaser at the judicial sale; and it is hardly reasonable to assume that the court intended so to determine, in the absence of parties and pleadings asking the protection of the rights of the beneficiaries in the deed of trust. At the time these orders were entered (1892) the law as to the right of an insolvent corporation to make a deed of trust preferring creditors was not considered settled in this state, and it is not at all unlikely that this fact influenced the court to exclude from its decision and judgment all such issues. *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 86 Tex. 148, 24 S. W. 16. In our judgment, the only reasonable conclusion to be reached is that the court intended that issues of title or lien not made in that case were not to be deemed determined therein, and the recitals in the order were inserted for the purpose of manifesting the exclusion of all such claims from consideration and determination. In so far as this sale is concerned, it left the beneficiaries in the Camp deed of trust unaffected. Their rights were neither established nor defeated by such orders, but stood as though the orders had not been made. *Teal v. Terrell*, 48 Tex. 508; *Water Co. v. De Kay*, 36 N. J. Eq. 548; *Groesbeck v. Golden* (Tex. Sup.) 7 S. W. 862. This holding is not believed to be in conflict with the decision of this court in *Park v. Prendergast*, 23 S. W. 585, to the effect that "a junior mortgagee, whose mortgage is expressly made subject to a prior mortgage, cannot defeat the prior mortgage lien by showing that it is invalid against the mortgagor." That proposition resulted from a construction of the contract of the parties. The grantor had the right to convey the property burdened with a prior mortgage, and the grantee taking it under covenants of title imposing such burden should not be heard to assert the superiority of his title over it.

2. The next question which we will consider is to what extent appellants are concluded by the judgment of foreclosure rendered in favor of appellee. As has been stated, the Southern Pine Lumber Company was plaintiff in that suit. The defendants were the Jefferson Lumber Company, debtor, Klidare Lumber Company, W. B. Ward, Atlanta Bank, T. J. Rogers, as assignee of the Citizens' National Bank, and W. R. Camp, and it was alleged that they claimed some

interest in the property. The National Bank of Jefferson and the Bank of Commerce of Kansas City were neither of them parties to that suit. Ward is the only one of the appellants who was made a party to that suit. His interest in the property, as considered in reference to the interest of his co-defendants, is $11\frac{1}{2}$ per cent. Of course, the interest of the two appellants who were not made parties are not concluded by the judgment. The question is whether Ward's claim of title is concluded by the judgment. As indicated by the statement previously made, the suit was to foreclose the deed of trust executed by the Jefferson Lumber Company for benefit of certain of its creditors in favor of the Southern Pine Lumber Company, who was a preferred creditor therein. The suit was filed August 10, 1895, and Ward and the other defendants were soon after served with citation, and judgment by default went against them, and a decree of foreclosure was entered June 12, 1896. Ward and the others had purchased the property at the receiver's sale in the state court in the suit of the Galveston National Bank against the Jefferson Lumber Company, and the purchase was confirmed June 30, 1892. On July 13, 1892, the purchasers organized the Kildare Lumber Company, and the Kildare Lumber Company, in July, 1892, executed the trust deed to L. S. Schluter to secure W. B. Ward in some \$5,000, and to secure the National Bank of Commerce for some \$30,000. On August 28, 1893, the National Bank of Commerce filed suit in the United States district court for the Eastern district of Texas, at Jefferson, to foreclose the Schluter trust deed on the property, and W. B. Ward, who was also secured in the Schluter trust deed, was made a defendant in that suit, and the Citizens' Bank, which was secured in the Camp trust deed made by the Jefferson Lumber Company, July 7, 1891, was also made a defendant, and T. J. Rogers, as assignee of the Citizens' Bank, filed a cross bill, and asked a foreclosure of the Camp trust deed to secure the amount due the Citizens' Bank. On October 3, 1894, there was a decree in the federal court in favor of Rogers, assignee of the Citizens' Bank, to foreclose the Camp trust deed, and in favor of the National Bank of Commerce for \$33,267, in favor of W. B. Ward on his cross bill for \$5,099, and a foreclosure of the Schluter trust deed,—this being the amount due on the Schluter trust deed,—and the decree gave Rogers a preference. The property was sold under this decree on September 3, 1895, to W. B. Ward and S. J. Fitzhugh, for \$45,000. They paid off the judgment in favor of Rogers, assignee of the Citizens' Bank, for \$13,000, and about \$2,000 costs, and credited the remainder of the \$45,000 on their debts. So at the time Ward was sued by the Southern Pine Lumber Company he had no title to the property, but had a debt of \$5,099, secured by the Schluter trust deed, which had been regularly foreclosed in the federal court, and the sale under that fore-

closure had not been made. The sale was made on the 3d of September, after the suit was filed, and the sale was confirmed in January, 1896. At the time the judgment was rendered, on June 12, 1896, Ward had a title to $11\frac{1}{2}$ per cent. of the property. The court held that all the title Ward had on June 12, 1896, the date of the judgment, was barred by that judgment. It is held that a plaintiff cannot recover on an after-acquired title unless it be specially pleaded. *Ballard v. Carmichael*, 83 Tex. 365, 18 S. W. 734. Our courts have further held that a title acquired by plaintiff during the pendency of his suit, and not pleaded by him, is not concluded by the judgment, and he may bring a new suit on this title. *Connolly v. Hammond*, 58 Tex. 21; *Freem. Judgm. § 249*. In section 329, *Freem. Judgm.*, the author discusses the question here under consideration as follows: "The question has not yet been sufficiently discussed to enable one to foresee upon which side the weight of authorities will be finally ranged as to whether a title may be regarded as an after-acquired one when its acquisition, though after the commencement of the action, was prior to the rendition of the judgment therein. It is well settled that the issues in a case ordinarily refer to the beginning of the suit, and that matters occurring during its pendency are not in issue, and cannot be received in evidence, unless under some supplemental pleading filed by permission of the court. So far as the plaintiff is concerned, no doubt he is not estopped from asserting any title acquired after the commencement of the action, because he must generally recover upon the cause of action held by him at that time, and cannot be aided by rights of action arising afterwards. A defendant will, however, ordinarily be permitted by the court to plead that he has acquired a defense, or that plaintiff's cause of action has terminated pendente lite; and, acting upon the rule that whatever may be presented as a defense to an action must be so presented, some of the courts have held that a title acquired by a defendant after the commencement of an action must be asserted by supplemental pleading therein, and, not being so asserted, is forever lost to him. But, in our judgment, the defendant is under no obligation to enlarge the issues presented by the plaintiff's complaint,—or, in other words, to tender an issue respecting a matter which he claims to have occurred pendente lite,—and, if he does not plead title acquired after the commencement of the action, is not estopped from asserting it in any subsequent controversy, though it is with the party who prevailed in the former action." The case of *Reed v. Douglas*, 74 Iowa, 244, 37 N. W. 181, holds contrary to the view taken by Mr. Freeman, and is the case alluded to in the above quotation. This case is reported in 7 Am. St. R. 476, and is there criticised by Mr. Freeman as not well considered, and contrary to the weight of authority and sound principle. In harmony with Mr. Freeman are *McLane v.*

Bovee, 35 Wis. 35; *Bank v. Hodgdon*, 64 Cal. 95, 27 Pac. 938. We are of the opinion that the view of the question taken by Mr. Freeman is sound, and should be held to be the law in this state. It is contended by appellee that, while this may be the correct rule when applied to a title acquired by defendant after answer has been filed, and prior to judgment, it should not be held to apply to a case where no answer at all is filed, and judgment is permitted to go by default against him. The cases above referred to do not discuss this distinction, and cannot be relied upon as deciding this particular contention. Mr. Freeman, in criticising the Iowa case, says, "The utmost that a judgment can be properly regarded as determining is that the facts alleged in the complaint were true when it was filed." We see no good reason for exempting defendant from setting up a title acquired after answer filed and before judgment, while holding that a title acquired after citation and before judgment is concluded by a default judgment. There is no well-defined principle upon which such a distinction may be safely based. This leads to the conclusion that Ward's claim to the property arising under the foreclosure sale of the federal court was not *res adjudicata*.

3. Appellants attack the Camp deed of trust as illegal and void, because made by an insolvent corporation, unable to continue longer its business, and the trust deed preferred some creditors over others. In *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 86 Tex. 189, 24 S. W. 16, it is held that when a corporation becomes insolvent, and ceases to be a going concern, its assets become a trust fund in the hands of the directors for the benefit of creditors, and the corporation cannot prefer certain creditors over others by conveying such assets to a trustee for the benefit of the preferred creditors. In the later case of *Fowler v. Bell* (Tex. Sup.) 37 S. W. 1058, the doctrine is reannounced, and such a conveyance is held to be void. Appellee contends that such issue can only be raised by a creditor of the corporation, and that appellants do not occupy such position in this suit. Appellants were in possession of the property under claim of ownership, when it was taken from their possession and placed in the hands of a receiver at the instance of appellee. Appellee has no right to take the property from them, and have it sold under foreclosure of a mortgage lien, unless it be upon a valid and subsisting mortgage. If it be void, then appellants have such interest in the property as would authorize them to resist the foreclosure sale upon that ground. Whatever defects there may be in their claim of title, their possession under claim of ownership should be held sufficient to justify their resistance to any illegal claim asserted against the property. In the case of *Fowler v. Bell*, above referred to, it was held that such a mortgagee could not foreclose against one who had purchased the property from one who was a creditor, and who at-

tached for his debt, and bought in the property at the attachment foreclosure sale. In that case Mr. Justice Brown says: "The only question we find it necessary to consider is, was the mortgage given by the McLeod Artesian Well Company in favor of Mrs. Bell valid? If it was not, she cannot maintain this suit to foreclose it, whether the defendant acquired title or not under the judgment foreclosing the attachment lien." The effect of the decision is that such a mortgage is not merely invalid as to creditors, but it is void as to all other persons against whom it is sought to be enforced.

Again, it is urged by appellee that, should appellants prevent it from realizing its debt out of this property, all the creditors of the insolvent corporation will be cut out, and the property appropriated by others not entitled to it. This contention is not true in fact. The claim of title asserted by appellants ultimately runs back to and through proceedings had to enforce the claims of creditors of the insolvent corporation. Were it otherwise, however, the appellants being in lawful possession of the property under claim of ownership, they would have the right to enjoin its seizure and sale under a decree foreclosing a void mortgage, by which they were not bound as parties. In the *Bell Case*, above cited, the court says: "The fact that the plaintiff in the attachment suit proceeded contrary to law, and appropriated to his exclusive use a part of the trust fund, will not justify the court in taking from the purchaser that which was lawfully appropriated, with no greater legal right than that of turning the property over to the defendants in error, to be by them applied to their exclusive benefit."

The points already discussed were the controlling issues with the trial court, and we do not feel called upon to discuss the other contentions upon which the court did not act. We think it necessary to pass upon the question whether there was error in the appointment of a receiver, and the refusal to discharge him on motion made for that purpose. The receiver was appointed upon the answer and cross bill filed by appellee in this suit, presented *ex parte* to the judge in chambers. It was made apparent by the pleadings then filed, the character of the mortgage, which had been foreclosed, and under which the property was levied upon and advertised for sale at the instance of appellee. Under our view of the case, the mortgage being void, and the appellants having the right to resist its enforcement against the property held by them, the receiver should not have been appointed. Even aside from this proposition, we think the record shows that the appointment of a receiver was wholly unnecessary. The debt of appellee was about \$6,000. The property is shown to have been worth double that sum. Appellee was not entitled to receive any revenue from it, and its alienation or other disposition could have been effectually prevented, if feared, by a restraining order of the

court. As stated, the appointment was made upon ex parte hearing, and the facts were not fully presented to the court. This is too often the case on such hearings, and this extraordinary power ought not to be exercised upon ex parte hearings except in cases of great emergency. Smith, Rec. § 374; Beach, Rec. § 134. The appointment was made February 9, 1898, and on the 7th of March following the court heard a motion to discharge the receiver, and denied the motion. Again, on June 28, 1898, motion to discharge was heard and denied. On these hearings the case was more fully developed, and showed a state of facts which should have secured an order discharging the receiver.

As heretofore stated, the debt of appellee was \$6,000, and the value of the property \$12,000. It did not appear that there was any revenue being derived therefrom which it was necessary to protect, and, so far as the matter of disposing of the property be concerned, a restraining order would have served the purpose. Jones v. Smith, 40 Fed. 314. In Beach, Rec. § 520, it is stated: "As has already been said, the principal ground for the appointment of a receiver is the inadequacy of the security. This inadequacy must be either (1) the insufficiency of the mortgaged premises as a security for the mortgage debt, or (2) the irresponsibility or inability of the mortgagor to pay any deficiency." "Proof must also be given of the insufficiency of the security, and this insufficiency must relate to the value of the property as compared with the principal debt on which the application is made, without reference to subsequent mortgages." And in Beach, Rec. § 529, it is stated: "To entitle him to this species of ejectment, it must be shown that the mortgaged premises are inadequate security for the debt, and that the mortgagor or other person liable for the mortgage debts is insolvent." In the case of Whitehead v. Wooten, 43 Miss. 523, the court refused to appoint a receiver upon the ground that, unless the mortgagee has contracted that the plaintiffs shall have the rents and income after default made, he is not entitled to them, or to a receiver to get them in, except in case of the insufficiency of the property to meet the debt. In Beach, Rec. § 510, it is stated: "That the principal duty of a receiver of real property is to look after the rents of the estate. He is virtually made landlord, and has the rights of a landlord as against the tenants." See Id. §§ 72-74. In this state a mortgagee is not entitled to possession, nor to rents of the property. Rev. St. art. 4882. The judgment of the court will be reversed, and cause remanded for another trial. The order appointing a receiver is hereby vacated, the receiver discharged, and the property ordered to be restored to the proper custody. The court below will make all necessary orders closing up the administration and adjudging the costs incurred therein. Judgment reversed, cause remanded, and receiver discharged.

51 S.W.—3

BUCHANAN v. EDWARDS et al.¹

(Court of Civil Appeals of Texas. March 4, 1899.)

PARTNERSHIP — PLEADING — EVIDENCE — CONDITIONAL SALE.

1. Failure to deny under oath, as required by Sayles' Civ. St. art. 1265, a partnership, alleged by one party to exist between the other party and a third person, is an admission thereof.

2. A. was to buy cattle, and ship to B., who was to pay for the feed and fatten them, and on sale B. was to receive his expenditures and interest, and then A. his, and the profits or losses were to be shared equally. *Held*, that they were partners as to the sellers of the cattle, so as to charge B. with notice of the terms of sale.

3. The cattle being bought on credit with title reserved to the sellers, who did not know of B.'s contract with A., and who were not required by law to record their contracts, and who, without objection of B., resumed possession, and sold the cattle at a loss, B. could not recover of them the advancements made by him for feed.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by R. G. Buchanan against J. L. Edwards and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Ashby S. James, H. G. Robertson, and Dudley & Robertson, for appellant. Watts, Aldridge & Eckford, Carrigan & Montgomery, and William H. Atwell, for appellees.

BOOKHOUT, J. The following statement is taken from appellant's brief:

"This suit was brought by appellant, R. G. Buchanan, and wife, Sallie Buchanan, of Tennessee, on January 29, 1894, against appellees, J. L. Edwards, W. L. Donnell, Thomas Powers, E. P. Davis, B. Gatewood, D. H. & J. W. Snyder, S. D. Davis, J. J. Daws, and R. A. Ferris, of Texas. Plaintiffs amended petition dismissed as to Powers, deceased, and alleged that in the latter part of September, 1891, the petitioner, R. G. Buchanan, entered into agreement with B. Gatewood and J. L. Edwards, acting together as the firm of Gatewood & Edwards, with the view to feeding and fattening beef cattle for the market, the purport of which was that Gatewood & Edwards should buy 1,000 head of cattle in Texas at the most advantageous price attainable, and place them on the cars in Texas, and ship them to the feeding points at Memphis, Tenn., where they were to be taken in charge by R. G. Buchanan, the freight to Memphis and the feeding expenses to be paid by Buchanan, and that, when the cattle were sold, Buchanan should be first repaid his said expenses, with 10 per cent. interest on the same; that Gatewood & Edwards were to be repaid the cost of the cattle, with 10 per cent. interest, and that the remainder of the proceeds should go one-half to Buchanan and one-half to Gatewood & Edwards, and, in the event of a loss, Buchanan was to bear one-

¹ Writ of error denied by supreme court.

half and Gatewood & Edwards the other half; that subsequently the number of cattle to which this agreement should apply was increased to 1,500 head, and later 2,170 head, all of which were placed in the Union Stock Yards, and later 1,209 were added, these being placed in the North Memphis Yard. Plaintiff further alleges that he was using his wife's means, name, and credit, and was thereby able to perform all of his agreements; that he believed Gatewood & Edwards were men of large means, and that it was understood that said cattle were to be free from incumbrance, and that under the contract Buchanan had the first lien for what he had expended, but that, after Buchanan had expended about \$24,000 in preparing the cattle for market, it developed that the cattle had been bought on credit, and the title retained to secure the purchase money, by secret agreements with the sellers to defraud the plaintiffs, who were feeding and attending to said cattle at great expense; and that petitioner was in position to carry out his contract when he discovered the liens, if the sellers would ratify the same, and recognize his superior interest in the cattle or their proceeds, on account of his expenditures, but that, instead of doing so, said parties, acting together (those who were not present knowing of the condition of matters, and ratifying the same), held a secret meeting, without plaintiffs' consent, acting under their secret agreements with Gatewood & Edwards, about January 30, 1892, and took possession of said cattle, and deprived the petitioner of the control and possession thereof, and refused to allow him any voice in their management; that at the time of such seizure Buchanan had fully carried out his agreement with Gatewood & Edwards in feeding and caring for said cattle, and so improved their condition that they had increased in value about \$10 per head above their cost and purchase price and cost of fattening, so that there was a profit in 3,199 cattle of \$31,990, and that Buchanan had at that time spent on them \$24,000; that plaintiff does not know how the proceeds of said cattle were distributed among defendants, but is advised that it was a common agreement among them that they would ignore plaintiff's rights in said cattle, and deprive him of possession thereof, and that they conspired together for that purpose, and that the sellers were to receive, when the cattle were sold, each his share of the proceeds as shown by their contracts of sale. Petitioners further charged by way of second count that plaintiffs were entitled to larger damages than the sum above named, for the reason that it was contemplated in their agreement with Gatewood & Edwards that the cattle should be held until about April 1, 1892, but that, after the sellers took possession of the same, the sellers misfed them, and in consequence 65 head died, and the others lost flesh, and decreased in value, so that, when they were sold, they had sustained an average loss from the value they

would have reached, if properly fed, of \$25 per head. That the defendants sold said cattle for about \$100,000, and plaintiffs got no part thereof, and that the same was converted by said sellers to their own use. Plaintiffs charged that the property and money used in the feeding of the said cattle were the separate property of Mrs. Sallie Buchanan. This is not important, however, as this suit was subsequently discontinued as to Mrs. Sallie Buchanan. Plaintiffs claimed damages for the above matters in the sum of \$75,000, and ended with a prayer for general relief.

"The defendants E. P. Davis, S. D. Davis, W. L. Donnell, and J. J. Daws jointly answered, and pleaded as follows: (1) To the jurisdiction of the court. (2) Exceptions to plaintiffs' petitions. (3) General denial. (4) Statute of two years' limitation. (5) They answered that they sold some of the cattle described in the petition to J. L. Edwards, and reserved the title to said cattle so sold until payment should be made, of which plaintiffs had notice; that all plaintiffs had done was done in Tennessee, subsequent to the execution of said sales, and subsequent to the arrival of the cattle in Tennessee; that under the laws of Tennessee such sales were not required to be recorded, and were valid as to all parties; that E. P. Davis sold J. L. Edwards 847 head November 7, 1891, and 323 head November 23, 1891, and that the sales were executed in Tennessee; that they had no contract of any sort with plaintiffs, and had no notice of the execution of any contract between Gatewood & Edwards and Buchanan prior to the making of the sales; that W. L. Donnell registered his sales in Shelby county, Tennessee; that there was a partnership between Gatewood & Edwards and Buchanan, the object of which was the buying, feeding, fattening, shipping, and selling cattle; that under this contract Edwards made the above contracts, and that large sums of money are still due them under their contracts with Edwards. The defendants D. H. and J. W. Snyder, pleaded misjoinder of parties defendant, general demurrer, general denial, and specially as follows, in addition to the special answer of Davis, above: That the sale contemplated execution in Tennessee, where sales with title reserved did not require registration; that the freight was never paid, and that Buchanan could not obtain feed; that all their acts were done with Buchanan's consent, and that they acted solely with reference to their 1,000 head of cattle. The defendants Gatewood & Edwards and Ferris pleaded, in effect, the same as Davis, above. Under the directions of the court there was a verdict for all of the defendants and against R. G. Buchanan. The plaintiff R. G. Buchanan then perfected appeal to this honorable court."

This case has been before this court on a former appeal by the defendants in the suit. The report of the case can be found in 36 S. W. 1022.

Conclusions of Fact.

(1) On September 29, 1891, the appellant, R. G. Buchanan, and Gatewood & Edwards entered into a contract by the terms of which Gatewood & Edwards were to furnish 1,000 head of feeding steers, the best that could be bought in Texas for the money, to be selected with great care, and make the best trade possible, and load them on the cars and start them to the feeding pens in Memphis, Tenn., or Huntsville, Ala. R. G. Buchanan was to pay the freight bills from the place of shipment in Texas to the feeding pens, and to furnish the money to pay the feed bills until the cattle were fat. The cattle were to be sold when fat, either at the feeding pens or as the judgment of the parties might determine, and the proceeds were to go—First, to pay the expenses of feeding and all yard rents, and the freight money advanced by Buchanan; second, to pay Gatewood & Edwards the cost of the cattle and 10 per cent. per annum interest on all moneys paid out by them; and, third, whatever moneys were made as profit were to be divided equally in two parts, one part to go to Buchanan and one part to Gatewood & Edwards. In the event of loss, then Buchanan was to bear one-half the loss and Gatewood & Edwards one-half. This agreement was subsequently extended as to the number of cattle, and the number increased to 3,223 head.

(2) In pursuance of, and under the terms of, this agreement, J. L. Edwards, in October, 1891, purchased 847 head of cattle from E. P. Davis, at Seymour, in Texas, which cattle were there loaded upon the cars, and then shipped to Memphis, Tenn., consigned to J. L. Edwards, arriving in Memphis on November 8, and on the same day were delivered to Buchanan for feeding. Afterwards, in November, Gatewood & Edwards purchased from E. P. Davis, 323 head of cattle at Seymour, Tex., and they were loaded on the cars, and consigned to J. L. Edwards, at Memphis, Tenn., where they arrived on November 23d, and on the same day were delivered to Buchanan for feeding. Davis and Edwards both went with the cattle to Memphis, and they there entered into written contracts of sale, by the terms of which Davis reserved the title to said cattle until the purchase price was paid, which amounted to \$21,286.86. Said contracts further provided that said cattle should not be sold without the written consent of said Davis; and, when sold, the proceeds were to go first to the payment of the purchase price and interest at the rate of 10 per cent. per annum. Said contracts further provided that said Davis had the right to appoint an agent or agents to look after said cattle, and, in the event he should conclude that said cattle were not being properly cared for and fed, then said Davis had the right to take possession of the same, and feed and market them as his own, without the process of law. No part of the pur-

chase price of either shipment of cattle was paid Davis in cash. The contracts were not recorded.

(3) On December 1, 1891, J. L. Edwards purchased from D. H. & J. W. Snyder, at Amarillo, Texas, 1,000 head of cattle, and they were loaded on the cars, consigned to J. L. Edwards, Memphis, Tenn., where they arrived on December 5th, and on the same day were delivered to Buchanan for feeding. There was a written contract of sale between the Snyders and Edwards executed in Texas, the terms of which were in all respects similar to the terms of the contracts between Davis and Edwards. This contract was recorded in Shelby county, Tenn., on January 8, 1892. The consideration of this sale was \$21,500, no part of which was paid. The above three shipments of cattle, amounting to 2,170 head, were taken to the feeding pens at the Union Stock Yards in Memphis, Tenn., where they were fed, the De Soto Oil Company furnishing the feed.

(4) W. L. Donnell sold J. L. Edwards 165 head on December 22, 1891, and 186 head on January 6, 1892, by written contracts of said respective dates, executed at Eastland, Tex., where said cattle were. The purchase price was \$6,457, no cash being paid. These contracts were similar to the Davis contracts, and were recorded in Shelby county, Tenn., January 11, 1892. Under similar contracts, J. L. Edwards purchased on December 22, 1891, from Thomas Powers 186 head, from J. J. Daws 122 head, and from S. D. Davis 45 head. These contracts were executed in Texas, and were not recorded.

(5) On December 26, 1891, Ferris & Price sold to J. L. Edwards 343 head of cattle, the cattle at the time being in Mitchell county, Tex. No part of the consideration was paid, but Ferris & Price reserved the title to the cattle until the purchase price was paid. The contract of sale contained the same conditions and reservations set forth in the Davis contracts. It was recorded in Shelby county, Tenn., December 31, 1891. The last seven shipments, amounting to 1,053 head of cattle, were taken to the feeding pens in the North Memphis Yards, and the feed was furnished by the Gayoso Oil Mills.

(6) The several contracts of sale do not recognize Buchanan as a party thereto, and the several vendors did not know, at the time of the making of the respective contracts, of the contract between R. G. Buchanan and Gatewood & Edwards. The cattle could be identified by their brands. Under the terms of the several contracts the freight was to be paid by J. L. Edwards. Buchanan had no actual notice of the reservations of the title in the several contracts, but did know that many of the cattle were bought on credit. He was told by Edwards, when the first shipment reached Memphis, in November, that he bought the cattle on credit. Buchanan fed and cared for the cattle until the middle of January, 1892, when the mills

furnishing the feed refused to furnish it any longer unless they were paid cash for the feed, or given a first lien upon the cattle. Buchanan was unable to pay cash for the feed. Buchanan wired Edwards at Ennis, Tex., to come to Memphis, on January 12, 1892. He immediately went to Memphis. Buchanan wanted a first lien given upon the cattle to secure the oil mills. This Edwards objected to, because the owners of the cattle held a first lien on them. Further negotiation resulted in their requesting the several owners of the cattle, by wire, to come to Memphis. The owners of the cattle went to Memphis, and, after being advised of the situation, each acting under his contract, and each acting separately for himself, resumed the possession of his cattle sold by each respectively, and arranged for their feed and care, and left them in the charge of J. L. Edwards. The cattle were finally sold at a loss to the owners. In the arrangement between Buchanan and Gatewood & Edwards the freight on the cattle from Texas to Memphis was to be paid by Buchanan. This he did not do, and when the owners took possession of their cattle the following parties paid the freight on their respective cattle: Ferris & Price, E. P. Davis, and Donnell. The freight on the cattle of the Snyders, S. D. Davis, and Daws was not paid until they sold, when the freight was paid out of the money received on such sales. Buchanan was present, and made no objection to the respective appellees resuming possession of their cattle. Buchanan was not reimbursed for his expenditures upon the cattle, which amount to a large sum. We further find that under the laws of Tennessee a contract of sale reserving title in the vendor until the payment of the purchase money is not required to be recorded, but may be recorded. Memphis, Tenn., is in Shelby county.

Conclusions of Law.

1. Each of the defendants except B. Gatewood and J. L. Edwards having in their several answers alleged and charged that there was a partnership between the appellant, R. G. Buchanan, and Gatewood & Edwards for the purchase and feeding of cattle, and that the cattle were purchased under said contract of partnership, and the plaintiff having failed to deny the existence of such a partnership by a proper pleading under oath, the appellant must be held to have admitted such partnership. Sayles' Civ. St. arts. 1192, 1265; Reed v. Brewer (Tex. Sup.) 37 S. W. 418; Gill v. Bank (Tex. Civ. App.) 47 S. W. 751.

2. The facts proven show a partnership between R. G. Buchanan and Gatewood & Edwards. For a discussion of the evidence upon this conclusion we refer to the opinion delivered by Mr. Justice Finley upon the former appeal of this case. 36 S. W. 1022.

3. The court did not err in instructing a verdict for defendants.

4. There is no reversible error pointed out in appellant's several assignments of error discussed in his brief, and the same are overruled. Finding no error in the record, the judgment is affirmed. Affirmed.

Additional Conclusions.

(April 1, 1899.)

The terms of the sale of the cattle purchased from E. P. Edwards were agreed upon between J. L. Edwards and E. P. Davis at Seymour, in Texas, and were reduced to writing at Memphis, Tenn., and the contract there signed and delivered.

HALL v. MILLER.

(Court of Civil Appeals of Texas. May 17, 1899.)

EXEMPTIONS—SELECTION OF PROPERTY—WHEN MADE—HORSES FOR FAMILY—ATTACHMENT—REPLEVY BOND—DISCHARGE—JUSTICE COURTS—STIPULATIONS—VALIDITY ON APPEAL.

1. Where an officer levying an attachment on property a portion of which may be exempt does not request defendant to select his exemptions, defendant may make the selection at the trial, under Rev. St. art. 2427, authorizing it to be made within a reasonable time after request so to do by the officer making the levy.

2. Two colts, which have never been used as a team for the family, and only one of which has been broken to use, the other being too young, may be claimed as exempt, under Rev. St. 1895, art. 2395, exempting two head of horses to each family.

3. A replevy bond in attachment proceedings is discharged by a decree adjudging the property exempt.

4. A remittitur of part of the amount sued for in justice's court, filed therein after judgment, is not binding on plaintiff in the county court, on appeal from the justice, whose judgment was annulled by the appeal.

Appeal from Falls county court; B. H. Rice, Judge.

Action by E. Hall against Ernest Miller. From a judgment for plaintiff for less than demanded, and adjudging certain property to be exempt, plaintiff appeals. Reversed.

E. Hall and Z. I. Harlan, for appellant.

KEY, J. Appellant sued appellee in the justice's court for \$134, due upon an open account, and sued out an attachment, which was levied upon certain personal property, including two colts, one about 18 and the other about 10 months old. Appellee replevied the colts by executing a bond in conformity with the statute. The case was appealed to the county court, where a verdict and judgment were rendered for the plaintiff for \$84; but the court declined to foreclose the attachment lien upon the two colts, holding the same to be exempt property. The plaintiff has brought the case to this court, and presents the following questions for decision:

1. The defendant owned two mares and two colts, and in this suit he claimed the colts as exempt property under the statute exempt-

ing two head of horses to the head of each family. The two mares were mortgaged, and the trial court instructed the jury that that fact would entitle the defendant to hold the colts as exempt property; and this ruling is assigned as error. The attachment was levied on all four of the horses, and the officer levying it did not request the defendant to select his exemptions, and point out the animals to be levied upon, as provided by article 2427 of the Revised Statutes. In view of these facts, we are of the opinion that the defendant had the right, at the time of the trial of this case, to make the election contemplated by the statute, and, having done so, and claimed the colts as exempt property, they were not subject to forced sale for the payment of the plaintiff's debt, and the levy of the attachment upon them created no lien, and the court might properly have so instructed the jury. Hence we hold that the instruction referred to does not constitute reversible error.

2. It is also contended that the colts referred to could not be held as exempt property, because they were not used as a team for the benefit of the defendant's family. The testimony does show that one of them had been worked in harness, while the younger one had never been worked or ridden. However, they were both horses, within the meaning of the statute, and the only one that was old enough for service had been broken to use. The other was too young to be used, and there is nothing in the record to show that when it reached the proper age it could not or would not be used for the benefit of the family. There is no merit in this point.

3. The replevy bond, following the terms of the statute, is conditioned that, "should the defendant be condemned in the action, he shall satisfy the judgment which may be rendered therein, or shall pay the estimated value of the property, with lawful interest thereon from the date of the bond." The two colts were estimated by the officer taking the bond to be of the value of \$35, and it is urged on behalf of the plaintiff that, as he recovered judgment against the defendant for his debt, he was entitled to a judgment against the sureties on the bond for \$35, the estimated value of the two colts, notwithstanding the fact that they were shown to be exempt property. There may be authorities in other jurisdictions that support the contention that such bonds are absolute obligations on the part of the sureties thereon to discharge in whole or in part such judgment as the plaintiff may recover against the defendant, but such has not been the ruling of the supreme court of this state, and it has been held that, if the writ of attachment or sequestration be quashed, the sureties upon the replevy bond are released. *Lumber Co. v. Bank*, 91 Tex. 95, 41 S. W. 68; *Mitchell v. Blum*, 91 Tex. 634, 45 S. W. 553. Upon the same principle, and for a like reason, it seems to us that the execution of a replevy bond does not cut off the right of the defendant and the sureties upon the bond to

show that the property seized is not subject to seizure and sale for the payment of the plaintiff's demand.

4. The plaintiff recovered a judgment in the justice's court, and thereafter filed a remittitur of \$50 thereof, thereby reducing the amount of the judgment to \$84. Upon trial in the county court, the defendant, according to the statement of facts, admitted that he owed the plaintiff the debt sued for,—the sum of \$134. The judge, however, instructed the jury that, as the plaintiff had filed a remittitur for \$50, he was only suing for, and could only recover, \$84, with interest thereon; and this ruling is assigned as error. Appealing the case to the county court resulted in annulling the judgment in the justice's court, and the case stood for trial in the former court as though it had never been tried before. Such being the case, we think the court was in error in holding that the remittitur was binding upon the plaintiff in the county court, and operated as an abandonment of \$50 of his claim. We therefore reverse the judgment of the county court, and here render judgment for the plaintiff for \$134, with 6 per cent. interest thereon from January 1, 1898. Reversed and rendered.

SMITH et al. v. OJERHOLM et al.

(Court of Civil Appeals of Texas. May 17, 1899.)

VENDOR'S LIEN—DISCHARGE.

The execution by a vendor of a deed, for the purpose of correcting the description in a previously executed deed, which recited that "it is agreed and understood that this deed does not affect or in any wise release the vendor's lien in the above-mentioned deed," does not operate to discharge the land from the lien reserved in the first deed.

Appeal from district court, Coleman county; J. O. Woodward, Judge.

Action by Francis Smith & Co. against J. M. Ojerholm and others. From a judgment in favor of one of the defendants, plaintiffs appealed. Affirmed.

R. W. Brown and H. C. Randolph, for appellants. J. P. Ledbetter, for appellees.

FISHER, C. J. This case was previously before this court, and will be found reported in 44 S. W. 41. The action is one by the appellants against Ojerholm as the maker, and Coleman as the indorser, of a certain note payable to J. B. Coleman and J. D. Davidson, which, in due course of trade, was transferred and indorsed by them to appellants, the consideration of which was part of the purchase price of 320 acres of land, situated in Fisher county, sold by Coleman and Davidson to Ojerholm, and for the foreclosure of the vendor's lien on the land described in the note. Appellee Coleman, for answer, alleged that he was not liable as indorser, because the note was not protested, nor was suit brought thereon at the next term of court after maturity or the succeeding term there-

after. The case was tried before the court without a jury, and judgment was rendered in favor of the plaintiffs against Ojerholm for the amount sued for, and for a foreclosure of the vendor's lien, and in favor of the appellee Coleman, to the effect that the plaintiffs take nothing as against him.

The only question that arises in the case is whether the judgment is correct in releasing Coleman from liability. This suit was filed on the 8th day of April, 1896, upon three notes, described in the plaintiffs' petition, due, respectively, December 31, 1893, 1894, and 1895, each being for the sum of \$60.95. These notes were executed by Ojerholm to Coleman and Davidson as part payment for 320 acres of land, which was conveyed by them to Ojerholm by deed dated December 31, 1888. Afterwards another deed was executed by appellees Coleman and Davidson to Ojerholm, correcting the field notes in the first deed, and in that deed it is stipulated that "It is agreed and understood that this deed does not affect or in any wise release the vendor's lien in the above-mentioned deed." There is evidence in the record which shows that the land in question in 1894, and during that year, was worth two dollars an acre,—much more than the amount of the note sued upon by the appellants. Therefore we find, as a fact, that Ojerholm, as to the debt of the plaintiffs in question, was not, during the year 1894, insolvent. There is also evidence in the record which authorizes a finding to the effect that the whereabouts of Ojerholm could have been discovered and ascertained during that year, and before the suit was instituted. We held in the first appeal of this case that the maturity of the note due in 1893 would authorize the institution of suit on all three of the notes, and judgment could be rendered thereon, with an abatement of interest that might accrue on the notes not due. Under this ruling, the appellants could have instituted their suit on all of the notes during the year 1894, at which time the defendant Ojerholm was solvent as to the debt in question. Therefore this ruling, together with the fact that his whereabouts could have been ascertained during that year, leads to the conclusion that the plaintiffs were not excused from instituting suit against him, in order to fix the liability of the indorser, Coleman. Consequently there was no error in the judgment of the court in releasing him from liability.

It is also contended by the appellants that the appellee Coleman is liable for the 57 acres released by him and Davidson from the operation of the first deed, under which the vendor's lien notes were executed. We do not so understand that the deed, in correcting the field notes, did release any part of the 320 acres that had been conveyed to Ojerholm from the operation of the vendor's lien. The appellants foreclosed their lien on all of the land described in the deed that secured their vendor's lien notes; that is, 320 acres. Such being the case, they have no grounds to com-

plain of the deed executed by Coleman and Davidson, by which they undertook to correct the field notes of the first deed executed to Ojerholm. The second deed executed by them did not affect the rights of the appellants as holders of the vendor's lien notes, and such was evidently the view of this question taken by the trial court, because it foreclosed the appellants' lien on the full 320 acres of land covered by the first deed from Coleman and Davidson to Ojerholm. These are all the questions that we care to discuss; therefore the judgment is affirmed. Affirmed.

BRANHAM v. SCOTT et al.

(Court of Civil Appeals of Texas. April 27, 1899.)

MARRIAGE SETTLEMENT—PAROL GIFT OF LANDS—EVIDENCE—SUFFICIENCY.

The proof that a husband had orally given his wife a house and lot in consideration of their marriage was not very clear, and the husband denied it. The wife had taken no separate possession of the lot, but had moved on it with her husband, and made repairs thereon quite insignificant as compared with the value of the use of the premises. Held to warrant a finding that the husband had not given the house and lot to the wife.

Appeal from district court, Harris county; John G. Tod, Judge.

Action by Martha Ann Scott and others against Betsy Ann Branham and another. From a decree for plaintiffs, defendant Betsy Ann Branham appeals. Affirmed.

Fisher, Sears & Sherwood, for appellant. Ashe & Spotts, for appellees.

GARRETT, C. J. This action was brought May 26, 1897, in the district court of Harris county, by the appellees, Martha Ann Scott and Mary Norris, joined by their husbands, against James A. Branham and his wife. Betsy Ann Branham, for the partition of lot 3, in block 4, Senechal addition to the city of Houston. The lot had been conveyed to John Branham by C. Ennis, and was subject to partition between the plaintiffs and their brother, James Branham, in the proportion alleged in the petition. The defendant James Branham answered, admitting the allegations of the petition, and joined in the prayer for partition. His wife, Betsy Ann Branham, filed an answer, in which she alleged separation from her husband, his abandonment of her, and refusal to join in her defense to the action. After a general demurrer and general denial and plea of title by limitation, she pleaded that the defendant James A. Branham, in consideration of marriage, had made her a verbal gift of the lot, and that they had moved upon the same, and she had occupied it for more than 10 years, and made valuable improvements thereon, on faith of such verbal gift. She pleaded these facts in reconvention, and asked for specific performance as to the interest of James A. Branham, and that

in the partition thereof the property be charged with the value of the improvements placed thereon by her. The case was tried by the court without a jury, and judgment was rendered decreeing a partition of the property between the plaintiffs Martha Ann Scott and Mary Norris and the defendant James A. Branham, and appointing commissioners for that purpose. The court also decreed that the defendant Betsy Ann Branham take nothing by her plea in reconvention and for improvements. The only question presented on appeal is the right of appellant to the interest of her husband in the lot sought to be partitioned. The finding of the court below is fully supported by the evidence. There was no clear proof of a verbal gift of the property, and it was denied by the husband. No possession was taken by the appellant on the faith of such gift. She merely moved upon the premises with her husband, and continued to reside there. No improvements were made at all. Only some slight repairs to the property were shown to have been made, quite insignificant in amount as compared with the use and occupation of the premises and the sums received for rent of rooms. The appellant utterly failed to show any cause for relief. The judgment of the court below will be affirmed. Affirmed.

MASTERSON v. BOKEL et al.

(Court of Civil Appeals of Texas. Feb. 23, 1899.)

PLEADING — SUSTAINING EXCEPTION — EFFECT — BOUNDARIES — PAROL AGREEMENT — STATUTE OF FRAUDS.

1. Where a general exception to an amended petition is sustained, and plaintiff declines to amend, the facts set out therein cannot be considered.

2. Dist. Ct. Rule No. 47 (20 S. W. xv.), providing that no agreement between the parties touching any suit pending will be enforced unless in writing, does not apply where parties to a suit to settle a boundary dispute pending the same agree to a survey, and a line is run in accordance with the agreement by the surveyor chosen.

3. A parol agreement between adjoining owners that a survey of the disputed boundary line shall be made, which is done, is not within the statute of frauds.

Appeal from district court, Harris county; William H. Wilson, Judge.

Trespass to try title, by Branch T. Masterson against Fritz Bokel and one Griffin. From a judgment for defendants, plaintiff appeals. Reversed as to defendant Bokel, and affirmed as to defendant Griffin.

Masterson & Masterson and W. S. Hunt, for appellant. Jas. A. Breeding, for appellee Bokel. Cline, Cline & Triplett, for appellee Griffin.

PLEASANTS, J. This suit was instituted by appellant to recover of appellees a portion of the 640 acres of land patented to Charles

Kessler, assignee of H. A. Robinson, and also a portion of the tract of land patented to appellant, assignee of John M. Swisher, the land sued for being, as described in the petition, strips on the western boundaries of said grants. The suit, while in form one of trespass to try title, was in fact, as between the plaintiff and the defendant Bokel, a suit to settle and establish the boundary between the Robinson and the Swisher, on the one side, lands owned by the plaintiff, and the land known as the "R. H. Freeling Survey," the southern half of which was owned by Bokel, and the latter survey bordering on the two tracts owned by the plaintiff, its eastern boundary being their western boundary. Defendants pleaded general denial, plea of not guilty, and in reconvention for certain portions of the land claimed by each. Upon trial of the cause, judgment was rendered that the plaintiff take nothing by his suit, and that the defendant Bokel recover, as against the plaintiff, the land described in his plea of reconvention, together with his costs, but that he recover nothing as to the defendant Griffin; and that the latter recover of the plaintiff and of the defendant Bokel, with his costs, the tract of land described in his plea of reconvention; and from which judgment the plaintiff appealed to this court. The case was tried by the court without a jury, and the judge's conclusions upon the facts were that the Robinson patent was older than the Freeling patent, but the survey of the latter was prior to that of the Robinson, and that the field notes of the Robinson called for the eastern boundary of the Freeling; that there was no conflict between the two surveys, and no part of the land claimed by the defendant Bokel, nor any part of that claimed by the defendant Griffin, was within the boundaries of the plaintiff's lands. Pending the suit, the plaintiff and the defendant Bokel made the following written agreement: "State of Texas, County of Harris. This agreement, made and entered into by and between Frederick Bokel and Erasmus Bokel, of the county of Harris, Texas, parties of the first part, and Branch T. Masterson, of the county of Galveston, Texas, party of the second part, witnesseth: First. It is agreed that the said parties of the first part own in fee simple one-half of the B. H. Freeling 1,476-acre survey in Harris county, Texas; said one-half of said land so owned by the parties of the first part being the southeast 738 acres of said survey. Second. It is admitted by the parties hereto that the party of the second part is the owner of all that certain tract of land adjoining the B. H. Freeling survey, and patented to Charles Kessler, assignee of H. A. Robinson, by patent No. 411, and consisting of 640 acres. It is also admitted that said party of the second part owns 1,109 1/2 acres of land patented to him, as assignee of John Swisher, by patent No. 206, Vol. 8 Third. That the said Henry A. Robinson and

John M. Swisher surveys lie east of and adjoining the said Benton H. Freeling survey, the east line of said Freeling survey being the same as the west boundary line of the said Robinson and Swisher surveys. Fourth. That the true position of the said west line of the said Robinson and Swisher surveys and the east boundary line of the said Freeling survey is now uncertain and unfixed, its true and exact position upon the ground being in dispute between the said parties of the first part and the party of the second part. That the parties hereto desire to have said line definitely established and fixed by a survey upon the ground, so that hereafter there can be no dispute and no uncertainty as to where said line actually lies. Now, therefore, for and in consideration of the premises, and in order that said boundary line may be definitely determined, and the further consideration that the party of the second part shall dismiss, at his own cost, a certain suit now pending in the district court of Harris county, Texas, wherein said boundary line is sought to be determined, so far as the same may affect the parties of the first part, the parties hereto agree as follows: 1st. That W. A. Polk, county surveyor of Harris county, Texas, or any other surveyor to be agreed upon by said parties, shall at as early a date as practicable, run out and establish the lines and corners of said Benton H. Freeling survey by beginning the survey on the corners of either the James Hamilton survey No. 96, the Daniel H. Fitch, the James F. Cruger, or the John Thompson surveys, as staked upon the ground, and running the courses and distances called for in the field notes of said Freeling survey so as to include the 1,476 acres of land in said survey; the said party of the second part hereby guarantying that the southeast one-half of the said Freeling survey shall contain 738 acres of land, and that said survey shall retain as nearly as possible the same general shape as now claimed for it by the said parties of the first part. 2nd. That the expenses for surveying out said land and establishing and fixing the lines and corners of said survey shall be borne by the said party of the second part, with the exception of the corner post, which the said parties of the first part agree to furnish. [Signed] Frederick Bokel, E. Bokel, Parties of the First Part. Branch T. Master-son, Party of the Second Part." In accordance with this agreement, the survey provided for was made, and the boundary established by the county surveyor, W. A. Polk, in the month of May, 1896. After this survey was made, the defendant Bokel not being entirely satisfied with it, it was agreed between the parties that the boundary between the Robinson and the portion of the Freeling owned by the defendant Bokel shall be run by the county surveyor, Polk, and the ex-county surveyor, J. J. Gillespie, and be so run as to give to the defendant Bokel, south of the land owned by McIver in the Freeling sur-

vey, 738 acres of land. This agreement was reduced to writing, but was not signed by the parties; and the surveyors named made the survey and established the boundary in accordance with the agreement, and made report of their work as follows:

"The State of Texas, Harris County. Field notes of a survey of 738 acres made for E. Bokel and B. T. Masterson. Situated in Harris county, on the waters of Brays bayou, a tributary of Buffalo bayou, about six miles south from the county seat of Harris county, and being out of the Benton H. Freeling, beginning at an iron axle in the E. line of the Thompson sur., same being the S. W. cor. of the B. H. Freeling; th. E. 1,780 ft. to a stake; th. N. 5,867½ ft. to a stake of the south line of McIvor land; th. W. along McIvor's S. B. line 7,060 ft. to a stake and mound in the E. B. line of the Hamilton survey; th. south along Hamilton E. B. line 4,112 ft. to an iron rod, being the N. W. cor. of the Fitch sur.; th. east along the north lines of the Fitch, Cruger, and Thompson surveys, 5,280, to the N. E. cor. of the Thompson sur., a stone for corner; th. south 1,755½ ft. to the place of beginning. Bearings marked —. Surveyed March 30th & Apl. 1st, 1898. R. Poole, J. H. McRady, Chain Carriers. Louis Gillespie, Flagman.

"I, W. A. Polk, county surveyor Harris county, and J. J. Gillespie, surveyor, do hereby certify that the foregoing survey was made actually on the ground, according to law, and that the limits, boundaries, and corners, with marks, natural and artificial, are truly described in the foregoing plat and field notes. [Signed] J. J. Gillespie. W. A. Polk, County Surveyor, Harris County.

"I, W. A. Polk, county surveyor Harris county, do hereby certify that I have examined the foregoing field notes, and find them correct, and that they are recorded in my office, in Private Sur. Book No. 4, page 162. [Signed] W. A. Polk, County Surveyor, Harris County."

The defendant refusing to abide by the survey made by the two surveyors, the plaintiff, by amendment to his petition, sought to enforce the agreement, and prayed that the line run by the two surveyors as aforesaid be established by decree of the court as the boundary between plaintiff's lands and the lands of the defendant Bokel. But the court held that the first agreement was superseded and avoided by the second; and the second, not being signed by the parties, could not be enforced, because to enforce it would be in violation of No. 47, of the rules regulating the practice of the district court (20 S. W. xv.); and the court refused to consider the agreement. To this action of the court the plaintiff duly excepted; and here assigns as error the refusal of the court to enforce the agreement; and we are of the opinion that the assignment is well taken, and should be sustained. We think rule No. 47 is not applicable to an agreement such as one for the establishment of a bound-

ary by actual survey upon the ground, and when the survey is made in accordance with the agreement. Furthermore, we think the second agreement, which was not signed, is but ancillary to and in furtherance of the first. The only difference between the two surveys seems to be that the second locates the boundary further to the east than the first, for the purpose of securing to the defendant the number of acres which the first agreement, between him and the plaintiff, guaranteed his portion of the Freeling survey should contain; and the second survey was made, as we understand the evidence, for this purpose, and at the instance of Bokel. The surveys were made in accordance with the agreement, and they were made at the expense of the plaintiff, and not to enforce the agreement when neither mistake, nor fraud, nor any other reasonable objection, can be urged against it would be unjust to the plaintiff. That the boundary, as established by the survey, is not in accordance with the conclusion of the court as to the locus of the boundary between the Robinson and the Freeling, nor the other finding of the court that the land claimed by the defendant Griffin is not within the limits of either the Robinson or the Freeling survey, is not sufficient reason why the agreement should not be enforced. The plaintiff did not undertake that Bokel should recover the land he was claiming of Griffin. Neither the plaintiff nor the defendant Bokel, by the finding of the court, can recover any land from Griffin. The judgment of the lower court will be reversed, and judgment here rendered that the agreement made between the plaintiff and the defendant Bokel that the line dividing their respective tracts of land, and forming the eastern boundary of the defendant's and western boundary of the plaintiff's lands, should be ascertained and established by an actual survey of defendant's land be, and the same is, enforced; and that the boundary between said lands be and is that established by the surveyors W. A. Polk and J. J. Gillespie by a survey made by them in accordance with said agreement, and by authority and direction of said parties, on the 30th of March and the 1st day of April, 1898, and which said boundary is evidenced by the field notes of said survey, being the second line designated in said field notes, which are as follows: "Beginning at an iron axle in the E. line of the Thompson sur., same being the S. W. cor. of the B. H. Freeling; th. E. 1,780 ft. to a stake; th. N. 5,867½ ft. to a stake on the south line of McIvor land; th. W. along McIvor's S. B. line 7,060 ft. to a stake and mound in the E. B. line of the Hamilton survey; th. south along Hamilton E. B. line 4,112 ft. to an iron rod, being the N. W. cor. of the Fitch sur.; th. east along the north lines of the Fitch, Cruger, and Thompson surveys, 5,280, to the N. E. cor. of the Thompson sur., a stone for corner; th. south 1,755½ ft. to the place of beginning." And it is further adjudged that neither plaintiff nor de-

fendant Bokel recover of defendant Griffin any of the land described in his pleadings, and claimed by him, and that he recover his costs of both plaintiff and defendant Bokel, and that plaintiff recover of defendant Bokel all costs incurred since the establishment of the boundary aforesaid by the said Polk and Gillespie, and that defendant recover his costs of plaintiff incurred prior thereto. No other assignments need be considered. Reversed and rendered.

On Motion of Appellee Bokel for Rehearing.

(April 6, 1899.)

Upon closer inspection of the record, we find, as contended by the appellee Bokel, that his general exception to the plaintiff's second amended petition was sustained, and the plaintiff declined to amend. Such being the case, the alleged agreements between the parties plaintiff and defendant Bokel to establish a boundary between their lands were not properly before the court upon trial of the cause, and should not, therefore, have been considered by the judge in drawing his conclusions of fact. While the facts disclosed by the transcript clearly authorized the judgment rendered by this court, it must be revised for the want of a pleading setting up the facts upon which we based the judgment rendered for the plaintiff. The motion for a new hearing is therefore sustained, and the judgment of the lower court, as between the parties to this appeal, is reversed, and the cause remanded for another trial as to them; but the judgment in favor of the defendant Griffin is affirmed. And in view of another trial we deem it proper to say that the court erred in sustaining the appellee's exceptions to the plaintiff's second supplemental (amended) petition. The unwritten agreements set out in that petition are, in our judgment, neither obnoxious to the forty-seventh rule of practice prescribed for the government of the district courts, nor to the statute of frauds; and if the agreements were in fact made, and a boundary line run by the surveyors chosen by the parties, in accordance with said agreements, the fact that they were not in writing cannot avail the appellees to defeat the appellant's suit for a specific performance of the agreements. Reversed and remanded.

SAN ANTONIO & A. P. RY. CO. v. BOLSTER.¹

(Court of Civil Appeals of Texas. March 23, 1899.)

MASTER AND SERVANT—RAILROADS—INJURY TO
FIREMEN—VERDICT—PREPONDERANCE
OF EVIDENCE.

A fireman claimed that while he was shoveling coal the engine lurched violently, through defects in the track, and threw him to the floor, wrenching his knee, and causing him great

¹ Rehearing denied.

pain. The engineer denied that the fireman spoke to him as the latter claimed. The fireman continued to perform his duties that day and the next, without complaint. He then began medical treatment, which continued three weeks, during which time he walked to and from the doctor's office, and then went into the hospital. On the trial he denied that his knee had ever before been injured, or that he had so stated, though he admitted the authorship of a letter, so stating, written shortly after the alleged injury; and in his report thereof he said he had wrenched his knee once before. His wife's testimony as to the condition of the knee and its cause, and that of the physician, which was that it was a sprain, for which he treated it, was based wholly on the fireman's account, the knee itself giving no indications of the cause. Another physician, who examined the knee about eight months after the alleged injury, testified that there were evidences of a dislocation of the semilunar cartilage, but no other physician testified as to such condition. The fireman and his wife denied that he ever had rheumatism, and several personal friends testified that they had never heard of his having it, but several co-employees testified to statements made by him before and after the alleged injury that he had rheumatism. Six physicians who examined him during the trial testified that the lameness was due to that, and he was treated for that while in the hospital. Expert witnesses for the company stated it was practically impossible for the fireman to be injured as he claimed, and to have labored thereafter as he did; and the latter's witnesses admitted it was unprecedented. *Held*, that a verdict for him was against the preponderance of evidence.

Appeal from district court, Dewitt county; James C. Wilson, Judge.

Action by C. P. Bolster against the San Antonio & Aransas Pass Railway Company. From a judgment for plaintiff entered on a verdict of the jury, defendant appeals. Reversed.

Proctors, for appellant. Wheeler & Rhodes and Price, Green & Green, for appellee.

WILLIAMS, J. We have failed to find any error in the rulings of the court below attacked by the assignments of error, except its refusal to grant a new trial upon the facts. The verdict, while not wholly unsupported by evidence, seems to us to be so clearly against its overwhelming preponderance as to demand that this court interpose, and set it aside. While we recognize fully the rule that the judgment of the jury and the trial judge must ordinarily be accepted as final upon such questions, and appreciate the importance of an appellate court carefully confining its action within its appropriate sphere, and interfering with verdicts thus approved on the ground that they are contrary to the preponderance of the evidence only when such preponderance is manifest and overwhelming, we must also recognize that interference sometimes becomes a duty, which is clearly defined in our system, and which cannot be disregarded. Briefly stated, our view of the case is that the conclusion that plaintiff was injured as he claims to have been is rendered so improbable by the evidence, when it is all considered together, that it should not be accepted as the

basis of a judgment in his favor. The real evidence of his injury comes from plaintiff himself. His account of it is that on September 2, 1895, as he was acting in the capacity of fireman on one of appellant's engines, and shoveling coal from the tender into the furnace, the engine was caused, by a defect in the track, to lurch violently, and to throw him to the floor, and wrench his right knee. His opinion is that his knee was dislocated, and at once slipped back into joint, though as to this he is not positive. But he states that he at once suffered great pain, and desisted from his work for a while, calling the attention of the engineer, who sat opposite, to the fact that he had hurt himself. He states that the engineer replied, "The hell you did?" and this is all he claims transpired between them upon the subject at any time. The engineer could not be found to testify, but his written report, made January 2, 1896, was read in evidence, without objection, in which he states that appellee said nothing to him about being hurt, and that he knew nothing of it, or of the lurch of the engine. The conductor of the train testified that he received no information of any injury to appellee, or of anything unusual occurring, though he saw both appellee and the engineer frequently during the trip. It was the duty of the conductor and engineer to report such mishaps. The train proceeded from the point in question to Cameron, distant therefrom 88 miles, arriving there late in the evening, and switched around the yards there for about three hours. Appellee then lay down on a cot, spent the night, arose early next morning, attended the engine, while switching, for four hours, about the yard, and then returned with the train to Yoakum, a distance of 118 miles, reaching there about night-fall, and walked home. During this time he performed all the duties of fireman, handling thousands of pounds of coal with his shovel, and bearing his weight upon the knee which he claims had been injured. He applied for no relief, and it does not appear that he complained to any one about the hurt before his return to Yoakum, though he passed a number of towns, going to and returning from Cameron, at which he could have obtained treatment. The switching was extra work, for which he received extra pay. He now claims that he had received a wrench of the knee, which has injured him permanently, and necessitates, nearly three years afterwards, the use of crutches. On the morning of September 4th he put himself under the treatment of a physician, which lasted until about September 24th, during which time appellee walked back and forth to and from the office. At the date last named, on the advice of the physician, he went to the hospital at San Antonio, remaining there about two or three weeks, and returning thence to Yoakum. He was also at the hospital twice subsequently. When he made application for permission to go to the hospital, according to his evidence, he said nothing about his injury or ailment. Accord-

ing to the evidence of two other witnesses, he said he had rheumatism. On his cross-examination he denied that this knee had ever before been injured, or that he had so stated in a letter written by him to an accident insurance company from which he had collected money because of his hurt. His letter, of date September 15, 1895, was produced, and he admitted its authorship. In it he said: "On or about April the 18th, I got my right knee sprained, but did not stop work, as I did not think it was sufficient to justify me. On the 2d of September I got it hurt over again, and had to lay off on the 4th, and have not been able to work since, and don't know when I can. I said nothing to foreman under the circumstances, but had my family physician to attend me all the time." On September 24, 1895, while in the hospital, he made a written report of his injury, in which questions and answers appear as follows: "Q. When and where were you injured? A. First injury about 18th of April, 1895, and second injury on September 2, 1895; both times between Flatonia and Muldoon. Q. What is the character and extent of your injuries? A. A wrench of right knee in both cases." In his report he further stated the cause and character of his second injury substantially in accordance with his testimony. This, so far as the record shows, is the first time he made known to his employer, or any of its agents, his claim that he had been hurt. These are the leading facts upon which plaintiff's case depends. There is some other evidence adduced by him by which it was sought to corroborate his statement, and this will be briefly noticed. His wife testified that she remembered his having received the hurt at the time stated by him, and gave an account, in a general way, of the condition of his leg, and of his treatment by the physician after his return. She also stated that he had not been hurt in April, but had been hurt in his left hip in February. She was not in a position to know the cause of the condition of his knee to which she testifies, and her evidence as to that is necessarily based upon his statement to her. The doctor to whom he went on September 4th for treatment testified at length. He found him lame, suffering with fever, and with a swollen knee. Upon plaintiff's statements and the physician's examination, together, the latter concluded that the knee was sprained. For this he treated him. There is much other expert evidence to the effect that the prescriptions given by this physician were proper for rheumatism, but not for sprain, but we assume that the evidence is sufficient to show that the treatment was in fact given for sprain. There was nothing in the condition of the knee to enable the physician to determine, from an examination of it, with any certainty, whether it arose from an injury or from rheumatism, and his opinion as to the cause was necessarily based upon appellee's account of it. Another physician, who examined appellee some eight or ten months after

the alleged injury, testified that he found evidences of there having been a dislocation of the semilunar cartilage about the knee, and to the existence of a cavity or indentation which indicated that there had been such an injury. But neither appellee, nor any other of the numerous physicians who examined him, gave evidence of such a condition of the joint. That appellee could not have sustained so violent an injury as this would imply, and still have performed the labor, and continued such use of the limb, as he testifies to, is too plain. Both of these physicians were of the opinion that appellee had received a wrench or sprain of the knee, and that his ailment was not rheumatism, but they were necessarily guided by the history given them of it, since there were no external evidences upon the limb which could be taken as indicating the one rather than the other. Appellee and his wife denied that he had ever had rheumatism, or other constitutional disease, and there was much evidence adduced upon this point. Several of his acquaintances and friends stated that they had never heard of his having rheumatism, and thought they were in a position to have known of it had such been the fact. On the other hand, an engineer with whom he had served testified to a statement by appellee, made prior to his alleged injury, that he was suffering from rheumatism. Five others of his co-employees testified to statements made by him to them, shortly after the time when he claims he was hurt, to the effect that his lameness resulted from rheumatism. Six physicians who examined him during the two trials of the case gave opinion that there had been no mechanical injury to the limb, but that the swelling and lameness were the effect of rheumatism. He was treated for rheumatism while in the hospital.

We concede that those experts who examined him first had the best opportunity to find outward evidences of mechanical injury, had there been such; and, if his account of the manner in which he was hurt and the nature of the injury received were such as we could accept as credible, we should doubtless hold the evidence sufficient to show that such an injury, and not rheumatism, was the real trouble. But all of the experts who testified for appellant stated positively that it was practically impossible for him to have been injured as he says he was, and still have performed the labor which he did. The two who testified for appellee say that this was not impossible, inasmuch as the powers of endurance of human beings cannot be measured; but both admit that his endurance, according to his evidence, was very remarkable, and, in their experience and reading, unprecedented. It is unnecessary for us to say that the accomplishment of the task which he performed would be impossible in one injured as he claims to have been injured. Under the pressure of necessity, or the impulse of powerful motives, men may undergo hardships and sufferings such as, under ordinary circumstances,

one would be apt to regard as beyond their powers of endurance. But not only was there no necessity, but no appreciable motive, for appellee to go on performing his severe labor, seeking no relief, making no complaint, if he was in truth suffering from the pain of such a hurt, which he says began at once, and was intense, and which the experts all agree must have been of the most excruciating kind if caused by such a hurt as he described. On the contrary, not only every natural impulse, but every rational motive, would have impelled any one situated as he was to seek and obtain relief which was so readily obtainable. His claim of injury seems to us to be wholly irreconcilable with his conduct afterwards, and this feature of the case, with the admitted and unexplained statements in his letter and report, convince our minds that his claim has no just foundation. The hypothesis that he was injured is inconsistent with admitted facts, while that of rheumatism is consistent with and explains them all. While the court did not err in submitting the case to the jury, we think it did err in refusing a new trial. Reversed and remanded.

PEEL v. GIESEN.

(Court of Civil Appeals of Texas. May 17, 1899.)

PARTNERSHIP—ACTION ON NOTE—PLEADINGS—PAROL EVIDENCE—LIMITATIONS.

1. An answer in an action on a note averring that it was executed for an interest in firm property, and that the parties, not having sufficient data to effect the entire settlement, postponed it, and invoking a settlement between them, is not demurrable as contradicting a written contract, as the note was given only in part performance of an oral contract.

2. The two-years limitation is not a bar to a counterclaim in an action on a note growing out of a partnership settlement, since Rev. St. art. 3356, provides that an action between partners for a settlement shall be barred in four years from the cessation of their dealings.

Appeal from Hays county court; Ed R. Kone, Judge.

Action by E. W. Giesen against R. H. Peel. There was a judgment for plaintiff, and defendant appeals. Reversed.

Will G. Barber, for appellant. P. N. Springer, for appellee.

KEY, J. Appellee brought this suit against appellant upon a promissory note for \$300, with interest and attorney's fees. The note was dated February 9, 1894, and due four months thereafter. The defendant, in his answer, averred that in December, 1893, he and the plaintiff formed a co-partnership for the purpose of engaging in the cattle-raising business; that, by the terms of the partnership contract, each was to furnish an equal amount of capital to be invested in the business, and was to share equally all expenses and all profits and losses; that the defendant furnished and paid into the partnership

various sums of money, aggregating \$1,059.75; that the plaintiff had only paid into the partnership the sum of \$250; that, accordingly, the defendant advanced and paid into the partnership \$809.75 more than the plaintiff did, prior to the execution of the note sued on; that the partnership business proved unprofitable, and large losses were sustained; that thereafter plaintiff and defendant agreed with each other that the partnership property owned by them was of the value of \$600, and plaintiff offered to sell defendant his one-half interest in said property for the sum of \$300, which proposition defendant accepted, and accordingly executed and delivered to the plaintiff the note sued upon, in payment for said interest of plaintiff in the partnership property. The answer also avers that, at the time of this agreement and the execution of the note, the parties did not have in their possession the necessary data to effect a settlement of their entire partnership business, and did not do so, but agreed to make such settlement at some future day, and that the plaintiff agreed and promised to pay defendant one-half of the excess in amounts advanced by the defendant to such partnership business over amounts advanced by the plaintiff; that, upon a proper settlement of their partnership accounts, plaintiff will owe and be indebted to defendant the sum of \$404.87½, with interest thereon from February 9, 1894. The answer also alleges that the plaintiff is wholly insolvent, and to permit him to recover upon the note sued on, without allowing amounts due defendant as a set-off, would inflict irreparable injury upon the defendant. It also invokes a settlement of the partnership affairs between the plaintiff and defendant, and prays that the amount owing by the plaintiff to the defendant by reason of the latter having advanced more than his share to the assets of the firm be set off against the plaintiff's demand, etc. This is the substance, in general terms, of the pleading referred to; but it is much fuller, and contains many more details than here stated. The trial court sustained two special exceptions to this answer, and judgment being rendered for the plaintiff, the defendant has appealed.

The exceptions referred to were (1) that the matters set up in the answer sought to vary and contradict the terms of the written contract which formed the basis of the plaintiff's suit; and (2) that it appeared from the face of the answer that the set-off or counterclaim pleaded by the defendant accrued more than two years prior to the filing of the suit, and was therefore barred by the statutes of limitation. We are of the opinion that the court erred as to both of these exceptions. The general rule which excludes parol evidence when offered to vary the terms of a written instrument has no application to collateral undertakings, or cases in which the written instrument was executed in part performance of an entire oral agreement. *Thomas v. Hammond*, 47 Tex. 42; *Henry v. McCardell* (Tex. Civ.

App.) 40 S. W. 172; Hansen v. Yturria (Tex. Civ. App.) 48 S. W. 795. The matters pleaded by the defendant come within the purview of article 3356 of the Revised Statutes, which provides, in substance, that an action by one partner against another for a settlement of the partnership accounts is barred in four years from the date of cessation of dealings in which they were interested together. Hence the two-years statute of limitation has no application. For the errors pointed out, the judgment will be reversed, and the cause remanded. Reversed and remanded.

WILSON v. VICK.

(Court of Civil Appeals of Texas. May 17, 1899.)

MECHANICS' LIENS—FORECLOSURE—OWNERSHIP OF PREMISES—CONTRACT LIEN—PLEADING—AMENDMENT—EFFECT—PHYSICIANS—ACTIONS FOR SERVICES—HARMLESS ERROR.

1. Where a contract to purchase building material gives the material man a lien on the land, he need not, as a prerequisite to foreclosure against the purchaser, prove that the latter was the owner of the land, or that he had authority to execute the lien, since he would be estopped to deny his ownership or authority.

2. An amended pleading takes the place of the original, and allegations of the latter not carried into the former are abandoned.

3. In an action to foreclose a lien on lands for material furnished under a contract providing for its delivery after the execution of the contract, and giving the material man the lien sought to be enforced, parol evidence that the material in question had been delivered prior to the execution of the contract is admissible, since it merely establishes a consideration for the contract.

4. An agreement by the purchaser of building material that the seller shall have a lien on the lands on which the building is to be erected creates a lien independent of the statute, and, in foreclosing it, the statute regulating the establishment of material men's liens need not be complied with.

5. Before a recovery can be had for medical services, it must appear that the physician rendering them had received a certificate authorizing him to practice medicine, and that it had been recorded as provided by statute.

6. The maxim, "De minimis non curat lex," applies to error in disallowing an entire counterclaim, one dollar of which should have been allowed.

Appeal from district court, Lee county; Ed. R. Sinks, Judge.

Action by R. A. Vick against J. H. Wilson. There was a judgment for plaintiff, and defendant appeals. Affirmed.

W. A. Morrison, for appellant. Orgain, Garwood & Bowers, for appellee.

FISHER, C. J. This is an action by the appellee, Vick, against the appellant, Wilson, on a written contract acknowledging an indebtedness of \$570.86 due the appellee for material furnished in the erection of a house situated on lot 25 in the town of Tanglewood, in Lee county. The petition also asks for a foreclosure of his lien as a material man, and for foreclosure of his lien under the contract

on the lot in question. Several exceptions were interposed to the petition, which were overruled by the trial court; and the defendant also pleaded an offset against the debt in question, for medical services rendered by the appellant to the appellee. The case was tried before the court without a jury, and judgment rendered for the plaintiff for the sum of \$322, with a foreclosure of the lien on the land described in the plaintiff's petition.

The trial court found the following facts and conclusions of law, which we adopt:

"(1) On the 19th day of February, 1896, the defendant, J. H. Wilson, executed and delivered to plaintiff, R. A. Vick, the contract sued on, and attached to his first amended original petition, which was duly acknowledged, and was recorded on the 26th day of March, 1896, in the deed records of Lee county. That there is no separate book kept by the county clerk of Lee county in which to record mechanics' liens. (2) That prior to the execution of said contract the plaintiff had furnished lumber of the value of \$570.86 to defendant, for the purpose of being used in the erection and construction of a house on lot No. 25, Flanniken & Rowland addition to the town of Tanglewood, in Lee county, Texas, which said lumber was furnished, as set out in the account attached to plaintiff's second amended original petition, between the dates of August 21 and November 15, 1895, and was used in the construction of a house on said lot; that defendant on January 1, 1896, paid \$177.88 on said contract sued on, and the same is credited thereon; that the amount due plaintiff is five hundred and twenty-two and nineteen one-hundredths dollars. (3) That the contract sued on was executed in consideration of the delivery of said lumber as aforesaid, and was so understood by both plaintiff and defendant at the time of its execution. (4) That the defendant at the time of the execution of said contract was, and is now, a single man.

"**Conclusions of Law:** From the above facts I am of the opinion that the lien sued on is a valid material man's lien, under the constitution, and that a compliance with the statute as to filing an itemized account of the material furnished, etc., was unnecessary. If, however, I am in error as to its being a material man's lien, I am clearly of the opinion that the contract constitutes a valid mortgage or contract lien, and that the plaintiff is entitled to a foreclosure on the above-described property for the amount due on the contract. I therefore hold that the plaintiff is entitled to recover as prayed for in his petition."

Appellant's first assignment of error is to the effect that the court erred in overruling his demurrer to the plaintiff's petition, because it was not alleged that the defendant was the owner of the land upon which the plaintiff was seeking to foreclose the lien, or that he had the right or authority to fix the lien upon the same, because it was not alleged

that the defendant at that time owned any interest in the land. The contract sued upon described the lot in question, and, in express terms, gave a lien in favor of the appellee on the land for the value of the material furnished or to be furnished in the erection of a house on the property. This contract was signed by the appellant. Such being the case, as between him and the other party to the instrument, the plaintiff, suing thereon, would not be required, as a prerequisite to a foreclosure, to prove that the party signing this instrument, and expressly admitting a lien upon the land, was the owner of the land, and had the authority to execute the lien in question. The defendant in such a case would be estopped from denying that he did not have title to the land covered by his contract, upon which he acknowledged the existence of the lien. Further, on this question, this exception was urged in the appellant's previous pleading, but was not carried into his third amended original answer, upon which he went to trial. The amended answer took the place of the previous answer, and was an abandonment of the original answer. If he desired to preserve this demurrer, he should have carried it into his third amended original answer, which was not done.

The contract sued upon is a promise to provide and furnish the appellant lumber and material (stating its value) for the erection of certain improvements on the lot in question. As a matter of fact, at the time that it was executed the material had been furnished to the appellant. The appellant objected to the introduction of evidence proving this fact, upon the ground that it varied the terms of the written instrument, as it stated upon its face that the appellee agreed to provide and to furnish material. We do not think there is any merit in this objection. It went to the question of consideration, which is generally subject to parol explanation.

There are many objections urged in the appellant's brief to the judgment of the court below, because the evidence fails to show that a material man's lien was fixed and preserved within the time and in the manner prescribed by the statute relating to that subject. We can dispose of all these questions in a general way, by stating that in our opinion the statutes relied upon have no application to a foreclosure of the lien in question. The court below, we think, correctly concluded that, as between the parties to the contract, the constitution gave the lien, and by virtue thereof the plaintiff was entitled to a foreclosure of his lien, independent of any question whether he had complied with the terms of the statute in preserving a material man's lien. We are further prepared to agree with the trial court in the conclusion reached, that, independent of any lien given by the constitution or the statute, as between the parties to the contract, the plaintiff could foreclose the lien by virtue of the contract sued

upon. What we have said practically disposes of the question raised in appellant's assignment as to the jurisdiction of the court.

Appellant also complains of the judgment because the court refused to allow the offset pleaded for professional services rendered to appellee by the appellant as a physician. There was no error in the judgment in this respect, because the facts do not show that the appellant has received a certificate authorizing him to practice medicine, and that the same had been recorded as provided by the statute. The articles for the value of which the appellant sues were furnished by him to the appellee in connection with the professional services rendered the appellee as his physician. Appellant's account, which he pleaded in offset, is for prescriptions and professional visits to the appellee and his family; and one item thereof is an oil atomizer, of the value of one dollar. This is the only article shown on the account which was furnished. This, it seems, was sold in connection with part of the medical services rendered by the appellant; but, however, we think the judgment should not be reversed on account of this trivial item, and that the maxim, "*De minimis non curat lex*," would apply as to this item. We find no error in the record, and the judgment is affirmed. Affirmed.

BURRELL et al. v. BLANCHARD.¹

(Court of Civil Appeals of Texas. April 27, 1899.)

MANDAMUS—PLEADING—SUFFICIENCY—SCHOOL CENSUS.

1. Mandamus will issue on the sworn allegations of the complaint where they are sufficient, and are met only by a general denial; but such allegations must include every fact essential to justify the application of so extraordinary a remedy.

2. A judgment granting a mandamus requiring school trustees to make up the school census for the year 1898 cannot be sustained where it does not appear from the petition for the writ that any of the defendants was a census trustee, whose duty it was to take the census under Acts 1897 (Sayles' Civ. St. arts. 3964-3970), providing that the county judge shall appoint a suitable person as census trustee to take such census.

3. A petition for mandamus to compel school trustees to enroll petitioner's children in the scholastic census of white children for the district is insufficient where there is no allegation that he had demanded of the trustees a proper listing of his children, and they refused to comply.

Appeal from district court, Jefferson county; Stephen P. West, Judge.

Action by C. W. Blanchard against J. J. Burrell and others for mandamus to compel defendants, as school trustees, to list his children in the scholastic census of white children. From a judgment granting the writ defendants appeal. Reversed.

¹ Rehearing denied.

Greer & Greer and A. E. Broussard, for appellants. Tom J. Russell, Matt Cramer, Hugh Jackson, and W. L. Douglass, for appellee.

WILLIAMS, J. The judgment appealed from, awarding the mandamus prayed for, was based solely upon the allegations of appellee's amended original petition, filed June 1, 1898, appellants' answer to same having been stricken out on motion. While it is true that the writ should issue upon the sworn allegations of the complaint when they are sufficient, and are met only by general denial (*Sansom v. Mercer*, 68 Tex. 488, 5 S. W. 62), it is true, also, that such allegations must include every fact essential to justify the court in applying this extraordinary remedy. *Cullem v. Latimer*, 4 Tex. 329; *Arberry v. Beavers*, 6 Tex. 473, 474. No exceptions were taken to the petition, but in the case last cited it is held that the absence of exceptions does not authorize the granting of the writ when the petition is not sufficiently specific and positive in its averments. The language of the court is peculiarly appropriate here: "The omission of a public officer to interpose those matters of defense which he might have interposed will not authorize the awarding of a mandamus against him to enforce the doing of acts involving the interests of the public, and in the performance of which the officer may be less interested than others, who are not, and, from the nature of the case, cannot be, made parties to the proceeding, and enabled to assert their rights." The present action was begun in October, 1897, to compel the defendants, the school trustees of district No. 8 of Jefferson county, to enroll appellee's children, alleged to be white, in the scholastic census of white children for that district, the petition alleging that such trustees had enrolled them among the colored children of that district; and to compel the other defendant, the county judge of Jefferson county, to apportion the school fund accordingly, and to recognize the right of such children to the privileges of the school taught for the white children. The cause remained undisposed of until June 21, 1898, when the judgment appealed from was rendered upon the amended petition filed June 1, 1898. It grants the relief prayed for against all of the defendants, and requires them to make up the school census for the year 1898 and the following years accordingly. A fatal objection to the judgment is that it does not follow the law in force by which the taking of the census for 1898 and 1899 is regulated. The act of 1897 (*Sayles' Civ. St. arts. 3964-3970*) made it the duty of the county judge to appoint a person,—either one of the trustees or other suitable person,—called the "census trustee," to take the census. It does not appear from the petition that any such person is among the defendants, and, consequently, there is no showing made of any duty incumbent on any of them to do the act required by the writ. The census, when

taken, is to be returned to the county judge, whose duty it is to revise it, and correct errors in it, and, if necessary, to require a new census to be taken. There is no allegation whatever that the county judge had failed in the performance of any of these duties with respect to the year 1898. Indeed, the amended petition was filed before the census for 1898 was required to be returned, and it does not appear that the judge had received, or in any way been called upon to act upon, a census for that year. The petition is drafted upon the assumption that the law remained as it had existed prior to the passage of the statute referred to, when it was the duty of the trustees to prepare the census; and, consequently, there is a failure to show a refusal to perform any duty imposed by the law by which the taking of the census for 1898 and subsequent years must be regulated. If the statute remained unchanged, there is yet an absence of any allegation that plaintiff had ever demanded of the trustees a proper listing of his children, and of a refusal on their part to comply. There is, it is true, a general statement that defendants have failed and refused to put the names of the children upon the census of white children, and the further statement that they had listed them as colored; but this is not sufficiently specific for this character of pleading. There should have been direct averments of the demand upon the parties charged with the duty, and a refusal on their part to perform it. There is also an absence of allegations of application to the county and state superintendents and the state board of education for redress. *Association v. Benson*, 76 Tex. 552, 13 S. W. 379. For the reasons given, the first assignment of error—that the court below erred in rendering the judgment awarding the mandamus upon the petition—must be sustained. We do not hold, however, that mandamus would not lie to enforce the performance of such a duty as that involved, were the proper parties before the court, and the necessary allegations made. That question, on account of the character of the petition, is not fairly presented. Reversed and remanded.

BIALEK et al. v. RICHMOND.

(Court of Civil Appeals of Texas. May 4, 1899.)

REVIEW—INSUFFICIENCY OF PETITION—FAILURE TO OBJECT.

The fact that no objections were taken to a petition before judgment will incline the court on appeal not to sustain an objection, taken thereafter, that it was not sufficient to warrant recovery, though it is admittedly very defective.

Appeal from Jackson county court; John O. Rowlett, Judge.

Action by J. M. Richmond against F. Bialek and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

W. A. McDowell and F. M. Austin, for appellants. J. M. Moore, for appellee.

WILLIAMS, J. It is urged that the petition is not sufficient to warrant a recovery against appellant F. Bialek, and it must be admitted that it is very defective. But, in view of the fact that no exceptions or other objections were urged to it before the judgment was rendered, we think that, under the liberal rule for the construction of the petition now applicable, the point cannot be sustained. This is applicable as well to the contention that the petition does not authorize a recovery for the value of services rendered by Dr. Malsch during the absence of appellee, and in his stead. We think, however, that the petition contains no allegations to warrant the recovery for services of Dr. Malsch rendered as an assistant. There are no allegations whatever on that subject. If appellee will within 15 days remit \$30 of the amount recovered by the judgment below, the judgment will be reversed, and judgment will be rendered by this court for the balance, and costs of appeal will be adjudged against appellee. The objection to the jurisdiction of the county court is not sustained. The petition claimed an amount within the jurisdiction, and there is simply a partial failure to sustain the allegations by the evidence.

KESSLER v. HALFF et al.¹

(Court of Civil Appeals of Texas. April 6, 1899.)

CONSPIRACY—PURCHASE OF GOODS FROM INSOLVENT—LIABILITY—ATTACHMENT—LEVY—HOW MADE—GOODS FRAUDULENTLY TRANSFERRED.

1. One who entered into a conspiracy with the buyer by which the latter bought goods on credit, and, without consideration, transferred them to the former, who sold them and divided the proceeds with the buyer, is not personally liable for the price of goods sold to the buyer by one on whom no fraud was practiced in inducing him to make the sale.

2. Under Rev. St. arts. 200, 2349, requiring a levy of an attachment on personal property to be made by taking possession thereof, except where the property is rightfully in the possession of a third person, when it may be made by giving notice to him, an attachment on property transferred in fraud of creditors, and in possession of the transferee, issued at the instance of a creditor of the transferor, can only be levied by taking possession of the property; a transferee in fraud of creditors having no right to the possession of the property.

Appeal from district court, Dewitt county; Joseph C. Wilson, Judge.

Action by M. Halff & Bro. against C. A. Kessler and another. There was a judgment for plaintiffs, and defendant Kessler appeals. Reversed.

Kleberg, Grimes, Baker & Leonard, for appellant. Price & Green and Lewy & Sehorn, for appellees.

WILLIAMS, J. About the 27th day of September, 1897, A. G. Wangemann, a merchant at Yoakum, was found by appellant, Kessler (his father-in-law), to be insolvent; and on that day Kessler, who claimed that Wangemann owed him \$15,000, and Wangemann, who acknowledged such indebtedness, executed an instrument in writing, signed by both, the terms of which were to the following effect. Wangemann conveyed to Kessler (1) his stock of goods, implements, iron safe, all items of merchandise, fixtures, show cases, and all personal property belonging to him, situate in a building which was described; (2) all choses in action, books of account, notes, and judgments; (3) an undivided half interest in a cotton gin; (4) 250 bales of cotton on a named platform,—the title to all of which property Wangemann warranted. Kessler accepted the conveyance in payment of his claim for \$15,000, and assumed the payment of something more than \$15,000 in addition, recited to be owing from Wangemann to other named parties. This instrument was at once filed for record, and Kessler took possession of the property conveyed. On the 1st day of October, 1897, appellees brought suit against Wangemann upon an account for \$1,221.25, and sued out an attachment, upon which the sheriff made the following indorsement, which truly states his action: "Came to hand on the 2d day of October, A. D. 1897, and executed the same day of October, 1897, by levying the within attachment upon, all and singular, the goods, wares, and merchandise and personal property of every name and nature, and by whatever description known or designated, conveyed in trust by A. G. Wangemann to C. A. Kessler on the 27th day of September, 1897; said property being now contained in that certain storehouse lately occupied by A. G. Wangemann in Yoakum, Dewitt county, Texas, and levied upon as the property of said A. O. Wangemann; this levy being made by giving a written notice hereof to said C. A. Kessler, the person in possession of said property." Kessler subsequently intervened, setting up title to the property thus attempted to be levied upon, and seeking to recover damages for the levy. Plaintiffs filed exceptions to the plea for damages, and also filed against Kessler the following pleading, seeking to recover judgment against him: "Further replying to said answer, these plaintiffs say that the pretended conveyance from defendant Wangemann to defendant Kessler was made by said Wangemann to said Kessler with intent upon the part of both said defendants to hinder, delay, and defeat the creditors of said Wangemann in the collection of their debts against him, and particularly to hinder, delay, and defeat plaintiffs in the collection of their said debt sued on herein against the said Wangemann, and hence no title to the said property conveyed thereby passed to said Kessler by reason of said conveyance. The said conveyance from Wangemann to Kessler was made in pursuance of a

¹ Writ of error denied by supreme court.

conspiracy entered into between said Wangemann and said Kessler, whereby said Wangemann bought goods from every merchant he could, throughout the country, with no intention of paying for them, and, when sufficient goods had been obtained to serve the purposes of said Wangemann and said Kessler, said Wangemann then conveyed the same to said Kessler, who, in conjunction with said Wangemann, sold said goods and divided the proceeds between themselves, and that the pretended debts recited to be due said Kessler, and to be assumed by him, are all fictitious. And plaintiffs say that the goods levied upon by their said writ of attachment have all been sold, and the proceeds divided between said Wangemann and Kessler, or else said Kessler has said proceeds now in his possession, and that said goods so levied upon were of the value of \$1,500." Kessler urged a general demurrer to this pleading, which was overruled. Wangemann presented a motion to quash the return on the attachment, on account of its vagueness, and the lack of sufficient description of property levied on, and a further motion to require the sheriff, in case the first motion should be overruled, to amend his return by making a full description and inventory of the property seized; and both were overruled. Upon a trial, judgment was rendered against both Wangemann and Kessler for the sum sued for, and costs; the judgment containing no foreclosure of the attachment lien, but reciting the levy, the acquisition thereby of a lien, and the conversion of the property by Kessler, of the value of \$15,000, pending the suit, and a consequent liability on his part for the debt.

Wangemann has not appealed, and hence the refusal to quash the return of the officer cannot be considered upon Kessler's assignment. But the sufficiency of the levy to create a lien upon the property necessarily comes up, in determining the questions raised by numerous assignments questioning the adequacy of the pleadings and evidence to support the personal judgment rendered against Kessler. The assignments raise the question as to the sufficiency of the plaintiffs' pleading against Kessler to authorize a recovery against him, and this will be first determined. No facts are stated through which he is shown to have become liable for the debt in its original creation. There is an attempt to charge a conspiracy between Wangemann and Kessler, having for its object the fraudulent obtention of goods by Wangemann, to be appropriated by them jointly. Waiving any criticism of the generality and vagueness of the allegation, it is enough to say that it does not attempt to charge that the goods, the value of which is sued for, were obtained from plaintiffs by fraudulent practices. No support for the judgment can be found in this part of the pleading. No evidence was offered in support of it, and the judgment is not based upon it. There are further allegations to the effect that the conveyance from Wangemann

was made, in pursuance of the conspiracy between them, for the purpose of defrauding creditors, and that the goods had been sold by Kessler, and the proceeds thereof divided between him and Wangemann, in carrying out such conspiracy. That these allegations, apart from any question as to the existence of lien upon the goods arising from the attachment, show no personal liability on the part of Kessler, is settled by the decisions in this state. *Le Gierse v. Kellum*, 66 Tex. 242, 18 S. W. 509; *Blum v. Goldman*, Id. 621, 1 S. W. 899. They could only be made effectual in an effort to reach and subject the property to the debt. No such effort is made by the pleading, the sole object of which is to affect Kessler with personal liability. If a cause of action is stated, it must, therefore, be based upon the facts that plaintiffs had acquired by the attachments a lien on the goods in Kessler's hands, and that Kessler, by converting them pending the suit, had defeated such lien, and deprived plaintiffs of the fruits which they would otherwise have reaped from a foreclosure of it and a sale of the property. The pleading set up a state of facts under which, we think, a levy such as was made would not be effectual. The allegation is that the goods had been conveyed to Kessler in fraud of creditors. If this was true, the conveyance did not entitle Kessler to possession, as against the levy of the attachment, and did not, therefore, interpose any obstacle to an actual seizure of the goods. The general rule of law requires the actual seizure of the property, to fix an attachment lien upon it. Great difficulty had been encountered in enforcing this rule, and at the same time allowing the taking, under such process, of property in which the defendant had an interest, but to the possession of which others, such as partners, mortgagees, pledgees, and others, were entitled, as security for some right of their own with respect to it. *Freem. Ex'ns*, 117, 120. To remedy such difficulties the statute provided a method of levying upon the interest of the defendant in property thus situated, without disturbing the rights of the rightful possessor, by serving him with notice. At the same time the statute requires in other cases the taking of actual possession, as before. We think it results from this that a levy by notice recognizes the rightfulness of the possession of the person holding it, and seeks to subject only the interest of the debtor remaining after satisfying the right of such possessor. Such a service of the writ is only applicable where the property is possessed by one entitled to its possession, whose right is intended to be recognized. When made, it does not limit or impair such right, but leaves the possessor in the full enjoyment of it. If it involves the right to sell the property for the satisfaction of some claim, the power must continue notwithstanding the levy, and its proper exercise cannot create a liability. The course for the creditor to pursue is in more instances prescribed by the statute. It is to

foreclose the attachment lien, sell the interest of defendant in the property, and leave the purchaser to satisfy the claim of the holders; or if, in case of a mortgage or pledge, the property has been sold by the mortgagee or pledgee after the levy, the right of the creditor or purchaser, according to the facts of the case, is to any surplus that may have been left after satisfying the debt secured. *Wynne v. Bank*, 82 Tex. 378, 17 S. W. 918. This, we think, sufficiently illustrates the proposition that, where the creditor intends to attack as fraudulent a conveyance under which a third party has received possession from defendant, he should cause an actual seizure of the property to be made, and thus put in issue the right of such party to the possession. Otherwise, we can see no restriction which a levy puts upon the action of either the possessor or the defendant in attachment. In case of possession under a recognized right in or with respect to the property, less than whole interest, the possessor, when notified of the levy, knows from the law that he must not so act as to defeat the right of the creditor to subject any residuary interest of the debtor in the property. But, under the facts alleged, no such condition existed. The defendant had no rights in the property as against either plaintiffs or Kessler, and Kessler had no right, promissory or other kind, that prevented an actual seizure of the property. There was nothing of defendant's to be reached by a notice, and no right of Kessler to prevent a seizure.

From what we have said, it is apparent that, in our opinion, no lien was fixed upon the property, if the facts alleged are true. To fix a lien, a valid levy was essential. To a valid levy, a seizure was essential, unless some person other than defendant was entitled to possession, which, according to the allegation, was not true. To give to the attachment the effect claimed would make this writ, under the levy by notice, fill a large part of the functions of the garnishment, without any statutory provisions such as regulate the latter remedy. In the levy it is assumed that the conveyance to Kessler was "in trust," the character of which trust is not stated. If the pleadings had alleged a conveyance in trust to pay debts, the levy under such facts might be held sufficient; but even then, to show liability on the part of Kessler, it would have been necessary to allege the conversion by him of a surplus over and above the amount necessary to satisfy the purposes of the trust. It may be true, also, that in such a case the attaching creditor might be allowed to contest the validity of some of the debts attempted to be secured, and by defeating them increase the surplus. This it is unnecessary to decide. But such creditor cannot, in our opinion, allege facts showing that an actual seizure was necessary to a levy, and at the same time establish a lien on the property by a levy by notice only. The pleadings being insufficient to support the judgment, it must be

reversed. If we could see in the case any ground upon which, by amending the pleadings, plaintiffs might recover, we should remand the cause. But, as we have seen, without a lien there is no ground upon which to reach Kessler. The undisputed facts show clearly that the conveyance to Kessler was not intended as a trust deed or mortgage, but as an absolute sale. On its face, the instrument purports to be such. *Frees v. Baker*, 81 Tex. 216, 16 S. W. 900. If the conveyance was fraudulent, as the court below held, the property was subject to actual seizure, and the attempted levy created no lien. Hence it is unnecessary for us to determine whether or not the evidence justified the court's conclusion that the sale was made to defraud creditors. To sustain the judgment, both that fact and the fact of lien are essential. If the sale was valid, it would, of itself, protect Kessler; and if it was invalid, and there was no lien upon the property, he still would not be liable. Reversed and rendered.

JAEGER v. BIERING.

(Court of Civil Appeals of Texas. April 13, 1899.)

DIRECTING VERDICT—TRIAL—EXCEPTIONS—SALE OF LAND—FAILURE TO DELIVER.

1. An instruction to return a verdict for defendant on an issue concerning which the evidence is conflicting is erroneous.
2. It is error for the court to refuse to hear and determine defendant's exceptions to special damages alleged in the complaint before proceeding to trial on the facts.
3. In an action to recover damages for failure to deliver possession of premises sold at the time agreed upon, it is not error to permit the plaintiff to show by defendant's former tenant, where the defense is that the premises were leased, and the lessee was to surrender the possession when the premises were sold, and the plaintiff knew of such arrangement, that the defendant fraudulently procured from him the writing whereby he agreed to surrender possession on sale of the property.

Appeal from Galveston county court; Morgan M. Mann, Judge.

Action by W. H. Jaeger against E. J. Biering. From a judgment in favor of defendant, plaintiff appealed. Reversed.

R. W. Houk, for appellant. S. S. Hanscom, for appellee.

PLEASANTS, J. The appellant sued appellee to recover of him alleged damages sustained by the plaintiff by the failure of the defendant to deliver possession to plaintiff, at the stipulated time, of a certain house and lot in the city of Galveston. Besides the rental of the premises between the time at which the plaintiff should have received the premises and the time when he did receive possession of the property, the petition claimed several items of special damages, and to all of them the defendant excepted specially, and, in addition to plea of general denial, among other matters alleged in defense of plaintiff's

demand averred that at the time of the sale of the property to plaintiff it was leased, and by the terms of the lease the lessee was to deliver possession whenever the defendant should make sale of the property, and that the plaintiff, knowing this, purchased the property and received defendant's deed therefor; but that said lessee, in violation of his written obligation, refused to deliver the premises, claiming that his lease was for one year; and thereupon judicial proceedings were instituted under the writ of forcible entry and detainer, in the name of the plaintiff, but at the expense of defendant, to eject the said lessee; and that, the litigation being unexpectedly protracted, at the repeated solicitations of plaintiff, and in a spirit of compromise, and in full satisfaction of all claims of plaintiff against defendant for his failure to put him in possession of said premises at the time agreed on at the time of said sale, defendant paid said lessee, through the said plaintiff, the sum of \$75, and that he also paid the costs of the suit and the fee of the attorney who represented the plaintiff in said litigation, and that thereby the said lessee was induced to deliver the possession of the property to the plaintiff, and that the plaintiff has since held, and now holds, possession of said premises. To this defense the plaintiff replied, denying that said payments were made in satisfaction of plaintiff's claim for damages against defendant. Upon call of the case for trial the plaintiff requested the court to dispose of the defendant's exceptions before the trial proceeded upon the facts, but the defendant asked that the court first hear the evidence, and this request was granted by the court, over the exception and protest of the plaintiff. The evidence was conflicting upon the issue joined between the parties upon the matters pleaded in accord and satisfaction by the defendant; but, notwithstanding such conflict, the court instructed the jury to return a verdict for the defendant, which was done, and judgment was rendered in accordance therewith, and plaintiff appealed to this court, and, among other assignments of error, assigns the judge's instruction to the jury to find for the defendant. This instruction was error, and for which the judgment must be reversed. The court sustained all of the exceptions to special damages claimed by the plaintiff. Most of these exceptions, we think, were properly sustained, but the exception to the item of damage in the alleged depreciation of the value of plaintiff's stock of dry goods should not have been sustained. If, as alleged, the purpose for which the house was bought, and that the plaintiff intended to purchase said goods, or goods of that description, was known to the defendant at the time he contracted to deliver possession of the premises within 30 days, the depreciation in the value of the goods while plaintiff was kept waiting for possession of the premises would be a legitimate element of damage.

The appellant also assigns as error the re-

fusal of the court to hear and determine the defendant's exceptions before proceeding with the trial upon the facts. It is scarcely necessary to say that such action, unless with the assent of both parties, was erroneous.

The court did not err in refusing to permit the plaintiff to prove by the testimony of the witness Kangerga that he had leased the premises for the term of one year prior to the sale to plaintiff, and had possession thereof for five months before said sale, and that at the time of the sale the defendant fraudulently procured from him, and without his knowledge, the writing binding him to deliver possession upon sale of the property by the defendant. The judgment is reversed, and the cause is remanded for another trial. If the defendant fails to establish his defense of accord and satisfaction, the plaintiff should have judgment for the rental value of the premises, assuming he establishes, by competent evidence, a contract to put him in possession, as alleged in his petition; such rental to be subject to any set-off by claim of rent established by defendant for the place conveyed to him by plaintiff, and the possession of which was retained by plaintiff pending the litigation over the possession of the place sold to plaintiff by defendant. Reversed and remanded.

KOSMINSKY v. RAYMOND et al.

(Court of Civil Appeals of Texas. May 10, 1899.)

AFFIDAVITS—ACKNOWLEDGMENT—ATTORNEY AND CLIENT.

A garnishee's attorney, who is a notary, may swear the garnishee to the truth of statements contained in his answer; such act not involving the exercise of judicial discretion.

Appeal from Bowie county court; R. H. Jones, Judge.

Action by Raymond, Hawes & Co. against M. Kosminsky. Judgment for plaintiffs, and defendant appealed. After affirmance of the judgment, defendant moves for a rehearing. Granted, and judgment reversed.

P. A. Turner, for appellant. S. J. Henry, for appellees.

FISHER, C. J. This is a garnishment proceeding instituted by the appellees against the appellant. The answer of the appellant, as garnishee, complies with the terms of the statute; but the court below dismissed the answer because, it seems, it was sworn to before the attorney of the garnishee, who was at the time a notary public. The only point presented is whether the attorney of the garnishee, who is a notary public, may swear the garnishee to the truth of the statements contained in his answer. In the original opinion¹ we held that the attorney, although a notary public, was not, under such circum-

¹ Withdrawn.

stances, authorized to administer the oath to the garnishee. A reconsideration of this question convinces us that we erred in this ruling. There are decisions from the courts of this state to the effect that an attorney, as a notary public, cannot take the acknowledgment of a married woman, who is then his client, to a deed, nor take the depositions of witnesses to be used in cases in which he may be an attorney for either of the parties. Taking the acknowledgments, under such circumstances, to deeds or instruments of writing, is, to some extent, judicial in character, as the officer, in taking such acknowledgments, has to exercise some discretion in passing upon the facts that authorize such acknowledgments to be made. It can readily be perceived why an attorney interested in a case should not be permitted to take the depositions of witnesses to be used on the trial. Taking down such testimony is an *ex parte* proceeding, and the officer who may be charged with the performance of such duty ought not to be interested in the controversy, either as a party or as an attorney, as the opportunity ought not to be given for coloring the testimony in favor of the party who is charged with the duty of reducing the answers of the witness to writing. But the work of swearing a party to the truth of the contents of a paper, and officially attesting the same, is ministerial in character, and involves the exercise of no judicial labor or of discretion; and we believe that making an affidavit before an attorney, such as in the case before us, is not prohibited upon principle, and presents a different case from those in which attorneys take the acknowledgments of their clients to instruments of writing, or the depositions of witnesses in causes in which they are interested. There is no statute in this state which prohibits an attorney from acting as a notary public, and the law, in express terms, confers upon the notary power to administer oaths, and take the affidavits of parties to written instruments. In the case of *Ryburn v. Moore*, 72 Tex. 86, 10 S. W. 393, a motion was made to strike out an affidavit filed by the plaintiff to the effect that he was unable to give security for costs, because it was made before one of the attorneys of the plaintiff, who was a notary public. The court, in passing upon the question, held that this was no ground for striking out the affidavit. The supreme court of Indiana, in the case of *Yeagley v. Webb*, 86 Ind. 425, in passing upon a motion to strike out a part of the appellee's answer because it was sworn to by her before her attorney, says: "The court committed no error, we think, in overruling this motion. We know of no law in this state which forbids an attorney who is also a notary public from administering an oath to his client. The propriety of such an act may possibly be questioned, but the act is not illegal. The oath thus administered is a legal oath, and, if untrue, the affiant might doubtless be convicted of perjury therefor." The

court, in the case of *McDonald v. Willis*, 143 Mass. 452, 9 N. E. 835, in passing upon the validity of an oath administered by an attorney of the party in relation to a cause in which he was employed as attorney, says: "It is true that a man cannot be a judge and an attorney for one of the parties in the same cause, but it has always been the uniform usage for attorneys for either parties to administer oaths, as justices of the peace, to their clients or others, when the necessity for voluntary affidavits arises in a case; and there is no sound objection to this, where the oaths are voluntary, and the act of the justice is substantially ministerial, and not judicial. In the case before us, the act of the attorney of the petitioner in administering to him the oath to his certificate was substantially ministerial, and did not involve or require any hearing, decision, or adjudication." In the case of *Reavis v. Cowell*, 56 Cal. 588, the court, in passing upon an affidavit made by the plaintiff before his attorney, who was a notary public, resisting a motion to change the venue, after repeating a statute similar to ours, which authorizes oaths to be administered by notaries, and affidavits to be made before them, says: "There is no such limitation found in the act to the power of a notary as is contended for in this case, and there is nothing in the rules of the court to which our attention has been directed prohibiting the notary from administering an oath to, or taking the affidavit of, his client. In the case of *Kuhland v. Sedgwick*, 17 Cal. 128, the court says: 'We are not aware of any provision of law making the notary incompetent to take it [the verification of his client].' In the case of *Dawes v. Glasgow*, 1 Burn. 8, the supreme court of that state uses the following language: 'Although there is an obvious impropriety in the practice, and this court is much disposed to discountenance it, yet there is no law, or rule of court under authority of law, against the exercise of such a power by an attorney in the case.' In the case of *Young v. Young*, 18 Minn. 94 (Gil. 72), the court says: 'The answer to the objection that the affidavit of service was sworn to before one of the plaintiff's attorneys of record is similar. The attorney was a notary public, and therefore, under section 4, c. 28, Gen. St., which confers upon each notary public the power to administer all oaths required or authorized by law to be administered in this state, was empowered to administer the oath in this instance.' We are of the opinion that an attorney who is a notary may take the affidavit of his client. It is now, and has been for many years, the practice in this state; and, however improper or reprehensible the practice may be, there is nothing in the law which prohibits it." There are other authorities in support of these, which it is not necessary to cite. Viewing the question solely from the standpoint of propriety, we are not disposed to encourage this practice; but, viewing it in its legal aspect, there is no rule

of law existing in this state which prohibits an attorney who may be a notary from taking the affidavit of his client. Motion for rehearing is granted, and the former judgment set aside, and the judgment of the court below reversed, and the cause remanded.

KOSMINSKY v. HAMBURGER et al.
(Court of Civil Appeals of Texas. May 17, 1899.)

TRIAL—INSTRUCTIONS—FRAUDULENT CONVEYANCES—RIGHTS OF CREDITORS.

1. A request to charge a jury, which excludes from their consideration a theory of the case which has some evidence to support it, is properly refused.

2. If defendant, to assist another in defrauding his creditors, entered into an arrangement whereby the debtor conveyed his property to a trustee to secure some of his creditors, and the defendant, in pursuance of such conspiracy, subsequently purchased such property from the trustee for a great deal less than it was worth, he is liable to the unsecured creditors for the difference between the value of the property and the amount paid; and the unsecured creditors need not refund to him the amount paid for the property, and applied by the trustee on bona fide indebtedness of the debtor, before seeking to subject such excess to the payment of their claims.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

Action by Hamburger Bros. & Co. against M. Kosminsky and another. From a judgment in favor of plaintiffs, Kosminsky appeals. Affirmed.

P. A. Turner and Dan T. Leary, for appellant. Henry & Henry, for appellees.

FISHER, C. J. This is an action by appellees against M. Kosminsky and one Gus Less. The plaintiffs, in effect, alleged that Gus Less was indebted to them for goods and merchandise sold him aggregating the sum of \$997, for which they asked judgment, and at the same time sued out an attachment against the property of Less, and caused it to be levied upon certain merchandise in the possession of appellant, Kosminsky; alleging that Less, for the purpose of defrauding his creditors, had made and executed a fraudulent deed of trust to one J. Deutschman, trustee, for the purpose of securing certain fictitious debts, among which was a fictitious claim of the appellant, Kosminsky, and that Kosminsky, Deutschman, and Less had entered into a conspiracy for the purpose of defrauding the plaintiff and other creditors of Less, and that Kosminsky, in pursuance of this conspiracy, bought the goods of Less at the trustee's sale; that said sale was fraudulent, and really for the benefit of Less. The goods attached were sold by order of the court, as perishable property, which realized the sum of \$925. Plaintiffs, in their petition, admitted that two of the debts secured by the deed of trust were valid. The case was tried before a jury, and the appellees, Hamburger Bros. & Co., recovered judgment

against Less for the amount of their claim sued for, and foreclosure of their attachment lien on the proceeds of the sale of the attached property.

The facts show that appellant, Kosminsky, for about \$7,500, bought the property transferred to the trustee by Less, a few days after the deed of trust was executed, and that this amount went towards paying off and discharging some of the debts secured by the deed of trust, among which were the two debts which were admitted by the plaintiffs to be valid. There is some evidence in the record which has a tendency to show that the other debts were fictitious, and that Kosminsky and Less were parties to a conspiracy to defraud the unsecured creditors of Less; and we do not feel bound by the conclusion reached by the court in the case of *Kosminsky v. Walter* (Tex. Civ. App.) 44 S. W. 540, where it had before it the construction of the deed of trust here in question, for the testimony, as appears from the record there, was not the same as shown by the record in this case. There, Kosminsky testified to the validity of the debt, and the good faith of the transaction between him and Less and the other parties to the instrument; but he did not testify in the case before us, and there is no evidence of that character in the statement of facts; nor is there evidence of the other beneficiaries mentioned in the deed of trust, whose claims were given preference, except that of the two banks, whose claims the plaintiffs admit were valid. And we cannot say that the verdict and the judgment of the trial court are without evidence to support them, on the proposition that most of the claims secured by the deed of trust were fictitious, and that a purpose existed between Kosminsky and Less to defraud the other creditors of Less.

Appellant's first assignment of error complains of the refusal of the court to give the following charge to the jury: "If you find from the evidence that some of the debts set forth and secured in the deed of trust read to you in this case are honest and just claims against Gus Less, and that some of said debts are fraudulent and fictitious claims against said G. Less, and that the beneficiaries in said deed of trust, holding and owning said honest debts, accepted said deed of trust in good faith, and without any knowledge of a part of said debts being fraudulent, then said deed of trust would be valid as to such honest claims, and invalid as to such dishonest or fraudulent claims; and if, under these circumstances, the trustee in said deed of trust sold and delivered said goods to the defendant M. Kosminsky, and paid said honest claims, and said Kosminsky had no notice of said dishonest claims, then the plaintiff in this case had no right to seize said goods, and take them from the possession of the defendant M. Kosminsky, without first paying or tendering to said Kosminsky the amount of said honest claims which had been paid by said trustee; and, if you find these to be the facts, then you will find

for the defendant M. Kosminsky." This charge, in the abstract, embodies a correct principle of law, but it did not go far enough. There are other features of the case, which arise from the evidence, which should have been embraced in the charge, in order to make it complete, so that the court would be required to give it. This charge was requested upon the theory that Kosminsky had no notice of the dishonest claims, and therefore the trustee would have the right to sell all of the property for the purpose of paying the valid debts, and that Kosminsky's title could not be disturbed unless the amount paid to discharge these valid debts was first repaid to him. This charge loses sight of the theory (which has some evidence to support it) that Kosminsky, although he may not have known that some of the claims were dishonest, was a party with Less to a scheme to defraud the creditors of Less in the execution of the deed of trust, and in the purchase of the property at the trustee's sale. Kosminsky may have in good faith believed that all the claims secured by the deed of trust were honest, but still he may have been a party with Less to a fraudulent scheme of placing the property in question, by reason of the deed of trust and the purchase by him, beyond the reach of the unsecured creditors; and, if such was the case, the unsecured creditors would not be required to refund to him the amount of money that he paid out on the valid debts, in order to subject part of the property purchased by Kosminsky to the satisfaction of their claims, when Kosminsky by the purchase acquired much more property in value than the sum he paid for the same. There is some evidence in the record which tends to show that the property purchased by Kosminsky at the trustee's sale was worth several thousand dollars more than the sum that he paid therefor. Now, if it is true that Kosminsky entered into a conspiracy with Less for the purpose of defrauding the creditors of Less, and the amount of money which he paid to the trustee for the purchase of the property went towards the satisfaction of honest debts, and Kosminsky, in furtherance of the fraudulent scheme, acquired possession of property of Less worth several thousand dollars more than he paid the trustee therefor, he would be held responsible for this excess; and creditors seeking to subject it to their claims would not be required, as a predicate thereto, to reimburse him the sum that he had paid out in the discharge of the bona fide debts. Kosminsky could not be charged with the amount he paid out in extinguishing the bona fide claims, but, if he was a party to the scheme to defraud creditors, the property in his hands in excess of the value of the bona fide claims could be subjected to the satisfaction of claims due other creditors of Less.

The charge requested, as set out in the second assignment of error, was, in effect, covered by the main charge of the court. Therefore there was no error in refusing it.

What we have said on the facts in effect disposes of the third assignment of error. We find no error in the record, and the judgment is affirmed. Affirmed.

**TEXARKANA & FT. S. RY. CO. v.
O'KELLEHER.¹**

(Court of Civil Appeals of Texas. April 6, 1899.)

**RAILROADS—PERSONAL INJURY—ESCAPING CINDERS
—NEGLECT—COMPANY'S LIABILITY.**

Cinders escaped from defendant's engine, and fell on a gallery where plaintiff was standing, 97 feet from defendant's railroad track, and one of them struck plaintiff's eye, destroying the sight. The engine was equipped with a spark arrester, but it was not shown to be in good condition, and the cinders escaping therefrom, including the one which injured plaintiff, were larger than would have escaped if the arrester had been in proper condition. *Held*, that the injury was due to defendant's negligence, and that it was liable therefor.

Appeal from district court, Jefferson county; Stephen P. West, Judge.

Action by Martha O'Kelleher against the Texarkana & Ft. Smith Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Greer & Greer, for appellant. Hugh Jackson and W. L. Douglass, for appellee.

GARRETT, C. J. This action was brought by Martha O'Kelleher against the Texarkana & Ft. Smith Railway Company to recover damages for the loss of an eye caused by a cinder escaping from a locomotive engine running upon the defendant's railway. The case was tried by a jury, and resulted in a verdict and judgment in favor of the plaintiff for the sum of \$560.

Plaintiff was standing on the gallery of a residence situated 97 feet from the defendant's railway track, and just outside of its right of way. A shower of cinders, escaping from an engine passing along the track and operated by the defendant's servants, fell upon the gallery, and one of them struck the plaintiff in the right eye, and lacerated the cornea so that sight was destroyed. The engine was equipped with a spark arrester, but it was not shown to be in good condition, and it appeared that the cinders escaping therefrom were larger than would have escaped if the spark arrester had been in proper condition, or if the engine had been properly equipped to prevent the escape of sparks and cinders. The cinder that wounded the plaintiff's eye was a larger one than should have been permitted to escape. From the facts of the case, we would have no hesitation in saying that the defendant would have been liable for damages resulting from a fire set out by the escaping cinders or sparks that injured the plaintiff's eye; and the question is, is there any difference in principle between the

¹ Writ of error denied by supreme court.

injuries resulting from the same state of facts? In the case of fire, the liability of the defendant would depend upon its permitting sparks to escape that it was in its power to prevent by the exercise of proper diligence in the equipment of its engine with appliances for that purpose, and in keeping them in good condition, as well as in the operation of the engine. If the defendant should fail to exercise such diligence, and damage should result, it would be held guilty of negligence. *Railway Co. v. Timmermann*, 61 Tex. 660; *Railway Co. v. Horne*, 60 Tex. 643, 9 S. W. 440; *Railway Co. v. Wallace*, 74 Tex. 581, 12 S. W. 227.

The fact that the fire is set out from sparks shown to have escaped from a passing engine is prima facie evidence of negligence. The business of the defendant being lawful, it is not responsible for accidents resulting from the running of locomotives over its railroad by the agency of steam, provided it has exercised the requisite care to prevent damage. But the damage to result from an act must be proximate, and not remote. It must be such as reasonably might have been expected as liable to result from the act causing it. This is a familiar principle of law. Destruction of property by fire escaping from an engine is an apparent consequence of permitting it to escape. A spark is liable to fall in combustible material, and kindle a fire. So are cinders emitted from the smokestack of a passing engine liable to fall upon persons near the track, and the eye, being an exposed portion of the body, is apt to be struck. While it is more obvious that a spark falling in combustible material will set out a fire than that a cinder is likely to get into the eye of a person near the track, yet the latter consequence is none the less direct, and, although not as likely to happen, might be easily foreseen. So, if the defendant permitted cinders to escape from its engine that, by exercise of due care, it could have prevented, and injury resulted to the person of one near the track, by coming in contact with the eye, we do not see, on principle, why it should not be deemed guilty of negligence, and held liable for the resultant damages. We have been unable to find a case where a person thus injured had brought an action, but we think the case here presented falls within the principle above mentioned, and that the defendant was negligent in permitting the cinders to escape, with respect to the injury done. None of the assignments of error present any ground for a reversal of the judgment of the court below. It will therefore be affirmed. Affirmed.

Motion of Appellant for Additional Conclusions.

(April 18, 1899.)

The appellant has filed a motion requesting additional conclusions of fact. The petition and charge of the court base the right of re-

covery upon an injury from a cinder which the appellant negligently permitted to escape from its engine, and the decision of this court was not based upon the fact that the cinder was a live spark when it struck the plaintiff's eye. We, however, make the findings requested.

1. Showers of cinders and sparks from appellant's engine fell upon the gallery where the plaintiff was standing. The cinder was hot when it struck plaintiff's eye, and the sensation produced was a "fearful burning."

2. The fragment or cinder taken from the plaintiff's eye was described as of the size of a pin at the point end, and about an eighth of an inch long. Spark arresters are usually constructed of No. 16 wire, which means wire one-sixteenth of an inch in diameter, with six interstices to the inch. The finding of the jury that the cinder that struck the plaintiff's eye was larger than should have been permitted to escape from the engine is supported by the evidence, and we approve the finding. The witness Reeves testified that a cinder of the size described could not escape through the meshes of a spark arrester made of No. 16 wire with six interstices to the inch. The spark traveled 97 feet through the air before it struck the plaintiff, and must have been reduced in size by combustion in its progress. A piece of the size that was found in the eye would hardly have had sufficient weight to give it enough momentum to pierce the eye, and the shape of it would indicate that it was a fragment of a larger cinder. The evidence showed that cinders fell on the gallery from the size of a pea down.

COTTON et al. v. RAND.¹

(Court of Civil Appeals of Texas. Dec. 21, 1898.)

TENANCY IN COMMON—CONTRACTS—TERMINATION—INNOCENT PURCHASERS—STATUTE OF FRAUDS—AGENT IN CHARGE OF LAND—PLEADING—VARIANCE—ESTOPPEL—LIMITATIONS—APPEAL—HARMLESS ERROR—ADMISSIONS.

1. An agreement of several owners of land to pay a co-owner a yearly salary for looking after the common interests is not terminated by a sale by one of such owners of his interest.

2. A purchaser of the interest of one of several owners of land takes it subject to a contract right of a co-owner to enforce payment out of the land for past-due services performed in looking after the common interests, though the purchaser had no notice of such right when he bought.

3. A contract wherein an agent employed to sell land is to receive his compensation from the proceeds of sales is not void under the statute of frauds.

4. There is no variance between an allegation that plaintiff was employed at a yearly salary to look after certain property and mineral lands, and proof that his charge of the mineral lands was merely nominal.

5. An agent employed to sell land does not terminate the agency by executing a contract pursuant to a conspiracy to defraud his principal of the land, where the contract was never acted on.

¹ Writ of error granted by supreme court.

6. An agreement by co-owners of land to pay a yearly salary for looking after the land, the legal title to which is in a trustee, is not terminated by the trustee's conveying the land, for a nominal consideration, to defraud his cestuis que trustent, under an agreement requiring the grantee to reconvey at the trustee's request.

7. The fact that an agent is employed to sell land under an agreement requiring him to obtain his compensation from the proceeds of sales does not make the refusal of the principal to accept a reasonable offer a termination of the contract, where the offer was for a large quantity, made by persons desiring to purchase for speculative purposes, and the contract denied the agent a right to sell in quantity for speculative purposes.

8. After an agent had been employed for a number of years, at a yearly salary, to care for land, and to sell it, the salary to be paid from the proceeds of sale, he brought suit for his salary before he had sold enough land to pay it. The principal, by answer, offered to pay what should appear to be due, and alleged that the contract of employment had long since terminated, and that all claim for services was barred by limitations. *Held*, that the principal could not claim that the cause of action had not accrued.

9. Under the contract sued on, certain land was made subject to plaintiff's claim against several joint owners for services performed for such owners in looking after the land, to be paid out of the proceeds of sale of the land. O., one of the owners, proved a counterclaim in his favor alone. *Held*, that the judgment should provide that the interests of the other owners should be made subject to their proportion of the amount due plaintiff, while O.'s interest should be subject to his proportion, less the amount of his counterclaim.

10. Any error of the court in fixing the amount of the interest of any of the co-owners in the land could not harm them.

11. One of several defendants, who, in his answer, offered to pay what should be found to be due to plaintiff, cannot complain of a judgment against him for only a portion of the recovery, and that to be satisfied only out of a sale of his interest in certain land.

12. Plaintiff cannot complain of error in refusing to give judgment against certain defendants, where he stated to the court that he was of the opinion that he could not recover against them, but that "he did not consent to this judicially, but left it to the court."

13. A failure of one suing on a contract for services to be paid for from the proceeds of the sale of land after the expenses of caring for the land were paid, to allege that there would be any surplus after payment of expenses, is cured by defendant's plea of reconvention, alleging that the contract with plaintiff had long since terminated, and offering to pay what should appear to be due.

Appeal from district court, El Paso county; A. M. Walthall, Judge.

Action by Noyes Rand against F. B. Cotton and others for personal services. Judgment for plaintiff, and defendants appeal. Affirmed.

Millard Patterson and W. B. Merchant, for appellants. Leigh Clark, Wm. H. Burges, W. M. Coldwell and W. B. Brack, for appellee.

Conclusions of Fact.

JAMES, C. J. The following contracts were in evidence:

"It is hereby covenanted and agreed by and between Noyes Rand, of Charleston, West Virginia, Francis W. Abney, of Charleston,

West Virginia, Richard W. Dorphley, of Philadelphia, Pennsylvania (for themselves and P. B. Delaney, of Philadelphia, Pa., and Clarence P. Ehrman, of Harrisburg, Va.), as parties of the first part, and Frank B. Cotton, of Boston, Mass. (for himself and others), as parties of the second part, in consideration of the sum of one dollar in hand paid to parties of first part, receipt of which is hereby acknowledged, and of the further payments to be made and stipulations to be performed as herein provided by said parties of the second part: First. That all options now held by said parties of the first part, or any of them, for the purchase of mineral lands in the state of Texas, as well as all options for such purchases as they may hereafter secure, and any and all such purchases as they may hereafter make, and all mineral lands already located or that may hereafter be located by them in the state of Texas, shall be for the joint benefit of the parties to this agreement. In the proportion of one-half interest to the parties of the second part. Second. That said parties of the second part will furnish the necessary amount of money, not exceeding thirty thousand (\$30,000) dollars, to pay the cost of such lands as may be selected by the parties of the first part out of any such as are now controlled or as may be secured hereafter, and that they will send a representative to such point or points as may be designated by parties of the first part to examine said lands as soon as so required to do; such representative to be authorized to pay for same as soon as he shall examine and approve of them, and the proper deeds and titles shall be furnished; said deeds to be made in the name of Frank B. Cotton and Edwin B. Buckingham, as trustees for the respective parties to this agreement. Third. That parties of the second part hereto will pay to the parties of the first part the sum of seventeen hundred and twenty-three (\$1,723) dollars, to reimburse outlays already incurred by them, including the cost of about six tons of ore now in transit from St. Louis, Mo., to Philadelphia, Pa., which ore shall thereupon become the property of the parties hereto, for their joint benefit; such payment to be made upon the execution of this agreement, and the delivery of said ore at such point as may be indicated by the parties of the second part hereto. Fourth. That parties of the second part will advance the sum of not exceeding thirty-five hundred (\$3,500) dollars to meet the cost of outfit and the necessary expenses of their aforesaid representative, and of such of the parties of the first part as may go to Texas to attend to this business, and to pay them for their services in such employment, which advance shall be reimbursed out of future earnings of this enterprise. Fifth. That parties of the second part will furnish such further amount of money as the parties hereto may decide as needed for developing the lands to be purchased under this agreement, and for carrying out the plans to be

hereafter agreed upon by said parties hereto; the entire amount so furnished to be reimbursed out of the net earnings of the enterprise, before any dividends shall be declared on the capital stock of the company to be formed as hereinafter provided. Sixth. That said parties of the first part agree that Noyes Rand and Francis W. Abney will personally go to Texas at once and attend to the purchase of the lands as aforesaid, and to carry out the plans of the parties hereto, for the space of three months from date of this agreement, if necessary,—receiving as compensation for their service while so employed two hundred dollars each per month, besides the cost of their outfit and necessary traveling and other expenses,—and will also secure the services of Clarence P. Ehrman, at the rate of one hundred dollars per month and expenses, to assist them; such payments to be met out of the advance hereinbefore provided to be made by parties of the second part. Seventh. That as soon as the parties of the first part shall have secured such lands as they may decide upon, and the parties of the second part shall have paid therefor, and the deeds therefor shall have been executed and received, a meeting of all the parties hereto, in person or by proxy, shall be held in such place as may be mutually agreed upon, and a company organized, under a charter to be obtained under the laws of Texas, or of such other state as may be decided upon, with such an amount of capital stock, and of such par value per share, as the parties hereto may determine, and directors and officers shall be elected to manage the business of said company; each of the respective parties hereto having an equal representation in the board of directors, but the officers to be of the party of the second part, or such as may be acceptable to them of the parties of the first part. Thereupon the titles to all lands that may have been purchased shall be properly vested in said company, in due legal form; and full paid stock of said company shall thereupon be issued to the respective parties hereto, in the proportion of one-half of the entire capital to the parties of the first part, or in such other divisions as the respective parties may agree among themselves. Eighth. That all lands which may be located or patented under this agreement shall be assigned to the hereinbefore named trustees by the individual in whose name they are to be located, under a written agreement to be executed at the time of authorization of such location in his name. Ninth. It is further agreed that none of the individual members of the respective parties hereto shall directly or indirectly operate in mineral lands or mineral products of the state of Texas within the district which this agreement is intended to cover, unless by consent of the other party hereto. In witness whereof, we have hereunto attached our signatures and seals this seventeenth day of April, A. D. 1880, in the city of Boston, Mass. Noyes Rand. [Seal.] Fran-

cis W. Abney. [Seal.] Richard W. Dorphley. [Seal.] P. B. Delaney, by R. W. Dorphley. [Seal.] Clarence P. Ehrman, by N. Rand. [Seal.] Frank B. Cotton, for Self and Others. [Seal.] Witness to all signatures: Samuel Colt. Pierce Powers."

"Whereas, it was agreed between Frank B. Cotton, of Boston, Massachusetts, of the first part, and Noyes Rand, of West Virginia, and Richard W. Dorphley, of Philadelphia, Pennsylvania, of the second part, on the 19th day of November, 1880, as follows: That all purchases of land, leases, mining rights and interests, or real estate in general, west of the Mississippi river, not embraced in a certain contract between the parties hereto and their associates, bearing date April 17, 1880, which may be made after November 19, 1880, by either or any of the parties of the second part hereto or their associates, shall be for the joint account and interest of the parties hereto and their associates, and no others, during the continuation of this agreement, or any contract that may be executed in accordance with it, said interest to be apportioned as follows: Two-thirds of all profits arising from such purchases to accrue to Frank B. Cotton and his associates; one-third to Noyes Rand, R. W. Dorphley, and their associates,—it is agreed and understood, as the conditions upon which this agreement is based, that the necessary funds for making the aforesaid purchases, for meeting necessary expenses, and for such improvements or developments as may be agreed upon between the parties hereto, are to be furnished or secured by said Frank B. Cotton and his associates; that said Noyes Rand and R. W. Dorphley will attend, themselves, or through competent representatives, to securing, purchasing, and getting in proper condition for development, improvement, or sale, as may be agreed upon, any purchase that may be made under this agreement; that the party of the first part and his associates shall not be held to any purchases or leases unless approved by him and his associates, or for a greater sum than \$2,000 for expenses, unless expressly authorized by him or them; and that the title to estates, leases, rights, and interests shall be vested in Frank B. Cotton, as trustee, for the purposes hereof. Now, therefore, this document is to be replaced by a formal contract as soon as the same can be prepared and executed. Witness our signatures this — day of December, 1880. Frank B. Cotton, for Self and Associates. R. W. Dorphley, for Self and Noyes Rand."

The following letter was in evidence:

"El Paso, Texas, August 10, 1881. Major Noyes Rand, El Paso, Texas—Dear Major: Confirming what I have already said to you in several conversations on the matter, I would request, for myself and for all the other parties to two certain contracts, bearing date Boston, Apl. 17, '80, and Dec. 21, '80, that you will continue to make your residence El Paso, Texas, and devote yourself to the

furtherance of our interests in the Southwest, representing us to the best of your ability, and acting as our agent in this section, under instruction and advice which I, as trustee named in both above-mentioned contracts, will from time to time send you; and, that I may be the better able so to advise or instruct, you will please, by regular correspondence weekly, and oftener, of course, if it be necessary, keep me thoroughly posted and informed as to your movements, and generally as to all matters at all affecting our interests hereabouts, and what opportunities, if any, arise which may be judiciously taken advantage of by us. In short, to give up your residence in West Virginia, and permanently locate yourself in this section, for at least one year, and consider yourself as in our employ for that term (12 months), occupying the same position that you have for a year or more past; i. e. as our agent, working for the benefit of all the parties interested. Of course, it is understood that you will not make sales or purchases for us, nor subject us, individually or collectively, to any obligations, pecuniary or otherwise, without special authorization by me, as above indicated, so to do, except, as agent and manager of our city property in El Paso, known as the 'Cotton Addition,' you may, without waiting to refer same to me, sell by our map of same such lots, and at such prices, for cash, as you may deem judicious, for dwelling-house lots, or improvement by the purchaser, but not in quantity for speculative purposes. All deeds, however, for such property so sold, and all deeds for any of the property comprised in this addition, or for any other property owned or controlled by the parties to the contract or agreement of December 21, 1880, above referred to, to be signed by me, as trustee, and all deeds for properties owned or controlled by the parties of our contract of April 17, 1880, to be signed by myself and co-trustee, E. B. Buckingham, and the full amount of money at which such property may be sold to be remitted to me, without deduction for fees, commissions, or expenses of any kind whatsoever, and the amount so paid and collected to be expressed in the deeds. In consideration of your complying with this request, and faithfully performing the duties of the trusts devolving upon you in the premises, we will at once proceed to put the house on our property here in tenable condition for yourself and family at our expense, for your occupancy free of rental while thus employed by us. We will also give you the free use of one of our horses; same to be, however, kept and fed at your expense. Will loan you the money, not exceeding one thousand (\$1,000) dollars, necessary to purchase furniture sufficient for your needs for said house; you to pay interest semiannually on such loan at the rate of 12 per cent. per annum, and said loan to be secured, until paid by you, by lien on your interest in lands or other properties acquired under the contracts above referred to,

or on the said furniture, or on both, as we may elect; and will pay you in addition the sum of two thousand (\$2,000) dollars per annum, in monthly payments, upon receipt of a monthly statement of account of all transactions made by you, with a general report of the condition of our affairs, etc. Trusting that this proposition will meet with your approval, and requesting that you will at once write me, notifying me of your acceptance of same, and hoping that it will be to the mutual advantage of us all, as I firmly believe it will, I remain, yours, very truly, Frank B. Cotton."

The above letter, supplemented or modified by the oral agreement alleged in the petition, constituted the contract under which plaintiff was engaged. His testimony is evidence that he performed the services, and that the sales from time to time were not sufficient to defray the expenses, and that there was nothing from the sales after paying expenses to apply to his salary. The evidence warranted the jury in the findings made in their verdict, both as to plaintiff's salary and as to defendants' cross action. The testimony showed that defendants were the owners of two-thirds of the Cotton addition, and the aggregate amount adjudged against defendants' interests was the proportion due from such two-thirds.

The case has already been before this court. *Cotton v. Rand*, 29 S. W. 682. It has been since tried on a fourth amended original petition, filed May 4, 1898, in which plaintiff, Rand, alleges that he is entitled to recover for his services as agent the sum of \$2,000 per annum from September 15, 1882, to some time in 1893, and alleging: That the contract originally made provided that plaintiff, Rand, should take charge of the Cotton addition to El Paso, and of the lands known as the "Mineral Lands," as agent for all interested parties, for which he was to receive \$2,000 per annum, in monthly payments, as specified in a letter from F. B. Cotton to him, dated August 10, 1881, which original contract was modified verbally in August, 1882, as follows: In August, 1882, Cotton, acting as trustee for all the parties, represented to plaintiff that he was financially embarrassed, and could obtain no money from his associates; that he would not be able to furnish the necessary means to carry on the operations as he had theretofore done, and would not be able to advance the sums he had promised to advance by the terms of the contract evidenced by said letter of August 10, 1881, and Rand's reply thereto,—and requested plaintiff, on behalf of all parties, to continue to act as agent at a salary of \$2,000 per annum, and it was understood and agreed that plaintiff should raise the necessary funds to carry on the business by sales of property in the Cotton addition, and, if necessary, by borrowing money; and it was further agreed that plaintiff should be paid his salary which might accrue, out of said Cotton addition, when sold, or as sales should be

made from time to time, it being understood that there was no, or but nominal, need for an agent for the mineral lands. And that plaintiff continued to act under this employment until in 1893, when this suit was filed. It appears from the petition that the Cotton addition was not sold, and it does not appear therefrom that lots had been sold to such an extent as to entitle Rand to demand payment of his compensation, or any part thereof, under the terms of the agreement he alleges, but the contrary is made to appear; and, with this condition before him, plaintiff, in order to show in himself a right to sue, alleged that if his right to sue had not accrued prior to August, 1894, it did accrue on that date, because "on that day the said Frank B. Cotton absolutely and wholly, by his own act, resigned, extinguished, renounced, and canceled his trusteeship, and breached his said contract with plaintiff, in that he pretended, as trustee, to sell to D. W. Williams all of the property known as the 'Cotton Addition,' as well as the mineral lands, and transferred to said D. W. Williams, a stranger, all right, title, and interest whatsoever that he, the said Cotton, had in and to the said Cotton addition or said mineral lands, either as trustee or otherwise; that the purpose of said Cotton in selling or conveying said property to Williams was to cheat, wrong, and defraud the other persons interested in the lands, and especially to cheat, wrong, defraud, delay, and harass this plaintiff, and that Williams was knowingly a party to such fraud, but that he (Cotton), being advised that the courts would not sanction such a transaction and scheme, has lately had said Williams reconvey to him the property, and caused the deed to be recorded less than a month before the filing of this amendment, though it was executed nearly a year before, and that he (Cotton) did not divulge or make known the fact of his having obtained said reconveyance in the trial of another case between the parties hereto at the last term of this court, in February, 1898, but suppressed the fact of said reconveyance in the trial of the case of Samuel Colt v. Frank B. Cotton et al., and said Cotton and said Williams used the deed to Williams in evidence to show that Williams was the owner of the property; that said Cotton having divested himself of the legal title to said Cotton addition and the said mineral lands, and thus renounced his trusteeship, by the conveyance to Williams, could not reinvest himself with the trusteeship of said property, further than as the mere naked holder of the legal title, without the consent of this plaintiff and other parties interested, which was not obtained." It will be seen that the nature of the case is quite different in this fourth amended pleading from that in the original petition, and we believe it is not necessary to do more than call attention to the above changes, in discussing the points raised in this appeal. The defendant Cotton, in addition to matters amounting to a general denial, which all defendants

pleaded, pleaded specially that Rand in March, 1892, conspired with Samuel Colt, one of the original defendants (now represented by Millard Patterson, his administrator), and F. W. Abney, to defraud him (Cotton) out of his interest in the property, by agreeing to obtain a judgment against him upon a spurious claim, and selling out his interest under the same, and by such conspiracy Rand ceased to be agent of defendant Cotton, abandoned the same, and took and accepted employment under and with said Colt and Abney, as their agent, at a fixed compensation per annum; the object being to cheat and defraud Cotton out of his interest in the property. Cotton, as trustee, also pleaded matters in reconveyance, which plea was adopted by Hunt; and defendants generally set up the statutes of limitations to plaintiff's claim. The case resulted in a verdict and judgment in favor of plaintiff against F. B. Cotton for \$570.93, and against W. P. Hunt for same amount, with an order for the sale of their respective two-fifteenths interests in the Cotton addition for the satisfaction of the judgment, and in a judgment against Millard Patterson, as administrator of the estate of Samuel Colt, for \$1,712.79, to be paid out of the six-fifteenths interest held by said administrator in the Cotton addition. The jury were directed to return a verdict in favor of all the other defendants, and judgment was rendered in their favor.

Conclusions of Law.

1. We think there is no merit in appellants' contention that the arrangement for plaintiff's compensation ceased upon the transfer by any of the interested persons of his interest in the contract relative to the Cotton addition, or of his interest in the property; nor in the contention that any such transfer matured plaintiff's contract for compensation; nor that a purchaser of any such interest, who purchased without notice of plaintiff's right to compensation then accrued, would take the interest free of such charge; nor that the statute of frauds has application to the contract alleged and shown; nor that there was a variance between the contract which plaintiff alleges and that to which he testifies.

2. From the contract which plaintiff alleges in his fourth amended original petition, and the testimony, we are inclined to think that his demand for compensation had not accrued. The agreement as alleged is that the funds necessary to carry on the business should be raised by sales of property, or by borrowing money, if necessary, and plaintiff's salary should be paid out of the addition, when sold, or out of sales as made from time to time. It seems to be the clear construction of such contract that the proceeds of lots should go to paying the expenses of the business, before going towards plaintiff's salary. Attention to the property and payment of the expenses were a part of what plaintiff was to do in order to earn the salary, and it is manifest that

his employment could not continue or exist without their payment; hence the nature of his employment contemplated that he should apply the proceeds of sales to expenses first. According to plaintiff's testimony, the sales were not sufficient to pay the expenses; hence, that condition for the accrual of his salary, or any part thereof, has not happened. As already stated, it is our opinion that sales of individual interests of the members of this concern did not have the effect of destroying the trust or maturing the salary. The contract of 1892 which plaintiff made with Colt and Abney, which defendant Cotton charges to have been a conspiracy in which plaintiff engaged to defraud him (Cotton) out of his interest, did not, in our opinion, terminate plaintiff's agency or mature his salary, because the said contract appears to have never been acted on by the parties thereto, and was practically abandoned from the start. Plaintiff continued to act as agent until he filed this suit, in 1893; and the suit, when tried the first time, was prosecuted to personal judgment against Cotton and Colt alone for all of plaintiff's salary, the latter then owning Abney's interest, which judgment we reversed. Plaintiff's suit for salary has been contested by Colt from the beginning, and this leaves no room for doubt that the contract between plaintiff and Colt and Abney was never respected or treated by them as binding. In a case of this kind it seems to us that an agent must do some act, or actually assume some relation, against the interest of his principal, to affect him. Here the agent continued to perform his services as usual, and the contract referred to was never of effect and never acted upon. Nor do we believe that the conveyance in 1894 from F. B. Cotton, trustee, etc., to W. W. Williams, matured plaintiff's claim. It was not a sale of the property. Plaintiff himself alleges it was a pretended affair,—done, as he says, for the purpose of defrauding all the other interested parties; also, that the consideration thereof was nominal; also, that Cotton had Williams reconvey it to him. From plaintiff's own allegations it appears that the other interested parties had nothing to do with this pretended conveyance. It is quite plain to us that it was not a sale of the property at all. It was an act of the trustee for some unexplained purpose, and, if it had had the effect of placing the property beyond plaintiff's reach for the purposes of his contract, Mr. Cotton would have become personally liable to plaintiff. But it did not have that effect. It seems to have been in Cotton's control at all times, and he had it reconveyed when desired.

3. Another theory upon which plaintiff's salary is claimed to have accrued in 1887 is set forth in the twenty-second assignment of error, and is based on the testimony of Rand that in that year he had an offer from a syndicate of \$100,000 for a half interest in the Cotton addition, and also an offer of \$100 per lot for enough lots to pay the indebtedness

then due, amounting to about \$5,000, which offers Mr. Cotton refused. The theory is that Rand had a right, if said offers were reasonable, to have the sales made, and Cotton's refusal gave him instantly a right to sue for the services he had performed. The original written contract (letter of August 10, 1881), of which the subsequent oral arrangement alleged was amendatory, denied plaintiff the right to make sales in quantity for speculative purposes, or for other than dwelling-house or improvement purposes by the purchaser, except when approved by Cotton. This disposes of the contention. There having been no sale of property as contemplated by plaintiff's contract, as alleged, to mature his salary, we doubt that his cause of action has ever in fact accrued. But this view would not necessarily require us to reverse the judgment in respect to the salary, for the following reasons: Defendant Cotton, as trustee, and for himself, pleads in reconvention for judgment against plaintiff, and in his plea states that he is ready and willing, and offers, to pay plaintiff what, if anything, shall appear to be due him from said dealings. The defendant Hunt adopted this pleading as his own. It seems to us that these defendants must therefore submit to the judgment rendered in favor of plaintiff, unless it be erroneous in some other respect. All the defendants (Cotton, Hunt, and Colt's representatives) have tried this case on the theory that plaintiff's cause of action had accrued. They all insisted in the district court, and here insist, that it had accrued for such length of time as to have been barred by limitations.

4. From what is stated above, it is obvious that we conclude that the court was correct in proceeding upon the theory that no limitations have affected plaintiff's demand, and that none of the many assignments based on limitations is well taken. The ground, if any, upon which limitations could be claimed in this case, is that plaintiff's right to sue accrued in 1894, when Cotton conveyed to Williams; the amended petition upon which the trial was had not being filed until 1898. There is no possible correctness in this view, because it appears that plaintiff has since then filed three amended petitions, all asserting a cause of action for plaintiff's salary; the first amendment being in 1895.

5. As to plaintiff's fifth assignment: Plaintiff alleges that his contract with Cotton for \$2,000 yearly was practically for services in respect to the Cotton addition; that at that time and since there really was nothing to do in connection with the mineral lands, and but nominal need of an agent in reference to them,—and his testimony is to the same effect. There was no variance between the allegation and the proof in this respect, as is claimed.

6. If there had been no plea or judgment in reconvention, and plaintiff had recovered a judgment, we believe the proper course would have been to order sufficient of the property

sold to pay it; thus making all the shares contribute in due proportion. The same would be true if the reconvention was in favor of all the owners. But the reconvention was personal against Rand for alleged delinquencies, and in favor of Cotton or Cotton and his associates, and not in favor of all the parties interested in the addition. It is obvious that, if a judgment had been recovered on the plea against Rand, it would have been a mere personal judgment against him, for which none of the others would have been liable. It would not have been a charge on any of the property. Here the reconvention was allowed, and the sum deducted from plaintiff's salary, and if for the difference, about \$7,000, a sale of the property had been ordered, Rand's associates (Crosby and others) would have received the benefit of Cotton's claim, to which they were not entitled, and the shares of Cotton, Hunt, and Colt would have borne more than their just proportion. We can see no possible way of satisfying such a balance remaining after deducting from the amount allowed plaintiff the amount allowed defendants, by a sale of the common property, without detriment to the interests of defendants. The form of this plea in reconvention has made it necessary, in allowing it, to provide some other method for satisfying what was adjudged to plaintiff, than by sales of the common property. The court, having ruled that Rand's associates were not liable to him for his salary, proceeded to ascertain what portion thereof the two-thirds held by Cotton and his associates was liable for, deducting from this the amount allowed in reconvention, and provided for a sale of such two-thirds to satisfy the balance. We do not agree with appellants' theory, that this claim for salary was a joint liability, in such sense that, unless all were sued, none could be liable, and that a judgment relieving some must necessarily relieve the others. The liability for plaintiff's salary was not a personal one on the part of the members, but to its payment each interest in the property should be made to contribute. Suppose, for example, one purchasing the interest of an original member had done so under circumstances that would estop plaintiff from looking to that interest for anything; could it be reasonably said that he could not look to the other interests for what was equitably due from them? We can see no objection whatever to plaintiff's remitting, if he pleases, what was due him from the shares of certain members, and looking to the shares of the others for the remainder, in due proportion. Still, so far as the defendants Cotton and Hunt are concerned, they, by their pleading, offered to allow or pay what was found to be due to plaintiff in this suit; and, if a personal judgment against them was thus submitted to for the whole amount of plaintiff's recovery, they should not be heard to complain of a judgment against them for only a portion of the recovery, and that only to be satisfied out of a sale of their interests. Nel-

ther has the administrator of Colt any just reason to complain of this form of relief, for he has had the full benefit of Cotton's plea in reconvention, and the judgment only purports to be against the interest of his intestate, to be made out of the same in due course of administration.

7. Those assignments which complain of the inability of the court to arrive at the respective interests of defendants in the land from the evidence are not well taken. The amount of recovery against said defendants appears correct, so far as being the amount due plaintiff for salary from the two-thirds of the land represented by them. The judgment in each instance is to be made only out of the property. If the party has really a greater interest than that ordered sold for his share, he is not injured, and, if he has less, he is not injured; so that these assignments, if otherwise correct, should not require a reversal.

8. The court evidently was of the opinion that Rand and his associates, and those holding under them, were not entitled to contribute to Rand's salary, and instructed a verdict in their favor, and directed the jury on this account to deduct from the sum allowed plaintiff one-third thereof, which they did. From what has already been stated, this furnishes appellants no ground for reversal. But it clearly was prejudicial to plaintiff, and might have entitled plaintiff to a reversal, but for the fact, as appears from one of the bills of exception in the record, that when the court was considering the question the counsel for plaintiff stated to the judge that in their opinion plaintiff was not entitled to recover against said parties. The exact language of the bill is that "plaintiff's attorneys stated in open court that in their opinion the plaintiff was not entitled to recover a judgment against Shuler and Crosby and those claiming under Crosby, but that they did not consent to this judicially, but left it to the court; and thereupon the court stated that he would charge the jury to return a verdict in favor of Shuler and Crosby, and those claiming under Crosby," etc. We think from this that plaintiff has no right to have the judgment reversed in order to extend his recovery to Shuler and Crosby and others, as he seeks to have us do by a cross assignment. It is expected of counsel to urge and maintain before the court the position or theory they rely upon, and in this instance, instead of doing so, they supported or induced the view taken by the judge, and practically argued in favor of it; and, although the ruling may have been wrong, plaintiff cannot complain of it.

9. In the twenty-fourth assignment it is urged that the court should have given an instruction to return a verdict for defendants because there is "no pleading and no evidence that there would be any surplus remaining after payment of the expenses that had been incurred on account of the Cotton addition." It matters not, it seems to us, if

the pleading should be adjudged imperfect in respect to the happening of conditions upon which plaintiff would have the right to demand his salary, and sue therefor, because, as already noted, the defendants Cotton and Hunt, by their plea in reconvention, so far as they were concerned, announced their willingness to have the matter of plaintiff's salary, etc., determined in this trial, and all of them proceeded upon the theory that plaintiff's demand had accrued. The charge asked was erroneous, also, in that there was testimony to show that the sales were not sufficient to pay the expenses of the business. The petition, however, in a general way, negatives the fact that the sales afforded a sum, after paying expenses, to apply to plaintiff's salary. We conclude that, so far as defendants are concerned, no substantial errors appear, and that the judgment should be affirmed.

**KESSLER v. FIRST NAT. BANK OF
YOAKUM.¹**

(Court of Civil Appeals of Texas. April 13,
1899.)

**PARTNERSHIP—PLEADING—SURPRISE—RIGHT TO
RELIEF THEREFOR.**

1. A petition by one clause alleged that defendants conducted a business under the name of one of them, and shared in the profits and losses therefrom, and otherwise sought to charge one defendant for money advanced on his recommendation to the other, who conducted the alleged business, and for transfers by the defendant conducting the business to the other in pursuance of a common intent to defraud plaintiff. *Held* not to allege that defendants were partners.

2. Where a petition is not such as to naturally apprise defendants of an effort to hold them as partners, and they are in fact misled and surprised thereby, they should be granted a continuance to enable them to amend and obtain a hearing on the defenses they may seek to make thereto.

Appeal from district court, Dewitt county; James C. Wilson, Judge.

Action by the First National Bank of Yoakum against C. A. Kessler and another. From a judgment for plaintiff, defendant Kessler appeals. Reversed.

Kleberg, Grimes, Baker & Leonard, for appellant. Proctors, Price, Green & Green and Davidson, Pleasants & Schleicher, for appellee.

WILLIAMS, J. The judgment from which this appeal is taken was rendered in favor of appellee against A. G. Wangemann and appellant, Kessler, for money advanced to Wangemann, both being held liable on the ground that they were partners in a mercantile and cotton business at the time such advancements were made. The principal reasons urged for the reversal of the judgment are errors in the rulings of the court during the trial, holding that the petition alleged a

¹ Application for writ of error dismissed for want of jurisdiction.

partnership, and refusing to the defendants thereupon leave to withdraw their announcement of readiness for trial, and to file a plea under oath, denying the existence of partnership. The record properly shows that, before the parties announced themselves ready for trial, a general demurrer to the petition was argued by counsel for appellant, Kessler, with the contention that it alleged no cause of action against him, no reference being made in this argument to any supposed avowment of a partnership between the two defendants. The demurrer having been overruled, and defendants having filed an amendment to their answer alleging facts constituting a defense, on Kessler's part, to all of the matters set up in the petition, unless there was an allegation of partnership, the parties announced "ready," and the trial proceeded before a jury. While evidence was being taken, certain questions put to plaintiff's witness by counsel for appellant were objected to by plaintiff on the ground that the evidence sought to be elicited was irrelevant, because the defendants were alleged to have been partners when the debt sued for was created, and to have incurred it as such, and, as there was no denial of such partnership under oath, testimony must be restricted to the questions whether or not the account sued on was correct, and whether or not the money was advanced to Wangemann for use in the business alleged to have been conducted by the partnership, or, in other words, for the purposes of the alleged partnership. The court sustained this objection, and throughout the trial restricted the evidence to the issues mentioned, and excluded evidence offered by defendants to disprove the allegations in the petition charging liability on the part of Kessler for the money. When the court held that the petition sufficiently alleged partnership, defendants promptly, both orally and in writing, stated that they had been misled and deceived by the allegations of the petition, and were surprised by the ruling of the court upon such allegations, and asked leave to withdraw their announcement, and to file a sworn denial of partnership, attaching such denial to their motion. This was refused by the court, and the trial was proceeded with, defendants not being allowed, although they offered to do so, to controvert their liability, except as above indicated. In their motion for a new trial defendants brought in review the matters stated, and sought another trial on the ground that they had been surprised by the state of the pleadings and the ruling of the court thereon, and that injustice had been done them. The record shows conclusively that the judgment against Kessler is based solely upon the assumption of the alleged partnership. The court below, in allowing the bill of exceptions taken to his ruling, states as his reasons for refusing to defendants leave to withdraw announcement and amend pleadings, in substance, that the petition had been

on file, and its contents known to defendants, since December 4, 1897, while the trial was in June, 1898; the facts as to partnership were as well known to defendants before as after the trial; the filing of a sworn denial would have introduced a new issue; the amendment was not necessary to the ends of justice, there being no meritorious defense shown, and the court not believing that there was any, because the court had just tried another case involving the failure of Wangemann, in which he had made a transfer of his property to Kessler, as alleged in the petition in this case, and the court believed such transfer was made to defraud creditors; that, while the issue of partnership was not involved in the other case, there were many circumstances tending to show its existence.

The petition in the case covers, with its allegations, 24 pages of the transcript. On the twentieth page occurs this paragraph: "Plaintiff further alleges that at the time of the creation of the debt herein sued on that said cotton and mercantile businesses were conducted by defendants under the name of said Wangemann, and they both shared in the profits and losses of said businesses." This is the part which was held to allege a partnership. The portions of the petition preceding it contain elaborate allegations by which it is sought to charge Kessler with liability for money advanced to Wangemann with which to buy cotton, by reason of his having introduced Wangemann to plaintiff, and vouched for his solvency and reliability; of the existence of an understanding, custom, and course of dealing by which Wangemann was to devote the money advanced to the purchase of cotton, which was to be sold, and the proceeds, as realized, turned over to plaintiff; of the fact that Wangemann had fraudulently overdrawn his account to the amount of about \$12,000, purchased 200 bales of cotton with part of it, and used the balance; and of the fact that Wangemann had then conveyed the cotton as well as all his other property, to Kessler for the purpose of defrauding plaintiff,—knowledge on Kessler's part of all these facts being averred. Under these facts plaintiff claimed that the cotton was charged with a lien or trust in its favor, and that Kessler, under all of the facts alleged, should be held liable. The parts of the petition following the paragraph above set out also seek to charge Kessler with liability for the money alleged to have been obtained by Wangemann upon elaborate allegations of fraud and deception practiced by them. There is nowhere in the petition, except in the paragraph quoted, a suggestion of the existence of a partnership, or the extension of credit to a partnership, or the advancing of money to Wangemann upon Kessler's credit, beyond the allegation of the advancement to Wangemann on faith of Kessler's recommendation of him. We should state further that the allegations of the first part of the petition show that for several years, and dur-

ing the period in which the indebtedness in question was created, Wangemann was engaged in the mercantile and cotton-buying business, and that plaintiff advanced him the money for use in the latter.

The first question which arises is whether or not the petition alleges the existence of a partnership between Wangemann and Kessler. There is nowhere a direct allegation that they were partners or members of a firm. It is charged that they conducted the business under the name of Wangemann, and shared in the profits and losses arising. To constitute a partnership an agreement, express or implied, is essential. There is here no positive allegation of the existence of such agreement. The averment that they shared the profits and losses might be true without the existence of an agreement or understanding by which they became partners. Such sharing might take place without any agreement or partnership. The allegation is undoubtedly defective in that it fails to allege directly and positively the existence of the partnership, or, otherwise, all of the facts essential to constitute it. The facts stated, if proven, would be sufficient, *prima facie*, to raise an inference of the existence of the partnership, because from them the agreement would be inferred. But, in pleading, the fact to be established should be directly averred, and not merely suggested as an inference from other facts stated. Such pleading is especially bad when the essential fact not stated is not necessarily to be inferred from those which are stated.

Another objection to the petition is that it does not positively and directly aver a partnership liability. If the partnership were sufficiently averred, the other facts might be collated from different parts of the voluminous pleading; but it is only in this way that a case against the partnership can be deduced from it. There being no allegation of extension of credit to a partnership, or to Wangemann and Kessler jointly, such fact is to be learned only by inference from the allegation that the money was furnished to Wangemann for use in the cotton business. But that allegation is found only in connection with others showing extension of credit to Wangemann, and seeking to hold Kessler responsible on account of facts other than partnership. A defendant, when called upon to answer a petition, ought not to be expected to take alleged facts out of their natural and stated connection, and, at his peril, to make every possible combination of which they are susceptible, but which the form and substance of the allegations do not naturally suggest. The facts upon which the plaintiff relies to show his right should be plainly, simply, and directly stated. *Railway v. Bayliss*, 62 Tex. 578. It might be conceded, for the purposes of this case, that all of the facts essential to show that the defendants were partners, and were liable as such, can be gleaned from the petition; but it must also be conceded, we think, that they are stated in an unusual and

disconnected manner, and in language not generally employed in such pleadings for such purposes. Upon reading the petition, its allegations do not plainly and naturally suggest to the mind the idea that a partnership is alleged, but rather tend to lead it away from such conception. It may be that a petition which only alleged a partnership, as does the paragraph above quoted, but which, in connection with it, alleged other facts to show a partnership liability, and prayed for the appropriate judgment, would be held sufficient on general demurrer, or to support a judgment, as well as to require a denial under oath. But this petition must be considered as a whole, and is not, we think, so constructed as to give to defendants that direct and unequivocal notice of the purpose to hold them as partners which is essential to impose upon them the burden of denying under oath the fact of partnership. In order to have such effect, the petition ought certainly to be reasonably sufficient by its averments, when interpreted according to their plain and natural import, to apprise defendant of the fact that a partnership is charged. This one does not, in our opinion, meet this requirement. It was calculated to mislead, and did mislead, the defendants. But if it were assumed that the petition, when properly construed after a critical examination of all its allegations, was sufficient to charge partnership, still we think the court should have granted such relief to appellant as would have enabled him to obtain a hearing upon the defenses which he sought to make. By the ruling made he was cut off from this. If this resulted from an error of his counsel which was inexcusable, he has no just cause of complaint. But we think it cannot be said that the oversight was an inexcusable or unnatural one. It was a consequence very likely to result from the character of the petition. The fact that the filing of the proposed plea would have introduced a new issue was not an insuperable objection. The case could have been delayed or continued to give all parties proper opportunity to prepare to meet the issue raised. The statute on the subject of amendment of pleadings does not prohibit such a course. The court has full power to set aside announcements for trial, and grant continuances or new trials, when a party has been deprived of a proper hearing of his defenses by an unforeseen condition arising without his fault. One or the other of these things should, we think, have been done here. Nor is the fact that the defendants, before announcing, knew the facts as to partnership an answer. They did not know that a partnership was claimed. Nor can it be said that justice has been attained; for Kessler has not been heard upon any of the defenses which he sought, both by pleadings and the offer of evidence, to make. The facts shown in the other case referred to cannot be employed to support this judgment, even if they were sufficient for that purpose. Since the petition was not such as to naturally call

defendants' attention to the effort to hold them as partners, and since they were in fact misled and surprised thereby, and Kessler was deprived of a hearing upon the facts alleged against him, we think the court should have allowed the withdrawal of announcement and the amendment of pleading, and have made such orders for the continuance or further trial of the case as fairness to both parties demanded; and, having refused to do this, should have granted a new trial. Reversed and remanded.

STRAUSS et al. v. WHITE.

(Supreme Court of Arkansas. Feb. 4, 1899.)

VENDOR AND PURCHASER—POSSESSION BY VENDEE—NOTICE TO CREDITORS—BOND FOR TITLE—ALIENABLE ESTATES—PROPERTY SUBJECT TO EXECUTION.

1. Possession of land by one holding under a bond for a title is notice to the obligor's creditors of the obligee's title, and makes the recording of the bond unnecessary.

2. A vendee of land, holding a bond for a title, after having paid a part of the price, has a beneficial estate, which is descendible by inheritance, and alienable by will, precisely as if it were an absolute estate of inheritance.

3. The interest of a vendor in lands, after having given a bond for a title on the receipt of a part of the price, is not vendible under execution.

Appeal from Jefferson chancery court; James F. Robinson, Chancellor.

Ejectment by Robert L. White against Abraham Strauss and another. Decree for plaintiff, and defendants appeal. Reversed.

N. T. White, for appellants. J. M. & J. G. Taylor, for appellee.

BATTLE, J. Robert L. White instituted an action of ejectment against Abraham Strauss and Henry Charles to recover the possession of a certain tract of land, which is described in his complaint. All parties claim to have acquired title to the land through Isom Jones. Plaintiff alleges that Frank Tomlinson recovered judgment against him; that an execution was issued on the same; that the land in controversy was levied upon and sold, as his property, under the execution, on the 1st day of November, 1881, to Frank Tomlinson, and was conveyed to him by the sheriff, who made the sale, on the 6th day of November, 1882; that he (plaintiff) recovered a judgment against Frank Tomlinson in the circuit court of the United States for the Eastern district of Arkansas on the 24th of October, 1883; that he caused an execution to be issued upon this judgment; that the marshal to whom it was directed levied upon the land in controversy, as the property of Tomlinson, to satisfy it, on the 24th of August, 1886, and sold the same to the plaintiff on the 23d of September, 1886, and on the 19th of October, 1887, conveyed the land to the purchaser.

The defendants claim title and hold possession under a sale of the land under an execu-

tion issued upon a judgment recovered by James Hancock & Co. against Frank Tomlinson; a mortgage executed by Isom Jones to Sam Berlin on the 7th of February, 1880; a deed of mortgage executed by Isom Jones to H. Strauss on the 31st of March, 1881; a deed executed by Isom Jones to Abraham Strauss on the 26th of October, 1882; a deed executed by M. L. Bell to Abraham Strauss on the 23d of June, 1886; and a bond for title executed by Frank Tomlinson to Henry Charles on the 14th of April, 1883.

It will be unnecessary to relate or consider the evidence as to the muniments of title under which the defendants claim, except the bond for title. The fact that they claim under many deeds does not make it necessary for them to sustain their claim under each and all of them. They had the right to strengthen their title by the purchase of conflicting claims, and can defeat the recovery of the land by the plaintiff if any of them shows that he is not entitled to the possession.

The plaintiff recovered judgment against Frank Tomlinson on the 24th of October, 1883. Prior to that day, on the 14th of April, 1883, Frank Tomlinson, by his bond for title, sold the land to Henry Charles for the sum of \$200, received \$30 of this amount, and agreed to convey the land to him when the remainder of the \$200 was paid. Charles took possession, and was in possession, cultivating the land, at and before plaintiff recovered a judgment against Tomlinson. This possession was notice to plaintiff of the title or claim under which Charles held, and relieved him of the necessity of filing his bond for record in order to protect himself against plaintiff's claim.

Abraham Strauss purchased Charles' interest in the land, and received from him the bond executed by Tomlinson, and no other evidence of title, and took possession of the land. He has since died, and his heirs, who have been made defendants, claim the land in his right. Can they hold it?

It has been uniformly held by this court that when the owner sells land, "takes the notes of the vendee for the purchase money, and executes to him a bond for title, the effect of the contract is to create a mortgage in favor of the vendor upon the land to secure the purchase money, subject to all the essential incidents of a mortgage, as effectually as if the vendor had conveyed the land by an absolute deed to the vendee, and taken a mortgage back to secure the purchase money." *Smith v. Robinson*, 13 Ark. 533; *Lewis v. Boskins*, 27 Ark. 61; *Holman v. Patterson's Heirs*, 29 Ark. 357; *McConnell v. Beattie*, 34 Ark. 113; *Harris v. King*, 16 Ark. 126; *Moore v. Anders*, 14 Ark. 633. "It follows, then," says the court in *Hardy v. Heard*, 15 Ark. 188, "that the vendee, in analogy to the mortgagor, is the owner of an equity of redemption, and that this is the real and beneficial estate, which is descendible by inheritance, divisible by will, and alienable by deed, pre-

51 S.W.—5

cisely as if it were an absolute estate of inheritance at law (4 Kent, Comm. 59, 160),—subject, of course, to the rights of the vendor." This court has also declared that, a mortgage being a mere security for a debt, the interest of the mortgagee is not vendible under execution. *State v. Lawson*, 6 Ark. 269; *Trapnall's Adm'r v. Bank*, 18 Ark. 61; *Meadow v. Wise*, 41 Ark. 285; *Harman v. May*, 40 Ark. 149. It is therefore plain that plaintiff, White, acquired no right or title to the land in controversy by his purchase, and consequently no right to the possession thereof. *Chisholm v. Andrews*, 57 Miss. 636; *Taylor v. Lowenstein*, 50 Miss. 282. As he can recover only upon the strength of his own title, and not upon the weakness of his adversary's, the defendants are entitled to hold the land, they being in possession.

The decree of the chancery court is therefore reversed, and the cause is remanded, with directions to the court to enter a decree in accordance with this opinion.

BLEVINS v. CASE.

(Supreme Court of Arkansas. April 22, 1899.)
SALE OF DECEDENT'S LAND — DEMAND — PRESUMPTIONS.

The statement of an administrator, suing to enjoin a sale of land to pay a debt under order of the probate court, that the creditor did not make a legal demand of the administrator to petition the court to sell, as required by law, without stating the facts showing that the demand, if made, was not legal, is insufficient to overcome the presumption that the court acted within its jurisdiction.

Appeal from circuit court, Cleburne county; Brice B. Hudgins, Judge.

Action by J. W. Blevins, as administrator, against R. B. Case. From a judgment for defendant, plaintiff appeals. Affirmed.

This was a suit to enjoin the sale of certain lands ordered by the probate court of Cleburne county for the payment of a certain claim which had been allowed by said court. It appears from the record that the appellant was appointed administrator d. b. n. on the 28th day of December, 1883; that the claim was allowed by the probate court in October, 1886. The order of the probate court directing sale of lands to pay said claim was made on the 21st day of July, 1896. The appellant, in his suit to enjoin, set up, *inter alia*, that the claim allowed by the probate court was pretended and fraudulent, and he alleged various reasons why it was simulated and fraudulent, and should not have been allowed by the probate court, none of which we deem it necessary to mention. He alleged that he knew nothing about the pretended claim until after the institution of proceedings by the appellee for the sale of the land. He further alleged that the appellee, Case, was not a creditor, nor the owner of said claim by assignment of it to him; that he (Case) never made legal demand to him, as

administrator of said estate, to petition the probate court for an order to sell lands belonging to the estate for the payment of debts. He sets up that the petition of Case to the probate court for the sale of lands was not properly verified. He says that Case is estopped by delay, laches, and neglect to pursue his remedy for the allowance and collection of said pretended claim. He prays that the judgment of allowance be vacated and quashed, and that restraining order issue restraining him from the enforcement or attempt to enforce the said order of the probate court for the sale of the lands. Demurrer to the complaint was overruled. The answer denied all the allegations of the complaint, and says: "If such order of sale by the probate court is prejudicial to plaintiff, he has an adequate remedy at law, and is not entitled to the determination which he seeks here." The chancellor found "that there was no fraud proved by the plaintiff in procuring the order of allowance of the claim upon which the order of sale in the said probate court was based; that the defendant has been and is guilty of laches in the prosecution of his said claim in the said probate court, so far as is shown in this cause; and it appearing, also, to the court that pending on the law side of this court is a suit between the parties hereto, on appeal from the probate court of this county, involving the issues in this cause, and the court being of the opinion that laches may be pleaded in a court at law, doth, upon the whole, find for the defendant." The court thereupon dismissed the plaintiff's complaint for the want of equity.

Ben Isbell, for appellant.

WOOD, J. (after stating the facts). We will not undertake to set out the evidence, but we are of the opinion that the court was correct in finding that there was no fraud in procuring the order of allowance of the claim upon which the order of sale was founded. If it be true, as appellant alleges, that appellee did not demand of him, in writing, as the personal representative of Gresham, deceased, 60 days before the next term of the probate court, to present his petition praying for an order to sell the lands belonging to the intestate, as required by law, then the court might have been without jurisdiction to make the order. The probate court is a court of superior jurisdiction. *Borden v. State*, 11 Ark. 519; *Ex parte Marr*, 12 Ark. 84; *Montgomery v. Johnson*, 31 Ark. 74; *Apel v. Kelsey*, 52 Ark. 341, 12 S. W. 703; *Alexander v. Hardin*, 54 Ark. 480, 16 S. W. 284. It has exclusive jurisdiction of the payment of claims against the estate of deceased persons. *Hornor v. Hanks*, 22 Ark. 572. Where a court of general jurisdiction acts within the scope of its general powers, its judgments will be presumed to be in accordance with its jurisdiction. The evidence was not legally

sufficient to overcome this presumption. The appellant simply says that he did not have legal notice, thus virtually admitting that he did have notice. But he does not show that it was not legal. That was a question for the court. The appellant's ipse dixit that the notice was not legal would not make it so. Affirmed.

ROBINSON v. DAVIS et al.

(Supreme Court of Arkansas. April 29, 1899.)

JUDGMENTS—VACATING—GROUNDS—SURPRISE—NEWLY-DISCOVERED EVIDENCE—PETITION—AMENDMENT.

1. A party seeking to set aside a judgment cannot complain that he was surprised by evidence produced at the trial, unless he asked for a continuance to procure testimony to meet it.

2. A petition, on the ground of newly-discovered evidence, to vacate a judgment declaring a tax title invalid because the levy was excessive, showed that the trial was had in a county other than the one in which the tax records were kept, and that the judgment was based on a certified copy of the sale of the lands, which showed the assessed valuation of the premises for the year in question to be less than it really was, thereby making the levy appear excessive, when in fact it was correct, as would appear from the tax book and assessment list for that year, which at the time of the trial were in the other county, so that petitioner had no means of obviating the surprise caused by the production of the erroneous copy of the sale. The petition did not show that petitioner had no notice of the condition of the record on which the claim that the deed was invalid was based. *Held*, that an order sustaining a demurrer to the petition would be affirmed, with leave to amend the petition so as to show that petitioner was not at fault in not having the records showing the levy to be correct at the trial.

Appeal from circuit court, Drew county; Marcus L. Hawkins, Judge.

Ejectment by Joe Davis and another against Nancy Robinson. From an order sustaining a demurrer to defendant's petition to vacate the judgment, defendant appeals. Remanded, with leave to amend.

W. B. Streett, for appellant. J. C. Connerly, for appellees.

HUGHES, J. Joe Davis, one of the appellees, brought this suit in ejectment against Nancy Robinson, in the circuit court of Chicot county, to recover the N. E. $\frac{1}{4}$ of section 17, in township 16 S., and range 1 W., situate in said county of Chicot. Judgment by default was rendered for the plaintiff. This judgment was set aside, and a new trial was granted. The Sunny Side Lumber Company purchased the land of Joe Davis pending the litigation, and, upon its application, was made a party plaintiff to the suit, and obtained a change of venue to the county of Drew, where the circuit court, on trial of the cause, found for the plaintiff, and rendered judgment accordingly. Before the next term of the court thereafter, the appellant (defendant below) filed her petition, under sections 4197, 5843, Sand. & H. Dig., to vacate this judgment; alleging surprise in the trial, and

unavoidable casualty, brought about by the plaintiff in the suit preventing the defendant from making proper defense, and for newly-discovered evidence, not before obtainable. The court sustained a demurrer to this petition, but granted the defendant leave to amend, which the defendant failed to do, and appealed to this court.

In the suit in ejectment the appellant relied upon a donation deed by the commissioner of state lands, founded on a forfeiture of said land to the state for the taxes of 1873, 1874, and 1875. The court found upon the trial that the forfeiture was void for the reasons, as stated in the opinion of the court, that the land was sold for taxes three times in one day (for taxes of 1873, 1874, and 1875); that the land was sold for an illegal levee tax; that the land was sold for an excessive school tax for the year 1873. It seems that the ground that the land was sold for an illegal levee tax is abandoned. We are of the opinion that it does not appear that the land was sold for taxes three times in one day. If it had been, it is a question whether the sale would be void on this account. But this question is not before us, as there is no appeal from that judgment. In his attack on the tax title of the appellant, the appellee introduced in evidence the certified copy of the delinquent list from which the sale of the land was made, which, on its face, shows that the school tax for the year 1873, in the district in which the land lies, was extended on an assessment of the land at \$969.60, and amounted to \$4.85. It was also shown that the rate of school tax for 1873 in that district was 5 mills on the dollar. It appeared, therefore, that the land had been sold for an excessive district school tax for 1873, and this rendered the sale void; and the court so declared, which was, of course, correct.

The appellant's petition to set aside the judgment was, in substance, as follows: "Plaintiff has discovered, since the trial of this cause, that the certified copy of the sale of said lands for taxes offered in proof by defendants [appellees here] contained an error in the amount of the assessment, and upon which the finding of the court was based; that by a clerical error, or some cause unknown to plaintiff, Robinson, the valuation of said lands, as shown by the exhibit then produced, was made to read \$669.60, when it should be \$969.60; that upon said erroneous valuation the whole tax appeared to be excessive, when, upon the correct valuation, \$969.60, the extension of the taxes was and is correct, and said sale is not void for excessive taxes." Exhibits showing the above statements to be correct are filed with, and referred to in, the petition. It is further stated in said petition that "this cause being in this Drew county circuit court on change of venue from Chicot county, where the records were kept, she had no means of obviating the surprise caused by the erroneous exhibit offered in proof as aforesaid, and was misled by

the same error that caused the court to find against her." These allegations, together with all others in said petition, are admitted by appellant's demurrer as true. A duly-certified copy of the assessment of this land, as adjusted by the board of equalization of Chicot county for 1873, exhibited with appellant's petition, shows that for that year 1873 said land was assessed at \$969.60, instead of \$669.60, as shown by the delinquent list as aforesaid. And a duly-certified copy of the tax book relating to this land, exhibited with appellant's petition, shows that taxes had been extended on this land for 1873 on a valuation of \$969.60, as shown by the assessment list for that year; thus showing that there was an error in the delinquent list, in showing the assessed valuation to be \$669.60, whereas in fact it was \$969.60, and that, therefore, the land was sold for the correct amount of school tax, which, at 5 mills on \$969.60, would be \$4.85. So it appears the facts, as they really were, were not presented to the court, which, had they been, might have secured for defendant a judgment. But the judgment of the court, upon the evidence before it, was correct, and must be affirmed. The petition of the appellant to vacate the judgment can be considered only on the ground of newly-discovered evidence. If the appellant was surprised on the trial, it was her duty to have asked at once for a postponement of the trial, to enable her to procure her testimony. This she did not do, and no question of surprise in the case is before this court. When the demurrer to the appellant's petition was sustained in the court below, and she was granted leave to amend, she declined to do so. The petition does not clearly state that she had no notice before the trial of the condition of the record upon which the appellee relied to show that her title was void. The records were in Chicot county. The trial was had in Drew county, upon change of venue. The question which confronts us is, can this court, upon an affirmation of the judgment of the circuit court sustaining a demurrer, remand the cause, with leave to amend? Amendment is always discretionary with the court. *Merrick v. Avery*, 14 Ark. 380. It is apparent that the merits of this controversy were not made to appear to the court below, and that it went off upon an untrue presentation of the real facts in the case. It was tried upon a part only of the record relating to the forfeiture of the land for nonpayment of taxes. The record was inconsistent and contradictory; the delinquent list and sale list showing that the land had been assessed for 1873 at \$669.60, and the assessment list and tax book showed the assessed valuation to be for that year \$969.60. It is apparent that, if the matter stands as it now does, the appellant is without remedy against a judgment against her that deprives her of her land for failure of her title, when, had the facts been fully presented, her title would not have been declar-

ed void. The appellant's deed was prima facie evidence of title in her deed from the state. She may have supposed that the record was regular and consistent, but on the trial, in a county other than that where the records of the tax sale were, it was suddenly developed that the record did not sustain her deed. This showing by the record introduced was false, and misled the court; but she had no means then and there of showing it, and perhaps did not know—which she afterwards discovered—that it was false. To remand the cause, with leave to appellant to amend her petition, will not deprive the appellee of an opportunity to present his whole case. *Kirstein v. Madden*, 38 Cal. 158; *Penny v. Vandeele*, 1 Hall, 184. To allow an amendment is the rule; to refuse, the exception. *Tiffany v. Henderson*, 57 Iowa, 490, 10 N. W. 884. "The rules for amendment are exceedingly liberal, when justice will thereby be done, and wrong prevented." *Church v. Holcomb*, 45 Mich. 39, 7 N. W. 172. In this case of *Church v. Holcomb*, Judge Cooley delivered the opinion of the court. The judgment was affirmed, and the cause was remanded, with leave to amend. See, also, *Lane v. Lane*, 87 Ga. 268, 13 S. E. 335; *Cottrell v. Watkins*, 89 Va. 801, 17 S. E. 328; *Branch v. Knapp*, 61 Ga. 616; *Picquet v. City Council of Augusta*, 64 Ga. 516; *Pease v. Morgan*, 7 Johns. 468; *Manz v. Railway Co.*, 87 Mo. 278. In *Thatcher v. Candee*, 42 N. Y. 157, a demurrer was sustained to the complaint for the want of proper parties. The judgment was affirmed in the court of appeals, and the cause was remanded, with leave to amend. We think that appellant should have an opportunity to show that she is not at fault for not having had the record of the tax sale at the trial, and, if not in fault, that she should have an opportunity to present it, and invoke the judgment of the court thereon. Remanded, with leave to amend.

ST. LOUIS REFRIGERATOR & WOODEN GUTTER CO. v. LANGLEY.¹

(Supreme Court of Arkansas. July 9, 1898.)

PUBLIC LANDS—TITLE OF STATE—TAX LIENS—FORECLOSURE—DONATION DEEDS—AFTER-ACQUIRED TITLE.

1. A state land commissioner has no authority to issue a donation certificate to land pending a suit by the state to foreclose a tax lien thereon.

2. A sale of land to the state in a suit to foreclose a tax lien confers no title which can be conveyed by a donation deed until after the expiration of two years, during which the title is subject to a right of redemption under Overdue Tax Act (Laws 1881, p. 69) § 11.

3. Sand. & H. Dig. § 699, making an after-acquired title of any "person" having executed a deed purporting to convey a fee pass to the grantee, does not apply to conveyances by the state.

4. A donation deed by the state land commissioner is merely a quitclaim conveying only such title as the state has when it is executed.

¹ Rehearing denied May 20, 1899.

Appeal from circuit court, Clark county, Rufus D. Hearn, Judge.

Suit by T. J. Langley against the St. Louis Refrigerator & Wooden Gutter Company. Decree for plaintiff, and defendant appeals. Reversed.

This suit was begun in ejectment for 80 acres of land. Afterwards an amendment to the complaint was filed, and the case, on motion of the plaintiff, was transferred to chancery, where the defendant filed an answer, and the cause was heard, and decree rendered, and this appeal prosecuted. The special findings of fact by the court are full enough to outline the contention of both parties. Substantially they are as follows: That the 80 acres of land in controversy was forfeited, sold, and duly certified to the state for taxes of 1873-1875. That on May 23, 1882, the commissioner of state lands granted to appellee a home-stead donation certificate, and on proper proof, on October 4, 1883, executed to him a donation deed for said land, which deed was recorded January 30, 1893. That immediately after May 23, 1882, appellee entered upon said lands, and remained, by himself and his tenants, in the actual and visible possession of same until December 1, 1892, assessing and paying all taxes thereon, when appellant took possession thereof, claiming title by the following chain, viz.: That on April 19, 1882, "an overdue tax" suit was instituted in Clark county, in which said land was included; that same was, according to law, by the chancery court, condemned to be sold for the taxes of 1873-1875, costs, etc., and under said decree a sale was had October 2, 1882, and said land was then sold to the state for the said taxes, costs, etc., due thereon, which sale was duly confirmed by said court, and afterwards duly certified to the state land office; that on June 5, 1886, the state, by its said commissioner, conveyed by "overdue tax deed" said lands to J. A. Smith, which deed was recorded September 3, 1887; that on September 9, 1887, said Smith, by his warranty deed, conveyed same to appellant, which deed was recorded September 10, 1887. That neither said Smith nor appellant had any actual notice of the claim of appellee, and both were purchasers in good faith, for a valuable consideration. The court found as matter of law that appellee's title was prior and superior to that of appellant; that appellee's damages by reason of the cutting of timber from said land were \$188.15, and for all other damages \$150; which amounts were decreed to him, less \$8.64 for taxes paid by appellant. Appellant excepted, and appealed to this court.

J. H. Crawford, for appellant. T. J. Langley, pro se.

WOOD, J. (after stating the facts). 1. Both parties to this litigation deaign title from the state,—the appellant through an overdue tax deed dated June 5, 1886, and the appellee through a donation deed dated October 4, 1883. The question is, who has the fee-simple title?

Section 2, Act March 12, 1881, provides for the filing of the complaint in an overdue tax suit, and that the clerk should enter on the record of the court an order to the effect that "all persons having any interest in said lands, or any of them, are required to appear in said court, within forty days from that date; then and there to show cause, if any they can, why a lien shall not be declared on said lands for unpaid taxes, and why said lands should not be sold for non-payment thereof." Section 3 provides for the publication of said order, and that "such publication shall be taken to be notice to all the world," etc. Section 6 provides for special notice to the state by service of summons upon its auditor. Section 7 provides that "in all cases where it shall be made to appear that the lands described in the complaint have been sold or forfeited to the state, the court shall enquire whether such sale or forfeiture was sufficient in law to vest a title in the state; and if the court finds that no title passed to the state by virtue thereof, the court shall proceed in the same manner as if no such forfeiture had taken place," etc. Section 15 provides that, "whenever a report of such commissioner [the commissioner to sell] shall be confirmed, all objections to the sale and the proceedings thereunder shall be adjudged in favor of the validity thereof, and * * * the court shall order the commissioner making such sale * * * to execute a deed to the purchaser, conveying to him the land bought by him in fee simple, and such deed shall be conclusive against the world." Laws 1881, p. 70. The state had no title to the land in controversy at the time the commissioner issued his certificate of donation. Under section 7 the decree necessarily determines that at the time of its donation the state had no title in the land, but only the right to enforce its lien for taxes. The state had instituted an action to foreclose this lien prior to the issue of the certificate of donation to appellee. It follows that the commissioner of state lands had no authority, prior to the sale of the land under the overdue tax decree, to issue a certificate of donation, and same conferred upon the donee no rights whatever. Nor did the state, at the time the donation deed was executed, have any title which the land commissioner had power to convey. Her title at that time was inchoate and incomplete, being subject to right of redemption for two years, as provided in section 11 of the "overdue tax act." But it is contended that, as there was no redemption, and the title became perfect in the state before she sold to appellant's grantor, such title should inure to the benefit of appellee under his donation deed. Undoubtedly, in the deeds of individuals that is the law. Section 699, Sand. & H. Dig., is as follows: "If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterwards acquire

the same, the legal or equitable estate afterwards acquired shall immediately pass to the grantee," etc. This statute is declaratory of the doctrine of estoppel which would prevail in the case of deeds executed by individuals were there no such statute. But it does not apply to conveyances made by the state. The state is not expressly named, nor is it included by necessary implication. *Martin v. Roesch*, 57 Ark. 474-476, 21 S. W. 881. In *Casey v. Inloes*, 1 Gill, 430, it is said: "The doctrine of estoppel does not apply to a grant from the state, so as to pass an after-acquired title, and that such grant passed only the title the state then had." The donation deed by the state land commissioner was a quitclaim, and carried only such title as the state had at the time it was executed. At this time the state had no perfect title, and the commissioner could not convey any. This court held, in *Woodward v. Campbell*, 39 Ark. 580, "that the state will not be estopped by the unauthorized acts of its officers that all who deal with a public agent must, at their peril, inquire into his real power to bind his principal." As to the statute of limitations, it does not appear that the court reached any conclusion of law based upon any findings of fact as to the statute of limitations. The court simply found as matter of law "that appellee's title was prior and superior to that of appellant," showing that the court only passed upon the donation deed, and upon the overdue tax deed, and pronounced the former "prior and superior" to the latter. There is nothing in the record, either in the pleadings or proof, that would justify us in passing upon the question of limitations either of two or seven years. The court erred in decreeing the donation deed of appellee prior and superior to the overdue tax deed of appellant, and for this error the decree of the Clark chancery court is reversed, and remanded, with directions to enter a decree for appellant according to this opinion.

TUPY v. KOCOUREK.

(Supreme Court of Arkansas. April 29, 1899.)

WARRANTY DEED—AFTER-ACQUIRED TITLE—CONSTITUTIONAL LAW—CONTRACT—CONSTRUCTION—SEVERANCE—RESCISSION.

1. Where one bought land at a tax sale, and conveyed it by warranty deed, he, and those claiming under him by a subsequent conveyance, can acquire no rights, as against his first grantee, by a subsequent confirmation of the sale and execution of the tax deed to him, based on the mistaken assumption that he had not conveyed.

2. The act of 1879, "to provide for the redemption of delinquent lands," is unconstitutional, and deeds made under it are void.

3. A contract calling for a warranty deed means a perfect title to the purchaser.

4. A contract for the purchase of two separate quarters of land cannot be severed, and, unless title to both can be given, the purchaser is entitled to rescission.

Appeal from circuit court, Prairie county; James S. Thomas, Judge.

Suit by John Kocourek against Joseph Tupy. From a decree in favor of plaintiff, defendant appeals. Reversed.

Eugene Lankford, for appellant. J. H. Harrod and Thweatt & Atkins, for appellee.

WOOD, J. This suit is upon a promissory note for \$1,380 made by Tupy to Kocourek as part of the purchase price for the S. W. $\frac{1}{4}$ of section 13, and the S. W. $\frac{1}{4}$ of section 5, township 1 N., range 5 W., in Prairie county, Ark. It is alleged that Kocourek owned the S. W. $\frac{1}{4}$ of section 13, and his wife, Anna, the S. W. $\frac{1}{4}$ of section 5. Upon the payment of the note, Kocourek and his wife were to execute warranty deeds to the lands mentioned. When the note was due, January 1, 1895, Kocourek and his wife made warranty deeds, tendered them to Tupy, and demanded payment of the note, which was refused, and this suit followed.

The answer set up no title in Kocourek to S. W. $\frac{1}{4}$ of section 13, nor in Mrs. Kocourek to the E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 5. The chancellor found that Mrs. Kocourek had title by the statute of limitations of seven years. This finding was correct. He also found that John Kocourek had title by a certain decree of confirmation. Was this finding correct? In 1866, S. P. Hughes bought the land (S. W. $\frac{1}{4}$ of section 13) at tax sale. In 1869, Hughes conveyed the land by warranty deed, upon consideration of \$200, to one Roy. In 1880 the clerk of Prairie county executed a deed to S. P. Hughes, conveying the land for the taxes of 1878 and 1879. In 1895, Kocourek petitioned the clerk of Monroe county for a deed to the land, either to himself or Hughes. The petition set up the purchase by Hughes at tax sale of 1866, and alleged that certificate of purchase had been issued, and same had been lost, mislaid, or destroyed. The affidavit of Hughes was not filed to that effect. The petition also set up a conveyance of the land from Hughes and wife to Henry in 1894, and from Henry and wife to Konigsmark in 1890, and from Konigsmark to Kocourek in 1892. The clerk in January, 1895, executed the deed to Hughes conveying the land. In September, 1895, a decree was rendered confirming the tax title of S. P. Hughes, and confirming and quieting the title of Kocourek, after reciting the facts as shown supra, in the petition to the clerk for a deed. It nowhere appears that Roy ever conveyed the lands back to S. P. Hughes or to Kocourek. It is manifest, therefore, that the confirmation of the tax title of S. P. Hughes, acquired in 1866, could not inure to the benefit of either Hughes or Kocourek; for Roy had acquired all the interest that Hughes had under the tax title, by virtue of the warranty deed from Hughes in 1869. The deed made by the clerk to Hughes in 1895, based upon the assumption that Hughes

had never conveyed the land, could not affect Roy's title. The petition of Kocourek to the clerk for a deed did not disclose the fact that Hughes had previously conveyed the land to Roy. The clerk could not decide who had the right to a tax deed when the facts were not disclosed, and his execution of same, under the circumstances, could confer no rights upon Hughes or Kocourek, who claimed under Hughes, antagonistic to Roy. Roy's title, so far as this record discloses, is good against any one claiming under the confirmation of the tax title of S. P. Hughes acquired in 1866. The court, therefore, erred in finding that Kocourek had title to the S. W. $\frac{1}{4}$ of section 13. The deed of the clerk to Hughes for the taxes of 1878 and 1879 was void. *Shaw v. Hill*, 46 Ark. 333.

But it is contended that, in the absence of insolvency or fraud on the part of Kocourek, Tupy cannot refuse to pay, inasmuch as the contract only called for a warranty deed, which has been tendered him. Tupy had never been in possession of the land. Where there is no stipulation to the contrary, the law will presume, in a contract for the sale of lands upon a valuable consideration, that the vendor intended to convey a good title, and the vendee will not be compelled to pay his money and accept it unless it is good. *Irving v. Campbell*, 121 N. Y. 353, 24 N. E. 821; *Bisp. Eq.* § 378; 28 Am. & Eng. Enc. Law, p. 70; 22 Am. & Eng. Enc. Law, p. 948. One who contracts and pays his money for a title to land ought to get not only a title that he can hold against all adverse comers, but one that he can hold without reasonable apprehension of its being assailed, and one that he can readily transfer, if he desires, in the market. *Irving v. Campbell*, 121 N. Y. 353, 24 N. E. 821; *Sheehy v. Miles* (Cal.) 28 Pac. 1046; *Street v. French* (Ill. Sup.) 35 N. E. 814; 22 Am. & Eng. Enc. Law, p. 948. note; *Griffith v. Maxfield*, 63 Ark. 548, 39 S. W. 852, and authorities cited. In common parlance, a warranty deed means a perfect title; and, in legal contemplation, when parties contract for warranty deed they must be understood to mean a title paramount to all others. *Devil. Deeds*, § 937. The contract for the sale of this land cannot be severed. The title to half of the land is not such as the contract contemplated. Therefore the appellant is entitled in his cross complaint to have the contract rescinded, and to have judgment against the appellee for the amount of \$1,100, with interest from the date of its payment at 6 per cent. per annum, and to have same declared a lien on the S. W. $\frac{1}{4}$ section 5, and to have this land sold to satisfy same, and to have his note of \$1,380 in the hands of appellee surrendered and canceled. The decree is therefore reversed, and the cause is remanded, with directions to enter a decree in accordance with this opinion, and for such other and further proceedings as may be necessary, and not inconsistent with this opinion.

BOLES v. McNEIL.

(Supreme Court of Arkansas. April 29, 1899.)

EJECTMENT—TAX SALES—DESCRIPTION—DELIN-
QUENT LISTS—PREMATURE FILING.

1. An advertisement for the sale of land for taxes, describing it under columns, with the captions, "Parts of Sec., Sec., Tp., R., Area," as "E. ½ S. E. 12 20 32 80," respectively, and giving the name of the owner, is sufficient; since, as the area given is legally one-half of a quarter section, the description could only designate the E. ½ of the S. E. ¼ of section 12, township 20, range 32.

2. Mansf. Dig. § 5731, as amended by Act March 28, 1887, provides that the collector shall attend at the places for holding elections in his county, and thereafter at his office at the county seat, "from the 10th day of April of each year," for receiving taxes; and section 5760, as amended by the same act, provides that he shall, by the second Monday in May in each year, file a list of delinquent taxes. *Held*, that a delinquent list filed on the first Monday in May is not prematurely filed, since it could be filed at any time after the 10th day of April; the word "from" in the amendment of section 5731 being, by clerical error, inserted for "until," as the intention is that the collector shall receive taxes at the county seat "until the 10th day of April," after which date he may file his delinquent list.

Appeal from circuit court, Benton county; Edward S. McDaniel, Judge.

Action of ejectment by Henry H. McNeil against Clementine Boles. There was a judgment for plaintiff, and defendant appeals. Reversed.

E. P. Watson, for appellant. J. A. Rice, for appellee.

BATTLE, J. The subject-matter in controversy in this action is the E. ½ of the S. E. ¼ of section 12, in township 20 N., and in range 32 W., and fractional S. W. ¼ of the S. W. ¼ of section 7, in township 20 N., and in range 31 W. Appellee deraigned title to the same from the United States, and the appellant claimed under a purchase at a tax sale. The circuit court held that the tax sale was invalid, and rendered judgment in favor of the appellee against the appellant for the possession of the land.

The court found that the sale of the E. ½ of the S. E. ¼ of section 12, in township 20 N., and in range 32 W., for taxes, was invalid, because it was not sufficiently described in the notice of the sale at which it was sold, and held that the sale of both tracts for taxes was void, because they were prematurely returned delinquent on account of the nonpayment of the taxes assessed against them for the year 1892.

These lands were assessed for taxation as follows:

	Parts of Sec.	Sec.	Tp.	R.	Area.	Value.
A. W. Dinsmore	E. ½ S. E.	12	20	32	80	1.60
A. W. Dinsmore	Erl. S. W. S. W.	7	20	31	50	1.60

Taxes to the amount of \$2.08 were levied on each of them for the year 1892. Both tracts were returned delinquent on account of the nonpayment of these taxes on the 1st day of May, 1893. The clerk added a penalty of 25

per cent. on the total tax levied, and caused the same to be advertised for sale for the taxes and penalty due thereon, in the manner provided by law, in words and figures as follows:

	Parts of Sec.	Sec.	Tp.	R.	Area.	Val.	Tax.	Pen.	Total
A. W. Dinsmore	Erl. S. W. S. W.	7	20	31	50	1.60	2.08	52	2.60
A. W. Dinsmore	E. ½ S. E.	12	20	32	80	1.60	2.08	52	2.60

They were sold by the collector of taxes pursuant to the advertisement, and were purchased by the appellant.

Was the "east half of the southeast quarter" of section 12 sufficiently described in the advertisement?

The statutes of this state provide that each tract or lot of real property shall be so described in the assessment thereof for taxation as to identify and distinguish it from any other tracts or parts of tracts, and that the same shall be described, if practicable, according to section or subdivision thereof and congressional townships. In an endeavor to comply with this requirement of the statutes, the assessor described one of the tracts in controversy in his assessment as follows:

Parts of Sec.	Sec.	Tp.	R.	Area.	Value.
E. ½ S. E.	12	20	32	80	1.60

And the clerk described it in the advertisement for sale as follows:

Parts of Sec.	Sec.	Tp.	R.	Area.	Val.
E. ½ S. E.	12	20	32	80	1.60

From these descriptions, it is evident that the clerk, following the description in the assessment, attempted to describe an 80 acres in section 12, in township 20, in range 32, in his county (Benton), and in this state. It was a legal subdivision of a section of land,—one-half of a quarter. In a column, with the caption, "Parts of Sec.," he described it as "E. ½ S. E." The first letter is the abbreviation of "east," and the next two of "southeast." In the order they were printed, and in the column they stand, they described a part of a section as "east of southeast," and that part of a section, as shown by the description, contained 80 acres,—a half of a quarter of a section. They could designate only one legal subdivision of a section, and that is the "east half of the southeast quarter." The land so described was the "east half of the southeast quarter" of section 12, in township 20, in range 32, and in the county of Benton. Then, again, it was assessed, and advertised for sale, in the name of A. W. Dinsmore, who was the owner of it at the time it was assessed and advertised, subject to a mortgage. This makes the identification of the land more full and complete. We think the description was sufficient. But we do not mean to hold that it would have been sufficient in the absence of the statement of the number of acres the tract described contained.

Was the land prematurely returned delinquent? It was returned on the 1st day of May, 1893. Appellee contends that it should have been returned on the second Monday in May, 1893, which was the 9th.

Section 5731, Mansf. Dig., reads as follows: "The collectors shall cause printed notices to be posted in three public places in each township, town or city throughout the county, one of which shall be at the place of holding elections in such township, town or city, and published in some newspaper published in the county, if any there be, stating on what day the collector or his deputy will attend at the places of holding elections, in each township, town or city, which day shall not be prior to the first Monday in November of each year, but as soon thereafter as practicable, for the purpose of receiving taxes. The collector or his deputy shall attend, for the purpose aforesaid, on the day and at the place named in such notices, and thereafter shall attend at his office at the county seat until the 10th day of February of each year, to receive taxes from persons wishing to pay the same."

Section 5760 of the same Digest reads as follows: "The collector shall, by the first Monday in March in each year, file with the clerk of the county court, a list or lists of all such taxes levied on real estate as such collector has been unable to collect, therein describing the land or town or city lots on which said delinquent taxes are charged, as the same are described on the tax books, and the collector shall attach thereto his affidavit to the correctness of such list. The clerk of the county court shall carefully scrutinize said list and compare the same with the tax books and record of tax receipt hereinbefore provided for, and shall strike from said list any tract of land, town or city lot upon which the taxes shall have been paid, or which does not appear to have been entered upon the tax book, or that shall appear from the tax book to be exempt from taxation."

The act entitled "An act to amend the revenue laws of this state," approved March 28, 1887, amended many sections of Mansfield's Digest by merely changing the time when various acts should be done. It amended section 5731 by changing the word "November" to "January," and the word "until" in the last sentence to "from," and the word "February" to "April," making the last sentence, as amended, read: "The collector or his deputy shall attend, for the purpose aforesaid, on the day and at the place named in such notices, and thereafter shall attend at his office at the county seat from the 10th day of April of each year, to receive taxes from persons wishing to pay the same."

It amended section 5760 by changing the words "first Monday in March" to the words "second Monday in May," and omitting the words "hereinbefore provided for" in the last sentence.

The decision of the last question in this case involves to some extent the construction of these two sections. Much depends upon the effect that shall be given to the word "from" in the last sentence in section 5731, as amended. The question presented by it is, was the use of it a clerical error?

Section 5731, as amended, after providing that the collector or his deputy shall attend at the places of holding elections in his county, for the purpose of receiving taxes, says: "And thereafter [he] shall attend at his office at the county seat from the 10th day of April of each year, to receive taxes from persons wishing to pay the same." It obviously means that the collector shall commence receiving taxes at the county seat immediately after he has attended the places of holding elections. The word "thereafter" denotes the beginning of the receiving of taxes at the county seat. Giving the word "from," in the same sentence, full force and its literal meaning, the collector would be required to commence receiving taxes at the county seat at two different periods of time. That is impossible. The legislature evidently meant to say: "And thereafter [he] shall attend at his office at the county seat until the 10th day of April of each year, to receive taxes from persons wishing to pay the same." The word "from" is a clerical error; evidently, made in copying section 5731, Mansf. Dig. This is made apparent by the sections following, which prescribe the duties of the collector after the 10th of April. Section 5746, Id., as amended by the act of March 28, 1887, says: "At any time after the tenth day of April, in each year, after such tax may be due, the collector shall distrain sufficient goods and chattels belonging to the person charged with taxes levied upon the personal property, to pay the taxes due upon the personal property of said person, and a penalty of twenty-five per centum thereon, * * * and the costs that may accrue, and shall immediately proceed to advertise the same in three public places in the county, stating the time when, and the place where, said property shall be sold." From the two sections quoted it is apparent that the legislature intended that the collector shall remain at his office at the county seat until the 10th day of April, for the purpose of receiving taxes on all classes of property, and that he may then proceed to collect unpaid taxes on personal property by distraint. Any other construction would make the two sections conflict; for a different construction would make the former section require the collector to remain at his office at the county seat after the 10th day of April, to receive taxes on personal property and lands, while the latter would make it his duty to leave his office after the 10th day of April, for the purpose of collecting taxes on personal property by distraint.

Taxpayers are allowed, by the act of March 28th, from the first Monday in January to the 10th day of April in each year to pay taxes on all classes of property without penalty. After that time the collector may distrain to pay taxes on personal property which have not been collected, and a penalty of 25 per cent. thereon, and may make out a list of the real property on which the taxes have not been paid. He is required to file such list by the second Monday in May of each year.

Owners of land may pay taxes thereon at any time before the list is filed, without paying a penalty, but there is no duty upon the collector to keep the tax books open for that purpose after the 10th day of April. He can file a list of the lands on which the taxes have not been collected at any time after the 10th of April, and on or before the second Monday in May.

It follows that the lands in controversy were not prematurely returned delinquent on account of the nonpayment of the taxes of 1892.

Reversed, and remanded for a new trial.

HOOVER v. BINKLEY.

(Supreme Court of Arkansas. April 7, 1899.)

APPEAL—DECREE OUTSIDE OF ISSUES—REVIEW—CONTRACTS OF SALE—RESCISSIION—STATU QUO—PARTIES—CONSIDERATION—EVIDENCE—RES GESTÆ—PRESUMPTIONS—SET-OFF AND COUNTERCLAIM.

1. In an action to enforce a contract of sale of land, wherein both parties allege a sale, but differ as to the consideration, a decree canceling the contract as inequitable is erroneous; not being within the issues.

2. One is not entitled to a rescission of a contract merely because he was old, in feeble health, and in financial trouble when he executed it.

3. A vendor of mortgaged lands, conveyed in consideration of the vendee's assuming the mortgage, is not entitled to a rescission of the sale, on the ground of mistake or fraud, without placing or offering to place the vendee in statu quo.

4. In an action to rescind a sale of mortgaged lands, the mortgagee should be made a party, where the vendee had executed a contract with the mortgagee, obligating himself to pay the mortgage.

5. In response to a mortgagee's request to pay the interest, to show good faith in requesting delay, the mortgagor showed the mortgagee's agent that he had crops sufficient to pay the interest; and the agent reported that the mortgagor was willing to deed the farm, to be kept either by the mortgagee or the agent. The mortgagor stated to others that he expected to get about \$15 per acre for the farm, and the agent stated that it was worth that much. A few days later, the mortgagor, after refusing an offer of a third person to assume the mortgage and pay \$400 for the farm, executed a quitclaim to the agent, who stated to a proposed tenant that he paid \$15 per acre for the farm, while he reported to the mortgagee that he received the deed to keep it himself or to turn it over to the mortgagee. A few weeks later the mortgagor executed a warranty deed to the agent for a named consideration, that was slightly in excess of the price of the farm at \$15 per acre. On the trial of an action to enforce a contract of sale, the mortgagor was dead, and the agent claimed that the warranty deed was executed merely to correct the description, and a witness for him testified that the mortgagor had conveyed the farm to the agent on his assumption of the mortgage, which would make the price of the farm at about \$10 per acre. *Held*, that the agent had agreed to pay \$15 per acre for the farm.

6. In an action to enforce a contract for the sale of land conveyed by a mortgagor to the mortgagee's agent, on an issue as to the consideration, letters written by the agent to the

mortgagee subsequent to the sale are inadmissible, as they are not part of the *res gestæ*.

7. A consideration named in a deed is presumed to be the true consideration, in the absence of evidence to the contrary.

8. In an action for the price of mortgaged land, the vendee's claim for corn which the vendor agreed to deliver to him in consideration of his paying interest on the mortgage debt is not a counterclaim, as defined by Sand. & H. Dig. § 723, as a claim arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action.

9. But such a claim may be asserted as a set-off *pro tanto*.

On Rehearing.

On an appeal from a decree canceling a contract of sale in a suit to enforce it, the court may reverse the decree of cancellation, and then decree an enforcement of the contract in a manner contrary to appellant's contention, where the case has been fully developed on both sides.

Cross appeals from circuit court, Sebastian county; Edgar E. Bryant, Judge.

Suit by T. B. Binkley, executor of the will of T. J. Webb, deceased, against H. H. Hoover. From the decree defendant appeals, and plaintiff files a cross appeal. Reversed.

Hill & Brozzolara, for appellant. Ira D. Oglesby, for appellee.

WOOD, J. This suit is to enforce an alleged contract for the sale of lands. Appellee contends that his testator sold appellant a tract of land of 458 acres, at \$15 per acre, or for the total sum of \$6,870; that appellant on the 1st of April, 1896, was to pay off a mortgage debt on the lands of \$4,000, and, after deducting this from the purchase money, to pay balance to appellee's testator, one Webb. Appellant contends that he purchased the land mentioned, and, as the only consideration therefor, he was to relieve Webb from all liability for the mortgage debt. The decree of the court, in part, was as follows: "That the allegations in the plaintiff's complaint that defendant was to pay Webb \$15 for the land in controversy were not sustained by the evidence,"—to which finding the plaintiff excepted at the time. "But the plaintiff's counsel had insisted in argument that, if he was not entitled to recover upon that issue, under the prayer for general relief he was entitled to have a rescission of the contract of sale. The court finds from the evidence that the contract of sale as alleged by the defendant, under which he claims the land in controversy, should be canceled and set aside, and that the defendant has not paid all of the mortgage indebtedness, and that it is now outstanding against said lands, and that it appears from the evidence that Webb did not understand the contract to be that the defendant was to have the land by simply entering into an obligation to indemnify Webb from the mortgage indebtedness. * * * The court further finds that the contract between defendant and Webb was inequitable and unjust, and should not be enforced, but that same

should be, and is hereby, vacated, canceled, and annulled, if the complaint under the prayer for general relief should be considered as amended to ask for this relief, with the right reserved, that this amendment and such relief should not in any way be considered as a waiver of any exceptions taken by him, nor considered as a waiver by him of the right to dismiss his complaint as heretofore requested, all of which rights were then and there reserved by the court to the plaintiff."

The decree of the court canceling the contract of purchase between the parties raises a new issue, and one not justified by any pleadings or proof in the case. Both parties claimed that there was a sale. They only differed as to what was the consideration. Both are here in the attitude of insisting that the contract be enforced according to their respective contentions as to what was the real consideration for the sale. True, appellee insists in his brief that the court should have allowed him to take a nonsuit. He says, also, in one place in his brief, that "a court of equity will not be alert to sustain, but, on the contrary, will seek to vacate, the questionable, unconscionable, and hard bargain made between a sharp, shrewd real-estate manipulator, as appellant is shown to be, and a feeble, decrepit, and cranky old man, who at that time, to use a homely expression, "had one foot in the grave." These and other expressions would imply that appellee was insisting that the court was correct in decreeing a rescission and cancellation. But, in the first sentence of appellee's brief, he says: "From the decree refusing to enforce the contract of purchase as set out in plaintiff's complaint, the plaintiff below (appellee here) filed a cross appeal." As he has not appealed from the refusal of the court to permit him to nonsuit, and is urging that the court erred in not enforcing the contract of sale set forth in his complaint, we take it that he does not mean to seriously press the obviously inconsistent positions of cancellation and the right to nonsuit. But, even if the court could have decreed a rescission of the contract under the prayer for general relief, there was no proof to justify it. Mere proof that a party to a contract was old, in feeble health, and financial trouble at the time the contract was executed,—which is the most that the proof showed in this case,—would not warrant the rescission of the contract. *Thompson v. Gossitt*, 23 Ark. 175; *Killian v. Badgett*, 27 Ark. 166. The proof does not show that Hoover took advantage of Webb's enfeebled and impoverished condition to drive with him a hard and unconscionable bargain. Moreover, a rescission would have been improper, any way, without placing or offering to place Hoover in statu quo. *Johnson v. Douglass*, 60 Ark. 39, 28 S. W. 515. Restitution was not offered, and, under the proof, with only the present parties litigant, would have been impossible. If the contract were as contended by Webb, then Hoover was to pay the mortgage debt.

There was proof that he had executed a written contract to North, the owner of the debt, obligating himself to pay same. This contract could not have been surrendered and canceled without making North a party to the proceeding. So the decree of the court below was erroneous. But as the case has been fully developed, and both sides seem to desire it, we will proceed to dispose of it as we deem it should have been decided under the pleadings and proof.

We concur in the finding of the learned chancellor that "Webb did not understand the contract to be that the defendant was to have the land by simply entering into an obligation to indemnify Webb from the mortgage indebtedness." Neither do we think that Hoover so understood it. But we are of the opinion that the contract, as understood and entered into by both parties, was that Webb conveyed the lands mentioned in the complaint to Hoover in consideration of the sum of \$15 per acre, and that Hoover was to pay off the mortgage debt on the land, which should be a part of the purchase money, and that the balance remaining after deducting the mortgage debt was to be paid to Webb, and that the entire consideration was to be paid when the mortgage debt matured, April 1, 1896. Webb had failed to make interest payments. The owners of the mortgage debt were threatening foreclosure if these payments were not made. Webb was willing and anxious to make satisfactory arrangements with his creditors to pay the interest, but he anticipated difficulty in being able to make these payments as his creditors desired, on account of sickness and the consequent late gathering of crops. He wrote his creditors that he was willing to do what was right in the premises, and would pay interest on interest that was due and unpaid, and requested them to advise him of their attorney with whom he might confer, and show his ability to pay in the near future. This was September 24, 1895, and in answer to a letter of September 13th, from the agents of his creditors, urging payment of the accrued interest. In answer to Webb's letter of September 24th, the creditors write, wanting to know exactly his financial condition, so as to know what to depend on. In this letter they say: "We think you should at least make some kind of a payment, as evidence of your good faith." In their letter to Hoover, their local agent, of October 14, 1895, the creditors say: "Our investor is getting very much dissatisfied, and will insist upon foreclosure unless the back interest is paid up." Hoover replies to them: "I expect that commencement of foreclosure proceeding will secure your interest payment. Webb is amply able to meet these obligations." Webb in the meantime had been advised that Hoover was the local agent for the creditors holding the mortgage, for we find Webb conferring with Hoover, and requesting him to make a trip to his (Webb's) place; and after Hoover has made

this trip he writes, under date of October 22, 1895, to the creditors: "I have just returned from a trip to the Webb farm, made especially to examine it, find out its condition, and the condition of the old man's affairs. He was in here to see me the latter part of last week, and it was at his request that I made the trip. From what he led me to believe at that time, I thought that I had a man in my employ that could take the old man's affairs, and take the tangle out of them; but, by going over everything and getting at the bottom, I find that it cannot be done." He reports in this letter that the old man's crop would be about 1,000 bushels of corn and about 10 bales of cotton. He speaks of certain liabilities of the old man, and of certain assets that were mortgaged to secure them, but does not say that the crop was mortgaged. He then proceeds in the same letter as follows: "He [Webb] offered to deed me the bottom farm, either to keep myself, if I wanted to pay interest, or to turn it over to you. I do not want it, and, as the information which I secured to-day in regard to his affairs may be of some use to you, I write you regarding it. He will be up to see me again the latter part of this week, as I told him I would study over his case, and see if I could see any way out. I looked to see if there were any available assets beyond the farm, should you prefer to foreclose to accepting a deed, and I could not see any." Further on he says: "I think the land is capable of making 6 per cent. on the amount of the loan, \$4,000, and taxes besides, if it is properly handled." (The omitted parts of this letter we do not think could throw any light upon the controversy). We may say, en passant, that the evidence showed that when Hoover was on this visit to the Webb farm, while he and one Bryan and Webb were looking over the plantation, Webb was talking about the loan company, and told Hoover and Bryan "that the loan company owned the Bates farm, which adjoined his, and that Bates had beaten the loan company out of the rents for that year, and that he considered it the same as stealing to do as Bates had done."

Now, in view of these facts, what shall we say of the quitclaim deed given by Webb to Hoover, conveying the lands mentioned for the nominal consideration of \$1, of date October 29, 1895? It appears that Webb had an honest disposition, and was anxious to make a satisfactory arrangement with his creditors for the payment of past-due and maturing interest. The principal of the mortgage debt was not due until the 1st of April, 1896. The owner of the mortgage debt was not demanding, and could not demand, payment of the principal of the debt, for that was not due for six months. But Webb was being urged to make payment of interest,—as one of the letters said, to "at least make some kind of a payment, as evidence of good faith." This was exactly what Webb was trying to do.

He invited Hoover out to look at his farm, and to see what he had, doubtless for the very purpose of convincing Hoover of "his ability to pay" interest. This was what the creditors wanted, and Webb, who was claiming to have a crop of 2,000 bushels of corn and 20 bales of cotton, supposed that when Hoover saw this, and understood the circumstances, there would be no difficulty in convincing his creditors that he was amply able to pay all interest due and to become due. And, to convince them of his good faith as well as ability, "he offered to deed Hoover the bottom farm, either to keep himself, if he wanted to pay interest, or to turn over to the creditors." In seven days after this we find him actually making the quitclaim deed to Hoover. There is nothing to show that Webb's purpose had undergone a change in so short a time. Having convinced Hoover, as he supposed, of his ability to pay the interest, Webb, as we think, conceived that there could be no stronger proof of his good faith than his giving a quitclaim deed as an earnest of his willingness to pay, and of his intention not to put his creditors to any trouble of foreclosure should he fail. That Webb understood this to be the purpose of the quitclaim we think is clearly shown, and there is scarcely less doubt that Hoover knew and understood that such was Webb's purpose. Else why should Hoover have written, seven days before the deed is executed: "He offered to deed me the bottom farm, either to keep myself, if I wanted to pay interest, or to turn over to you. I do not want it"? And why should he have written, two days after the deed was executed: "Webb has given me a quitclaim deed to his farm, to be held by myself, or turned over to you, as you may see fit"? Now, when Hoover wrote the letter, if he had really bought the place for the consideration he alleges, he knew that he had bought it for that consideration, and Webb knew it too; and, if this were the fact, the deed was not given to Hoover to be held by him, or turned over to the creditors, as they saw fit at all, but it was given to Hoover to convey absolute title to him, and to be held by him and not another. Hoover's present contention is in direct conflict with the position he then assumed. Again, if the quitclaim was upon the consideration contended for by Hoover, we would naturally expect so important a part of the contract—the real consideration for it—to be named in the deed itself. Then, again, if such were indeed the consideration, it seems hardly probable that Hoover, as an honest man, would have failed to mention so important a matter in the letter written two days after to the holders of the mortgage debt, which, according to his contention, he had then bound himself to pay. Thus the quitclaim appears to us in the light of the letters of Webb and Hoover. But, when the quitclaim deed is considered in connection with the correspondence and other evidence, it seems utterly unreasonable that

its purpose could have been other than that indicated supra; for the proof shows that, about the time of the negotiations concerning the deed between Webb and Hoover, one Ingram offered to assume the mortgage, which he understood to be \$4,200, and to pay Webb, in addition, \$400. For aught the proof shows to the contrary, Ingram was amply able to pay this sum. It will not be presumed that Ingram was insolvent. Hoover also contends that, in addition to the quitclaim deed, Webb was to give him 1,200 bushels of corn, worth \$400, in consideration of his paying the mortgage debt. Webb would hardly have accepted the offer of Hoover, and rejected that of Ingram, when by doing so he would have lost \$800.

2. We are equally clear that the warranty deed of November 19, 1895, was not made for the purpose simply of correcting a misdescription in the quitclaim, and upon the same consideration for which that was made, as is contended by appellant. We are of the opinion that the warranty deed was made for the express purpose, as it purports, of conveying absolute title to the lands therein mentioned, and for the consideration therein named,—at least, at a rate of \$15 per acre, for the consideration named amounts to more than that. *Prima facie*, the consideration named in a deed is the true consideration. But the real consideration may be shown by parol. *Jordan v. Foster*, 11 Ark. 139; *Pate v. Johnson*, 15 Ark. 275. We do not concur with the learned chancellor in saying that the allegations in the plaintiff's complaint that the defendant was to pay Webb \$15 per acre for the land in controversy were not sustained by the evidence. True, the consideration named is \$7,020, while the amount sued for is \$6,870, making a difference of \$150. Whether this discrepancy arose from a mistake or miscalculation as to the number of acres described in the deed,—which might have been the case,—or a desire not to sue for more than is named in the complaint, the proof does not disclose, nor is it material; for the real consideration has been shown, and there is ample proof to show that it was at the rate of \$15 per acre. There is proof as to the value which would justify the conclusion that the land was worth that much, though there is also evidence to the contrary. The testimony of witness Bryan shows that Hoover himself said that the lands were worth \$15 per acre, and this the witness thought was before Hoover purchased the land and got his deed. We quote from this witness' testimony: "He does not know whether it was before or after the deeds were made, but thinks it was before Hoover purchased the land; for Hoover told him that several parties were wanting the place,—mentioning Dr. Smith, who had offered to give \$6,000,—and said there were several other parties about Lavaca who wanted it, and that he could get it for \$15 per acre, and that he (Bryan) had better trade quick, as Mr. Webb was old and cranky, or

something like that, and they were liable to miss it unless they made a quick trade. Hoover seemed to think that the land was well worth \$15 per acre. Said it was a good stock farm, if handled right. Hoover said he could buy it, and would, if it suited him (Bryan) to go in partners with him. This was after they came back from the trip visiting the land. After this conversation, Hoover called him in his office one day, and showed him the deed, and said that he had everything fixed up to buy the place, if it suited him (Bryan) to buy with him, and, if it did not he (Hoover) would rent it to him," etc. This witness also says that while he and Hoover were with Webb, looking over the place, Webb asked him (Bryan) if he did not think the place was worth \$15 per acre. He further shows that Hoover told him after he got the deeds that the place cost him \$15 per acre. Another witness, who was present at a conversation between Bryan and Hoover about renting the place in the fall of 1895, says: "Bryan wanted the place cheaper than Hoover offered it, and Hoover told Bryan he could not rent it cheaper, because he was paying \$15 per acre for the land; that he was paying this amount to Mr. Webb." Another witness (Ingram) says: "Webb offered the place to him for \$6,500, and said he believed he could get \$7,000. This was about the time of the negotiations between Webb and Hoover." It thus appears that Webb thought the land was worth \$15 per acre, and was asking approximately that for it; that Hoover thought it was worth \$15 per acre, and was anxious to get Bryan to join him and pay that for it; and that, after he had bought it and procured the deed for it, he told him that it cost him \$15 per acre. We are of the opinion that these verbal admissions of Hoover as to the value of the land, and what he was willing to pay and had paid for it, have a far more serious aspect than this counsel seem willing to concede. They say, "He may show that they were simply lies; that they were merely puffing;" and counsel seem inclined to so treat them as having been made to induce strangers to purchase, or to enter with Hoover into an advantageous contract of rental. But this theory is shorn of all plausibility when it is remembered that Hoover, although called as a witness after the above facts had been elicited, and therefore cognizant of same, failed to deny that the statements were true, or to assert that they were made under mistake, or to in any manner explain what was their real purpose. Then it was he missed the golden opportunity. Furthermore, the "puffing idea" vanishes when we consider that Bryan shows that Hoover made the statement that the lands were worth \$15 per acre, and could be had for \$15 per acre if they made a quick trade, etc., when he was in the attitude of one wishing to buy, and not one who had already purchased. A man who would "puff" what he expected to buy, so as to enhance or stiffen the price he would

have to pay, in these times, would be classed among the curios. No; the only reasonable explanation* of these admissions by Hoover is that they were made because they were true, and before there was any thought to dissemble. It was in proof that Hoover said "Webb was old and cranky"; but he would have been something more than that, had he sold the land upon consideration of being relieved of a debt of \$4,000 or \$4,300, and with no assurance from one having authority to release him, when he might have been released indeed by selling to another, and besides might have pocketed several hundred dollars. The only evidence appellant has to support the contention that the land was sold to Hoover upon consideration that he would relieve Webb from liability on the mortgage debt is that of A. J. Hoover. The testimony of this witness does, indeed, support appellant's view, but we think the decided preponderance is with the contention of the executor (appellee). True, learned counsel argue that the correspondence of Hoover with T. E. Bowman & Co. establishes the contention of appellant. It would too greatly incumber this opinion to set out the letters in *hæc verba*, but we do not think it possible to gather from them that Hoover had bought the land from Webb. On the contrary, if they are to be taken as true, they show that Hoover had not bought the place at all, and would not take it in consideration of paying off the mortgage debt; for if he had really bought the land in consideration of paying off the mortgage debt when the quitclaim deed was executed, the 29th of October, 1895, why, then, was he writing to Bowman & Co., November 7, 1895, to this effect: "I made a personal examination of the farm, to see if I could not take it, and make it pay interest and taxes for the next two years, after which time I thought there might be a change. I should like to own the farm, but decided to let it alone." Why, if he had already bought the place from Webb, and agreed to assume the mortgage debt, was he writing to Bowman & Co., in the above and other letters, representing that he had decided to let it alone, and that he was trying to negotiate with other parties to take it, and that other parties might be induced to take it if certain arrangements could be made, satisfactory to Bowman & Co. and these parties, as to the payment of the principal and interest on the mortgage debt, etc. In a letter of November 11th, Hoover says: "Your recent letter at hand, and will see the parties interested, and let you know regarding the land in a day or so. Will take one of the parties out to-morrow to see the farm." On November 19th he writes: "In regard to Webb place, will say that I have everything all right. Parties will take the place at 7 per cent. of \$4,300." This latter date was the date of the warranty deed from Webb to him, but still he does not disclose the real truth to Bowman & Co. of his purchase on that day from Webb, but

represents to them "that parties will take the place." And not until as late as December 12th does he let them know the truth,—that he himself wants the place from them on certain terms. The letters of Hoover to Bowman & Co., in the light of his contention here, are exceedingly disingenuous. We are convinced that Hoover did not determine to buy the place of Webb until he thought he had made satisfactory arrangements to rent the place so that he could pay for it at the price agreed upon between himself and Webb, to wit, \$15 per acre, and that he concealed the fact from Bowman & Co. of his desire to purchase himself until he had gotten their consent to an advantageous arrangement for the payment of the mortgage debt. So, if the letters are considered, they do not strengthen his case. But, if these letters had caused us to come to a different conclusion, we would have had to sustain the lower court in excluding them. They were written after the consummation of the contract between Hoover and Webb concerning the sale of the land. They were about matters with which Webb had no concern, and his rights, as already secured by the contract he had made with Hoover, could not be affected in any manner by any trade that Hoover and Bowman & Co. might make. It is a well-settled rule of evidence that no conversation or written statement, not concomitant with the matter to which it relates, which proposes to tell what has happened, or recite facts or circumstances connected with the past transaction, even though they explain or attempt to explain it, are not *res gestæ*. 1 Greenl. Ev. 110; Rice, Ev. 384. This correspondence could not be said to come within the definition of *res gestæ* approved by this court. Oil Co. v. Slover, 58 Ark. 168, 24 S. W. 106; Railway Co. v. Kelley, 61 Ark. 52, 31 S. W. 884.

3. Concerning the so-called counterclaim of \$220, we think, under the proof in this case, this claim for corn was not strictly a counterclaim, as defined by our statute; for it did not arise out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, nor was it connected with the subject of the action. Sand. & H. Dig. § 723. But, if it was a just claim, appellant would have had the right to assert it as a set-off *pro tanto*. Appellee, in setting up and proving that the consideration for the deed was different from that contended for by appellant, overcomes the allegation that the promise of Webb to let Hoover have 1,280 bushels of corn was a part of the agreement by which the defendant was to relieve Webb from liability for the mortgage indebtedness. But the appellee does not deny the allegation "that Webb was to pay the past-due indebtedness, amounting to \$320," and that the defendant paid to James S. North the said \$320, past-due interest, and the said Webb delivered, as part fulfillment of his agreement, 400 bushels of corn, and that "the remaining 820 bushels were not delivered." Therefore, as

the answer was properly verified, we must treat this allegation as confessed.

The decree is therefore reversed, and the cause is remanded, with directions to enter a decree in favor of the appellee, executor of the estate of Webb, for the sum of \$8,870, with interest at 6 per cent. per annum from the 1st of April, 1896, less the sum of \$220, with interest at 6 per cent. per annum from time same was paid on the mortgage debt; that the amount thus ascertained be declared a lien on the land; and that the land be sold, and the proceeds be applied (1) to the payment of the mortgage debt mentioned in the complaint, and (2) the balance, if any, to the executor of Hoover,—and for such other and further proceedings by the chancery court as may be necessary to carry out the decree, not inconsistent with this opinion.

On Motion to Rehear.

(May 23, 1899.)

Upon a careful review of the record, we adhere to our former conclusion on the facts of this case. This is the only reasonable construction to place upon the conduct of both Webb and Hoover, in the light of all the facts presented by this record. The conclusion we first reached is upheld by the decided preponderance of the evidence; and so far as Hoover is concerned, under the circumstances disclosed by the proof, it is the only interpretation of his conduct at all compatible with honest and fair dealing.

Counsel for appellant, with their usual vigor of argument, and copious citations, have pressed upon our attention, in their brief for rehearing, the estoppel of appellee to complain here of the decree of the court rescinding the contract of sale. We have carefully considered their argument and examined their authorities, and we are of the opinion that it is entirely unnecessary for us to go into that question. Let us concede that counsel for appellant are correct about that. Then the case would stand alone upon his appeal. He was not satisfied, and would not accept the decree of the court rescinding the contract of sale, but has appealed from it, and is here insisting that the court erred in the rescission of the contract of sale, and in not decreeing that the sale was actually made according to the contention of his answer. We agree with the appellant that there was a contract of sale, and that the court erred in decreeing a rescission of same. Therefore we cannot affirm the decree of the learned chancellor. But we do not concur with appellant that the terms of the sale were as he contends. Then the question is,—and it is raised directly by appellant's own appeal,—what were the terms of the sale? This we have determined, on the facts, against appellant's contention, and have directed such a decree in this regard as should have been rendered in the first instance. There is no pretense that the cause has not been fully developed. On the contrary, it has been ex-

haustively and elaborately developed on both sides. We have therefore taken up the cause on appeal, and decided it upon the merits as presented by the whole record, and we believe our conclusion is in conformity with well-established rules of chancery procedure. *Pickett v. Ferguson*, 45 Ark. 177; *Crease v. Lawrence*, 48 Ark. 312, 3 S. W. 196; *Farnsworth v. Hoover*, 66 Ark. —, 50 S. W. 865. The motion for rehearing is therefore overruled.

STATE v. RICE.

(Supreme Court of Missouri, Division No. 2.
May 9, 1899.)

CRIMINAL LAW—CONTINUANCES—INDICTMENTS—SUFFICIENCY.

1. A motion for continuance by an accused for the absence of witnesses must show the materiality of the evidence expected to be obtained, and that he believes the facts he expects to prove to be true.

2. An accused is not prejudiced by the overruling of his motion for continuance for absent witnesses, where their evidence was in support of a defense shown on the trial to be without merit.

3. The appellate court will not review the refusal of a continuance unless it is shown that the discretion of trial court was abused.

4. An indictment charging that accused did feloniously shoot deceased with a gun, "and then and there giving her" a mortal wound, is not insufficient, in that it does not charge that the mortal wound was feloniously given, since the "feloniously" first mentioned is sufficiently connected by the words "and then and there."

Appeal from circuit court, Oregon county; W. N. Evans, Judge.

Carroll M. Rice was convicted of murder, and he appeals. Affirmed.

S. A. Handy and Harris & Norman, for appellant. The Attorney General and Sam B. Jeffries, for the State.

BURGESS, J. The defendant was convicted in the circuit court of Oregon county of murder in the first degree, and his punishment fixed at death, for having shot to death, with a Winchester rifle, his wife, Mary C. Rice, at said county, on the 27th day of June, 1898. He appeals.

Defendant had been previously married before his marriage to the deceased. By his first wife there were three children, the oldest being about 9 years of age. The deceased was about 20 years of age at the time of the homicide. She and the defendant had not lived happily together, and she had left him two or three times, but, upon his solicitations, returned to him. Finally she left him, and went to the house of an aged lady, by the name of Conner, to make her home, where she had been living about three weeks, when defendant, on the evening or night of June 26, 1898, took his rifle, and went and watched around the house nearly all night, with the hope that his wife might come out, so he could see her; and, failing in this, he went to the spring where he knew the fam-

ly got water, and waited until morning, thinking that she would come to the spring for water. Between 6 and 7 o'clock in the morning, being June 27, 1898, deceased and Mrs. Sarah A. Conner, a daughter-in-law of the lady with whom deceased was then living, and who had stayed there the night before, went to the spring for water, and there met defendant, who asked deceased if she would return and live with him. She replied that she would not, and stooped down to get her bucket of water, when defendant raised his gun, remarked to her, "God damn you" and fired at her; the ball penetrating her left breast, entering the body in the region of the heart, from the effects of which she died in about 30 minutes. He then left her lying upon the ground, returned to his camp where he was living, sent for one of his neighbors, and told him all about the homicide. He had repeatedly threatened to kill deceased if she did not return and live with him.

The indictment against defendant was returned on the 23d day of August, 1898. Thereupon, at his request, the cause was set for trial on the 5th day of September, 1898. When the case was called for trial at that time, defendant presented his motion for a continuance upon the ground of the absence of four witnesses therein named. The application was overruled, and the action of the court in this regard is assigned for error. Section 4137, Rev. St. 1889, provides that "all indictments or informations shall be tried at the term at which the indictment is found or information filed if the defendant is in custody, or appears at such term, or at the first term at which the defendant appears, unless the same be continued for cause." It is clear from this statute that the case stood for trial at the term at which the indictment was preferred; and, to entitle defendant to a continuance, his motion, in addition to the facts therein stated, should have shown the materiality of the evidence expected to be obtained, and that the facts he expected to prove by said witnesses he believed to be true (section 4181, *Id.*), but it contained no such averments. While the motion discloses that defendant expected to prove by the absent witnesses that deceased had repeatedly threatened his life, that she carried concealed upon her person a dirk and revolver, and that she procured poison with which to poison him, the nature of the defense intended to be relied upon by him does not appear, from the motion, to have been self-defense, for which purpose only the evidence would have been admissible. The materiality of the evidence did not, therefore, appear from the motion, and for this reason the motion was properly overruled. *State v. Pagels*, 92 Mo. 300, 4 S. W. 981; *State v. Bryant*, 93 Mo. 273, 6 S. W. 102; *State v. Cochran* (Mo. Sup.) 49 S. W. 558; *State v. Kindred*, *Id.* 845. Not only this, but it was developed upon the trial that the plea of self-defense was a mere pre-

text without merit, and unworthy of being called such. Hence defendant could not possibly have been prejudiced by the action of the court in overruling the motion. Moreover, the granting or refusing a continuance is a matter resting largely in the discretion of the trial court; and this court will not interfere unless it be made to appear that such discretion has been unwisely exercised, which has not been done in this case. *State v. Day*, 100 Mo. 242, 12 S. W. 365; *State v. Banks*, 118 Mo. 117, 23 S. W. 1079.

It is also insisted that the indictment is bad, in that it fails to charge that with the bullet so shot out of said rifle the defendant "then and there, feloniously, willfully," etc., did strike, penetrate, and wound; in other words, that the words "feloniously," etc., previously alleged, are not connected with the mortal shot by the use of the words "then and there." The indictment alleges that "the grand jury upon their oath present that Carroll M. Rice on the 27th day of June, 1898, at the county of Oregon, in and upon one Mary C. Rice, then and there, feloniously, willfully, deliberately, premeditatedly, on purpose, and of his malice aforethought, did then and there shoot off and discharge at and upon her, the said Mary C. Rice, with the Winchester rifle aforesaid, loaded with the gunpowder and leaden balls aforesaid, and then and there giving to her, the said Mary C. Rice, with one of the leaden balls aforesaid, in and upon her, the said Mary C. Rice, and upon and in the left side of the body of her, the said Mary C. Rice, one mortal wound, of the breadth of two inches and of the depth of eight inches, of which said mortal wound the said Mary C. Rice at the time and place aforesaid instantly died." While the indictment is rather unartistically drawn, it is not, we think, subject to the objection urged against it, as the words "feloniously," etc., first alleged therein, are subsequently connected with the striking of the bullet, and its result, by the use of the very words, to wit, "then and there," etc., which defendant insists are necessary to make the indictment good. It would perhaps have been better had the word "feloniously" been repeated next after the words, "then and there," when used the second time in the indictment, so that it would read, "then and there feloniously giving to her, the said Mary C. Rice, with one of the leaden bullets," etc., "one mortal wound;" but as the words "feloniously," etc., as first alleged, are connected with the mortal shot by the words "and then and there," the words "feloniously," etc., become component parts of the subsequent allegations, and connect them with the mortal shot, which is all that was necessary in order to make the indictment good. *State v. Herrell*, 97 Mo. 105, 10 S. W. 387, and authorities cited; 8 Chit. Cr. Law (5th Am. Ed.) 738.

The evidence showed defendant to be guilty, beyond any question, of one of the most deliberate and unprovoked murders

ever perpetrated by man. He seems to have had a fair and impartial trial, and must suffer the penalty imposed by law for its transgression in such cases. We affirm the judgment, and direct the sentence to be executed.

GANTT, P. J., and SHERWOOD, J., concur.

STATE v. RUFUS.

(Supreme Court of Missouri, Division No. 2.
May 9, 1899.)

CRIMINAL LAW—INSTRUCTIONS—APPEAL—RECORD—REVIEW.

1. It is the duty of the court in a criminal case to instruct the jury, though not requested so to do.

2. The assignment of certain remarks of the prosecuting attorney as a ground for a new trial, and setting them out in the motion, does not make them a part of the record, so as to be reviewable, but they should be copied into the bill of exceptions.

3. The appellate court will not interfere with a verdict approved by the trial court on the ground that it is unusual and severe, in the absence of a showing that it was manifestly the result of passion or prejudice.

Appeal from circuit court, Pemiscot county; Henry C. Riley, Judge.

Essex Rufus was convicted of shooting, with malice, with intent to kill, and he appeals. Affirmed.

Roberts & Sellers, for appellant. The Attorney General, for the State.

BURGESS, J. At the February term, 1898, of the circuit court of Pemiscot county, the defendant was convicted of shooting, with malice, with intent to kill, one Rankin Schofner, and his punishment fixed at five years' imprisonment in the penitentiary. He appeals.

At and for several months prior to the 1st of June, 1898, the defendant and Rankin Schofner and his wife occupied as their residence different parts of the same house, Schofner renting from the defendant. Defendant wanted possession of that part of the house in which Schofner was living, and had been urging him for some time to move out, and go elsewhere. A week or 10 days before the shooting, they had some words over some chickens which Schofner owned. On the day of the shooting, defendant, anticipating, as he claims, trouble with Schofner, put a pistol in his pocket, and went to his mother's, who lived only a short distance away, for some milk, and upon his return, with a jar of milk under his arm, he saw Schofner coming, meeting him in the road, having at the time both hands in his pockets, and, fearing that he was going to use a knife or pistol upon him, he put down his jar of milk, drew his pistol, and shot him, the ball entering the left fore-

arm about 1½ inches below the elbow joint, ranging downwards, and lodging in the arm, from which it was afterwards extracted. Schofner was not armed at the time of the shooting, nor was he making any demonstration of violence towards the defendant, but when shot he went into his house, within a few steps of which the shooting occurred.

1. Among the grounds assigned in the motion for a new trial filed by defendant, and which may be considered together, are that the verdict of the jury is against the evidence, against the law as declared by the court, the giving instructions by the court of its own motion on behalf of the state, the admission of evidence on the part of the state, and the exclusion of evidence offered on behalf of defendant. With respect to these assignments it may be truthfully said that they are without merit. There was abundant evidence to authorize the verdict, which is in accordance with the law as announced by the court in its instruction to the jury. It was not only proper for the court to instruct the jury, but it was its duty to do so, and it makes no difference whether the instructions given were prepared and asked by the respective counsel, or whether prepared by the court, and given of its own motion. With respect to the remaining assignment, we have not been able to discover wherein error was committed in the admission or exclusion of evidence, and no particular instance of that character is suggested in the motion.

2. Another assignment is that the court permitted the prosecuting attorney, in his argument to the jury, to go outside of the record; but the language complained of is not copied in the bill of exceptions. Merely assigning such remarks as a ground for a new trial, and setting them out in the motion, neither proves they were made, nor makes them a part of the record. *State v. Levy*, 126 Mo. 554, 29 S. W. 703; *State v. Green*, 117 Mo. 298, 22 S. W. 952; *State v. Paxton*, 126 Mo. 500, 29 S. W. 705; *State v. Jackson*, 126 Mo. 521, 29 S. W. 601.

3. It is also claimed that the verdict, in view of the evidence and instructions, is unusual and severe. Of this the court and jury were the better judges. The court approved the verdict, and, having done so, this court will not interfere, in the absence of something showing that it is manifestly the result of passion or prejudice; which does not appear in this case.

4. In the motion in arrest which was filed it is urged that the indictment is bad, but this contention is entirely without merit. The indictment is in the usual form in such cases, and free from objection. We find no error in the record, and therefore affirm the judgment.

GANTT, P. J., and SHERWOOD, J., concur.

LAMB et al. v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. Nov. 16, 1898.)

Dissenting opinion. For majority opinion, see 48 S. W. 659.

SHERWOOD, J. Action for \$10,000 damages for injuries resulting to Mrs. Lamb, the beneficial plaintiff herein, by being struck by a tender which was attached to an engine belonging to defendant company, and which knocked plaintiff down, bruising her about the head, face, and limbs, and the engine and tender ran over and crushed the heel and under portion of her left foot. The answer of defendant was a general denial, coupled with a plea of contributory negligence. The reply was a general denial. The petition counted on the night of the occurrence of the injury being "dark and cloudy." In her original petition, "smoke" was alleged as an additional ingredient of injury; but this element was eliminated from the amended petition, because of an instruction given at the instance of defendant, to the effect that, if plaintiff's view was obstructed by smoke or otherwise, it was her duty to have waited until such smoke or other obstruction had been removed before attempting to cross the track, and a failure to do so would preclude a right of recovery. The accident occurred on the 16th day of June, 1893, about 8:20 o'clock in the evening of that day, in the city of Pleasant Hill (a city of over 2,000 inhabitants), at a public crossing of Wyoming street, where that street crosses the railroad track of defendant company, which track runs through the city from the southeast, in a northwesterly direction, and divides the business from the residence portion of the city. Wyoming street runs north and south through the city, and across the tracks (two in number) at that crossing. A plat and photographs which will accompany this opinion will give an accurate idea of the scene of the accident and its surroundings.¹ It will be noted in this connection that the two tracks involved in the evidence preserved in the record are parallel, and for a long distance entirely straight,—for a distance of a quarter of a mile to the east,—and there are no obstructions to the vision along the lines of the first and second tracks. Along those tracks a great many trains were accustomed daily to pass backward and forward. Mrs. Lamb was 26 years of age; was born and reared in Pleasant Hill; was perfectly familiar with the crossing and with the running of the trains, and, living, as she did, north of the railroad tracks, was accustomed to cross them at this same crossing two or three times a day; and a great many trains were passing as plaintiff usually went over the crossing, and this had been the case with her for years. This crossing was west of the depot about two-thirds of a block, or about 322 feet. There is a sidewalk on the west side of

Wyoming street, which crosses these tracks. At this point the first track is a switch track, on the south, and the passenger track is next to it on the north. It is 13 feet and 8 inches from the south rail of the second or passenger track to the south rail of the first or switch track; and each track is 4 feet 8 inches wide. On the evening in question she had been over on the south side of the railroad to Rayburn's grocery store, about 175 feet to the south of the first railroad track, and left there for the purpose of returning home. Accordingly she walked north on the sidewalk on the west side of Wyoming street until she approached within four or five feet of the south rail of the first (south or switch) track. There she stood for three or four minutes, waiting, as she says, for the passenger train then about due to come in from the west, or Kansas City, and go on east across the sidewalk on the west side of Wyoming street, before she would venture to cross. Pretty soon the expected passenger train came in view. The engine whistled at the usual place, west of the Wyoming street crossing, 80 rods, or 1,320 feet, from the place where plaintiff was standing. This passenger train traveled on the second track north of plaintiff, proceeding east to the depot. While this was occurring, and when the passenger train, the cars of which were brilliantly lighted, had almost crossed over the crossing at Wyoming street, the last car having gotten about east of that street, an engine and tender came from the east along the first (south or switch) track, on the immediate south of which plaintiff was then expectantly standing. This engine and tender, running backwards, was going west, and crossed Wyoming street running at a rate of speed variously estimated at 6 to 20 miles per hour. It is asserted in plaintiff's behalf that no signals were given by the engine going west, but on this there is the usual conflict. She testifies that, before she stepped on the first or nearest track to her, she looked both ways, up and down the track, and did not see or hear the engine, and then stepped on the first or switch track, when "almost instantly" she heard the engine whistle, and then the tender immediately struck her, knocking her 25 or 30 feet westward, etc., and that no bell was sounded on the engine in question. And she also testified that, just before the passenger train came down, she looked to the west, and saw some box cars there, some 50 yards distant on the first track, and that her vision was equally unobstructed toward the east, and that she could have seen the engine and tender 50 yards to the east, when she looked in that direction, had it not been for the smoke and dust between her and the engine and tender, and that there was no other obstruction, that she knew of, to have prevented her, when standing four or five feet from the first track, from seeing an engine on that track clear down to the depot, and that the smoke came from the passenger train. Further on she testifies that the smoke, and the dusky even-

¹ Not procurable.

51 S.W.—6

her from seeing the engine and tender, and that when she first went down to the track, and as the passenger train was coming in, she looked down east, and saw Duncan's building, the depot, and the lights in the windows, and that, if there had been no smoke or dust, she could have seen an engine and tender 50 feet to the east as they came towards her. Asked further with reference to the crossing of the passenger train, she says that when she last saw it it was still moving down; that then she looked east, but saw only the passenger train; that, immediately after the passenger train passed by her, she looked east, and then west, and then stepped on the track. Asked whether at that juncture she could see the engine, she answered: "I do not know whether I noticed whether I could see the engine or not. I saw the passenger lights." In no place in her testimony does it appear that she looked down the first track, near which she was standing. She may have looked east,—that is, let her eye follow the passenger train, and the second track on which it was moving,—without looking at the first track at all. She also testifies that as she was standing at the place beside the track at which she stopped, and before the passenger train pulled in, there was nothing to have prevented her from crossing the tracks in safety. She says, indeed, that, even after the passenger train got within 100 yards of the crossing, she had time to have made the crossing, but she felt safer waiting, although it was less than 25 feet from where she was standing to the north rail of the passenger track, and although night was approaching. In addition to plaintiff's testimony already set forth, her testimony had been preserved as given at the last or second mistrial. Asked at that time if she had seen the engine before it struck her, she said: "I do not remember seeing it until it struck me. I heard the sound of the whistle." Asked how far it was when it whistled,—whether 6, 8, or 10 feet,—she said: "It seems it was closer than that. It may have struck me right at once. I do not know." Asked again if it might have been off 8 or 10 feet when it whistled, she said, "No;" if it had, she could have gotten off the track. On that former trial she was also questioned about the smoke about which she had testified, and stated that it settled in the direction where she was,—right close to her. Upon this, being asked if the smoke remained clear up to the time she was hurt, she said she did not remember whether it did or not, and that she did not pay any more attention to it after she first looked and saw it there. On a former occasion the deposition of plaintiff had been taken, and she stated that, when the passenger train had gone by, she started to cross. Asked how far she had gotten before being struck, she answered, "One step; one foot on the track."

Mundy, a negro, came along as plaintiff was standing where she had stopped, saw her there, and then crossed over, and, looking back, saw

passenger train as it was coming in. This witness says that as he crossed over the tracks he looked east, and saw the engine and tender that afterwards struck plaintiff coming back (that is, coming west); that they were about the lower crossing (Commercial street), a block distant; that this was east of the depot; that there was no obstruction at this time between plaintiff and the engine and tender, or between witness and those objects; "that anybody that was looking that way, and watching for anything to look at, could have seen it."

Hayes, another witness, who crossed the tracks with Mundy, says that he and Mundy crossed the tracks together in front of plaintiff, and that in crossing he looked east, towards the depot, and saw the engine and tender down back of Duncan's, and moving west, and that it was in plain view from where witness was, and that there was nothing in the way to obstruct plaintiff's view of the engine and tender; that they ran up to the crossing just at the same time the passenger train went by, both of them passing the same point where the accident occurred at the same time; that the bell on the passenger train was ringing. But whether the bell was ringing on the approaching engine, witness could not say.

Goudy, another witness, says: He was a passenger on the Kansas City incoming train. Was in the middle or chair car. There were three coaches on the train, all of them lighted. The window was up, and he sitting on the south side. Saw plaintiff as the train was crossing Wyoming street. She was standing on the sidewalk and looking towards the passenger train, and witness recognized her when passing. That the engine and tender which he supposed struck plaintiff passed the rear end of the passenger train about the middle of Wyoming street. That both the engine and train were moving at the time,—the train going east, and the engine going west. That the engine passed witness about the middle of Wyoming street,—a street 95 feet between sidewalks,—and plaintiff was then on the sidewalk. That in the judgment of witness, who had been depot agent for over 16 years, and was consequently familiar with the locality, a person standing 4 or 5 feet south of the south track could see as far east as beyond Commercial street, and perhaps as far as the tank.

Barnes, another witness, says: On the evening of the accident he was sitting at the corner of Dunn's drug store, which is on the west side of Wyoming street, and about 12 feet south of the railroad tracks, and the next door north of the post office, when he observed the passenger train coming in from Kansas City, and saw the engine and tender which struck plaintiff. The ringing of the bell first attracted his attention that way, and he saw plaintiff walking slowly down the sidewalk towards the track, and she seemed to pause

before she got to the track, and, though her back was towards witness, she seemed to be looking towards the passenger train, and up into the cars, as the train ran up to the crossing. That, as the last car moved out of the way going east, the engine and tender came out from behind Duncan's, and were about 15 or 20 feet of plaintiff when witness first discovered them. That, as the last car moved out of the way, plaintiff stepped forward, and, as the engine and tender were backing up at a pretty rapid rate, witness raised to his feet, because plaintiff seemed not to be looking at them, and they did not seem to attract her attention, and just as he rose to his feet they struck her. And that plaintiff and the engine and tender were both in plain view of witness just before the collision occurred.

Another witness (Dunn) was in front of the Pleasant Hill Company's drug store on the evening of the accident, a little northwest of Duncan's store, and also on the west side of Wyoming street. He did not witness the accident, but he saw the engine and tender as they went towards the crossing where plaintiff was struck, and that they were in plain view from where plaintiff stood at the crossing. That immediately after the accident witness had no difficulty in distinguishing an object 150 yards or so, and that immediately after that occurrence he had no trouble in distinguishing a man from a woman that far as they came up to the crossing from the depot.

Hubbard was standing at the rear of Duncan's store, within 10 feet of the south track on the east side of Wyoming street, and about to cross the track there, when his attention was directed to the engine and tender by the noise of the wheels and the puffing of the smokestack. Casting his eye to the east, he saw them coming, and about 50 feet distant; and, though he says he saw no lights on them, yet it does not appear that he had the slightest difficulty in seeing them. At that time, he states, he saw plaintiff on the opposite or west side of Wyoming street (a street 98 feet wide between sidewalks), just to the railroad when he saw her, and, though plaintiff was an entire stranger to him at that time, he had no trouble in recognizing her; and then he says he heard two or three sharp whistles, and the accident occurred at the same time, though he says he did not see plaintiff struck.

Belmont, who was with Hubbard, gave similar testimony, and says that although the evening was dusky, not dark, you could see a person across the street,—not able, perhaps, to recognize him, unless personally acquainted with him.

Thomas was on the west side of Wyoming street, 130 feet south of plaintiff, near the post office, and saw the engine and tender that struck plaintiff come out from behind Duncan's; saw it very plainly; saw it on up to where plaintiff was struck, and heard her scream.

McArthur was with Thomas at the post office, which he states is about 160 feet from Duncan's corner, and saw the engine and tender come from behind that corner up to where plaintiff was standing.

Hughes, also near the post office, says he saw the engine and tender come from behind Duncan's store, and that they would have to come between plaintiff and the lights of the passenger train when moving west to the crossing.

York was about 15 or 20 feet south of plaintiff when the accident occurred, and saw the engine and tender when they were about 15 feet from plaintiff, and a person with her, and said, "If they do not see that train, they will get run over," and about that time it struck her. He also says he first saw the engine and tender about 40 feet off, that the passenger coaches were brilliantly lighted, and that, standing where plaintiff was, the engine and tender would be bound to pass between her and the lights of the passenger train.

Bailey was sitting on the sidewalk almost due south of the west line of Duncan's store, and about 175 feet from the point of the accident, and saw the engine and tender as they crossed Wyoming street. The passenger coaches were brilliantly lighted, and, from the position occupied by plaintiff, there was nothing to obstruct her view, and no reason why she should not have seen the engine and tender by the lights of the passenger train.

The testimony of all the witnesses is to the effect that the engine and tender passed the rear portion of the passenger train about on Wyoming street. Davis, a negro, was, when the accident occurred, at the water tank, west of the depot, and on the north side of the railroad tracks. He could then see objects about the width of a block, very plainly. He first saw the engine and tender about 150 feet from where the plaintiff was injured. The last witness, as well as seven others who preceded him, were witnesses for plaintiff. The others were for defendant.

McGrath, for defendant, testified: That he was the engineer on the engine and tender that struck plaintiff. He saw plaintiff standing near the track when he got within 60 feet of her. She was standing still, with her face to the north, and did not appear to look towards him. He thought she was going to remain standing until the crossing was made. He was on the east side of the plaintiff. There was no obstruction between the plaintiff and him. That she was about 6 feet from the track, and remained there up to the time when he got within 10 or 12 feet of her, when she started across the track. That immediately he tooted the whistle and reversed the engine. That it was impossible to have stopped the engine after he saw that plaintiff was going on the track. That she was facing the north, and looking that way, and that he did not see her looking towards him. He also states that the bell on the engine was rung con-

tinuously from the time they left the elevator, 200 or more feet east of the depot, until the west sidewalk of Wyoming street was reached.

Gilbert was standing 100 yards west of where plaintiff was injured, and giving signals to the engineer on the engine and tender, and there were several lights on the engine, and he could see and distinguish them before plaintiff was struck. Heard several blasts of the whistle before the engine stopped. Asked how far he could see the engine and tender before it got to the crossing, he replied that he could see it as far as the tank east of the depot.

Mrs. Edmonson was standing on the east sidewalk which crosses the track north of Duncan's store, and, standing there, heard the bell of the engine ringing, and, looking around, saw the engine and tender. She heard the bell before she saw the engine and tender, and the bell on the engine continued to ring after it passed her, and she saw the tender strike plaintiff, who was standing on the opposite sidewalk, and she saw and recognized plaintiff. Several other witnesses testified in a similar strain as to the facility with which men and women could be seen and recognized at considerable distances on the evening in question, but it is quite unnecessary to quote from them all.

At the close of the testimony, defendant asked an instruction in the nature of a demurrer to the evidence, which was denied. The jury returned a verdict for plaintiff for \$3,000.

The evidence already recited conclusively shows that this case falls within that category of cases which announce these principles: That, in like circumstances to those here presented, the contributory negligence of plaintiff precludes her from recovery, and that the well-established physical facts disclosed by this record are an all-sufficient answer to plaintiff's assertion that she filled the measure of ordinary care by looking in the proper direction before she stepped upon the track. These principles will be found announced and elaborated in the following cases: *Hayden v. Railroad Co.*, 124 Mo. 566, 28 S. W. 74; *Kelsay v. Railroad Co.*, 129 Mo. 362, 30 S. W. 339; *Lane v. Railroad Co.*, 132 Mo. 4, 33 S. W. 645, 1128; *Maxey v. Railroad Co.*, 113 Mo. 1, 20 S. W. 654; *Payne v. Railroad Co.*, 136 Mo. 562, 38 S. W. 308; *Huggart v. Railroad Co.*, 134 Mo. 673, 36 S. W. 220; *Vogg v. Railroad Co.* (Mo. Sup.) 36 S. W. 646; 3 *Elliott, R. R.* §§ 1165, 1166, and cases cited. And, under the authorities cited, even if defendant company failed to give the customary signals, this would not justify plaintiff in failing to use all proper precautions. If a traveler could have seen the train by looking, the presumption is that he did not look, or, if he did look, did not heed what he saw. *Elliott, R. R.*, and *Payne's Case*, supra. Now, as to the ringing of the bell. As before remarked, the testimony is conflicting on this point. Several witnesses were positive that the bell was properly rung.

Some others deny this, while others did not hear it. Section 2608 is the statute (Rev. St. 1889) on which such duty, speaking in a general way, is bottomed. The provisions of that section, so far as necessary to quote them, are as follows: "A bell shall be placed on each locomotive engine, and be rung at a distance of at least 80 rods from the place where the railroad shall cross any traveled public road or street, and be kept ringing until it shall have crossed such road or street, or a steam whistle shall be attached to such engine and be sounded at least eighty rods from the place where the railroad shall cross any such road or street, except in cities, and be sounded at intervals until it shall have crossed such road or street, under a penalty of twenty dollars for every neglect of the provisions of this section, to be paid by the corporation owning the railroad." Under the theory that this section was applicable to cities, this instruction was given at plaintiff's instance: "The court instructs the jury that, under the law in this state, it was the duty of the defendant's servants and agents, in running, conducting, and managing defendant's locomotive engine and tender when approaching any traveled public road or street, to ring its bell on such locomotive engine at a distance of at least eighty rods from the place where its railroad crossed any public traveled street or road, and to keep the bell ringing until it crossed said street or road; and a failure on the part of the servants and employes of any railroad company running and managing its locomotive engine and tender to ring such bell, as herein above described, at such times and places as herein above specified, is negligence." A careful or even a cursory reading of section 2608 should convince any one that the statute is impossible of application to switching engines when operating in cities. If it should be held thus applicable, it would block the progress of railroad trains throughout the state,—indeed, over the continent of North America,—because it would require that a switching engine about to cross a street should ring its bell for 80 rods before doing so. Now, it is a fact of such common knowledge that city streets are not a quarter of a mile apart, and that city blocks are not 80 rods long, that we may take judicial notice of it. But, even if they were that far apart, still this would not help the matter, because, even then, if switching engines attempted to do intermediate switching, they could not comply with the statute. This is too plain for serious discussion. In our judgment, the statute applies, and was only intended to apply, to passenger or freight trains when regularly made up, when approaching a country crossing, or crossing on the boundary line between city and country. Any other conclusion than this leads to manifest absurdity, and, when this is so, the letter of a statute may be enlarged or restrained according to the true intent of the framers of the law. for "the letter killeth, but the spirit maketh

alive." Under this conservative rule, general terms are so limited and restrained as not to lead to injustice, oppression, or an absurd consequence; the presumption being indulged that no such anomalous consequence was intended by the framers of the law. *Ex parte Marmaduke*, 91 Mo., loc. cit. 234, 4 S. W. 51, and cases cited; *Suth. St. Const.* § 218. But, while we say this, at the same time we say that, outside of the statute, and under the principles of the common law, a railroad corporation would not perform its full duty of ordinary care, unless those employed on a switching engine, engaged in its customary avocation, should ring its bell, or, if necessary, take any other precautions adapted to the exigency of the situation. It is this exigency which, like the mercury in the thermometer, determines to what degree prudence shall rise in order to reach the mark of ordinary care. And when the engineer approached with the engine and tender to within 60 feet of where plaintiff was standing on the sidewalk, and saw her there, he had the right to presume that she would not be guilty of such reckless folly as to attempt to cross in front of the moving tender. *Purl v. Railroad Co.*, 72 Mo., loc. cit. 172, and cases cited. In addition to the testimony of plaintiff and others adduced at the trial, there are preserved her admissions made at a former trial, and in a deposition. Though such admissions would not be admissible in the case of an ordinary witness, except for the purpose of impeachment, yet it is otherwise where, as here, the witness is a party to the suit. In such case such admissions constitute evidence not only of an impeaching nature, but evidence also of a substantial and probative character. In *Bogle v. Nolan*, 96 Mo. 85, 9 S. W. 14, such evidence was held admissible, overruling an aberrant decision in *Priest v. Way*, 87 Mo. 16, and following the dissenting opinion in that case (a circumstance not infrequent in this latitude). For the reasons aforesaid the demurrer to the evidence should have prevailed.

The foregoing opinion, filed by me in division No. 2, I herewith file as my dissenting opinion in court in banc.

ROBINSON and MARSHALL, JJ., concur.

STATE v. GRAY.

(Supreme Court of Missouri, Division No. 2.
May 9, 1899.)

CRIMINAL LAW—APPEAL—RECORD—MOTION FOR
NEW TRIAL—EXCEPTIONS TO RULING.

Where the record does not show that any exception was taken to an order overruling a motion for a new trial, only the record proper can be reviewed.

Appeal from circuit court, Holt county; O. A. Anthony, Judge.

James Gray was convicted of burglary in the second degree, and appeals. Affirmed.

John W. Stokes, for appellant. Edward O. Crow, Atty. Gen., and Sam. B. Jeffries, Asst. Atty. Gen., for the State.

BURGESS, J. Defendant was convicted in the circuit court of Holt county of burglary in the second degree, and his punishment fixed at two years' imprisonment in the penitentiary. He appeals.

While the record shows that defendant filed his motion for a new trial within four days after verdict, as required by statute, and that the motion was overruled, it does not show that any exception was taken to the action of the court in overruling the motion; so there is nothing before this court for review, save and except the record proper. *Ross v. Railroad Co.*, 141 Mo. 390, 38 S. W. 926, and 42 S. W. 957; *State v. Murray*, 126 Mo. 526, 29 S. W. 590; *Danforth v. Railway Co.*, 123 Mo. 196, 27 S. W. 715; *State v. Gilmore*, 110 Mo. 1, 19 S. W. 218; *State v. Harvey*, 105 Mo. 316, 16 S. W. 886. The indictment is in a form often approved by this court. Finding no reversible error in the record, we can but affirm the judgment. It is so ordered.

GANTT, P. J., and SHERWOOD, J., concur.

STATE v. HIBLER.

(Supreme Court of Missouri, Division No. 2
May 9, 1899.)

CRIMINAL LAW—ARGUMENT TO JURY—RAPE—REVIEW—INSTRUCTIONS.

1. In a prosecution for rape, a statement in the argument to the jury, wherein the state's attorney refers to "the hellish deed perpetrated by that young devil on that girl," where rebuked by the court, was not prejudicial error.

2. Where the evidence of prosecutrix showed that she had been forcibly ravished, and defendant, as a witness, admitted the sexual intercourse, but denied the use of force, though he had admitted the rape when charged with it by the mother of prosecutrix, shortly after the offense, a conviction will not be disturbed where the trial court has approved the verdict.

3. In a prosecution for rape, an instruction given at the request of the state, which calls the jury's attention to special facts brought out by the evidence as bearing on the question whether the offense was committed, though possibly objectionable for singling out specific facts, was not ground for reversal where the facts particularized were the weak points in the state's case, and chiefly relied on by the defense, as shown by an instruction requested by the defense, which called attention to such facts as material to the defense.

4. The appellate court will not reverse a conviction because of the insufficiency of the evidence where there is substantial evidence of defendant's guilt.

Appeal from circuit court, Chariton county; W. W. Rucker, Judge.

Nolan Hibler was convicted of rape, and he appeals. Affirmed.

The language used by one of the counsel for the state in his argument to the jury was as follows: "Gentlemen of the jury, you heard the testimony about this. I know my friend,

Mr. Dempsey, while he was making a terrible case against the road overseer of that district,—and I believe it is about the only defense that I saw in the case,—he was giving the road overseer the very devil, and I have no doubt if we had him here and tried him that you would convict him; but what had the county road overseer of the bad roads of that community to do with the hellish deed perpetrated by that young devil upon that girl?" Counsel for defendant objected to the statement, and asked that counsel be reprimanded. The court said that counsel should "indulge in no personalities with reference to the defendant. [To the stenographer]: Note that the court condemns the remark, and rebukes the counsel."

Dempsey & O'Shaughnessy, for appellant. Edward C. Crow, Atty. Gen., and Sam. B. Jeffries, Asst. Atty. Gen., for the State.

BURGESS, J. At the July term, 1898, of the circuit court of Charlton county defendant was convicted of rape, alleged to have been committed on one Imogene Sublett, at said county, on the 12th day of June, 1898, and his punishment fixed at five years' imprisonment in the penitentiary. He appeals.

The defendant and Imogene Sublett were about the same age,—20 years,—lived about three-quarters of a mile apart, and had attended the same school. The families of which they are members were upon intimate terms, and the younger members especially exchanged visits. Defendant had never called upon Imogene but once, however, before the evening of July 12, 1898. In pursuance of an arrangement of two weeks' standing, she, in company with the defendant, left her home in a two-horse buggy on the evening of July 12, 1898, to go to Zion Church, about $3\frac{1}{2}$ miles distant, to attend "children exercises." They were late getting there, and when they did arrive the exercises had begun, and the church crowded, so they, being unable to get seats, started back home. She testified that when they left the church two other buggies turned around, and left also, traveling the same road, one going east in front of them for a mile until they came to a cross road, when they turned north, while the buggy in front continued eastward; that, as soon as they turned north, defendant put his arm in back of her, and when she requested him to remove it he refused, but talked about the lascivious conduct of other girls. She requested him several times to "shut his mouth," but he persisted in his unseemly talk and conduct; and when she told him, if he did not desist, that she would jump out of the buggy, he told her if she did he would get out also. When they were within three-quarters of a mile from her house, he stopped his team, and assaulted her, whereupon she started to get out of the buggy, but he threw his arms around her, and pulled her back in. Some one was then heard to be approaching in the rear,

which startled defendant, and caused him to drive on up to and past the Sublett residence about three-fourths of a mile, across Salt creek and South Branch Bridge, where he stopped again. She screamed, and tried to get away from him. Hearing another buggy coming, he started the team, and drove into a field about three-fourths of a mile away, where he stopped his team for a third time, and continued his assault upon her. She screamed, fought, and resisted as best she could, but he succeeded in accomplishing his purpose. While on the way home she told him he had just as well kill her, and throw her in the ditch. He told her if she would not say anything about it he would marry her. She replied, "No, I won't do it, narry a time." She was not out of the buggy from the time they started to the church until they returned to the Sublett home, about 11 o'clock that night, and was on the seat all the time. When she reached home, all the members of the family had retired except her sister Dollie. She was excited, and had been crying. Her sister tried to get her to tell what was the matter with her, but she told her that she would not do so that night, but would do so in the morning. She slept none that night, but cried continuously. Her hat and clothing were badly soiled, her underclothing torn and bloody, her private parts lacerated, and her person sore, so that she could not do anything for about a week. The next morning, early, after the assault, she told her mother and sister how she had been treated by defendant the night before. She did not at that time tell her father, for fear that he would kill defendant, and get into trouble over it; nor did he learn of it for about a week; and a few days thereafter a warrant was issued for defendant, and his arrest followed on June 21, 1898. Defendant, in response to a note written to him at the command of her mother, called at Sublett's on Thursday evening after the offense is alleged to have been committed, and, when charged by Mrs. Sublett, in the presence of Imogene, with the crime, did not deny it, but begged her to say nothing about it, and said they would marry that fall. Defendant testified as a witness in his own behalf, and stated that as they were on their way home some one in a buggy followed close behind them; that when they reached the Sublett home they thought best to drive on, as they did not want to be recognized by the person in the buggy behind them. After driving on some distance across a small stream known as "Salt River," to a point beyond where the road crossed another, into which the party in the rear turned, they started back home. On reaching the Sublett home, the prosecutrix got out of the buggy, and went into the house, while defendant went on to his home. While at the Sublett residence, Charles Sublett, a brother to the prosecutrix, came out, got in the buggy with defendant, and rode with him to the next cross road. He did not deny that he had carnal intercourse with Imogene Sublett, but

denied that he raped her. Thomas Vaughn, a witness for defendant, testified that he attended the exercises at Zion Church the night of June 12, 1898, and that on his way home he caught up with a buggy as they were near the Sublett place, and that there was also a buggy following close behind him, but did not state who the occupants of either of the buggies were. The road was a public road, and traveled a great deal, and on or near that part of it over which defendant traveled that night after leaving the church, and before returning to the Sublett home, there are several residences, which were occupied, but none of the occupants or any other person seems to have heard the cries of the prosecutrix.

1. In his argument to the jury one of the counsel for the state made use of language which defendant insists was outside of the record, a personal attack upon and prejudicial to him, and for which the judgment should be reversed. It is true that the language complained of was somewhat harsh, but not so much so, we think, as that which was used in *State v. Summar*, 143 Mo. 220, 45 S. W. 254, and which was held not to justify a reversal of the judgment in that case. While counsel, in their arguments before juries, should confine them to the facts disclosed by the evidence, and never indulge in personal abuse of the defendant on trial in a criminal case, it is not every divergence from this course that will justify the reversal of the judgment. But, in order to justify such a result, it should appear to the court that the remarks complained of were prejudicial to defendant, and probably had something to do in bringing about the conclusion reached by the jury; and such, we think, was not this case.

2. It is next insisted that the evidence was insufficient to authorize the verdict. To this contention we cannot agree. If the prosecuting witness, Imogene Sublett, testified truthfully, there is no escape from the conclusion that defendant forcibly ravished her. It is true that he testified that he did not rape her; that she did not halloo; but he did not deny having connection with her, nor did he deny having committed the offense when charged with it by the mother of the girl in her presence. Of the weight of the evidence the jury were the sole judges, and, they having found defendant guilty, and their verdict having been approved by the trial court, this court will not interfere. This rule has been so often announced by this court that it is not thought necessary to cite authorities upon the question.

3. The third instruction given on the part of the state is criticised upon the ground that it assumes that defendant assaulted Imogene Sublett, singles out parts of the evidence, and calls especial attention thereto, and comments on the evidence. It is as follows: "In determining whether or not the defendant assaulted the prosecuting witness as charged in the indictment, and whether he actually had sexual intercourse with her as alleged, and

whether such sexual intercourse, if had, was consented to by the prosecuting witness, she resisted such assault with all the ability she had to make resistance, you should take into consideration the relative size and strength of the parties; the time and place of making the alleged assault; the ability or inability of the prosecutrix to successfully resist such assault; the effort made by the prosecutrix, if any, to alarm the neighbors, and bring help to her rescue; the distressed and excited condition of the girl's mind when she arrived home soon thereafter, if you find she was so distressed and excited; the fact that she disclosed to her mother and sister the assault made upon her soon thereafter, if you find she so made such disclosure; the condition of her clothing upon her arrival home; as well as all the other facts and circumstances disclosed by the evidence in the case." The instruction does not, we think, assume that an assault was committed, nor is it a comment on the evidence. It does, however, call the attention of the jury to special facts, together with all other facts and circumstances disclosed by the evidence in the case. But by it the facts are particularized which were the weak points in the state's case, and chiefly relied upon by the defense, namely, the size and strength of the parties; that the offense, if committed, was while the parties were in a buggy, and the prosecuting witness on the buggy seat; that she hallooed as loud as she could at the several places where the assault was attempted, and finally accomplished, and was not heard, although within hearing distance of different persons; and the further fact that she did not complain to any one of the treatment of her by defendant until the next morning thereafter,—all of which were circumstances tending to show that she was not raped; hence we think the instruction more in favor of defendant than against him. The same view seems to have been taken by defendant at the time of the trial, as by the seventh instruction given at his request the jury were instructed that, if the prosecuting witness made no complaint, and did not, as soon as opportunity afforded, after the offense was committed, complain of the offense to others, but concealed it for any considerable length of time thereafter; and by the ninth that, unless she made an outcry at the time of the sexual intercourse, they would take these facts into consideration in determining the guilt or innocence of the defendant, thus calling attention to the want of action on the part of the prosecuting witness with respect to matters material to the defense, while at the same time complaining of the state's instruction because it does the same thing. While we do not wish to be understood as approving the state's third instruction, we are not inclined, under the circumstances, to reverse the judgment on account of it alone. It may not, however, be out of place to say that an instruction should not single out specific facts in such a way as to give them undue prominence, but, if any

fact is mentioned, then all the facts involved in the issues in the case should be mentioned, so as to give them the same importance, and thereby make the instruction cover the whole case.

4. The next contention is that the testimony of the prosecuting witness is incredible in itself, uncorroborated by the physical facts, and insufficient to sustain the verdict, but there is nothing disclosed by the record which justifies this criticism. The weight of the testimony was for the consideration of the jury, and, if the prosecuting witness testified to the truth,—and they must have believed that she did,—defendant is guilty as charged. It cannot be said that there was no substantial evidence of defendant's guilt, and it is only in such circumstances that this court will interfere.

5. There is no ground for the assertion that the verdict of the jury was the result of passion or prejudice, or that it is not supported by substantial evidence. Finding no reversible error in the record, we affirm the judgment.

GANTT, P. J., and SHERWOOD, J., concur.

STATE v. WILLIAMS.

(Supreme Court of Missouri, Division No. 2.
May 9, 1899.)

RAPE—IMBECILES—CRIMINAL LAW—SEPARATION OF JURY—NEW TRIAL.

1. Sexual intercourse with a female of such weak mind that she cannot comprehend the nature and consequence of the act, or distinguish right from wrong, is by force, within Rev. St. 1899, § 3480, so as to constitute rape.

2. The separation of one of the jury before the introduction of any evidence, where the state affirmatively shows that such juror was not subject to improper influences while separated, is not a ground for a new trial.

Appeal from circuit court, Texas county; L. B. Woodside, Judge.

William Williams was convicted of rape, and he appeals. Affirmed.

Robert Shuck and W. H. Dodson, for appellant. Edward C. Crow, Atty. Gen., and Sam B. Jeffries, Asst. Atty. Gen., for the State.

BURGESS, J. Defendant was convicted in the circuit court of Texas county on the 23d day of November, 1898, of the crime of rape, and his punishment fixed at five years' imprisonment in the penitentiary. He appeals.

Eliza Buckner, an imbecile female, was raised in Texas county, and lived with her parents all of her life. She was about 34 years of age at the time of the commission of the offense with which defendant stands charged. She did not know right from wrong; could not learn her letters or count; nor could she tell the hour of the day by the clock, nor the number of days in a week or month. She could do nothing, unless told, and then, as a rule, had to be shown. She was at times

sent to a spring about 150 yards from the family dwelling, for water. Some time in the month of October, 1897, while she was at the spring, defendant went to her, and, while in conversation with her, took advantage of her feeble mind by having intercourse with her. This he admitted to others to have done on several occasions. As a result of this intercourse she became pregnant, and in due course of time was confined, and gave birth to a child, which was dead when delivered. Defendant was well acquainted with Eliza Buckner, and knew her to be an imbecile. At the close of the evidence on the part of the state, defendant interposed a demurrer to the evidence, which was overruled, and he saved his exceptions.

At the close of all the evidence, the court over the objection of defendant, instructed the jury as follows: "(1) The court instructs the jury that if you believe and find from the evidence that the defendant, at and in the county of Texas and state of Missouri, at any time before the finding of this indictment, did willfully and feloniously have sexual intercourse with one Eliza Buckner; and if you further believe and find from the evidence that at the time of such intercourse, if you believe it was had, the said Eliza Buckner was a person of unsound mind, and of such weak intellect and intelligence that she could not and did not know or comprehend the nature and consequence of such an act, and could not understand right from wrong,—you will find the defendant guilty of rape, and assess his punishment at death or imprisonment in the penitentiary for a term not less than five years. (2) 'Willfully,' as used in these instructions, means intentionally. The term 'feloniously' means wickedly and against the admonition of the law; that is, wickedly and unlawfully. (3) The court instructs the jury that the defendant is a competent witness in his own behalf, and his testimony should be considered by you in making up your verdict; but, in determining what weight you will give to his testimony, you may consider the fact that he is the defendant and on trial." At the request of defendant the following instructions were given: "(1) In order to convict in this case, it devolves upon the state to show and prove that the defendant, at some time, in Texas county, Missouri, had sexual intercourse with Eliza Buckner, and that she at such time was a person of such weak and disordered mind that she could not comprehend or understand the nature and consequence of such an act, and did not at such time know right from wrong; and, unless the state has so shown, you will find the defendant not guilty. (2) The defendant is presumed to be innocent, and this presumption remains with him until the state, by evidence, establishes his guilt to your satisfaction, and beyond a reasonable doubt. If, therefore, upon a consideration of all the evidence in the case, you have a reasonable doubt of defendant's guilt, you should give him the benefit of

such doubt, and acquit him; but, to authorize an acquittal on the ground of doubt alone, it should be a reasonable doubt, and not the mere possibility of defendant's innocence."

While the defendant is not represented in this court, a number of causes are assigned in the motion for a new trial why the judgment should be reversed, the first of which is that the verdict of the jury is against the evidence. This contention, however, is wholly without merit, as there was an abundance of evidence to justify the verdict; and, even if there was not, this court would not interfere unless there was no substantial evidence of defendant's guilt, and there is no room for any such contention in this case. For the same reason no error was committed in refusing defendant's demurrer to the evidence. Nor was the verdict against the law as declared by the court.

The question then presents itself as to whether or not the offense comes within the provision of section 3480, Rev. St. 1889, which reads as follows: "Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female child under the age of fourteen years, or by forcibly ravishing any woman of the age of fourteen or upwards, shall suffer death, or be punished by imprisonment in the penitentiary not less than five years, in the discretion of the jury." If, then, Eliza Buckner was incapable, from mental disease, whether idiocy or imbecility, from giving her consent, and defendant had carnal intercourse with her, he was guilty of rape. This seems to be the rule of law with respect to such an offense. Whart. Cr. Law (9th Ed.) § 500. In the case of *State v. Tarr*, 28 Iowa, 397, it was held that a conviction for rape was proper, without proof of resistance on the part of the female being shown, or that the force used by the defendant was against her will, when it was shown that she was idiotic or of imbecile mind, and there was nothing to indicate that she desired or consented to the intercourse; and when the imbecility of the female is shown, and the force on the part of the defendant, then, if there is nothing to indicate consent, the act is, in legal contemplation, against her will. If, then, as was found by the jury, the defendant had sexual intercourse with Eliza Buckner, and she was at the time a person of such weak and disordered mind that she could not comprehend or understand the nature and consequence of such an act, and did not at the time know right from wrong, the offense was complete, because it was by force, and without her consent. *Reg. v. Fletcher*, 8 Cox, Cr. Cas. 131.

The only remaining error assigned in the motion for a new trial is the separation of the jury, after being impaneled and put in care of the sheriff, without any authority from the court. In support of this assignment, defendant filed the affidavit of R. M. Beaty, in which he stated: That he was a member of the jury in the trial of the case, and that one William Freeman was also a member of said

jury. That said Freeman told Sheriff Trusty that he wanted to see T. N. Bradford. "Trusty said he couldn't let him off; it wouldn't do. Freeman left the jury, and come up the street, and the jury waited until he came back. When Freeman left the jury, we were all at the sample room at the Southern Hotel. We came up the street, and then Freeman came back to us, in front of Schesler's store." In opposition to said motion for new trial the prosecuting attorney filed the counter affidavit of Juror W. A. Freeman, as follows: "W. A. Freeman, being duly sworn, on his oath states: That he was one of the jurors that set in the trial of the case of *State of Missouri against Wm. Williams*, charged with rape. That, in the evening of the day the jury were impaneled, the sheriff, J. D. Trusty, allowed the jury to walk up the street, to opposite the telephone office, in the company of said sheriff. On returning to the room in Southern Hotel, affiant walked down the sidewalk, and the balance of the jury in the street, but a few feet away. That he never spoke to any one, while thus apart from the jury, but the attorney for the defense, W. R. Shuck. That he said, in a joke, to the said attorney, that 'I am wondering who of you left me on the jury.' I do not remember any other conversation. Never spoke to any one else about the case. Never was away from the jury after that. The time I spoke to Mr. Shuck was in the evening before the trial, which was commenced next morning, and before any evidence was heard in the case." The separation of the jury occurred before any evidence was introduced, and, it affirmatively appearing on the part of the state that the jurors were not subject to improper influences, their separation furnished no ground for a new trial. *State v. Collins*, 86 Mo. 245; *State v. Avery*, 113 Mo. 475, 21 S. W. 193; *State v. Sansone*, 116 Mo. 1, 22 S. W. 617. Finding no reversible error in the record, we affirm the judgment.

GANTT, P. J., and SHERWOOD, J., concur.

STATE v. HARPER.

(Supreme Court of Missouri, Division No. 2.
May 9, 1899.)

HOMICIDE — MANSLAUGHTER — TRIAL — INSTRUCTIONS — EVIDENCE.

1. Under Rev. St. 1889, § 3470, defining manslaughter in the second degree as the unnecessary killing of another, "either while resisting an attempt by such other person to commit any felony, or do any other unlawful act after such attempt shall have failed," an instruction that, if such killing was done by the defendant while deceased was attempting to commit a felony upon and against the father of the defendant, he is guilty of manslaughter in the second degree, unless it is further found that such killing was necessarily done in order to prevent the deceased from committing such felony, and was also done under such circumstances as would have justified the father of the defendant himself in shooting deceased, is erroneous.

2. Evidence that, while defendant's father and deceased were engaged in a quarrel, defendant, coming from a distance, saw deceased about to strike his father, a man 75 years old, with a fence rail, with a friend of deceased standing near with an ax, he shot and killed deceased in order to prevent injury to his father, is insufficient to sustain an instruction for manslaughter in the second degree.

3. Upon evidence that defendant took the life of one who was in the act of striking his father with a fence rail, without knowing the cause of the difficulty, or who began it, an instruction that if the father began the quarrel, but the taking of the life of deceased was necessary to save the father's life or to prevent great bodily harm, defendant was guilty of manslaughter in the fourth degree, is erroneous; it being necessary only that defendant should have good reason to believe, and did believe, that he was justified in using such force to save his father from impending peril.

4. There is no error in refusing an instruction covered by those already given.

Appeal from circuit court, Dunklin county; J. L. Flrt, Judge.

Jid Harper was convicted of manslaughter in the second degree, and appeals. Reversed.

Ely & Kelso and J. L. Downing, for appellant. The Attorney General, for the State.

BURGESS, J. At the July term, 1898, of the circuit court of Dunklin county, the defendant was convicted of manslaughter in the second degree, and his punishment fixed at five years' imprisonment in the penitentiary, under an indictment theretofore preferred by a grand jury of said county charging him with having at said county, on the 6th day of April, 1897, shot and killed one Thomas Oden. After unsuccessful motions for new trial and in arrest, defendant appeals.

The homicide was committed on the 6th day of April, 1897, in Dunklin county. At that time Thomas Oden, Charles Hall, the defendant, and his father, Starling Harper, all lived in the same neighborhood; Oden's home being about three-quarters of a mile from Harper's, but at the time stated Oden was staying at his mother's, who lived about two miles from Harper's. On the day before the difficulty, deceased, Charles Hall, and Louis Hall, his father, and another man called by the witnesses "Indian Doctor," on their road home from the town of Campbell, in said county, arranged to send a challenge to the Harpers to meet them the following Saturday on halfway ground, and they would "do them up"; the deceased agreeing to carry the challenge. On the morning of the difficulty, deceased, Charles Hall, and a boy by name of David Ramsey, went from the house of deceased to the house of Charles Hall, about two miles distant, for the purpose of carrying some provisions and a man and his wife to Hall's house. There were two roads leading from the house of deceased to Hall's,—one a direct route; the other not so direct, leading by Harper's, and something near three-quarters of a mile fur-

ther. The road last named runs through the Starling Harper farm, and was opened by him for his own convenience. In going to Hall's house from Oden's on this occasion, the parties took the direct route, but returned by the road leading by Harper's house, which is fenced upon both sides for about 300 yards. In passing through the lane, they overtook Starling Harper, who was in the road, walking in the same direction that they were going. When they overtook Harper, he and Oden began quarreling, during which Harper said to him, "You are following that damned bacon thief around, are you?" Whereupon Oden invited him to go with him off of his (Harper's) premises, and settle the matter. Harper, although near 75 years of age, accepted the challenge, and when the parties reached the end of the lane they stopped. Oden then got off of the wagon on which he, Hall, and Ramsey had been riding, and took from a fence near by a rail, and, while Harper was striking at him with a hoe which he had in his hands, he struck Harper on the head or shoulder with the rail. Defendant, who was at work in a field near by, hearing the parties quarreling, started to the assistance of his father, Starling Harper, and while on the way was handed a loaded shotgun by his mother. When he got within about 25 feet of the combatants, deceased was in the act of striking Old Man Harper the second time with the rail, when Harper observed defendant, and told him to shoot; whereupon defendant said to Oden, "I am going to shoot you," and fired at him, the load entering the left side, from the effects of which he died on the same day. In the meantime Charles Hall had also gotten off of the wagon, and was standing near by with an ax in his hand and defendant turned the gun upon him, but did not shoot. Oden struck Starling Harper one blow with the rail after the shot was fired. He was not knocked down, however, during the encounter.

At the close of the testimony the court gave the jury, over the objection of defendant, the following instructions, at the request of and on behalf of the state:

"The indictment in this cause was filed on the 16th day of July, 1897, and charges the defendant with murder in the first degree. According to the evidence adduced, however, it will be necessary for you to determine, in case you find the defendant guilty of any offense, whether the conviction should be for the specific offense charged, or for murder in the second degree, or manslaughter in the second degree, or for manslaughter in the fourth degree.

"Murder in the first degree is the killing of a human being willfully, deliberately, premeditatedly, and with malice aforethought. Murder in the second degree has all of the elements of murder in the first degree, excepting that of deliberation.

"Manslaughter in the second degree, for

the purpose of this trial, is the killing of a human being unnecessarily, while resisting an attempt by such human being to commit a felony.

"Manslaughter in the fourth degree, for the purpose of this trial, will be explained in a subsequent instruction applied to this case.

"As used in defining murder, 'willful' means 'intentional,' as contradistinguished from 'accidental.' 'Deliberately' means, for the purpose of this trial, in a cool state of the blood; that is, not in a heat of passion caused by some just provocation to passion. 'Premeditately' means thought of beforehand any length of time, however short. 'Malice' does not mean spite or ill will, but signifies an unlawful state of mind; such a state of mind as one is in when he intentionally does an unlawful act. 'Malice aforethought' means malice with premeditation; that is, that the unlawful act intentionally done was determined upon before it was executed.

"Bearing the foregoing in view, and considering it as a basis, the court submits to you the further instructions following:

"(1) If you should believe and find from the evidence that, at the county of Dunklin and state of Missouri, any time prior to the day on which the indictment was filed, the defendant, Jid Harper, in the manner and by the means specified in the indictment, shot and wounded the deceased, Thomas Oden, and shall further believe that such shooting was done willfully, deliberately, premeditatedly, and with malice aforethought, and shall further believe that on the same day the said Thomas Oden died, at the said county of Dunklin, in consequence of such shooting and wounding done by the defendant, you will find the defendant guilty of murder in the first degree.

"(2) If you shall find from the evidence that, within the time and at the place specified in the preceding instruction, the defendant, in the manner and by the means specified in the indictment, shot and wounded the deceased, Thomas Oden, and shall further believe such shooting and wounding was done willfully, premeditatedly, and with malice aforethought, but without deliberation, and shall further find and believe that on the said day of the said shooting the deceased died from the effects of such shooting and wounding, at the county of Dunklin and state of Missouri, you will find the defendant guilty of murder in the second degree.

"(3) If you shall find and believe from the evidence that, at the county of Dunklin and state of Missouri, any time within three years prior to the day on which the indictment was filed in this cause, the defendant shot and wounded the deceased, Thomas Oden, and that the said Thomas Oden died on the same day from the effects of such shooting and wounding, at the said county and state, and shall further find and believe from the testimony that such shooting was done by the defendant while said deceased was attempting

to commit a felony upon and against the father of the said defendant, you will find the defendant guilty of manslaughter in the second degree, unless you further find and believe from the testimony that such shooting and wounding by the defendant was necessarily done; that is, unless you find from the testimony that it was necessary in order to prevent the deceased from committing such felony upon the person of the father of the said defendant, and was also done under such circumstances as would have justified the father of deceased in himself having delivered the fatal shot."

"(5) But if the jury believe from the testimony that Starling Harper, the father of the defendant, provoked the quarrel with Thomas Oden, the deceased, or began the quarrel, with the purpose of taking advantage of the deceased, and of taking his life, or of doing him some great bodily harm, and that on said day named in the indictment, to wit, the 6th day of April, 1897, the said defendant shot the said Thomas Oden, at the said county of Dunklin and state of Missouri, and that such shooting was done willfully, deliberately, premeditatedly, and with malice aforethought, and that said Thomas Oden died from the effect of such shooting on the same day, at said county and state, then such homicide was not justifiable, however imminent the peril of the said Starling Harper may have become in consequence of an attack made by him upon the said deceased, Thomas Oden, and under such circumstances the defendant is guilty of murder in the first degree.

"(6) But if the jury believe and find from the evidence that on the 6th day of April, 1897, at the county of Dunklin and state of Missouri, one Starling Harper, father of the defendant, Jid Harper, began the quarrel or provoked the difficulty with the deceased, Thomas Oden, or voluntarily entered into a difficulty with the said deceased, yet if they also believe from the evidence that this was done by the said Starling Harper without any felonious purpose, and that thereupon the deceased attacked the said Starling Harper, father of the said defendant, and that the said defendant was compelled, in order to save the life of the said Starling Harper, or to save him from great bodily harm, to take the life of the said deceased, and that said defendant did, under such circumstances, shoot and kill said deceased, at the county of Dunklin and state of Missouri, within three years before the filing of the indictment in this cause, you will find the defendant guilty of manslaughter in the fourth degree.

"(7) You are the sole judges of the credibility of the witnesses and the weight of their testimony; and, if you believe that any witness in the cause has willfully sworn falsely as to any material fact or matter testified to by such witness, you are at liberty to disregard or treat as untrue the whole or any part of the testimony of such witness.

"(8) Under the law, the defendant is a com-

petent witness in his own behalf, and you should take his testimony in account, and give it such weight as you deem it entitled to receive, in passing upon his guilt or innocence; but, in determining what weight you will attach to his testimony, you may take into consideration the fact that he is the defendant in the cause, testifying in his own behalf, and his interest in the result of this trial.

"(9) The court instructs you that the burden of proving the defendant guilty beyond a reasonable doubt rests upon the state, and if upon the evidence, considered as a whole, the jury entertain a reasonable doubt as to defendant's guilt, you should give him the benefit of such doubt, and find him not guilty; but a doubt, to authorize an acquittal on that ground alone, should, as stated, be a reasonable doubt, and one fairly arising from the evidence as a whole. The mere possibility that the defendant may be innocent will not warrant you in acquitting him on the ground of reasonable doubt.

"(10) If you find the defendant guilty of murder in the first degree, you will simply so state in your verdict. You are charged with no responsibility with respect to the punishment for murder in the first degree. If you find the defendant guilty of murder in the second degree, you will so state in your verdict, and assess his punishment at imprisonment in the penitentiary for any term of years, not less than ten, that you may deem proper. If you find the defendant guilty of manslaughter in the second degree, you will so state in your verdict, and assess his punishment at imprisonment in the state penitentiary at such term as you may deem proper, not less than three years and not more than five years. If you find the defendant guilty of manslaughter in the fourth degree, you will so state in your verdict, and assess his punishment at imprisonment in the county jail not less than six months, or by a fine not less than five hundred dollars, or by both a fine not less than one hundred dollars and imprisonment in the county jail not less than three months."

At the request of, and on behalf of, the defendant, the court gave the following instructions:

"The court instructs the jury that the right to defend one's self or his parents against danger is a right which the law concedes and guarantees to all men. Therefore the defendant may have killed deceased, Oden, and be innocent of any offense against the law.

"If, at the time he shot the deceased, he had reasonable cause to apprehend, on the part of deceased, a design to do Starling Harper, defendant's father, some great personal injury, and there was reasonable cause for defendant to apprehend immediate danger of such design being accomplished, and to avert such apprehended danger to his father he shot deceased, and, at the time he did so, he had reasonable cause to believe, and did be-

lieve, it necessary for him to shoot deceased to protect his father from such apprehended danger, then, and in that case, the shooting was not felonious, but was justifiable, and you will acquit him.

"It is not necessary to this defense that the danger should have been actual or real, or that danger should have been impending, and immediately about to fall on the father of defendant. All that is necessary is that defendant had reasonable cause to believe, and did believe, these facts. But, before you acquit on the ground of defending his father against threatened danger, you ought to believe defendant's cause of apprehension was reasonable.

"Whether the facts constituting such reasonable cause of apprehension have been established by the evidence you are to determine, and, unless the facts constituting such reasonable cause have been established by the evidence in the cause, you cannot acquit him on the ground of defense of his father, even though you may believe that defendant really thought his father was in danger."

The following instructions were also asked for by defendant:

"(1) The court instructs the jury that the defendant is in law presumed to be innocent until his guilt is established by such evidence as will exclude every reasonable doubt. Therefore the law requires that no man shall be convicted of a crime until each and every one of the jury is satisfied by the evidence in the case, to the exclusion of every reasonable doubt, that the defendant is guilty as charged. So, in this case, if the jury entertain any reasonable doubt of defendant's guilt, they should acquit him; or if they entertain any reasonable doubt as to whether he was excusable and justifiable in the acts complained of, if he committed them, they should acquit him; or if any one of the jury, after having consulted with his fellow jurymen, should entertain such a reasonable doubt, the jury cannot, in such case, find the defendant guilty.

"(2) The court instructs the jury that, in considering the question of impending danger to the father of defendant, they have a right to take into consideration, in determining the reasonable cause of defendant to strike in his father's defense, the relative age and physical condition of the deceased and Starling Harper, defendant's father.

"(3) You are further instructed that you are the sole judges of the weight of the evidence and the credibility of the witnesses in the cause, and, if you believe any one of them has willfully sworn falsely as to any material fact in the cause, then you are at liberty to disregard the whole or any part of the testimony of any such witness."

Said instructions Nos. 1, 2, and 3, asked by the defendant, were by the court refused, over the objection and exception of defendant.

It is claimed by defendant that the court

erred in defining "manslaughter in the second degree." By section 3470, Rev. St. 1889, it is provided that every person who shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or do any other unlawful act, after such attempt shall have failed, shall be guilty of manslaughter in the second degree; and, if defendant is guilty of manslaughter in the second degree, it is under this section of the statute; for the only other section pertaining to manslaughter in that degree is the one next preceding it, which has no reference whatever to this kind of case. The attempt to commit a felony had not failed, according to the evidence, at the time the fatal shot was fired; and it is only where the killing of a person is unnecessary, while resisting an attempt by such person to commit a felony, or do some other unlawful act, that the person committing the homicide is guilty of manslaughter in the second degree, under this section. In passing upon this same statute in *State v. Dierberger*, 96 Mo. 666, 10 S. W. 168, it is said: "Section 1243, Rev. St. 1879, seems to apply to those cases of unnecessary killing where the person killed was attempting to commit a felony or do some unlawful act, and the killing occurred after the attempt had failed. Here the resistance to the arrest seems to have been one continuous struggle, up to the time the second shot was fired, and we cannot see that it comes within that section." So, in the case at bar, the struggle between defendant's father and the deceased was not only going on at the time the fatal shot was fired, but the deceased struck him one blow with the rail thereafter. We are of the opinion, therefore, that the definition of "manslaughter," as given by the court, is incorrect and erroneous. It is clear from the evidence that the killing was intentional, and was therefore, under the evidence, murder in the second degree, or manslaughter in the fourth degree, unless justifiable. *State v. Edwards*, 70 Mo. 480; *State v. Curtis*, 70 Mo. 600; *State v. Watson*, 95 Mo. 412, 8 S. W. 383; *State v. Dierberger*, *supra*.

The third instruction given on the part of the state is criticised upon the ground that it imposed upon the defendant the duty of determining with absolute certainty what force was necessary to be used in resisting deceased, while the law justified him in using such force as appeared to him, from the surrounding circumstances, to be reasonably necessary for that purpose. It is well settled that, in resisting an attempt to commit a felony, the person so resisting is not required to determine with absolute certainty what force is necessary for that purpose, but it does exact of him that he shall not use any more force than shall seem to him to be reasonably necessary for that purpose. As was said by *Sherwood, J.*, in *State v. Palmer*, 88 Mo. 568: "If the defendant acted in a moment of apparently impending peril, it was

not for him to nicely gauge the proper quantum of force necessary to repel the assault of the deceased." See, also, *Nichols v. Winfrey*, 79 Mo. 544; *Morgan v. Durfee*, 69 Mo. 469. While, in the case in hand, the homicide was not committed in the defense of defendant's person, if it was committed in defense of his father the same rule obtains with respect to the quantum of force necessary to repel the assault of the deceased as if the assault had been committed on him personally. The instruction was therefore erroneous, in that it imposed upon defendant the duty of determining with absolute certainty what force was necessary to be used in resisting the assault. It is bad for the further reason that it is for manslaughter in the second degree, while the evidence did not authorize an instruction for that offense.

The sixth instruction given upon the part of the state is clearly erroneous for like reason. It was not absolutely necessary that defendant should have been compelled to take the life of Thomas Oden in order to save the life of his father, or to save him from great bodily harm, to justify him in killing Oden; but if he had good reason to believe, and did believe, that his father was in impending peril, then he was justified in using such force as appeared to him, from the surrounding circumstances, to be reasonably necessary for the purpose of defending him against such peril. It is also vicious in telling the jury that if *Starling Harper* began the quarrel, or provoked the difficulty, with the deceased, *Thomas Oden*, or voluntarily entered into a difficulty with the said deceased, yet if they also believe from the evidence that this was done by the said *Starling Harper* without any felonious purpose, and that thereupon the deceased attacked the said *Starling Harper*, etc., and the defendant killed said *Oden*, etc., they would find him guilty of manslaughter in the fourth degree; thus making the defendant guilty of manslaughter in the fourth degree, whether or not he knew that his father sought or brought on the difficulty, and is clearly erroneous. *State v. Linney*, 52 Mo. 40.

The evidence showed that, when defendant appeared upon the scene, his father and deceased were engaged in the difficulty, while *Charles Hall* was present with an ax in his hand. He did not bring it on, nor did he know who did. In the circumstances, he had the right to interfere in behalf of his father, and whether what he did could be justified upon the ground of his necessary defense would depend upon the motive prompting the act, and the circumstances under which it was done, and not upon the fact that his father may have voluntarily entered into the difficulty. *State v. Hickam*, 95 Mo. 322, 8 S. W. 252.

No error was committed in refusing the first instruction asked by defendant. The matters presented by it were fully covered by the instructions that were given. The

same may be said with respect to the second instruction asked by defendant and refused.

For these considerations we reverse the judgment and remand the cause.

GANTT, P. J., and SHERWOOD, J., concur.

CITY OF BETHANY v. HOWARD et al.
(Supreme Court of Missouri, Division No. 2.
May 9, 1899.)

MUNICIPAL CORPORATIONS—ACTION ON CONTRACTOR'S BOND.

A bond was given to a city by a contractor for a public improvement, conditioned to pay all the bills for labor or material used in the construction of the improvement. On completion of the work the city settled with the contractor and his bondsmen, paying them the balance due on the contract, in consideration of an agreement by the bondsmen to pay all the bills for labor and material. The bondsmen failed to perform this agreement. *Held* that, as the materialmen were not bound by the settlement, the city could not sue in its own name, but only as trustee for the material men.

Appeal from circuit court, Harrison county; P. C. Stepp, Judge.

Action by the city of Bethany against L. W. Howard and others on a contractor's bond. From a judgment sustaining a demurrer to plaintiff's petition, plaintiff appeals. Affirmed.

J. W. Peery, for appellant. Sallee & Goodman and D. J. Heaston, for respondents.

GANTT, P. J. From a judgment sustaining a demurrer to plaintiff's petition, plaintiff appeals. The cause is in this court on an order transferring it from the Kansas city court of appeals.

The petition is in these words: 'Plaintiff, for amended petition, for cause of action states that it is a municipal corporation, duly and legally organized under the laws of the state of Missouri as a city of the fourth class; that on the 18th day of June, 1894, the plaintiff and the defendant L. W. Howard, by authority of and in pursuance to an ordinance duly passed and approved, made and entered into a written contract, a copy of which is herewith filed and made a part hereof, which was signed by said L. W. Howard and by this plaintiff, and by the terms of which said Howard agreed to dig and wall, according to certain plans and specifications mentioned in said contract, a certain well for the plaintiff, for the purpose of supplying water for its waterworks then in process of construction, for the agreed price of eight hundred dollars; that it was provided in said contract that said Howard should furnish to plaintiff weekly statements of the work done on, and material furnished for, said well, and by whom done and furnished, and the amounts thereof, and should also furnish to plaintiff receipted bills for said work and material, from the persons doing said work and furnishing said material, and it was expressly agreed in said contract that in con-

sideration that said Howard should perform said work according to said plans and specifications, and would also pay for all work and labor done and material furnished by any person in the digging and walling of said well, said plaintiff would pay to said Howard said sum of eight hundred dollars, and that the payment for all work and labor done or material furnished in the performance of said contract by said Howard was, by the terms of said contract, made a part of the consideration thereof, and such payment for all labor and material furnished in the construction of said well by said Howard was made a condition precedent to the payment of said sum of eight hundred dollars by plaintiff; that it was further provided by said contract that this plaintiff should have the right to apply any part of the amount which might be due said Howard from it under said contract to the payment of all claims for work done or material furnished and used in constructing said well. Plaintiff further states that at the same time, to wit, on said 18th day of June, 1894, and as a part of the same transaction, and for the purpose of securing the faithful performance of all of the conditions of said written contract on the part of said L. W. Howard, and for the purpose of securing payment by him for all work and labor done and material furnished by any person or persons in the performance by said Howard of said contract, and in the construction by him of said well, the said Howard, as principal, and the said defendants Ashman H. Vandivert and Geo. I. Phillips, as securities, did then and there execute and deliver to this plaintiff their certain bond or writing obligatory, a copy of which is herewith filed and made a part hereof, under their hands and seals, wherein and whereby they acknowledged themselves to be held and firmly bound unto this plaintiff in the penal sum of one thousand dollars, the condition of which said bond or writing obligatory was that whereas said Howard had on that day entered into a written contract with this plaintiff, by which he had agreed to dig, wall, and complete said well for the plaintiff for the sum of eight hundred dollars, and the said Howard was to pay for all labor done on said well, and for all material used or furnished for same, the said well to be dug and walled up and finished according to certain written plans and specifications, which was made a part of his said contract, and if the said L. W. Howard should dig said well according to his said contract with the plaintiff, and according to the plans and specifications, and should pay for all labor done on said well, and also pay for all material furnished for or used on the same, and should complete said contract in a good and workmanlike manner, and by the 18th day of July, 1894, then said obligation should be void, otherwise to remain in full force and effect. Plaintiff further states that said L. W. Howard did not keep and perform the conditions in said contract, and of said bond, upon his part, in this, to wit,

that he failed and neglected to pay for work and labor performed and for material furnished and used in the digging, walling, and constructing of said well by the following named persons, in the following amounts, to wit, Miner & Frees, \$24.08; Cadle Lumber Company, \$61.55; Merritt L. Devers, \$96.90; R. T. Bedell, \$59.58; that all of said amounts so due said persons, co-partnerships, and corporations last hereinbefore named were for work done on said well, or for material furnished and used in the construction thereof; that said L. W. Howard was at all times herein named wholly and totally insolvent, and was so known to be to this plaintiff, to his co-defendants, Ashman H. Vandivert and Geo. L. Phillips, and to all of the parties herein named as doing work on, or furnishing materials for, the completion of said contract for digging and walling said well, and said work was done and said materials were furnished by the parties hereinbefore named, wholly relying upon the terms and conditions of said contract and of said bond, and wholly relying upon the indemnity provided thereby. Plaintiff further states that on or about the 17th day of August, 1894, and after said Howard had claimed to have completed his said contract of digging and walling said well, and when he demanded of plaintiff the balance claimed by him and by his said securities to be due him from plaintiff, the parties hereinbefore named presented their respective claims hereinbefore set forth to this plaintiff and its officers, and claimed that plaintiff was liable to them, respectively, for the amounts hereinbefore stated, and demanded that plaintiff should require said claims to be paid by said L. W. Howard and his said securities before making any final settlement with said defendants; that thereupon the defendants, each in his own proper person, appeared before the plaintiff's board of aldermen, and claimed a balance due to said Howard for the digging and constructing of said well in the sum of three hundred and forty-nine dollars; that said claim for three hundred and forty-nine dollars so presented by the defendants included a part of the material furnished by the parties hereinbefore named; that said parties who had furnished materials being then and there still claiming and demanding that plaintiff should pay their said bills, or protect the same, and the said defendants Ashman H. Vandivert and Geo. L. Phillips, and each of them, being then present, agreed and admitted that, under the contract and bond hereinbefore mentioned, they were liable for said claims for material and work, and this plaintiff then and there about to exercise the right conferred upon it by said contract, and to apply a part of the balance due said Howard thereon to the payment of said claims for work and material thereupon, it was then and there stipulated and agreed by and between this plaintiff and the defendants that the defendants were to pay each and every of the claims hereinbefore named for

work and labor and material furnished, and relieve this plaintiff and its officers from all liability or alleged liability on account of said bills for work and labor and material, and that in consideration of the defendants performing their said agreement, as by said bond and contract they were also bound to do, the plaintiff would accept said well, and pay to said defendants Ashman H. Vandivert and Geo. L. Phillips on their said bill the sum of one hundred and ninety-six dollars and seventy-five cents, and it was expressly stipulated and agreed by and between the plaintiff, through its officers thereunto duly authorized, and the defendants in their own proper person, that said well was to be accepted, and said sum of one hundred and ninety-six dollars and seventy-five cents to be paid by the plaintiff to the defendants, solely on condition that the defendants should pay for the work and material claims hereinbefore named; that thereupon the plaintiff, relying upon said promise and agreement of said defendants, and each of them, to fully pay off and discharge said claims for work and material hereinbefore named, and in the belief that said claims would be immediately paid, and plaintiff and its officers relieved of any alleged liability thereon, and in order to settle and compromise the claims that were being made upon it by the parties hereinbefore named, and in order to fully settle with the defendants all of their liability upon said contract and bond, did receive said well, and did pay to the defendants Ashman H. Vandivert and Geo. L. Phillips, at the instance of the defendant L. W. Howard, the said sum of one hundred and ninety-six dollars and seventy-five cents, but the said defendants, disregarding their said contract and bond, and their said agreement in relation thereto, after receiving said sum of one hundred and ninety-six dollars and seventy-five cents, did fail and refuse to pay said claims, or any part thereof. Wherefore plaintiff alleges that by reason of the premises there has been a breach of the conditions of said bond, and it prays judgment against the defendants for the sum of one thousand dollars, and that execution issue thereon for the sum of two hundred and forty-two dollars and six cents, and for costs, and for all other proper relief to which it is entitled, the premises being considered." The defendants demurred to the petition because it did not state a cause of action.

This bond was considered by this court in *Devers v. Howard*, 46 S. W. 625, 144 Mo. 671. It was then ruled (following *City of St. Louis v. Von Phul*, 133 Mo. 561, 34 S. W. 844), that the bond secured the material man for the amount of his bill for materials furnished Howard in the construction of said well. To these decisions we still adhere. Conceding that the four firms (Miner & Frees, the Cadle Lumber Company, Merritt L. Devers, and R. T. Bedell) each had his or its several rights of action upon said bond for the amount due it, the question still remains as to the right

of said city of Bethany to bring this action, under the circumstances detailed in the petition. It may be remarked, in passing, that it appears from the face of the petition that this is the same account upon which the case of *Devers v. Howard* was prosecuted, so far as *Devers* is concerned. A marked characteristic of this petition is that, while it avers the bond sued on is available to the material men mentioned, this action is not brought by the city to their use as relators, but is an independent proceeding by the city as the trustee of an express trust. While it is settled law in Missouri that the trustee of an express trust may sue in his own name, inasmuch as this trustee bore a dual relation to this bond the circumstances of this case justified the circuit court in sustaining the demurrer. The right of the material men under the contract and bond is independent of the city, and they are not bound by the settlement with the city. For this reason, as the city has settled its claim with the contractor, and paid over the balance due from it on the contract, it ought not to be permitted again to sue without disclosing its trust character; otherwise, it may turn out that it might recover the amount due the material men, and the defendants still be liable to suit at the instance or in the names of the several material men. So far as the city is concerned, of course it has no right to bring the suit in its own right after the settlement it pleads. As held in *Devers v. Howard*, these material men can sue in the name of the city to their use, and control said actions, or in their own names; but the city, upon its own showing, is estopped from suing under the circumstances of this case, without averring that the action is brought to the use of the material men. The demurrer was properly sustained, and the judgment will be affirmed, without prejudice to the right of the several material men to proceed in their own names, or in the name of the city to their respective uses as relators, in which they will control their own suits, and the judgment on demurrer in this case will constitute no bar. Judgment affirmed.

SHERWOOD and BURGESS, JJ., concur.

KOERNER v. LEATHE.

(Supreme Court of Missouri, Division No. 2.
May 9, 1899.)

ARBITRATION AND AWARD—SUFFICIENCY OF FINDING—MOTION TO VACATE—RIGHT TO JURY TRIAL.

1. Where parties submit a cause to arbitration, under a statute providing that the award should be made a rule of court, they waive their right to a jury trial on issues raised by a motion to vacate the award.

2. Where, in an agreement for the submission of an action for attorney's fees to arbitration to ascertain the amount due, defendant admits a liability for services rendered to him personally, and also for services rendered to him in his capacity as officer of a corporation, the award need not separately state the amounts due from defendant in his different characters.

Appeal from St. Louis circuit court; Jacob Klein, Judge.

Action by Gustavus A. Koerner against Samuel H. Leathe to recover attorney's fees. From an order overruling defendant's motion to vacate an award of arbitrators, he appeals. Affirmed.

The parties to this action entered into an agreement of arbitration, in accordance with the statutes of this state providing that the award should be made a rule of court. The controversy arose over the claim of the plaintiff against defendant for compensation for legal services rendered by plaintiff to defendant and certain corporations largely owned and managed by defendant. The arbitrators selected were Messrs. Given Campbell, Samuel N. Holliday, and John J. O'Brien. The arbitrators were first duly qualified, and, upon due notice, held their sessions, heard the evidence, and rendered their award for plaintiff. All the statutory steps were taken to have the award confirmed by the judgment of the court. Upon receiving notice, the defendant appeared, and moved the court to vacate the award on four several grounds: First, the partiality of Mr. O'Brien, one of the arbitrators, for John M. Holmes, who was alleged to have an interest in the award to Gov. Koerner; second, because of the failure of the arbitrators to designate the amount due from defendant to plaintiff for each of the said corporations, the Belleville, St. Louis & Southern Railroad Company and the Crown Coal & Tow Company, but instead found a lumping sum total for all of said services; third, in not allowing defendant a credit for cash paid; fourth, in exceeding their powers in acting on matters not submitted to them or contemplated by the agreements of submission to arbitration. That motion was overruled, and defendant appeals.

R. M. Nichols, for appellant. Kehr & Tittman, for respondent.

GANTT, P. J. (after stating the facts). The alleged errors will be examined in the order of their assignment.

1. When the motion to vacate, for the causes already noted, was filed, defendant demanded that the issues thereby raised should be submitted to a jury. The court refused this request, and defendant excepted, and now urges this as a ground for reversal. When a suitor demands a course of procedure on the ground that it is secured to him by the constitution, it behooves the court to give the claim a careful consideration, however unfounded it may appear at first blush. Such is the claim of defendant in this case. That an action at law might be maintained on a common-law award, or a refusal to abide by such an award, will not be questioned, and in such cases the questions of fact were and are triable by a jury. So it was held in *Duren v. Getchell*, 55 Me. 241, and *Goodwine v. Miller*, 32 Ind. 419, cited by defendant. But when,

as in the case at bar, the submission is under a statute which authorizes parties to submit their differences to arbitrators, and they agree that, in accordance with the statute, the award may be made a rule of the circuit court, it is obvious the parties have waived their common-law right to a jury trial, and have selected another and different tribunal. This court, as early as *Vaughn v. Graham* (1848) 11 Mo. 575, held, in an opinion by Judge Scott, that by the common law an award could not be set aside for any cause in a court of law; that the relief was in equity prior to the enactment of the statutes governing awards. It is quite generally held that the statutory provisions are not exclusive, but that the aggrieved party may still resort to equity (*Hieronimus v. Allison*, 52 Mo. 102); but, wherever the point now raised has been adjudicated, the ruling has been that, on the issue of vacating or setting aside the award for fraud or partiality, or on the statutory grounds, resort must be had to the court, and on the issue thus raised the parties are not entitled to demand a jury. Thus, in *Beattie v. David*, 40 N. J. Law, 102, the supreme court of New Jersey said: "Where, however, as in this case, the parties, by agreement, consent that the cause be referred to a referee chosen by themselves, and make that consent a rule of court, they cannot enter a dissent to the report, and demand a jury trial. They have chosen their own tribunal, and must abide by the decision. The court will, however, control the report, as the verdict of a jury would be." In *Goodwine v. Miller*, 32 Ind. 419, the supreme court of Indiana, while holding that an action at law might be maintained on a common-law award, and was triable by a jury, was careful to say: "This was an action on a common-law award, and not a rule of court, to show cause why judgment should not be rendered thereon." Subsequently, in *Milner v. Noel*, 43 Ind. 324, upon a rule to enforce the award, the appellant demanded a jury, which was denied. The court says: "We are not aware of any rule of law by which the party excepting to an award in cases like this can have a trial by jury. In *Goodwine v. Miller*, 32 Ind. 419, which was an action on a common-law award, this court held that a trial might be had. But the court was careful to distinguish that kind of case from such as this. The court said: 'This was an action on a common-law award, and not a rule of court to show cause why judgment should not be rendered thereon.' The statute provides that 'the court shall hear the proofs and allegations of the parties, to invalidate and sustain such award or umpirage, and shall decide thereon, either confirming such award or umpirage, or may modify and correct the same in the cases prescribed in the last preceding section so as to effect the intent thereof, and to promote justice between the parties, and shall render judgment on such original or corrected award or umpirage; or the court may vacate such award or umpirage for any of the causes here-

51 S.W.—7

inbefore specified,' etc. It seems quite clear to us that in refusing a jury trial the court committed no error." The same result was reached and adhered to in *Spencer v. Curtis*, 57 Ind. 221; *Boyden v. Lamb*, 152 Mass. 416, 25 N. E. 609; *Leonard v. Reservoir Co.*, 113 Mass. 235. When we consider, also, the language of sections 415, 417, Rev. St. 1889, providing that, when any writ of error or appeal from a judgment on an award shall be taken, copies of the original affidavits upon which any application in relation to such award was founded, and of all other affidavits and papers relating to such application, shall be annexed to, and from a part of, the record in the appellate court, and such court may reverse, modify, amend, or affirm, in whole or in part, it seems clear that the legislature intended the proofs on motion of this character should be taken by affidavits, and that the appellate courts should hear and review the judgment as in equity cases. This court in *Tucker v. Allen*, 47 Mo. 490, held that the design of our statute was to encourage the adjustment of differences in a summary mode. While expressly preserving the right to resort to the courts of equity, the statutory method is itself what learned counsel aptly designates as "a quick bill in equity." Our conclusion is that the circuit court rightly held that defendant was not entitled to a jury to determine his motion to vacate and set aside the award.

2. The charge that John J. O'Brien, one of the arbitrators, was guilty of improper conduct in receiving entertainment from John M. Holmes, Esq., was obviously not sustained. In view of the long acquaintance existing between defendant and Mr. O'Brien, the responsible official position held by Mr. O'Brien for eight years, and the fact that neither social nor business relations existed between Mr. O'Brien and Holmes, this imputation is reckless. Equally groundless is the charge that Mr. Holmes and plaintiff were to share in the award to plaintiff; that is to say, one-third to Holmes and two-thirds to Koerner.

The remaining assignment of error is the failure of the arbitrators to separate and distinguish the amount due from defendant to Koerner individually, and the respective sums owing by him in his representative character for the Crown Coal & Tow Company and the St. Louis, Belleville & Southern Railway Company. The agreement disposes of this claim. In the submission Leathe agrees that he is not only liable for the services rendered to him personally, but "that said Leathe is responsible to said Koerner for the amount which may be due him from said companies for services." It thus appears that, as between Koerner and Leathe, the latter's liability was primary. He did not stipulate for separate awards. His relation to the two companies was not a matter for adjustment by the arbitrators. The companies were not parties to the award, and, had the findings been separate, they would not have bound the companies in any

separate settlements between them and Leathe, not even evidence of their liability to him. The sole inquiry was Leathe's liability to Koerner. This obligation being original and personal, the arbitrators rightly determined in one award the amount due to Koerner on account of all the services rendered. The objections to the award were properly overruled by the circuit court. The judgment was for the right party, and is affirmed.

SHERWOOD and BURGESS, JJ., concur.

STATE ex rel. ZIEGENHEIN, Collector, v. THOMPSON.

(Supreme Court of Missouri, Division No. 2.
May 9, 1899.)

TAXATION—ASSESSMENT—PETITION.

1. Under Rev. St. 1889, §§ 7553, 7555, 7557, 7679, requiring that lands shall be assessed in the name of the owner, the state's lien for taxes cannot be enforced against a lessee thereof.

2. When a petition fails to state facts sufficient to constitute a cause of action, it is error on the face of the record for which judgment will be reversed, though no objection was made to it by motion in arrest or for new trial in the trial court.

3. A petition to enforce the state's lien for taxes directed against the lessee of lands without previous assessment of the leasehold, and no averment in the petition of the nature of the lease, the length of the term, or the liability of the lessee to pay the taxes, is insufficient.

Error to St. Louis circuit court.

Action by the state of Missouri, upon the relation of Ziegenhein, collector, against Judson M. Thompson, to enforce the state's lien against real property in St. Louis. Judgment rendered against defendant, and execution ordered, and he brings error. Reversed.

This is an action by the state, at the relation of the collector of revenue of the city of St. Louis, to enforce the state's lien against real property in city block 194, having a frontage on Eighth street of 50 feet by a depth of 127 feet. The petition states that the Mission Free School is the owner and Judson M. Thompson is the lessee of said property. It then proceeds to make the usual allegations based upon the laws of Missouri relating to the assessment of the property and its delinquency for the taxes for the years 1890, 1891, and 1892, and that by virtue of these laws the state had a lien upon said "described real estate" for said taxes, and stated that it was the duty of the collector to enforce the payment of these taxes charged against said real estate by suit to enforce the lien of the said state; set out the amount of taxes and interest, and that all of said taxes, interest, and register's fees are set forth in the tax bills of said back taxes filed with the petition, marked Exhibits "A," "B," and "C," and prayed judgment for \$2,064, being the amount of said back taxes, interest, and register's fees, and interest thereon from March 31st at the rate of 10 per cent. per annum, together with

2 per cent. collector's fees and 5 per cent. attorney's fees; and prayed that said judgment should describe the real estate described in the petition, that it should state the amount of taxes and interest found to be due on said real estate for said years, that it should be decreed to be a prior lien in favor of the state of Missouri upon this real estate, and that it be sold to satisfy such judgment, etc. The petition contained no allegation stating any facts showing any particular interest in said property by said Thompson. It merely stated that "Judson M. Thompson is the lessee of above-described property." It stated that the Mission Free School was the owner of the property. To this petition both defendants filed answers, said Thompson filing a general denial. Subsequently the plaintiff voluntarily dismissed the suit against the Mission Free School, the owner of the property, and took judgment against Judson M. Thompson. The court found that there was due on said real estate for state, city, and school taxes, including interest and register's fees for the years 1890, 1891, and 1892, \$3,085.77; that Thompson was the lessee of said real estate. It then found the amount due for each year's taxes separately, and fixed the interest, and adjudged that the judgment be levied out of the right, title, and interest of said defendant, Thompson, in and to said real estate. The said judgment was also declared a lien, and directed that it should be enforced by sale under execution as required by law. The tax bills filed as exhibits with the petition showed that the property was assessed to the Mission Free School. The suit as originally brought was against the Mission Free School as owner. From the judgment thus rendered against him, the defendant, Thompson, has sued out a writ of error from this court.

Campbell & Ryan, for plaintiff in error. E. C. Slevin, for defendant in error.

GANTT, P. J. (after stating the facts). It is settled law in this state that when a petition fails to state facts sufficient to constitute a cause of action it is error on the face of the record proper for which the judgment will be reversed, though no objection was made to it by motion in arrest or for new trial in the trial court. Defects cured by the statute of Jeofails, of course, would not constitute such reversible error. *Childs v. Railroad Co.*, 117 Mo. 414, 23 S. W. 373; *State v. Hoyt*, 123 Mo. 348, 27 S. W. 382; *State v. Bland* (Mo. Sup.) 46 S. W. 440; *Smith v. Burrus*, 106 Mo. 94, 16 S. W. 881. The assessment and levy of taxes in this state is purely statutory. The sufficiency of the petition to charge defendant, Thompson, with the taxes must be measured by the statutes. By these statutes, lands and real estate are required to be assessed in the name of the owner thereof. Sections 7553, 7555, 7557, 7679, Rev. St. 1889. A valid assessment has invariably been held an essential prerequisite to the lawful exercise of the pow-

er of taxation. *Abbott v. Lindenbower*, 42 Mo. 162; *State v. Railroad Co.*, 114 Mo. 1, 21 S. W. 28. The tax bills sued on in this case disclose that the parcel of land upon which the state seeks to enforce her lien belonged to the Mission Free School as owner. The petition declares that the said school is owner, and that defendant, Thompson, is a lessee thereof. There was no assessment of the leasehold of said Thompson by the assessor, and there is no averment in the petition of the nature of his lease, the length of the term, or his liability to pay the taxes on said property. It is true that the attorney of the Mission Free School pleaded its exemption from taxes under its charter, and averred that Thompson was the owner of the building, but on the trial plaintiff dismissed as to the owner, the Mission Free School, and no averment of Thompson's interest was left in the record; so that, as the record stands, he is subjected to the payment of taxes upon the real estate of his landlord, which the collector concedes is exempt from taxation. Upon the record proper the judgment is obviously erroneous, and must be and is reversed, and the cause remanded.

SHERWOOD and BURGESS, JJ., concur.

STATE v. HEADRICK.

(Supreme Court of Missouri, Division No. 2.
May 9, 1899.)

CRIMINAL LAW—CHANGE OF VENUE—HARMLESS
ERROR—HOMICIDE—INSTRUCTIONS—EVIDENCE
—WEIGHT AND SUFFICIENCY.

1. Under Laws 1895, p. 162, requiring that the petition on an application for change of venue shall be supported by affidavits of at least two citizens, an application based on the affidavit of defendant, and an offer to support it by oral testimony, is insufficient.

2. Error in overruling an application for change of venue on the ground that the moving affidavits were insufficient is harmless, where on the following day defendant renewed his motion on the requisite affidavits, and was heard.

3. That there was considerable feeling against defendant at the time of the homicide, and some talk of mobbing him, and the sheriff removed him to another county for safe-keeping, is not sufficient ground for change of venue, where it appeared that the feeling was confined entirely to the locality in which the crime was committed, and was such only as is found among relatives and friends of deceased.

4. Error in refusing an instruction asked by a defendant on trial for homicide is not reviewable, where it was not assigned as error in the motion for a new trial.

5. It is not error for the court to refuse an instruction on self-defense asked by defendant, where it had already given a sufficient instruction covering that defense.

6. Defendant, who had been in the employ of deceased, was discharged by him less than a month before the homicide. On the day of settlement between them, defendant exhibited a revolver, and stated that the next thing he would do they would all remember the balance of their lives. The wife and daughter of deceased testified that, on the morning of the homicide, deceased accompanied them from the place where they had been milking as far as

the barn, which he entered, and they went on towards a spring; that they saw defendant walking across the barn lot, and, shortly after, heard a shot; that they saw deceased running from the barn, pursued by defendant, who was firing at him; that deceased fell, and defendant stopped at his feet, and reloaded his revolver, shot deceased's wife, pursued her, and stabbed her in the arm and throat. Defendant admitted killing deceased and continuing to shoot him after he was dead, but claimed that he had gone back to the premises at the request of the daughter, and had met her secretly, and had been in hiding in the barn; that, while attempting to go back into the barn, he was discovered by deceased, who began to abuse him, and tried to assault him, and called to his wife to bring his gun; that, being apprehensive for his life, he shot deceased. *Held* sufficient to justify a conviction of murder in the first degree.

Appeal from circuit court, Cape Girardeau county; Henry C. Riley, Judge.

John Headrick was convicted of murder in the first degree, and he appeals. *Affirmed*.

Ed. W. Hays and L. Caruthers, for appellant. Edward O. Crow, Atty. Gen., and T. D. Hines, Pros. Atty., for the State.

GANTT, P. J. The defendant was indicted, tried, and convicted of murder in the first degree at the adjourned August term, 1898, of the circuit court of Cape Girardeau county. After unsuccessful motions for a new trial and in arrest of judgment, he appeals to this court.

The evidence shows that the defendant had worked as a farm hand for the deceased, James Lall. Some time in June, 1898, the defendant was arrested for taking a horse and buggy belonging to some one (the record does not disclose who), and appropriating it to his own use, and injuring the same, and was convicted of the misdemeanor, it seems. He was arrested at the house of Lall, and taken away; and, after he was at liberty again, he returned to Lall's house. He found that Lall had employed one Brodarlick in his place, and, when he wanted to go to work again, Lall stated to him that he had hired Brodarlick, and could not give him (Headrick) employment. Thereupon Lall and defendant settled up. The defendant had \$2.10 coming to him, and deceased paid him \$1.10; and defendant directed deceased to leave the other dollar, any time he wished, at John Woods', in Jackson, Mo. Defendant then got his clothes and left. Albert Summers and Miss Jessie Lall were present when the settlement was made. Summers testified that he knew Headrick, and that he had seen him with a pistol (38 caliber), and that on the day of the settlement, at the back door of the house of Lall, defendant exhibited the pistol to witness Summers, but made no threats to kill any one; but after he settled with Lall, and Mr. Lall had gone away, in the presence of Miss Jessie Lall and Summers (witness stated) the defendant said the next thing he would do they would all remember the balance of their lives, or words to that effect. Defendant and witness Summers then left together, and walk-

ed away from the Lall homestead; and witness Summers testified that defendant said he was going to take morphine and kill himself, if he did not get work soon, and exhibited a bottle labeled "Morphine" to witness. It seems defendant was raised about three miles from the Lall homestead, and that he had been living with his mother and stepfather, and that he had formed an attachment for Miss Lall, and that he talked to various persons about Kirksey and Miss Jessie Lall being sweethearts, and wanted at least two different young men of the neighborhood to assist him in breaking up the relation of lovers between Miss Lall and Kirksey, but each of the young men declined to do so. The evidence showed that defendant was loafing around the town of Jackson, two and a half or three miles from the Lall homestead, and about three-quarters of a mile or a mile from where defendant lived, most of the time from the day he and Summers were at Lall's, up to the time of the killing. The evidence was conflicting as to whether or not Miss Jessie Lall met and conversed with the defendant on the streets of Jackson just prior to the killing. She denied it, and the defendant asserted that she did, while disinterested persons who saw them on the street about the same time said that Miss Jessie was with another girl, and got in the buggy, and was preparing to drive away, when John Headrick, the defendant, simply walked up to the buggy, spoke to the girls, and they drove off. Before the tragedy, defendant went to a physician in Jackson, and sought medical attention for a disease he had contracted, and asked if some one else (not naming the person) could also use the medicine he procured. On the morning of July 1, 1898, about 6 o'clock, according to the testimony of Mrs. Lall and Miss Jessie Lall, these two ladies were near their barn, at the Lall homestead, milking cows; and James M. Lall, the deceased husband and father, came from the house to the place where they were milking, and sat down near them and talked with them; and when they had completed milking and started towards the spring house, which was on the other side of the fence from where they were, deceased walked between them, laughing and talking, until the barn was reached, when he turned into the hallway of the barn, which hallway was simply the ordinary opening in a country barn, with the barn proper on one side and the cornerb on the other, and the roof connecting the same, and the ladies (mother and daughter) went on to the spring to take care of the milk. Mrs. Lall and her daughter testified that after they left the father, and before they reached the spring house, they saw defendant, in his shirt sleeves, come walking from the road across the barn lot. He did not pass them, and they did not speak to him, nor he to them. Mrs. Lall testified that, just as she stepped her foot into the spring house, she heard a shot, and, turning and casting her eyes towards the

barn, she saw her husband come running out of the hallway through the door at the north end of the barn, and the defendant pursuing him, firing at him as he ran; that witness Mrs. Lall and her daughter started running towards the husband and father, hallooing to defendant to stop shooting, and that just as they reached the fence, and started to get over, the deceased fell, and that defendant stopped at the feet of deceased, and began loading his revolver, and, before he completed loading his revolver, Mrs. Lall had reached her husband's side, and threw herself on his prostrate form; and that while in this position defendant shot at her twice,—the one shot entering her back, and the other missing her by reason of the fact that her daughter struck the pistol up as the shot was fired. Mrs. Lall and her daughter testified, and the defendant admitted, that he fired the remaining charges in his pistol into the body of the deceased after he was dead, and also that he then took the pistol and beat the mother over the head with it. He then made the girl go in front of him, towards the house, and the mother arose and started to her mother-in-law's (Grandma Lall's), a quarter of a mile distant; and defendant, seeing her, ran after her, overtook her, and stabbed her three times on the arm and shoulder, and cut her ear almost off, and then attempted to cut her throat (severely gashing it), and left her in the road, unconscious. Defendant then returned to the house, and, soon after, Mrs. Lall regained consciousness, and ran across the field to her mother-in-law's, where she was taken care of. Defendant went back to the house, and made Miss Jessie Lall get some water, where he washed his hands leisurely and walked away. He was seen leaving the premises, and was looking back, and seemed to be suspicious of somebody following him. The neighbors soon gathered, and the body of deceased was taken care of, and search was made for defendant. The murder having occurred on July 1st, on Friday, defendant was finally apprehended in the neighborhood on Sunday morning. The defendant admitted the killing, but claimed that he had gone back to the premises on Wednesday night before, at the request of Miss Jessie Lall, and had met her secretly, and that he had been in hiding in the barn, and about the Lall homestead, since Wednesday night, and that Miss Jessie Lall was furnishing him food, and was slipping out of the house at night and coming to see him. This was all denied by Miss Lall on the witness stand. Defendant claimed that on the morning of the tragedy he was attempting to go back into the barn and get into the loft, to secrete himself and remain during the day, and admitted that he saw the ladies going to the spring house, and corroborated their testimony up to the time that he entered the barn. Then defendant testified that as he entered the hallway of the barn he saw James M. Lall, the deceased, and, being afraid he would raise a row with him if he

saw him, defendant slipped into the corner crib, on the east side of the hall, which had only one door in it, about three feet above the floor of the hallway, and that as he got into the crib the door of the crib creaked, and attracted the attention of Mr. Lall, and he came around and looked into the crib to discover what made the noise, and that he saw defendant, and began to abuse him, and, as Lall had a currycomb and brush in his hands, that he undertook to assault the defendant with the currycomb, and that, when defendant drew back out of reach, the deceased advanced, and began to cry for his wife to bring the gun, in order that he might kill defendant, and that defendant then, being apprehensive of his life, fired and shot the deceased in his eye, and that deceased then turned and ran out of the hallway to the point where he was found lying, and that defendant followed him, firing, as the ladies described he did. He also admitted firing shots into the dead body of James Lall.

The indictment follows the most approved precedents, and is entirely sufficient. The arraignment was regular.

The principal complaint is urged against the refusal of the circuit court to award defendant a change of venue. The record shows that at the November adjourned term the defendant filed his own unsupported affidavit, alleging prejudice of the inhabitants of the county against him, and offered to supplement it by oral testimony. The court overruled this application, and declined to hear the oral evidence offered to support it. The act of 1895 (Laws Mo. 1895, p. 162) provides that "the petition of the applicant for a change of venue shall set forth the facts or grounds upon which such change is sought, and such petition shall be supported by the affidavit of petitioner and the affidavit of at least two credible citizens of the county where said cause is pending, and the truth of the allegations shall be proved to the satisfaction of the court by legal and competent evidence." Instead of complying with this statute by filing the affidavit of the two compurgators, defendant offered his own affidavit, and proposed to support it by oral testimony. Again and again we have ruled that the right to a change of venue is purely statutory, and the party seeking it must comply with the substantial requirements of the statute. The word "affidavit," *ex vi termini*, means an oath reduced to writing. 1 Enc. Pl. & Prac. 309; 1 Am. & Eng. Enc. Law (2d Ed.) p. 909, and cases cited. No error was committed in holding this application insufficient, under the statute. *State v. Lanahan*, 144 Mo. 31, 45 S. W. 1090; *State v. Neiderer*, 94 Mo. 79, 6 S. W. 708. Moreover, no injury resulted from this ruling, because defendant the next day filed the requisite supporting affidavits, and renewed his application, and the court gave him a full hearing as to the existence of the alleged prejudice. This second application was also overruled, and this is made an

additional ground for reversal. We have examined the evidence, both on the part of the state and defendant, and find no evidence of abuse of discretion. What prejudice existed was entirely local, and such, and such only, as is to be found always among the relatives and intimate friends of the deceased.

Error is assigned in refusing an instruction asked by defendant. The motion for new trial contains no such ground. The trial court was not asked to set aside the verdict on account of any error in the giving or refusing of instructions, and, unless this is done, its action is not reviewable. *State v. Gilmore*, 110 Mo. 1, 19 S. W. 218. It appears, however, that the circuit court gave a most liberal instruction covering the law of self-defense, and there was no reason for giving the instruction of defendant on that subject, even if it had not been properly refused on other grounds.

The only other error assigned is that the weight of the evidence is against the verdict of the jury. Reference to the statement of the evidence hereinbefore made demonstrates beyond the cavil of a doubt that the defendant deliberately premeditated and planned the murder of James Lall; that he was lying in wait for his victim to come to his barn to feed and curry his horses; that he began firing upon the unsuspecting farmer, whose only means of defense were the currycomb and brush; that Mr. Lall instantly fled; and that defendant pursued and shot him as he ran, and emphasized his malignity by discharging all the loads of his revolver into the prostrate form of the deceased after he was dead. Not content with the accomplishment of the unprovoked and inexcusable murder of the husband and father in the presence of, and in spite of the pleadings of, the wife and daughter, he deliberately reloaded his revolver and shot the devoted wife as she attempted to shield her husband from further mutilation. Every element of willful, deliberate, and cruel murder was overwhelmingly established by the testimony, without one fact to mitigate its atrocity and brutality. The jury could not have rendered any other verdict, under the evidence. There being no error in the record, the judgment is affirmed, and the sentence of the law is directed to be executed.

SHERWOOD and BURGESS, JJ., concur.

COOLEY v. KANSAS CITY, P. & G. R. CO.
(Supreme Court of Missouri, Division No. 2.
May 9, 1899.)

RAILROADS—DESTRUCTION OF TREES—ACTIONS—
MEASURE OF DAMAGES—PLEADING—SUFFICIENCY—
CONTINUANCE—DISCRETION—WITNESSES—
CROSS—EXAMINATION—APPEAL—REVERSIBLE
ERROR.

1. Under Rev. St. § 2114, providing that omissions, imperfections, etc., in the trial, not being against the justice of the suit, may be

supplied when the judgment is given, or by the court into which the judgment is removed by appeal, an omitted jurat to the affidavit for appeal may be supplied by the trial court after judgment of reversal.

2. The appellate court cannot, in a subsequent appeal, go behind an order granting a former appeal to determine the sufficiency of the affidavit, for such appeal, where the former appeal was submitted on its merits, without any objection to the order.

3. An order refusing a continuance for an absent witness will not be disturbed where his testimony was cumulative.

4. Applications for continuance are addressed to the discretion of the trial court, with the exercise of which the revisory courts will not interfere unless it is abused.

5. In an action for value of trees destroyed by defendant, a complaint alleging that plaintiff conveyed a right of way to defendant, reserving all fruit trees thereon, and, if any of them were destroyed by defendant, it was to pay therefor, and that defendant did destroy a number of the trees, and failed to pay for them, is not insufficient in failing to allege ownership, since it is inferable from the other facts pleaded.

6. Plaintiff conveyed a right of way to defendant, reserving the trees thereon, for the destruction of which defendant was to pay their reasonable value. *Held*, that in an action to recover for trees destroyed the measure of damages is not the difference in value of the land before and after their destruction, but the value of the trees so destroyed, since the ownership of the land under the conveyance was distinct from that of the trees.

7. In an action to recover the value of fruit trees destroyed by defendant, after plaintiff's witnesses had testified as to the value of the several kinds of fruit trees, and on cross-examination as to the distances they were apart, the court refused to permit them to be asked if they believed the acreage value which their figures would lead to was correct. *Held*, that such curtailing of the cross-examination is not reversible error, since defendant could easily, from such data, have calculated the acreage value, and presented it in his argument to the jury.

Appeal from circuit court, Jasper county; E. C. Crow, Judge.

Action by W. C. Cooley against the Kansas City, Pittsburg & Gulf Railroad Company. There was a judgment for plaintiff, and defendant appealed to the Kansas City court of appeals, and after a judgment of affirmance the cause was transferred to the supreme court. *Affirmed*.

Trimble & Braley, John A. Eaton, and John W. McAntire, for appellant. McReynolds & Halliburton, for respondent.

GANTT, P. J. This case has been certified to this court by the Kansas City court of appeals because of an alleged conflict in the opinion of the Kansas City court of appeals with the opinion of the St. Louis court of appeals in *Shannon v. Railway Co.*, 54 Mo. App. 223. In the latter case the landowner sued the railroad company for damages for the destruction by fire of fruit trees and a hedge belonging to the plaintiff, an adjoining proprietor, and it was ruled that the measure of damages was the difference in the value of the land of plaintiff before and after the fire. In the case at bar, however, the suit is upon a contract

in which the defendant company obtained a right of way from plaintiff, and agreed that, if the defendant found it necessary to remove or destroy certain fruit trees growing, then standing on the land, it would pay for them at a reasonable price. We agree with the Kansas City court of appeals that the contract, by its terms, segregated the title to the trees from the land, and that the only question involved is the reasonable value of the trees. To apply the rule laid down in *Shannon's Case*, *supra*, would be to allow plaintiff to recover for damages to land which had become the property of defendant. It seems perfectly obvious to us that the two cases are clearly distinguishable, and the very satisfactory opinion of the Kansas City court of appeals is adopted, and made a part of the opinion, as fully expressing our views of the law of the case. That opinion is as follows:

"In the Kansas City Court of Appeals, March Term, 1896.

"W. C. Cooley, Respondent, vs. Kansas City, Pittsburg & Gulf Railroad Company, Appellant. 4,322.

"Appeal from Jasper Circuit Court.

"For a proper understanding of the question raised by the present appeal, the statement of the case made by us when it was here on another occasion, and reported in 60 Mo. App. 641, will, we think, be found sufficient. The result of the former appeal was a judgment here reversing that of the circuit court, and remanding the cause. After the cause had been remanded to the latter court, the defendant moved to dismiss the same, for the reason that no affidavit for an appeal had been filed by the plaintiff, and therefore the appeal granted was unauthorized by law, and did not confer jurisdiction upon this court to render said judgment of reversal. To the affidavit upon which the appeal was granted there was no jurat appended. The circuit court, after hearing evidence as to whether or not the plaintiff's attorney, by whom the affidavit was signed, had made oath thereto before the clerk, overruled the defendant's said motion to dismiss, and permitted the clerk to attach the proper jurat to the affidavit. The order granting the appeal was regular on its face, and our attention was at no time called to the defect in the affidavit, either by motion or otherwise. Section 2114, Rev. St., expressly provides that the omissions, imperfections, defects, and variances mentioned in the preceding section (2113), and others of like nature, not being against the right and justice of the matter of the suit, and not altering the issues between the parties on the trial, shall be supplied and amended by the court when the judgment shall be given, or by the court into which such judgment shall be removed by writ of error or appeal. No reason is therefore seen why the omitted jurat could not have been supplied by leave of either this or the circuit court, even after the judgment of reversal was given by the court. *Bergesch v. Keevil*, 19 Mo. 127;

Crum v. Elliston, 83 Mo. App. 591. But, if we are in error in this, there is still another reason why we will not countenance the defendant's assault on our judgment. *St. Louis Bridge & Construction Co. v. Memphis, C. & N. R. Co.*, 72 Mo. 664, was where it was objected in the supreme court that the affidavit for the appeal was insufficient. The court, in disposing of the objection, said: 'If the affidavit were not such as to warrant the order granting the appeal, the respondent should have made his motion to dismiss the appeal before it was submitted. We will not, after a submission of the cause on its merits, go behind the order granting the appeal, to determine the sufficiency of the affidavit on which it was made, or whether any affidavit whatever was filed.' Adopting and applying, as we must, the rule just stated, and it becomes plain that we cannot, on the present appeal, go behind the order granting the former appeal, to determine the sufficiency of the affidavit, or whether any affidavit whatever was filed. We think that under that rule we are concluded.

'The defendant further complains of the action of the court in refusing to grant a continuance of the cause on its application. The record discloses the fact that the witnesses Wink and Hunt, with the absent witness, Davison, 'took the pains to go through the right of way and count up the trees.' The two former testified as to the number, kind, and condition of trees that were on the right of way, and that were subsequently cut down by the defendant. The facts that the defendant proposed to prove by the absent witness, Davison, were not materially variant from those of the other two named witnesses who did testify. Besides this, we are not satisfied that the application shows that measure of diligence required by law. Such applications are always addressed to the discretion of the trial court, with the exercise of which the revisory courts will not interfere, unless it is apparent that there has been an abuse.

'The defendant's objection that the petition does not state a cause of action cannot be sustained. It appears from the allegation thereof that the plaintiff, while he owned the fee-simple title to the land therein described, entered into a written contract with the defendant for the sale of a right of way over the same one hundred feet in width, reserving all the fruit trees standing thereon. If, however, any of such trees should be destroyed by defendant, it was thereafter to pay a reasonable price therefor. It is further therein alleged that the plaintiff subsequently executed a deed to defendant, conveying to it the said right of way, with the same reservation as that contained in the contract already referred to. It is further alleged that the defendant cut down and destroyed a specified number of said fruit trees standing on the right of way so acquired by defendant of plaintiff, and has failed and refused to pay for the same. The trees, while standing on the land,

were a part of it, and the title to them could neither be sold nor reserved, except by statutory deed. *Potter v. Everett*, 40 Mo. App. 152; *Deland v. Vanstone*, 26 Mo. App. 297; *Andrews v. Costigan*, 30 Mo. App. 29; *McIlvaine v. Harris*, 20 Mo. 458; *Railroad Co. v. Freeman*, 61 Mo. 80. The reservation was an interest in the land. While the plaintiff reserved the title to the trees, yet, by the very terms of the contract, he conferred upon the defendant a license to destroy them, if, in clearing out its right of way, it chose to do so. If the defendant destroyed the trees, it was not a trespasser, for this it had the right to do, under the contract, if it so willed. The title to the trees remained in plaintiff unimpaired, and until the defendant exercised its license. This operated as divestiture of the plaintiff's title, and fixed the liability of the defendant to pay therefor. The title to the trees did not primarily pass to and vest in the defendant, under the contract and deed, but it did so the moment the defendant exercised the license accorded to it by said instruments. The ownership of the trees at the time they were taken by the defendant, if not expressly alleged, is plainly inferable from the other facts alleged, and hence we think the petition is sufficient, and certainly so after judgment.

'The defendant further objects that the court erred in permitting the plaintiff to ask the witnesses what was the value of the fruit trees cut down and destroyed by defendant, for the reason that such inquiry was not directed to any measure of damages recognized by law. It is the defendant's contention that the proper inquiry of the witnesses should have been as to what was the difference in the value of the land before and after the trees had been destroyed, and in support of this contention cites *Shannon v. Railway Co.*, 54 Mo. App. 223, which is bottomed on *Dwight v. Railroad Co.*, 182 N. Y. 199, 30 N. E. 308. This latter case overrules that of *Whitbeck v. Railroad Co.*, 86 Barb. 644. In *White v. Stoner*, 18 Mo. App. 540, which was decided by us many years before that of *Dwight v. Railroad Co.*, supra, we quoted approvingly from *Whitbeck v. Railroad Co.* No further reference need be made to these conflicting decisions than to say that in each and all of them the party suing was the owner of the land and the trees growing thereon and deriving nourishment therefrom. Here the case is different, for the defendant's ownership of the land was so limited by the reservation in the grant thereof to it that it did not extend to the fruit trees standing thereon, the ownership of the latter remaining in the plaintiff. The case, then, is one where the title to the soil is in the defendant, and that of the trees in the plaintiff. The two interests in the land, by the terms of the deed, were vested in separate and distinct owners. The case, for this reason, is therefore to be distinguished from the cases just referred to. Nor is this a case where the owner of the soil

and the trees thereon growing is suing for damages for the destruction of the latter. Doubtless, the measure of damages of the owner of the land in such case is the difference in the value of the land before and after the destruction of the trees. But no such rule can apply to a case like this, where the ownership of the land is distinct from that of the trees. To apply the rule upon which the defendant insists would be to allow the plaintiff to recover for an injury to the value of the land which is the property of the defendant. This is, of course, preposterous.

"There is no inherent difficulty in the way of determining the value of the trees. The contract of the parties provided that, if the trees reserved were destroyed by the defendant, they should 'be paid for at a reasonable price.' The only question, therefore, is, what was their reasonable price? This question is answered by the remark made by Judge Ellison when the case was here on the former appeal, to the effect that it was their 'value as fruit trees. They were to be valued at what they were.' If the fruit trees in controversy, at the time they were destroyed by defendant, had no market value, then the law allows the next best evidence to ascertain their value. Persons who are orchardists, or have knowledge of the value of fruit trees in the vicinity, were competent to testify their opinions of the value of such trees. *Railway Co. v. Dawley*, 50 Mo. App. 480; *Thomas v. Mallinckrodt*, 43 Mo. 58; *Tate v. Railway Co.*, 64 Mo. 149. We are therefore of the opinion that the circuit court did not err in rejecting the defendant's offer to prove 'the difference between the value of the land with and without the orchard.'

"Nor do we think the defendant has any just ground to complain of the action of the court in restricting the cross-examination of the plaintiff's witnesses. After the witnesses had testified as to the value of the trees, the defendant was permitted to inquire of them how many feet apart the various kinds of fruit trees should be planted in the orchard, and the like. Possibly, the court might, with propriety, have permitted the cross-examination to have extended further than it did, but that it did not do so is not such error as will authorize a disturbance of the judgment by us. The plaintiff's witnesses having testified as to the value of the several kinds of fruit trees, and the distance they should be planted apart in the orchard, the defendant could, from such data, have easily calculated the number of trees in an acre of orchard, and the consequent value of the same. This was a deduction which could have been appropriately made by counsel, and presented in the argument for the consideration of the jury. No serious harm resulted to the defendant from the action of the court in curtailing the cross-examination of the witnesses to the extent already indicated. The value of the trees was left to the jury, under the evidence, and we cannot say that the verdict is excess-

ive. It has the support of substantial evidence. The judgment will be affirmed. All concur."

For the foregoing reasons given by Judge SMITH, the presiding judge of that court, the judgment is affirmed.

SHERWOOD and BURGESS, JJ., concur.

STATE v. KIMES.

(Supreme Court of Missouri, Division No. 2.
May 9, 1899.)

INCEST—SUFFICIENCY OF EVIDENCE.

Defendant was charged with incest by his niece, who testified that he had intercourse with her on several occasions, resulting in pregnancy, and that they were detected on one occasion by her cousin. The cousin testified to seeing improper actions between them, and corroborated her testimony as to the detection in flagrante delicto. Defendant admitted being with prosecutrix on the occasion testified to by her and her cousin, but claimed that he was sitting by the roadside, talking with her, and denied the sexual intercourse. *Held*, that the evidence was sufficient to justify a conviction.

Appeal from circuit court, Sullivan county; John P. Butler, Judge.

John L. Kimes was convicted of incest, and he appeals. Affirmed.

Wilson & Clapp, for appellant. Edward C. Crow, Atty. Gen., and Sam B. Jeffries, Asst. Atty. Gen., for the State.

GANTT, P. J. The defendant was indicted, tried, and convicted of incest in the circuit court of Sullivan county at the November term, 1898. The defendant was duly arraigned, and entered his plea of not guilty. The cause was tried at the same term. The defendant is the uncle of Ollie Kimes, a young unmarried woman, about 20 years old, the daughter of Wallace Kimes, a brother of defendant. The defendant at the time of the commission of the offense was, and is now, a married man, about 40 years old. The evidence is positive, direct, and fully corroborated, that in the spring of 1898 the defendant and his family lived with his parents; that his mother was sick and died in June, 1898; that, during the old lady's illness, Ollie Kimes from time to time visited her grandmother, and assisted in waiting on her in her sickness. During these visits, she testified, defendant had sexual connection with her on various occasions, resulting in her becoming pregnant by him. On one occasion they were detected in flagrante delicto by a cousin of Ollie Kimes (Roscoe Smart), who was also a grandson of the old lady Kimes. The defendant testified in his own behalf, and denied the sexual intercourse, but corroborated young Smart in every other particular, as to the time and place, and the presence of defendant and Ollie Kimes. The defendant also offered evidence that his general reputation for truth was good. We

have not had the benefit of argument or brief by defendant, but have read the record and the brief of the attorney general, and considered the various grounds in the motion for a new trial. The indictment is good, and is not even assailed by defendant. The evidence is short, clear in point, and, if believed by the jury, as it evidently was, fully sustained their verdict. The instructions met every requirement of the law. In a word, the cause was well tried, and the record discloses not the slightest ground for reversing the judgment, and it is accordingly affirmed.

SHERWOOD and BURGESS, JJ., concur.

BANKS et al. v. GALBRAITH et al.
(Supreme Court of Missouri, Division No. 2.
May 9, 1899.)

WILLS — PLEADING — INCONSISTENT AVERMENTS —
JOINDER — MARRIAGE — INDIAN CUSTOMS
— RIGHTS OF ISSUE.

1. In an action by pretermitted heirs against the legatee named in their ancestor's will for contribution, an averment that the will was procured by undue influence on the part of the legatee is inconsistent with the claim for contribution.

2. In an action by pretermitted heirs against the legatee named in their ancestor's will for contribution, it is improper to join in the same count with the allegations as to the execution of the will and the failure to provide for plaintiffs an allegation that the will was procured by undue influence on the part of the legatee, as it would be a commingling of two different causes of action in one count.

3. Where an Indian woman leaves the Indian country, and goes to Missouri, with her parents, and is there sold to a white man, and she lives with him in Missouri, the relation created is governed by the laws of Missouri, and not by Indian customs.

4. Where an Indian woman is sold by her parents to a white man in Missouri, in accordance with Indian marriage customs, and lives with him for several years, without a lawful marriage, the issue born to them is incapable of inheriting from the father.

Appeal from circuit court, Holt county; C. A. Anthony, Judge.

Action by Oscar Banks, Willie Banks, Ada Banks, and Bessie Banks, minors, by their next friend, George Nuzum, against Catherine Galbraith, William Banks, Lewis Banks, Walter Banks, Annie Banks, Tracey Banks, Henry Banks, Mathew Banks, and Alice Ruth Banks, to establish plaintiffs' rights as pretermitted heirs of William Banks, Sr., deceased. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

This is an action by plaintiffs to establish their rights as pretermitted heirs of William Banks, Sr., deceased, late of Holt county, Mo. The record discloses substantially these facts: That William Banks, Sr., deceased, lived in Holt county, Mo., from about the year 1840 until the 6th day of April, 1895, when he died testate, having made a will disposing of all his estate to the defendants, without having

in any way mentioned the plaintiffs or their father in the will. That in 1840 said William Banks, deceased, settled on the east shore of the Missouri river in Holt county, Mo., and established a trading point for the sale of goods, and operated a ferry across the Missouri river between his trading post and a landing known as "Iowa Point" in Kansas. Tribes of Indians, known as the "Foxes," "Sacs," and "Iowas," occupied a reservation in the then territory of Kansas which included the place of said ferry landing on that side of the river. Banks continued in business at his trading post on the Missouri side, doing a general mercantile business, and trading with both white people and Indians as his customers, operating the ferry and carrying on a farm, and kept store. In 1844, after he had been in business there about four years, he bought a woman, called "Wa-rush-ka-me," of her parents, and paid for her with goods, and maintained illicit relations with her for about three years, during which time she had a child, who is called "Joseph Banks" in the record of the proceedings in this case, and under whom the plaintiffs in this suit claim as heirs at law a portion of the estate of William Banks, deceased, by descent or inheritance. This woman was a member of the Iowa tribe of Indians, and lived with her parents on the Indian reservation in Kansas territory, opposite to where William Banks lived and kept his trading point. After Banks bought this woman, she divided her time between living with the tribe and with Banks, going back and forth. Her parents brought her over, and delivered her to Banks, and received the consideration for her at his place of business in Missouri. After she had visited him occasionally, remaining with him such length of time as suited her inclination, she left him, or he put her away, or sent her home, where she remained until her death. There were other squaws that came across the river and dwelt with Banks and his partner for illicit purposes, and some of the witnesses say no one knew who sired their children. And shortly after Banks sent Wa-rush-ka-me home, or broke his illicit relations with her, he appropriated another Indian woman, called "Jane," who was the mother of William Banks, Jr., one of the defendants, and this woman lived with Banks until she died, about 1854. So far as the present inquiry is concerned, it is not necessary to determine whether Banks, Sr., was legally married to the last woman or not, or whether William Banks, Jr., defendant, and his children, who are devisees under the will, are his legitimate heirs or not. The question is whether Joseph Banks is a legitimate child of William Banks, Sr., and that depends upon whether his reputed father, William Banks, was legally married to his mother, Wa-rush-ka-me. Of course, if the plaintiffs succeed in establishing their legitimacy, so that they would be regarded as legal heirs of William Banks, Sr., deceased, it would

then be necessary for defendant William Banks and his children to establish their heirship, and in that event plaintiffs would take half the whole estate, and the remaining half would be disposed of under the will, between Miss Galbraith and William Banks, Jr., and his children, defendants. The jury, under the instructions of the court, found for defendants, and plaintiffs appeal.

T. C. Dungan, for appellants. John Kenish and S. F. O'Fallon, for respondents.

GANTT, P. J. (after stating the facts). 1. No error was committed in striking out so much of plaintiffs' petition as charged undue influence on the part of Miss Galbraith. That allegation is utterly inconsistent with the other averments of the execution of the will, and the failure to mention plaintiffs, or to provide for them. Plaintiffs sue as pretermitted heirs, and not to set aside the will. Moreover, if permitted to remain, it would have been the commingling of two different causes of action in one count. It was very properly eliminated.

2. The real question in this case is the propriety of the action of the circuit court in giving a peremptory instruction to the jury to find for defendants. It was shown beyond peradventure that William Banks, Sr., did not go through the form of a marriage with Wa-rush-ka-me in the Indian country. By all the witnesses it was established that she was a widow, and came with her parents to the trading post of William Banks, Sr., in Holt county, Mo., and he then and there gave her relatives some presents, and she lived in his house, cooked for him, and the evidence tends to show, cohabitated with him in Missouri, and nowhere else. There is not a syllable of evidence of any witness to an agreement in the present tense between William Banks, Sr., and Wa-rush-ka-me that they would be husband and wife for life. The only contract, if any, shown by the evidence, was a bargain between Banks and the parents of Wa-rush-ka-me for the prostitution of the woman for such time as Banks chose to use her. It is too plain for discussion that in Missouri, at least, such an arrangement did not constitute a lawful marriage, either at common law or according to regulations provided by our statutes. The plaintiffs invoke former decisions of this court to the effect that if William Banks, Sr., was married to Wa-rush-ka-me, in the Indian country, according to the Indian customs, and that from the time of said marriage he held her out as his wife, and lived with her as such, and Joe Banks, their father, is the issue of such marriage, and was treated by William Banks, Sr., as his lawful child, then such Indian marriage was a lawful marriage. *Johnson v. Johnson's*

Adm'r, 30 Mo. 72; *Boyer v. Dively*, 58 Mo. 529; *La Riviere v. La Riviere*, 77 Mo. 518. But it will be observed that in each of said cases, and in the subsequent opinion of this court in *La Riviere v. La Riviere*, 97 Mo. 80, 10 S. W. 840, the fact that the marriage was in the Indian country, and according to the Indian customs, was the controlling fact. In neither of those cases was it asserted that an Indian woman could leave her tribe in the Indian country, and come into Missouri, and form an adulterous and meretricious intercourse with a citizen of Missouri, and that such a connection would constitute marriage, either according to the common law or the regulations prescribed by our statutes. In this state marriage is a civil contract by one man and one woman competent to contract, whereby they are mutually bound to each other, so long as they both shall live, for the discharge, to each other and the community, of the duties and obligations which flow by law from such relation (*State v. Bittick*, 108 Mo. 183, 15 S. W. 325); and such contract is not dissolvable at the will of either or both of said parties. It can only be dissolved by death, or a decree of divorce by a competent court. The cases decided by the courts sustaining marriages between white men and Indian women in the Indian country simply conform, to an almost universal principle of international law that a marriage celebrated in other states and countries, if valid by the laws of such countries, are valid in this state, even though the same might, by the force of our laws, be invalid if contracted here. But those decisions fall far short of sustaining as a lawful marriage the illicit relation shown to have existed between William Banks, Sr., and Wa-rush-ka-me. That relation must be tested by the laws of Missouri, and according to our laws it was nothing more nor less than a temporary illicit cohabitation. It was not a marriage in any sense, even according to plaintiffs' own evidence, and the unlawful relation was made even more conspicuous by the evidence of defendants. The trial court correctly sustained the demurrer to the evidence. There was neither a lawful marriage nor a marriage of any kind in fact. There is no warrant in our statute of descents for holding that the issue of such a relation can inherit from the father. The arrangement was clearly illicit in the beginning, and the proofs did not show any change in the subsequent relations of the parties, but, on the contrary, confirmed the view that it was a mere commercial arrangement, without any of the sanctity or permanence of a marriage, within the contemplation of the laws of Missouri, by which alone it can and must be tested. The judgment is affirmed.

SHERWOOD and BURGESS, JJ., concur.

BASSETT v. O'BRIEN et al.

(Supreme Court of Missouri, Division No. 2.
May 9, 1899.)

ESTATES—LEGAL AND EQUITABLE TITLE—MERGER.

Husband and wife executed a deed of trust on the latter's land to secure a loan from the guardian of an estate of their children, which was foreclosed after the wife's death. The purchaser sold to another, who attempted a rescission because of failure of title, claiming that on the wife's death, of which he had no knowledge, the mortgage merged into the fee inherited by the children. *Held*, that his claim was untenable, since the legal title was in the trustee on condition broken, and the equitable title in the children, and a legal estate never merges into an equitable one.

Appeal from circuit court, Buchanan county; A. M. Woodson, Judge.

Action by Harry D. Bassett against William A. O'Brien and another to rescind a conveyance of land. Judgment for defendants, and plaintiff appeals. Affirmed.

James F. Pitt, for appellant. Benjamin Phillip, for respondents.

GANTT, P. J. This is an appeal from a final judgment sustaining a demurrer to the petition. The petition is in these words: 'Plaintiff states that on the 4th day of May, 1896, defendant O'Brien, claiming to own and intending to convey the fee in the premises hereinafter described, executed and delivered to plaintiff a general warranty deed of that date, by which he, by the terms thereof, purported to grant, bargain, and sell and convey to plaintiff, his heirs and assigns, lots 1 and 2, in block 54, of St. Joseph Extension addition, an addition to the city of St. Joseph, Buchanan county, Missouri, in consideration of the sum of \$2,000, and that defendant covenanted expressly in said deed that he had good right to convey; that said premises were free of incumbrances done or suffered by him, or those under whom he claimed, and that he would warrant and defend the title to the same; that plaintiff, intending to purchase the fee in said premises, and believing that he would obtain the same, paid said consideration, as hereinafter stated. And plaintiff says that there were breaches of said covenants implied and expressed in said deed, in this, to wit: That at the date of said deed said defendant O'Brien had no right to convey said premises, and was not at that time, nor has he since become, seised or possessed of any estate whatsoever in said lands; that plaintiff has paid in cash upon said consideration the sum of four hundred dollars. And, further, plaintiff says that on the 21st day of May, 1889, the title to the premises aforesaid was in Susan Thornton; that said Susan died on the — day of January, 1890, leaving, as her children and heirs, Reuben O., Hanna M., Phoebe, and Lulu Thornton, all minors, and children by her husband, Charles A. Thornton, who also survived her; that, at the time of the death of the said Susan, James M. Hall was the duly appointed and qualified guardian

and curator of said children, and continued in office until after the trustee's sale hereinafter mentioned; that on the 20th day of June, 1889, Susan Thornton and Charles A. Thornton, her husband, executed and delivered to said James M. Hall a deed of trust of that date, upon the premises aforesaid, to secure to said Hall a note for the sum of one thousand dollars, with C. B. Claggett named therein as trustee, said note representing a loan made by said Hall of the funds of said minors and the estate in his hands as such curator; that said deed of trust was foreclosed at the request and by the direction of said Hall, acting as guardian and curator, on the 10th day of January, 1891; and that at such foreclosure sale defendant O'Brien became the purchaser of said premises, and received a deed from the trustee, which said trustee's deed bears date January 10, 1891, and through and by which only defendant O'Brien claims any title to said premises; that on the 21st day of February, 1890, said Charles A. Thornton, after the death of said Susan, and prior to the date of the trustee's sale aforesaid, executed and delivered a deed of that date to Charles F. Keller, in trust for the grantor and said minors, and said Charles A. Thornton is still living. And, further, plaintiff says that negotiations between plaintiff and defendant for sale and purchase of said premises were conducted through and by said Zeidler, as the agent of defendant O'Brien, and it was agreed between plaintiff and said agent that plaintiff would purchase said premises if the title in fee to said O'Brien should be approved by plaintiff's attorney upon an examination of an abstract of the title to said premises; that thereupon said agent undertook to and did furnish to plaintiff's said attorney an abstract, and said attorney, after examining the same, certified to plaintiff that the title shown was good, and thereupon, relying upon the facts shown in said abstract and the certificate of his said attorney, plaintiff took and paid for the deed aforesaid. And plaintiff says that said abstract was false and misleading, in this: that it did not disclose the death of said Susan Thornton; that a sheet and paper which did disclose that fact had been taken out of, and separated from, said abstract at the time it was furnished to plaintiff's said attorney, and said attorney passed upon and examined said title without knowledge of the fact of the death of said Susan Thornton, and plaintiff did not discover that his attorney had been so misled until after he had taken the deed as aforesaid; that said Zeidler, at the time of furnishing said abstract to said attorney, did not know that said paper or sheet was missing, or that said abstract did not contain and show all facts necessary to ascertain the true state of the title of said defendant O'Brien. And plaintiff further says that, at the time of receiving the warranty deed aforesaid, he (plaintiff) executed and delivered to said O'Brien his certain promissory note, of the same date, for the

sum of one thousand dollars, a deferred payment in part of said consideration, and to secure the same he also executed and delivered to the said O'Brien a deed of trust upon said premises, with John M. Stewart named therein as trustee; that said promissory note is negotiable, and now in the hands and possession of the defendant Zeidler, as the agent and holder of the same, for the benefit of the defendant O'Brien, with power to negotiate or otherwise dispose of the same for the benefit of said defendant; that said note is in form as follows: '\$1,000.00. St. Joseph, Mo., May 4, 1896. One year after date I promise to pay Wm. A. O'Brien or order one thousand dollars, for value received, with 7 per cent. interest per annum from date until paid. The interest to be paid semiannually; if not, to become as principal, and bear the same rate of interest. [Signed] Harry D. Bassett.' And plaintiff says that, in consideration of the premises, the note aforesaid is wholly without consideration. Wherefore plaintiff brings into court and tenders his deed of quitclaim to said premises, executed by himself and wife to said defendant O'Brien, and prays that said note may be delivered up and canceled, and that said defendants, O'Brien and Zeidler, or either of them, be enjoined from transferring, assigning, or in any manner disposing of, or changing the present possession of said note, and that upon payment of four hundred dollars in cash, and the cancellation of the note aforesaid, his said deed of quitclaim be delivered to said O'Brien, and that he may have all further and proper relief."

Demurrer: "Come now the defendants in the above-entitled cause, and demur to plaintiff's amended petition for the following reasons, to wit: Because said amended petition does not state facts sufficient to constitute a cause of action against defendants or either of them; because said petition shows upon its face that the defendant O'Brien had perfect title to the property described therein at the time he conveyed the same to plaintiff; because the fact that a paper attached to the abstract mentioned in said petition, showing the death of Mrs. Thornton, was removed therefrom, if it was removed, or the fact that Mrs. Thornton was dead, did not in any way affect the validity of the title to said property."

It is apparent that the petition is bottomed upon the proposition that O'Brien obtained no title by his purchase of the lots under the trustee's sale and deed made at the request of the guardian and curator of Mrs. Thornton's heirs, in pursuance of the conditions of the trust deed executed by her and her husband to secure a note for \$1,000 borrowed by her and her husband from the guardian and curator of her children, of moneys belonging to them and in his hands as guardian, and that, in consequence of such invalidity, a breach of O'Brien's covenant of title to plaintiff had occurred, and a rescission is asked because the abstract of title did not disclose Mrs. Thorn-

ton's death. The invalidity of defendant's title is predicated entirely upon the proposition that, when Mrs. Thornton died, the mortgage held by the guardian for the minor children merged into the fee which descended to them from their mother, subject to their father's estate by the curtesy for his life. Upon the conceded facts, did a merger take place when Mrs. Thornton died? Assuming that Mrs. Thornton's children were the actual mortgagees, as it was their money loaned by their guardian to their mother, for which she executed the mortgage, still it must be borne in mind that the petition alleges that Mrs. Thornton was a married woman; that these children were born of the marriage to their father; and that their mother died seised of the property, and their father survived their mother, and was still living, when the suit was brought. An estate by the curtesy was thus created in the father, and upon their mother's death a life estate in the father intervened between them and their inheritance in fee. This estate by the curtesy consummate is a vested legal estate for life. Mergers are not favored, either in courts of law or of equity. *Simonton v. Gray*, 34 Me. 50; *James v. Morey*, 2 Cow. 246-300. "Merger" at law is defined to be "when a greater estate and a less coincide and meet in one and the same person, in one and the same right, without any intermediate estate." 1 Jones, *Mortg.* (4th Ed.) § 848. The rule in equity is the same as at law, with this modification: that at law it is inflexible, whereas in equity it is clear that a person may become entitled to an estate subject to a charge for his own benefit, and, if he choose, can hold the estate and keep the charge alive. It becomes a question of intention in the person in whom the two interests are vested. To this it may be said all the cases are agreed. *Forbes v. Moffatt*, 18 Ves. 389; *Compton v. Oxenden*, 2 Ves. Jr. 263; *Gardner v. Astor*, 3 Johns. Ch. 53. In this case it is urged, as a matter of law, that upon the death of Mrs. Thornton, and the descent cast upon her three children, a merger resulted, which extinguished their beneficial interest secured by the mortgage. This contention ignores the estate of their father by the curtesy, which became consummate by the death of their mother, and intervened and prevented the vesting in possession of the mortgaged lands. No clearer case of the interposition of an intervening estate, which might otherwise be merged, than is presented by this record, can be found. Viewing it from the standpoint of equity, must it be presumed that it would be the intention of the children to merge the estates? Would it have been to their interest? The father's curtesy unquestionably existed and was mortgaged. The children or beneficiaries had the right to keep alive this mortgage to remove this curtesy by having it sold to pay the debt due to them. Neither at law nor in equity can it be said a merger was effected. *Stantons v. Thompson*, 49 N. H. 273; 1 Jones, *Mortg.* (4th Ed.) § 848, and cases

cited. But while we have assumed that the children of Mrs. Thornton, the real beneficiaries in the deed of trust, were mortgagees so far as the intervening curtesy affected the questions at issue, as a matter of fact and law no legal title whatever vested in them by the execution and delivery of the deed of trust. The legal title was in the trustee, Claggett, upon condition broken. *Siemers v. Schrader*, 88 Mo. 20; *Hospes v. Almstedt*, 13 Mo. App. 270; *State v. Koch*, 47 Mo. 582-584. The equitable title, subject to the mortgage with condition broken, descended to the heirs. There was no union of title in the heirs of Mrs. Thornton, as the legal title was outstanding in the trustee, Claggett, and the equitable title in her heirs. While an equitable estate will merge into a legal estate, all other requisites being present, it is a maxim of the law that a legal estate never merges into an equitable one. By the statutes of this state, guardians are required to invest the moneys of their ward, if possible, on prime real-estate security. The care and maintenance of the estate of his wards is committed to the guardian and curator. He may direct a sale to collect the moneys due his wards. He is under bond for the faithful discharge of his duties. In this case the guardian directed the sale. O'Brien purchased at the sale, and there is nothing to impeach the sale. The sale and deed conveyed the legal title of the land. Plaintiff took O'Brien's title, and the heirs have not questioned it. The fact that plaintiff did not know of Mrs. Thornton's death did not affect the title he bought. The circuit court correctly sustained the demurrer, and adjudged that the petition stated no cause of action. Judgment affirmed.

SHERWOOD and BURGESS, JJ., concur.

JOHNSON v. BOWLWARE et al.

(Supreme Court of Missouri, Division No. 2.
May 9, 1899.)

BOUNDARIES—DESCRIPTION—SUFFICIENCY—EJECTMENT—DEED—REPUGNANT DESCRIPTION—REJECTION—DEFENSE—REVIEW—WEIGHT OF EVIDENCE—ACTION AT LAW.

1. A description of land began at a fixed monument, and closed in these words: "thence west twenty rods to the place of beginning," whereas it should have been "thence east twenty rods," to reach the place of beginning. *Held*, that the description was sufficient, the mistake being rejected for repugnancy, and there being enough to take the boundary to the fixed monument.

2. In ejectment a repugnant part of a description in a deed may be rejected, and the intention of the parties thereto be ascertained and identified from what remains, if possible.

3. The weight of evidence will not be reviewed in an action at law if the declarations of law were correct.

4. Conceding that it is a good defense, in ejectment by a judgment creditor claiming land by a sale under his judgment, that the land was bought with money belonging to the judgment debtor's mother, and that, although conveyed to hinder his creditors, it was conveyed to de-

fendants, who were her heirs, a mere "claim" that such were the facts in relation to the purchase of the land by the judgment debtor would constitute no defense.

Appeal from circuit court, Carroll county; W. W. Rucker, Judge.

Ejectment by Moses P. Johnson against Robert Bowlware and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Hale & Son, for appellants. C. C. Hammond, Jr., and Jas. L. Minnis, for respondent.

GANTT, P. J. Action of ejectment for the following lands in Carroll county, Mo.: "Sixty-five acres, commencing twenty (20) rods west of the southeast corner of the northeast quarter of section No. seventeen (17), township No. fifty-five (55), range No. twenty-one (21); thence running north one hundred and twenty (120) rods; thence east twenty (20) rods; thence north twenty-two (22) rods; thence west ninety (90) rods; thence south one hundred and forty-two (142) rods; thence east seventy (70) rods to the place of beginning,—all in the northeast quarter of section No. seventeen (17). Also a tract of land commencing at the southeast corner of the southeast quarter of the northeast quarter of section No. seventeen (17), township No. fifty-five (55), of range No. twenty-one (21); thence north one hundred and twenty (120) rods; thence west twenty (20) rods; thence south one hundred and twenty (120) rods; thence west twenty (20) rods to the place of beginning." Ouster laid as of August 25, 1895. Damages and rents and profits averred and prayed for. Bowlware is tenant of his co-defendants, and his answer is a general denial, and that the other defendants are his landlords. The answer of the other defendants is a general denial, and an offer of judgment to plaintiff for one undivided one-ninth of the lands sued for. A jury was waived, and the cause tried by the court. It was admitted Bowlware was in possession, at the commencement of the suit, as tenant of the other defendants. It was further admitted that A. J. Shannon was the common source of title under deeds dated March 14, 1893, and April 14, 1893, from A. H. Cutler et al. and P. P. Brightmare, duly executed, acknowledged, and recorded. Plaintiff then read in evidence a sheriff's deed from George E. Stanley, sheriff of Carroll county, conveying to plaintiff the right, title, and interest of A. J. Shannon in and to the land in controversy, which deed is dated July 27, 1895, made pursuant to a sale under execution issued on a judgment rendered by the circuit court of the city of St. Louis in favor of plaintiff against A. J. Shannon, December 15, 1886. Proof of damages for detention and monthly rents and profits was made by plaintiff, and he then rested. Defendants then offered and read in evidence a deed dated April 15, 1893, from A. J. Shannon to James M. Shannon, for the lands in controversy; also a deed from

James M. Shannon to the defendants S. R. Charles, A. J. H. and W. E. Shannon, Mary Robinson, Virginia Bowlware, Rebecca Jeffries, and A. J. Shannon. The defendants then rested. Plaintiff, in rebuttal, offered several witnesses, whose evidence tended to prove that the deeds read in evidence by defendants were wholly without consideration, and were made by A. J. Shannon to defraud his creditors, and that all parties to said deeds participated in said fraud, and that no title passed thereby. Plaintiff offered evidence tending to prove that after the execution of the deed from A. J. Shannon to J. M. Shannon, and before the execution of the deed from J. M. Shannon to defendants, the said J. M. Shannon executed and delivered to A. J. Shannon a deed reconveying all of said land to him, and that A. J. Shannon fraudulently destroyed said last-mentioned deed; that A. J. Shannon was insolvent. Plaintiff again rested. Defendants then offered evidence tending to show that A. J. Shannon originally purchased said lands as the agent of his mother, and with her money, but took the deed in his own name; that after her death he conveyed to J. M. Shannon, and the latter conveyed said lands to the heirs of the mother of A. J. Shannon, pursuant to her direction in her lifetime. This was all the evidence.

The defendants asked two instructions, as follows: "First. If the court, sitting as a jury, finds from the evidence that the Shannon heirs, as testified to in this cause, claimed that the land in controversy was purchased by A. J. Shannon for his mother, and with her money and means, and that after her death they claimed that they were each entitled to their interest in said land as heirs of their mother, and that the deed read in evidence from James M. Shannon to them was made in pursuance of said claim, then the deed to them was not fraudulent, and cannot be attacked by plaintiff in this form of action as a deed made in fraud of creditors, although the court may further find that A. J. Shannon, when he executed the deed to James M. Shannon made the same for the purpose of defrauding his creditors, including this plaintiff. Second. If the court, sitting as a jury, finds from the evidence that the Shannon heirs claimed that they were entitled to their interest in said land as heirs of their mother, and that the deeds should have been made to their mother, instead of to A. J. Shannon, and that after the mother's death they claimed and received from James M. Shannon the deed read in evidence, prior to any sale of the land under plaintiff's execution, then said deed is not fraudulent, and cannot be set aside, or attacked by plaintiff in this form of action as made in fraud of creditors, although the court may further find that when A. J. Shannon made the deed to James M. Shannon he intended thereby to hinder, delay, and defraud his creditors. If James M. Shannon had reconveyed said land to the Shannon

heirs by the deed read in evidence before the sale of the land under execution, although A. J. Shannon may have received a deed from James M. Shannon for the land in controversy, and destroyed the same, prior to the deed read in evidence from James M. Shannon, yet, if said deed was destroyed, and the second deed by James M. Shannon, before plaintiff acquired any title to said land by virtue of his execution sale, plaintiff cannot, in this cause, set up or claim any title to said real estate by virtue of said deed so destroyed." The foregoing were the only instructions asked, and they were refused by the court. The trial court gave judgment for the plaintiff for the land sued for, and for rents and profits. Two grounds for reversal are urged: "First. That the sheriff's deed under which plaintiff claims does not describe part of the land claimed in the petition, to wit, the 15-acre tract." This assignment is predicated upon the fact that in describing said tract by metes and bounds the description closes with these words: "thence west twenty rods to the place of beginning," whereas it should have read, "thence east twenty rods to place of beginning." Second. The refusal of defendant's two instructions.

1. It is a fixed principle in the construction of deeds that monuments, when called for in the description of land, will control calls for courses and distances. *West v. Bretelle*, 115 Mo. 653, 22 S. W. 705; *Rutherford v. Tracy*, 48 Mo. 325; *Burnham v. Hitt*, 143 Mo. 414, 45 S. W. 368. Where a part of a description in a deed is repugnant to or inconsistent with the other parts, if sufficient remain from which the intention of the parties can be ascertained and identified, that part which is repugnant may be rejected altogether. This may be done in an action of ejectment, and resort to equity is not necessary. *Evans v. Greene*, 21 Mo. 208; *West v. Bretelle*, 115 Mo. 653, 22 S. W. 705. The word "west" in the foregoing description is obviously the mistake of the scrivener. It can and must be rejected, and there is still sufficient remaining to call for a closing of the survey by running to the S. E. corner of the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section No. 17, a fixed monument. No error occurred in disregarding the erroneous call for the course west.

2. As to the instructions. This was and is an action at law. The weight of the evidence will not be reviewed in this court if the declarations of law were correct. Moreover, the evidence has not been preserved. The recital is only that certain evidence tending to prove certain facts was offered by the respective parties. It will be observed that the first declaration only prayed the court to declare the law to be that, if the Shannon heirs claimed that the lands were purchased with the money of their mother by A. J. Shannon, and that the deed from A. J. Shannon to J. M. Shannon was made in pursuance of that claim, then the deed was not fraudulent, even though A. J. Shannon made it to

defraud his creditors. Conceding that if the land was bought with the mother's money it would avail under the pleadings, and in this form of action, it is plain that a mere claim would constitute no defense. It falls far short of an equitable defense. The court correctly refused to so declare the law. This vice runs through the second declaration of law asked by defendant also, and the court properly refused it. The court evidently found for plaintiff on one of two grounds,—either that the deeds were made by A. J. Shannon to defeat and defraud his creditors, with the knowledge and participation of defendants, or that James M. Shannon, prior to his deed to defendants, had conveyed the land back to A. J. Shannon, and thereby vested the land in A. J. Shannon, and nothing passed by James M. Shannon's deed to defendants. The evidence was ample to support either finding, and, as no error of law was committed, the judgment of the circuit court is affirmed.

SHERWOOD and BURGESS, JJ., concur.

THOMAS v. THOMAS et al.

(Supreme Court of Missouri, Division No. 2.
May 9, 1890.)

WILLS—CONSTRUCTION.

A testator gave to the six children of his son then living, to be paid to each on reaching majority, an undivided one-third of the residue of his estate, and provided that, should any of them die unmarried and without issue, or any other children be born to his son, all of his son's children should divide the third equally. *Held*, that distribution should be made only to the son's children living when the eldest became of age.

Appeal from circuit court, Adair county; Andrew Ellison, Judge.

Action by Hezekiah H. Thomas, a minor, by David N. Thomas, his curator, against Eugene D., Ellen M., and Vida V. Thomas, and Elizabeth Thomas, guardian and curator of Edna, Milton, and Ethel Thomas, minors. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

O. D. Jones, for appellant. H. F. Millan and Campbell & Goode, for respondents.

GANTT, J. This is an appeal from a judgment sustaining a demurrer to plaintiff's petition, which was filed in the circuit court of Adair county January 5, 1897. The petition is as follows: "Plaintiff, for his amended petition, states that he is an infant under the age of twenty-one years, and that David Nelson Thomas has been by the probate court of Adair county, Missouri, duly appointed curator of his estate, and is legally qualified as such, and that the said David Nelson Thomas is his father, and is also the father of defendants; that defendants Edna Thomas, Milton Thomas, and Ethel Thomas are infants; and that Elizabeth Thomas has

been by the probate court of Adair county, Missouri, duly appointed curator of their estates, and is legally qualified as such. Plaintiff, for his cause of action, says that on or about August 10, 1885, his paternal grandfather, John Thomas, departed this life, in the state of California, testate, leaving his last will and testament, bearing date of July 4, 1882; the instrument bearing date thereto attached, and marked 'Exhibit A,' which said instrument is made a part of this petition. Plaintiff says that said will was admitted to probate in the supreme court of Los Angeles county, state of California, and letters testamentary, with will annexed, were granted to Milton Thomas and H. S. Parcels, of Los Angeles county, California. Plaintiff says that the clause in said will is as follows, to wit: 'I have heretofore given large amount to each of my children, and consider it advisable to leave the balance of my estate to my relatives and descendants hereinafter named, to be paid to each upon his or her reaching his or her majority.' An after clause in said will is as follows, to wit: 'I give to the six children of my son David Nelson Thomas and his wife, Elizabeth, one undivided one-third of the residue of my estate. Should any of these children die unmarried and without issue, or any other children be born to my said son, I will that all of his children divide equally, share and share alike, the said one-third of my estate.' Plaintiff says that distribution and partition of the estate of the said John Thomas has been made, but without any provision being made for carrying out the trust created by said will, or preserving and protecting the property of said estate. Plaintiff states that five of the defendants, to wit, Eugene D. Thomas, Ella M. Thomas, Vida Thomas, Edna Thomas, and Milton Thomas, were living at the date of the execution of said will, and were a part of the six children of David Nelson Thomas referred to in said will; that Ethel Thomas, one of the defendants, was born after the execution of said will; that Nelson Thomas, one of the children of David Nelson Thomas living at the execution of said will, died on or about July —, 1885; that plaintiff has been born since the execution of said will, and since the distribution and partition of said estate, to wit, on the — day of —, 1896. Plaintiff says that at the date of the execution of said will, the said David Nelson Thomas was forty-five years of age; that Milton Thomas, son of testator, was sixty years of age; that Sarah Ellen Parcels, daughter of testator, had departed this life, she having died before the execution of said will. Plaintiff further says: That at the time of testator's death the said John Thomas was the owner of a large amount of real estate. That part of said real estate was situated in the state of California, and part of said real estate was situated in Adair county, Missouri. That there has been partition made of all said real estate, and a

one-third part thereof set off as the share of the children of the said David Nelson Thomas. The share of the Missouri real estate so set off for the said children is described as follows, to wit: The northwest one-fourth of the northeast one-fourth of section nine (9), township sixty-two (62), range fifteen (15) west; also, lots one and two (1 and 2), block eleven (11), city of Kirksville, Adair county, Missouri. That the value of said Missouri real estate so set off is about \$10,000.00. That defendants have sold part, if not all, of the real estate situated in California, and set off as the share of the children of David Nelson Thomas, and the proceeds thereof, amounting to about eighteen thousand dollars, are in the hands of defendants. Plaintiff further states that, under and by virtue of the provisions of said will, he is entitled to share equally with defendants in the one-third part of the residue of the estate of the said John Thomas, deceased, devised and bequeathed to all the children of David Nelson Thomas, and in the property hereinbefore described and set off as the share of said children, and the proceeds thereof now in the possession of the defendants. Plaintiff further says that possibility of issue is not yet extinct in the said David Nelson Thomas, and that, should any children be hereafter born to the said David Nelson Thomas, said children will be entitled to share equally with plaintiff and defendants in the said one-third of the residue of said estate. Plaintiff further says that upon the death of the said John Thomas, and upon the distribution and partition, the defendants took the one-third of the residue of said estate, with a trust attached in favor of any after-born children of the said David Nelson Thomas; that defendants are wasting and mismanaging said property; that they have mortgaged a part of said Adair county lands; that they have attempted to dispose of the same; that defendants deny the trust, or plaintiff's rights to share in said property, or the right of any child or children which may hereafter be born to the said David Nelson Thomas; that plaintiff has no adequate remedy at law. Wherefore the plaintiff prays the court to declare a trust in favor of plaintiff and any children hereafter born to the said David Nelson Thomas; to appoint some suitable and discreet person as trustee to take charge of and manage said land property until, in the course of events, the shares of takers is determined; to order defendants to pay into the court all moneys and funds received from said estate; and for all orders necessary to preserve said estate and property, and to carry out the provisions of said will, and for general relief." Defendants demurred to this petition for the reason that it did not state facts sufficient to constitute a cause of action, and because, upon the facts alleged, plaintiff could take nothing under said will. Upon the hearing of the demurrer the record states: "And for

the purposes of said demurrer the following agreed statement was made by the parties, to be considered as if stated in the petition, to wit: That at the date of the execution of the will of John Thomas, and the codicil thereto, Milton Thomas, testator's oldest son, was a man of large means; that Laura and Mary Thomas, daughters of said Milton Thomas, and legatees under said will, had reached their majority; that David N. Thomas was the youngest child of testator, and was shiftless, intemperate, and of uncertain habits, and possessed little or no property; that the persons mentioned and provided for in said will composed all of testator's descendants at the time of making the said will; that three of the six children of David N. Thomas, who were living at the death of the testator, had reached their majority before the birth of plaintiff; that in 1889 Elizabeth Thomas was divorced from David N. Thomas and was awarded the custody of their six children, and in 1895 David N. Thomas was remarried, the plaintiff herein being a child of said second marriage; that Elizabeth, the first wife of David N. Thomas, was born in the year 1846; that, in considering the demurrer, the court may consider the will, in connection with the petition."

A cursory reading of the two items of the will which we are called upon to construe would present very little difficulty, but, when carefully considered in the light of adjudicated cases, it will be found that few questions have given the courts more trouble. The bequest and devise in this case is to a class, of an aggregate portion of the testator's estate. No intermediate estate is created, and the legacy is not confided to trustees. Certain general principles are deducible from the decided cases: Where a legacy is given to a class of individuals in general terms,—as to the children or grandchildren of a person named,—and no period is fixed for the distribution, the time for distribution will be the death of the testator. *Viner v. Francis*, 2 Cox, Ch. 190; *Devisme v. Mello*, 1 Brown, Ch. 537; 2 Jarm. Wills (6th Ed.) *1010, and cases cited. Under this rule, children born or begotten prior to, and in esse at, the time of the death of the testator, will be entitled to share in the distribution; but those living at the execution of the will, who die before the testator, are excluded. But where the distribution is, by the terms of the will, deferred to some time after the testator's death, the gift will embrace, not only all the children or members of the class living at the death of the testator, but all those who shall subsequently come into existence, and are living at the time of the distribution. If the bequest is a present bequest, the beneficiaries who are in esse at the death of the testator will take vested interests in the fund, but subject to open and let in after-born children who shall come into being and belong to the class at the time appointed for the distribution. And where the distribution is postponed until the

attainment of a given age by the children, the legacy will apply only to those who are living at the death of the testator, and who shall come into existence before the first child attains the age named; this being the period when the fund is first distributable, with respect to any member of the class. Where the members of a class take vested interests in a legacy distributable at a period subsequent to the death of the testator, but subject to open and let in after-born children, they take their vested interests in their shares subject to the distribution of those shares as the members of this class are increased by future births; and, on the death of any of the children previous to the period for distribution, their shares will go to their respective representatives. *Tucker v. Bishop*, 16 N. Y. 402.

Recurring to the third item or clause of the will of John Thomas, the language is: "I give to the six children of my son David Nelson Thomas and his wife, Elizabeth, one undivided one-third of the residue of my estate. Should any of these children die unmarried and without issue, or any other children be born to my said son, I will that all of his children divide, share and share alike, the said one-third of my estate." In the preceding clause he had provided that his descendants should be paid their shares upon each arriving at his or her majority. Under a long line of authorities, it seems settled that the period of distribution fixed by the testator is the majority of the oldest child of David Nelson Thomas. The gift is a present one, but the time appointed for distribution is the majority of the oldest child. While, therefore, the children living at the time of the death of the testator took vested interests, they were subject to open and let in any and all after-born children to said David N. Thomas who might come into existence, and answer the description of being a part of all his children when his eldest child arrived at its majority. As the record discloses that three of the six children of David N. Thomas who were living at the death of the testator reached their majority before the birth of plaintiff, Hezekiah Thomas, he is excluded from sharing in the said legacy to his father's children.

Does this conclusion effectuate the intention of the testator? The general rule for the construction of a will is that the intention of the testator is to be collected, not from any particular or detached clause of the will, but from the whole taken together, and the general intent is to be preferred to a particular one. It is contended by plaintiff that the testator, by using the expression, "Should any other children be born to my said son, I will that all of his children divide equally, share and share alike, the said one-third of my estate," intended that all of the children of David Nelson Thomas, whether born and living at the time he directed the first distribution of this third of his estate, or subsequently, should share therein. In other words, the contention is either that the direc-

tion of the testator to distribute to each of his said grandchildren the portion given to him or her upon his or her reaching his or her majority must be ignored, as a minor consideration, and the division of this estate be deferred until the possibility of issue becomes extinct in David Nelson Thomas, which is not deemed to be possible so long as he lives (1 Washb. Real Prop. [5th Ed.] *109, § 36; *Rosier v. Graham*, 146 Mo. 359, 48 S. W. 470), or, if the legacies are distributed in accordance with the will, restitution by those who have received their legacies must be made from time to time as other children happen to be born afterwards,—an extremely inconvenient, if not impracticable, course. To make each part of the will consistent with the whole, the courts have sought to prevent a violation of the intention to give to all of the children by applying the word "all" and "children born" to all of those in esse at the period of distribution. This determination was reached from an anxiety to provide for as many children as possible with convenience. *Barrington v. Tristram*, 6 Ves. 348. This rule of exclusion of children born after the vesting of any of the shares in possession has been criticised. Lord Thurlow, in *Andrews v. Partington*, 3 Brown, Ch. 404, said he often wondered how it came to be so decided; there being no greater inconvenience, in his opinion, in case of a devise than in that of a marriage settlement, where nobody doubts that the same expression means all the children. This, in turn, has been answered with the remark that in marriage settlements one, at least, of the parents generally takes a life interest, so that the shares of the children do not vest in possession until the number of objects is fixed, and before marriage, as there are no children to whom it can be applied, it must mean all; and there is no place to draw the line in, nor any reason why it should be one more than another. It is a debt of nature, and all the children are entitled, whereas in a legacy like this it depends on the meaning of the words used. It is well, also, to state that this rule of exclusion applies only to the distribution of the principal where the aliquot share of each member of a class cannot be ascertained until the class is closed. It has been directly held that it has no reference to legacies of income. In *re Wenmoth's Estate*, 37 Ch. Div. 266. In *Ellison v. Airey*, 1 Ves. Sr. 111 (Lord Hardwicke), the rule was announced that where a legacy is to be distributed among a number, described as a class, all who answered the description at the time of distribution should take, to the exclusion of all who happened to answer it afterwards. In *Helasse v. Markland*, 2 Rawle, 274, the supreme court of Pennsylvania, in an opinion by Chief Justice Gibson, followed *Ellison v. Airey*, supra, and applied it to the construction of a will which gave the legacy to executors in trust to invest and apply to the support and education of all the children of the testator's son, Henry, "born and to be

born during their respective minorities, as they, the said trustees, shall think proper and most beneficial, and to divide and pay the principal in equal parts and shares to the said children when and as they severally and respectively arrive at the age of twenty-one years." Said Henry had five children living at time of testator's death, and five born afterwards, and it was admitted he might have more. All the children were living when the suit was commenced, and all except plaintiff were under the age of 21 years. It was held that none of the children could take who were not born when plaintiff arrived at the age of 21. It was further distinctly ruled that the words "born or to be born" were not sufficient in themselves to change the general rule, and let in children born after the first period of distribution. In *Curtis v. Curtis*, 6 Madd. 14, the residuary bequest was an annuity to the father, and remainder, subject to the annuity, to his children, when they attained 21; and it was held that all the children took vested interests when the eldest reached 21 years of age. *Ward v. Tomkins*, 30 N. J. Eq. 3. In *Hubbard v. Lloyd*, 6 Cush. 522, the bequest was "unto all the children of B., equally, when they shall severally attain the age of twenty-one years." It was ruled by Chief Justice Shaw that all the children born before one of them reached 21, although born after the death of the testator, would share alike, but those born after the first came of age were excluded. And the same ruling was made by Sir William Grant, as master of the rolls, in *Gilbert v. Boorman*, 11 Ves. 238. In *Andrews v. Partington*, 3 Brown, Ch. 404, Lord Thurlow, the lord chancellor, said: "Where a time of payment was pointed out, as where a legacy is given to all the children of A. when they shall attain twenty-one, it was too late to say that the time so pointed out shall not regulate among what children the distribution shall be made. It must be among the children in esse at the time the eldest attains such age." In the states in this Union, in addition to the cases referred to in Massachusetts, New Jersey, and New York, the supreme courts of South Carolina (*Swinton v. Legare*, 2 McCord, Eq. 440), Illinois (*Handberry v. Doolittle*, 38 Ill. 202), North Carolina (*Simpson v. Spence*, 58 N. C. 208), and Maryland (*Shotts v. Poe*, 47 Md. 513) sustain the same doctrine. There are also numerous cases, like *Storrs v. Benbow*, 2 Mylne & K. 46, affirmed in 3 De Gex, M. & G. 390, and *Townsend v. Early*, 28 Beav. 429, which hold and construe the words found in this will, "any other be born" to mean children born between the making of the will and death of the testator. The general rule being, then, so well established, and it being equally well settled that the use of the word "all," or "children born or to be born," does not vary the ordinary rule, we feel constrained to hold that plaintiff cannot take under the will of his grandfather, because he was born after

the period fixed by said testator for the distribution of the shares of the children of David N. Thomas, to wit, when the eldest reached the age of 21 years. The cases cited by appellant from our own Reports as to the vesting of remainders do not apply here. There is no remainder in the case. No intermediate estate is created by the will. That plaintiff answers the description of one of the class to whom the gift was devised could not be questioned, if he had been born prior to the majority of his eldest brother, but he was not born until after three of said children had reached their majority. We do not feel at liberty to reject a rule so long asserted and maintained by the highest courts of England and America, nor to discard the reasoning upon which those decisions stand. The judgment of the circuit court is affirmed.

SHERWOOD and BURGESS, JJ., concur.

FERRELL et al. v. GRIGSBY et al.

(Court of Chancery Appeals of Tennessee. Feb. 11, 1899.)

DEATH — PRESUMPTION — ADMINISTRATION — COLLATERAL ATTACK — ACTION ON BOND.

1. One who left the county where he and all his relatives lived over 20 years ago, and has never been heard from since, though inquiries have been made for him, is presumed to be dead, so that letters of administration on the estate are authorized on his estate.

2. The county court which granted letters of administration, being a court of competent and exclusive original jurisdiction in such matters, is conclusively presumed, on a collateral attack, to have acted, in issuing the letters, on sufficient information.

3. The presumption of death of a person from his absence unheard of for 20 years is not affected by the fact that within that time a suit to sell land proceeded on the theory that he was a nonresident by making him a defendant by publication.

4. The sureties on the bond of a clerk of a county court cannot defend against liability for proceeds of a sale of land officially received by him, on the ground of invalidity of the sale, in that one who was made a defendant by publication as a nonresident was dead, where his heirs are ratifying the sale by seeking to recover the fund.

5. Liability of a principal on an official bond need not be fixed before recovery against his bondsmen.

6. The principal in an official bond being dead, and his estate having been suggested insolvent, it is not necessary to bring his representative before the court, in order to fix the liability of his sureties.

Appeal from chancery court, Dickson county; A. J. Abernathy, Chancellor.

Bill by J. W. Ferrell, administrator of John Rollins, deceased, and others against W. W. Grigsby and others. Decree for complainants. Defendants appeal. Affirmed.

W. Blake Leech, for appellants. Morris & Cook, for appellees.

WILSON, J. The original bill in this case was filed to recover of defendants, as sureties of T. K. Grigsby, formerly clerk of the county

court of Dickson, a fund belonging to the estate of John Rollins, alleged to have been officially received by him, and which he failed to turn over to his successor when he retired from office. After the suit had been pending for some time, the two children of John Rollins were permitted to become parties complainant with Ferrell, his administrator. The fund sought to be recovered arose from a sale for partition in the county court of lands belonging to a bachelor brother of John Rollins while T. K. Grigsby was clerk of that court, the purchase money for which he collected. While he was in office he paid out to parties entitled all the purchase money, except the share going to John Rollins, amounting to the sum of \$106.50. John Rollins had left the country a number of years before this land of his brother was sold, and his whereabouts were unknown; nor was it known whether he was dead or alive. He left his wife and two children in Dickson county. He was made a party defendant by publication to the county court suit to sell the land of his brother for partition. We infer, and find from the record, that he left the county over 20 years ago, because of the infidelity of his wife. He has never been heard of since, although his son, one of the complainants, since his arrival at age, investigated, and others of his relatives have sought to find out what became of him, and whether he be dead or alive. His wife lived in adultery in Dickson county after he left; and, so far as is disclosed by the record, she is yet living in that county, although, from the only direct evidence in the case, her whereabouts, and whether she is living or dead, are unknown. It is apparent from the record that none of the complainants have made any efforts to locate her, or to find out whether she be dead or alive. T. K. Grigsby, while in office, declined to pay out the share of John Rollins, it is to be inferred from the record, because it was unknown whether said Rollins was dead or alive, and because he had no legal representative that he believed was authorized to receipt for it. Why he did not turn his share over to his successor when he retired from office is not clearly shown. The probabilities are that the matter was overlooked at the time. He died soon after retiring from office, and when this bill was filed his estate was being settled up as an insolvent estate under a suggestion of its insolvency by his administrator. Grigsby sold the land of the brother of John Rollins as clerk and special commissioner, and all the sureties on his bond as special commissioner of his court, while in office as county court clerk, are defendants to this bill, except one who had died, and whose estate had been suggested insolvent by his representatives. Complainant Ferrell, who married a half-sister of John Rollins a short while before this bill was filed, qualified as the administrator of said Rollins before the county court of Dickson county. Said Ferrell bought the lands of the brother of John Rollins at its

sale under the county court proceedings before mentioned. The foregoing presents all the essential facts appearing in the pleadings and evidence.

The bill was demurred to as follows: (1) The bill does not disclose the fact that John Rollins, the alleged intestate of complainants, is dead. (2) The bill, on its face, leaves the defendants to presume that complainants had the legal right to administer, but nothing is shown why the wife and those having the legal right to administer, failed to do so; nor is it shown that complainant is an heir or creditor, or that he was requested to administer. (3) The bill fails to aver any demand made of the administrator of T. K. Grigsby, the principal of defendants. (4) The bill fails to show that the principal of defendants had been sued, and the liability fixed, or that the principal had been exhausted. This demurrer was overruled, and the defendants answered. In their answer it is denied that John Rollins is dead, or that complainant Ferrell is the legal administrator of his estate. It denies that the land of the brother of John Rollins was legally sold, or that said Rollins was ever legally made a party to the suit under which it was attempted to sell the land of his brother. It insists that the wife of John Rollins is a necessary party to this bill, and also the administrator of the estate of T. K. Grigsby. In fact, all the averments of the bill are put at issue. Proof was taken disclosing the facts set out in this opinion, down to where it commences to state the substance of the grounds of the demurrer filed. The chancellor heard the cause upon the pleadings, proof, and exhibits on September 20, 1898. He gave the complainants a decree for \$106.50 and interest thereon from the filing of the bill; making together the sum of \$115.55, and the costs. The record discloses that the defendants prayed an appeal from this decree, and were given 30 days to execute an appeal bond. The record and order of the court do not show that the prayer for the appeal was granted, except in so far as we may infer that the prayer for the appeal was granted because the defendants were given 30 days to execute a bond. The appeal bond given does not recite that the appeal prayed was granted, but does recite that it is given "for the prosecution of an appeal prayed."

In view of this state of the record, it is a matter of great doubt, under the decisions of our supreme court, whether the case is legally before us, or has ever been removed from the chancery court. But we proceed to determine the questions raised by the assignment of errors, inasmuch as it is clearly inferable, we think, from the record, that the appeal prayed was, in fact, granted, and inasmuch as the parties have presented the case on its merits.

The errors assigned raise the following points in brief: First, that the liability of the principal on an official bond, or his administrator, must be fixed before a recovery can be

had against his bondsmen; second, that the record fails to show any legal ground for the appointment of the complainant Ferrell as administrator of John Rollins; third, that it was error to decree a liability against defendants as sureties on an official bond, when John Rollins, the real party entitled to the fund sought to be recovered, was not before the court; fourth, that it was error to decree a fund to be paid to the administrator of John Rollins, when the record shows that said John Rollins is a nonresident of the state, and not dead; fifth, that it was error to decree the fund to be paid to the complainant administrator because, if his administration is proper, the county court sale of the land, from which the fund sought arose, was illegal. This assignment seems to be rested upon the theory that John Rollins was made a defendant by publication to the county court suit under which the land of his brother was sold in 1892, and that therefore he was alive then; and, if alive then, he is, in contemplation of law, in the absence of proof to the contrary, alive now. In other words, as we understand counsel in this assignment of errors, the point raised is that, if, as the county court proceedings show, John Rollins was alive and a nonresident in 1892, thus making the county court sale valid, there is no presumption of law, from the lapse of time since then, that he died, and, this being so, the administration granted upon his estate is valid; and if, on the contrary, he was then dead, the county court sale was void.

We dispose of the assignments of error in the reverse order of their statement above. As before stated, the proof indisputably discloses that John Rollins left Dickson county, where he and all of his relatives lived, over 20 years ago, and that he has never been heard of since, although inquiries have been made for him. This being so, the presumption of law is that he is dead, and the letters of administration granted on his estate were authorized by law. In addition, the letters were granted by the county court, a court of competent, exclusive, and original jurisdiction of such matters in the first instance, and it is conclusively presumed, in a collateral attack, to have acted, in issuing the letters, upon information legally justifying their issuance. *Brien v. Hart*, 6 Humph. 131; *Townsend v. Townsend*, 4 Cold. 70 et seq.; *Varnell v. Loague*, 9 Lea, 160; *State v. Anderson*, 16 Lea, 321, 331, and cases cited; *Franklin v. Franklin*, 91 Tenn. 120, 128, 18 S. W. 61; *Railway Co. v. Mahoney*, 89 Tenn. 311, 15 S. W. 652. Moreover, if the county court suit to sell the land of the brother of John Rollins did proceed on the theory that he was a nonresident and alive in 1892 by making him a defendant by publication, this fact does not destroy the legal presumption, or mean that it could not arise, that he was dead when letters of administration to complainant on March 3, 1897, were issued. The letters say, on their face, that it was made to appear to the court that John Rollins was dead, or had been missing

for 20 years. Besides all this, his only heirs, now of age, are ratifying the sale by seeking to recover his part of the fund arising from the sale, and so, if he was then dead, the attempt to bring him before the court as a live man then worked no harm of which the defendants can complain. This error is overruled. The fourth error assigned is not well taken, and is overruled, and for the reasons, in effect, stated under the fifth. As a matter of law, under the facts of this case, John Rollins is dead, and was dead when the letters of administration were issued to complainant Ferrell. Mrs. John Rollins had been living away from her husband in adultery for years before the fund sought to be reached here came into existence. She was not entitled to it. In addition, the interest of John Rollins in the real estate of his brother, upon the death of the latter, descended to the said John, if he was living, and, if he was dead, it descended to his children. The evidence, and the presumption of law applicable to it, are that John Rollins was dead when his brother's land was sold, and, this being so, the interest of John passed to his children, the complainants here. The second error has been disposed of by what has been said under the fourth and fifth. The first error is not well taken, and is overruled. *T. K. Grigsby* was dead, and his estate had been suggested insolvent. It was not necessary to bring his representative before the court, in order to fix the liability of the surety. There is no error in the decree of the chancellor, and it is affirmed, with costs. The other judges concur.

Affirmed orally by supreme court, March 8, 1899.

PARMAN et al. v. MARSHALL et al.
(Court of Chancery Appeals of Tennessee. Feb. 11, 1899.)

SALES—PASSING OF TITLE—EXECUTION.

Where the owner of an undivided half interest in an ungathered crop of corn sells his interest to a creditor at a certain price per barrel, and agrees to gather and haul the corn to the vendee's mill, weigh it, and, when the amount is ascertained, receive credit on his debt therefor, until it has been gathered, weighed, and delivered, title does not pass, and a judgment creditor of the seller may levy on the standing corn.

Appeal from chancery court, Williamson county; H. H. Cook, Chancellor.

Bill in equity by W. B. Parman and J. C. Parman, as partners, against J. K. Marshall and others. From a decree against them in favor of defendant Marshall, complainants appeal. Affirmed.

M. M. Hearn and H. H. Lane, for appellants. Eggleston & Eggleston, for appellees.

WILSON, J. This bill was filed November 15, 1896, by W. B. Parman and J. C. Parman, partners in the mill business, under the firm

name of Parman Bros., to enjoin a sale under an execution levied by a constable upon the undivided half interest of G. O. Vaughn in a field of growing corn. The bill avers that October 24, 1896, complainants bought the undivided interest of George O. Vaughn in a field of corn then matured, but standing ungathered, on the premises of one Dr. W. A. Pascal, and that thereafter the defendant Nevils, a constable of Williamson county, levied an execution, issued November 14, 1896, on a judgment of J. K. Marshall, obtained before a justice of the peace, on said corn. The bill avers that, by virtue of this purchase of the interest of Vaughn in said corn, October 24, 1896, the title thereto was vested in complainants, and that they had a superior right to the execution creditor under his levy made thereafter. The bill sets out the circumstances under which complainants purchased the corn thus: That George O. Vaughn was indebted to complainants before and on October 24, 1896, and that on this date complainant W. B. Parman was on a note of said Vaughn in the National Bank of Franklin, and Vaughn came to him for the purpose of inducing him to renew the note, which matured on that day, and said to him that the bank would not renew unless \$20 was paid on the same, and that he did not have this sum, and besought said complainant to assist him in renewing the note by loaning him the \$20 and again indorsing for him. That he at first declined to do this, and thereupon said Vaughn said that if complainants or one of them would pay the \$20, and go his security on the note again, he had 20 or 30 acres of corn on Dr. W. A. Pascal's place, lying in the Fourteenth civil district of Williamson county, and that he owned a one undivided half interest in this corn, and that he would sell complainants the corn at \$1.10 per barrel, and said that, if they would take the corn at this price, it should not cost them one cent to gather and haul it to the mill, that he would gather and haul same for complainants to the mill, and that all that was over after the \$20 were paid to renew the note in bank complainants could enter as a credit on their account against him for \$529.75, and that complainants, being anxious to get a payment on their debt, purchased the whole of the corn, at \$1.10 per barrel. That this trade was made October 24, 1896, said Vaughn agreeing to gather and haul said corn to them as above stated, when complainants would weigh the same, and credit the value of the same at the price above stated. Complainants paid the \$20, and renewed the note. It was distinctly and positively agreed and understood that the corn was complainants' from the day the trade was made, and that defendant had no further interest in the same. Both parties knew that there was not enough to pay all of complainants' debt, and that there was not over about 120 barrels, one-half of which belonged to Vaughn; that is, about 55 or 60 barrels in Vaughn's one-half. Since the sale Vaughn has

no interest in the same, but the title passed to complainants, and this was the intention of both parties when the trade was made. The bill then avers the recovery of the judgment, February 2, 1894, by defendant Marshall against G. O. Vaughn before a magistrate, and the issuance of an execution thereon November 14, 1896, and its levy on the undivided interest of said Vaughn in the field of standing corn. It also alleges that the constable will proceed to sell the corn levied upon by him as the property of Vaughn, unless restrained, and an injunction is asked for the purpose of restraining further action under the execution levied by him. It is asked that complainants be permitted to give a proper bond, and to be allowed to gather and use said corn. An injunction issued under the prayer of the bill. Defendants demurred to the bill (1) because the bill shows on its face that the sale of the corn in question to Parman Bros. was not complete, so as to vest the title to said corn in them; (2) that, under the allegations of the bill, it is shown that the title to the corn was in G. O. Vaughn at the time of the levy made by J. M. Nevils, he not having divested himself of the title by doing all that he was to do in order to complete the sale of the corn under his executory contract with Parman Bros. The chancellor overruled the demurrer, and the defendants answered. We need not go into a statement of the details and averments of the answer. It is sufficient to say that they deny that complainants had been vested with the title to the corn before the levy of the execution under the executory contract between Vaughn and Parman Bros. alleged in the bill. They insist that they acquired the better right to the corn by virtue of the levy of their execution. It is asked that the answer be taken as a cross bill, and that upon the hearing they be given a decree against complainants and the sureties on their injunction bond for the value of the corn levied upon, and all proper damages sustained by reason of the injunction sued out by complainants. Proof was adduced by the parties consisting of the depositions of complainants, George O. Vaughn, defendant Marshall, the constable, and several other parties. The chancellor heard the cause, December 23, 1897. He held, in effect, that complainants did not acquire a complete title to the corn levied upon by virtue of their contract entered into with Vaughn, October 24, 1896, and that under the contract and agreement Vaughn was to do other things in connection with the corn before a perfect title thereto vested in complainants; that defendant Marshall, by virtue of the levy of his execution upon the corn before it was delivered, weighed, and received at the mill of complainants, acquired a superior right. He thereupon gave defendants a judgment, under their prayer therefor, against complainants, and the sureties on their injunction bond, for the sum of \$28.60, with interest amounting to \$1.85,—together, the sum of

\$30.45. He taxed complainants with the costs. He gave complainants a decree against G. O. Vaughn for the amount of their account, with interest, making together the sum of \$571.

Complainants prayed and were granted an appeal from that part of the decree of the chancellor giving judgment against them in favor of J. K. Marshall for the value of the corn and costs of the case. They have assigned numerous errors. They all raise the question, under different aspects, that the sale of the standing crop of corn by Vaughn to Parman Bros. was complete before the levy of the execution in favor of Marshall, and hence, as a matter of fact as well as of law, that by the sale the title to the corn was divested out of Vaughn and vested in the vendees. It is urged, in support of this proposition, that the evidence clearly shows that, after the agreement on the part of Parman Bros. to advance Vaughn \$20 and renew his note in bank, and to take the corn at \$1.10 per barrel, and credit the account of Vaughn with the purchase price after the repayment of the \$20, the sale was complete and the title vested. In other words, it is insisted that Vaughn, under the contract of sale, had nothing else to do, and that his subsequent agreement to gather and deliver the corn at the mill of Parman Bros., where it was to be weighed, and the amount ascertained, was no part of the contract of sale, and that it was a pure gratuity on his part, prompted by his sense of gratitude to Parman Bros. for past kindnesses. The weight of the proof does show that when Vaughn proposed to let Parman Bros. have his undivided interest in the field of corn at \$1.10 per barrel, if they would pay \$20 on his note in bank, and renew it for the balance for him, and permit the corn to repay the \$20, and the balance of its price to be credited on a past-due account he owed Parman Bros., and the latter accepted or agreed to the proposition, nothing was said about who was to gather and deliver the corn, nor was anything said about where it was to be received or measured. After the proposition to sell on the terms above stated was made and accepted, and while the parties were going from the mill of Parman Bros. to the bank to arrange about the note, Vaughn said to Mr. Parman that, as the firm had been kind to him, he would gather and deliver the corn at the mill, where it could be measured, if they would wait for a short while, until he finished sowing his wheat. This seems to have been assented to by Parman Bros. But conceding that, under the proof, nothing was said about who was to gather and deliver the corn in the original proposition made by Vaughn to sell, and which was accepted by Parman Bros., and that it was the understanding between the parties that the corn, upon the acceptance of this proposition, was to be the corn of Parman Bros., and that such a contract in reference to a standing crop of corn put it, before it was gathered and meas-

ured, beyond the right of creditors of the vendor to seize it by attachment or the levy of an execution, the complainants cannot recover in this case, and for the reason that, upon the assumptions of fact above stated, we have a case made by the proof that is not presented in the bill.

The original bill states, almost in direct terms, that Vaughn was to gather and deliver the corn at the mill of his vendees. It is urged upon us that the bill was amended to correct this statement, and that the amendment is shown in the original bill by being underscored in red ink. We copy the relevant parts of the bill, and as amended, as it appears in the record, italicizing the amendments: "Complainants would respectfully state and show unto your honor that defendant Geo. O. Vaughn had, prior to October 24, 1896, been getting meal and corn from complainants, and also, from time to time, getting money from complainants, and on October 24, 1896, he owed complainants the sum of \$529.75. At this time defendant Vaughn had a note in the National Bank of Franklin, and W. B. Parman, one of complainants, was his security, and said note was then due, and the bank refused to renew the note, which was about \$175.19, unless Vaughn would pay \$20 on the same. Vaughn came to complainants, and besought them to assist him in renewing this note. Complainants told him they could not do so. Vaughn said he did not have the \$20 to pay, but said, if complainants or one of them would pay the \$20 and go his security on the note again, that he had 20 or 30 acres of corn on Dr. W. A. Pascal's place, lying in the Fourteenth civil district of Williamson county, and that he owned a one undivided half interest in this corn, and that he would sell complainants the corn at \$1.10 per barrel, and *said that, if they would take the corn at this price, it should not cost them one cent to gather and haul the same to their mill, that he would gather and haul the same for complainants to their mill, and that all that was over, after paying the \$20 paid to renew the note in bank, complainants should enter as a credit on the \$529.75.* Complainants, being anxious to get a payment on their debt purchased the whole of the corn, at \$1.10 per barrel. *This trade was made October 24, 1896,* said Vaughn agreeing to gather and haul said corn to them as above stated, when complainants would weigh the same, and credit the value of the same at the price above stated. Complainants paid the \$20, and renewed the note. It was distinctly and positively agreed and understood that the corn was complainants' from the day the trade was made, and that defendant Vaughn had no further interest in the same. Both parties knew that there was not enough to pay all of complainants' debt, and that there was not over about 120 barrels, one-half of which belonged to Vaughn; that is, about 55 or 60 barrels in Vaughn's one-half. Since the sale Vaughn has no interest in the same, but the title pass-

ed to complainants, and this was the intention of both parties when the trade was made." The bill then states the rendition of the judgment in favor of Marshall, the issuance of an execution thereon, and its levy upon the corn, and then says: "Said corn is yet un-gathered and in the open field. *The corn was matured at the date of complainants' purchase.*"

We take it that it is plain, from these averments, that Vaughn was to gather the corn and deliver it at the mill of Parman Bros., where it was to be weighed, and, when the amount was thus ascertained, Vaughn was to have a credit upon his past-due account owing his vendee for the price, less \$20, which was to be retained to reimburse Parman Bros. for that amount advanced when the note was renewed in bank. Under the case made in the bill, even as amended, as is above indicated, Vaughn had not done all, that he was to do in order to divest himself of the title and vest it in Parman Bros. Moreover, it is apparent, we think, from the evidence of both Vaughn and Parman, that it was their understanding that Vaughn was to gather and deliver the corn at the mill of the latter, and that Parman was to pay a specified price per barrel, according to what it measured at the mill. Under the bill, the case is clearly controlled by the case of *Williams v. Allen*, 10 Humph. 337. In that case the trial judge had instructed the jury "that if the plaintiff bought a parcel of corn from defendants, which was in pens, separate and distinguishable from all other corn, at the price of one dollar per barrel, and there was nothing to be done by defendants but to measure it with plaintiff, and deliver it, the property in the corn vested unconditionally in the plaintiff, and the risk was, of course, his." And Judge McKinney, delivering the opinion of the supreme court, held that this instruction was incorrect, saying that the general principle is well established that no sale is complete, so as to vest an immediate right of the property in the buyer, so long as anything remains to be done as between the buyer and seller. He further said: "Where goods are sold by number, weight, or measure, so long as the specific quantity is not separated and identified, the sale is not completed, and the goods are at the risk of the seller,"—citing *Story*, Cont. § 800. He proceeds: "The contract may be complete and binding in other respects, but the property in the goods remains in the vendor, and they are at his risk, if any act is to be done by him before delivery, either to distinguish the goods, or ascertain the price thereof. Though the subject-matter of the contract be clearly ascertained, yet, if the price cannot be calculated until the parties have weighed the goods, no property therein passes to the buyer till such act be done." *Bush v. Barfield*, 1 Cold. 93; *Bond v. Greenwald*, 4 Heisk. 460. We might cite numerous other cases, but the foregoing, in our opinion, control the present case. There is no error

in the decree of the chancellor, and it will be affirmed, with costs. The other judges concur.

Affirmed orally by supreme court, March 8, 1899.

DUNN v. DUNN et al.

(Court of Chancery Appeals of Tennessee. Feb. 11, 1899.)

EQUITY—REHEARING—IMPROVEMENTS.

1. A petition to rehear must be filed during the term at which the decree complained of is rendered.

2. A petition to rehear cannot be entertained after an appeal has been allowed, and appellant has taken the oath prescribed for poor persons in lieu of giving bond.

3. Where a wife expends her separate means on the improvement of land of her husband's father, on the faith that he would allow her an interest therein, and on his advice, she will be protected, to the extent that the improvements enhance the land.

Appeal from chancery court, Sumner county; J. S. Gribble, Chancellor.

Bill by Mrs. M. T. Dunn, by her next friend, against M. C. Dunn and others. There was a decree for defendants, and complainant appeals. Modified.

C. R. Head and J. J. Turner, for appellant. W. C. Dismukes and Ed. T. Seay, for appellees.

WILSON, J. This bill was filed November 5, 1895, by Mrs. Dunn, by next friend, against her husband, some of her children, and the executor of A. G. Dunn,—this executor being also trustee under the will,—to assert her rights to a tract of land set out in the third clause of the will of said A. G. Dunn, or, if this could not be done, to ascertain the cost of the improvements she had put on the land, and have the same declared a lien on it. The pleadings and evidence disclose that the husband of complainant, the defendant M. C. Dunn, is a dissipated man, and has been for a number of years, and that, growing out of this and other conditions, they became estranged. They have five children, three boys and two girls, all of them of age, except two, and one of these two is about of age. It appears that, in the unfortunate differences and estrangement existing between their parents, the children have taken the side of their mother. M. C. Dunn is the son of A. G. Dunn, who died testate in Sumner county in 1895, at the advanced age of 90. A. G. Dunn made a will in October, 1884. It was prepared by Judge East, of Nashville. There is no complaint as to it. Its third clause is as follows: "I give to Blackburn H. Dunn, as trustee for my son Michael C. Dunn and his wife, during their natural lives, and on their death to such children as they may have surviving (in case one or more of their children should die leaving a child or children, then such grandchildren is or are to take the in-

terest of its parents in the following estate): [The land is then described.] Such trustee is to hold the title to said property, and the same is to be occupied at discretion of Michael C. and wife, and said trustee is not to be made responsible for rents unless he should collect the same; and said trustee, Michael C., and his wife are empowered to sell said land. The same is situated in Sumner county, Tennessee, in civil district No. 5." In June, 1893, old man A. G. Dunn made a codicil to this will. It was also prepared by Judge East, in compliance with the request and directions of the old gentleman, contained in a letter sent to him through his son Michael (the defendant M. C. Dunn). Said codicil is as follows: "I, Albert G. Dunn, make the following codicil to the above and foregoing will, dated 13th day of October, 1884, and declare the same a part thereof. I revoke item three of said will, and make the following disposition of the property mentioned therein. I will and devise the same to Blackburn H. Dunn in trust for use and benefit of my son Michael C. Dunn for and during his natural life, and on death of said Michael C. the same is to go to his children equally, and to the descendants of any children of his that may die during his lifetime, per stirpes, with power in the trustee and said Michael to sell the property herein conveyed, and reinvest the proceeds in other real estate upon like trusts as are herein conveyed, and to make sales and reinvestments of any property into which the money is invested, but always to reinvest in other real estate upon similar trusts." It is thus seen that complainant, Mrs. Dunn, wife of defendant Michael C. Dunn, is by the codicil cut off from any interest in the land devised in the third item of the will. Under that item of the original will she is given a life estate in the land jointly with her husband. After the death of old man A. G. Dunn, his will, with the codicil above quoted, was probated in common form before the county court of Sumner county. His son Blackburn H. Dunn, being named as executor, qualified as such, and also as trustee under the codicil.

The insistence of Mrs. Dunn, in her bill and evidence, is that she expended, in building, from her separate means, a dwelling and other improvements on the land devised in the third item of the will of old man Dunn, about \$1,400, upon his explicit promises and declarations, and upon his advice, that his will, as to said third item, should stand, so that she would have a home thereon during her life, and her children a home thereon after her death; that these expenditures for the improvements were made during the old man's life, upon the faith of his promises and declarations aforesaid, and under his advice; that without them, and without her reliance on them, she would not have expended in improvements on the land all her separate means; and that, in view of these facts, it would be unjust and inequitable to permit her

to be thrown out of her home, under the operation of the codicil, revoking entirely, as to her, the devise under the third clause of the will, on the faith of which she expended on the land all her estate. Her further insistence is that, in the event the court cannot give her the right to the property as provided in the third clause of the will of A. G. Dunn, she should, under the facts, be given a decree for the cost of her improvements, declaring the same a lien upon the land. It further appears that the improvements were put upon the property in or about 1887. It should be further stated that in the bill it is averred that complainant had always, in connection with some of her children, operated and controlled the land since she made the improvements; that her husband had taken no control or management of the same; that owing to his dissipated habits, etc., he had furnished them no support; and that since the death of old man Dunn, and the probate of his will, Blackburn H. Dunn, executor and trustee under the will, was demanding rent, and threatening to turn her out, and claimed the growing crops; and an injunction is asked to restrain the trustee and her husband in this regard. The bill also sets out the sources whence complainant claims she got the means used in putting the improvements on the property. The bill also, in effect, charges that the codicil was the result of the age and feebleness of old man Dunn, and the improper influence of M. C. and B. H. Dunn. The defendants, except the minor children of complainant (that is, the husband of complainant and Blackburn H. Dunn), in their answer, deny all the grounds of equity and relief averred. Avoiding details, their contention, in substance, is (1) that the improvements were not erected on the land devised in the third clause of the will of A. G. Dunn, but upon a separate piece, of five acres, that the old man had deeded to M. C. and his wife, the complainant; (2) that the improvements were not paid for by the separate means of complainant, and that she never had any separate estate; (3) that A. G. Dunn made the codicil to his will of his own volition, that he was entirely competent to do so, and that they had nothing to do with it.

A large volume of proof was taken in the cause. It is conflicting in its relation to certain issues, or to matters bearing upon the issues in the case under the pleadings, and exhibits a sad case of estrangement between man and wife and between father and some of his children. It is especially conflicting as to whether the improvements alleged to have been built by complainant are on the tract of land devised in the original third item of A. G. Dunn's will, or upon a separate piece, of five acres, that the old gentleman deeded to his son M. C. and his wife, the complainant. It is also conflicting as to whether the complainant, Mrs. Dunn, had a separate estate or means, and as to whether she expended them in making improvements on the faith that

the third item of the will of A. G. Dunn would be permitted to remain by him as a part of his will, or whether she made the expenditures on the faith, or in view, of his deed to the five acres. The chancellor heard the case upon the pleadings and proof October 1, 1897, at a special term of his court. He held that the allegations of the bill were not sustained by the proof, and dismissed it at the cost of complainant. He further held that during A. G. Dunn's life he executed a deed in fee simple to M. C. Dunn and wife to five acres of land, and that the improvements paid for, and spoken of in the case, were put on said five acres. But, in the opinion of the court, there was doubt as to the correct boundaries of this five acres on which the improvements were placed; and thereupon, it appears from his decree, it was agreed by the parties in open court that the master might select two disinterested freeholders, who, in conjunction with the county surveyor, were to go upon the premises, and survey, and determine the boundaries and corners of, this five acres of land; and, if they could not find or ascertain the boundaries and corners, then they were to survey, and fix the corners of, five acres of land that included the improvements. He further ordered that the master take proof, and report to the succeeding term of the court what damages had been sustained by M. C. Dunn and his trustee, B. H. Dunn, by reason of the injunction issued under the bill, and the amount of rent due M. C. and his trustee during the pendency of the suit. He directed, however, that this report be held up in case complainant prayed and obtained an appeal to the supreme court. From the record it appears that on October 2, 1897, during the special term, and the day after the above decree was rendered, the complainant prayed and was granted an appeal to the supreme court from the decree dismissing her bill and taxing her with the costs, and she was given 10 days in which to give bond, or to take the oath prescribed for poor persons; and the order or decree granting the appeal recites that, if the bond or oath is not made in the time given, the appeal is not granted. The record discloses that Mrs. Dunn took the oath to perfect the appeal October 9, 1897. But it appears that on December 13, 1897, at the regular time for holding court, Mrs. Dunn, by next friend, filed a petition for a rehearing of the case. In this petition she alleges several grounds why, in her opinion, a rehearing should be granted. It is alleged in it that the court adjourned before its decree aforesaid went down, and that the minutes of the term at which it was rendered had not, when this petition to rehear was filed, been signed. She insists that in the decree no recovery was given her for her money spent in improving the place, and that the decision was given under a misapprehension of the facts. The petition sets out the evidence of two witnesses, tending to show that the improvements were put on the five acres deeded by A. G. Dunn

to her and her husband, and insists that these witnesses were mistaken, and that it is clear the court based his decree upon their evidence. She files with her petition the affidavits of several parties to show that the evidence of the foregoing witnesses on the point above was incorrect. The rehearing is asked that she might take the depositions of the parties, and show that the improvements were not placed on the five acres deeded to her and her husband by A. G. Dunn, but upon the tract devised in the third item of the will of A. G. Dunn. The record discloses, under bill of exceptions, that the case, upon the application for a rehearing, was tried upon the petition of complainant and the affidavits of the several parties, which are set out. At the regular December term following the special term at which the above decree was entered the chancellor held that the application came too late, and dismissed the petition on this ground. It seems that there was a special term of the chancery court of the county held in February, 1898; and the cause came on for hearing on the report of the commissioners appointed under the decree in October previous to report the boundaries and corners of the five acres deeded by A. G. Dunn to complainant and her husband, and the exceptions thereto. These exceptions were overruled, and the report confirmed. The report of these commissioners simply sets out, by metes and bounds, five acres of land, including the improvements. It does not say whether or not it is the five acres deeded by A. G. Dunn to complainant and her husband, or whether it is a part of the tract devised by the third item of the will of A. G. Dunn. The exceptions filed to the report are not in the record.

The errors assigned here, in substance, are: First, that the chancellor erred in not decreeing that complainant was entitled to a life interest in the tract of land devised in the third item of the original will of A. G. Dunn, and that under the facts the codicil to the will could not operate to defeat her rights fixed by said clause of the will; second, that the court erred in not holding that the improvements were erected, out of her separate means, on the tract devised in the third clause of said will, on the promises of A. G. Dunn, and the reliance of complainant thereon, that said third clause of the will would not be changed so as to affect the rights of complainant as fixed under said clause; third, that the court erred in not granting her a rehearing, under the averments of her petition therefor, and the affidavits accompanying it.

In dealing, first, with the last error assigned, we find that the petition to rehear was filed at a term of the court subsequent to the term at which the decree complained of, and sought to be reheard, was rendered. We take it, that we need not cite authorities to the proposition that a petition to rehear must be filed during the term at which the decree complained of is rendered. In addition, it appears from the record that an appeal had

been prayed and granted at the term at which the decree was rendered, and that the appeal had been perfected before the petition to rehear was filed at the subsequent term. This being so, the case, as to the decree complained of, was in the supreme court, and the chancery court had no jurisdiction in respect to it. It results that there is no error in the action of the chancellor in dismissing the petition to rehear.

The main question in the case is as to whether the complainant, with her separate means, erected the improvements on the tract of land devised in the third clause of the will of A. G. Dunn, upon the promises and declarations of said Dunn that the said clause of his will should stand, and the property therein devised be a home for complainant during her life, if she would expend her separate means in erecting the improvements thereon. We find as facts: (1) That Mrs. Dunn, in contemplation of law, had a separate estate, in money, when these improvements were erected on the land, in 1887. (2) That the improvements were erected with the knowledge and assent of old man Dunn, and that they are on the tract of land devised in the third clause of the will, or that, at least, complainant was induced by him to believe that the improvements were being placed on said tract. (3) That said improvements erected or constructed by her separate means cost about \$1,000, and at least not less than \$750. (4) That there is no definite proof as to the extent to which the tract of land was enhanced in value by the improvements, the case having been apparently deserted for the purpose of meeting other issues in the case. (5) That old man A. G. Dunn did deed a five-acre piece of land, in fee simple, to his son M. C. and his wife, the complainant; that this deed was never acknowledged, but was delivered to complainant; that she sent it to her brother, in Louisville, who died soon thereafter; and that said deed has never been found or heard of since. (6) That old man A. G. Dunn was competent to make a will at the time he made the codicil to his original will, herein quoted, and that he was not unduly influenced thereto by either M. C. or B. H. Dunn. We find, in this connection, that the state of feeling existing between complainant and her husband, and him and some of his children, was exceedingly unpleasant, and that on one or more occasions his children, or some of them, were quite rude in their conduct towards him, when he would come home in a drunken condition, and in a mood to make the situation exceedingly disagreeable. It is, moreover, shown that on one occasion, and perhaps two, he was refused admittance to the house, and that thereupon a neighbor carried him over to his father's, or he went himself. It appears, and we find as a fact, that M. C. Dunn reported to his father this treatment of him by his wife and children, and that thereupon the old gentleman made the codicil to his will for the purpose of certainly securing a home

for his son M. C. (7) That the complainant expended her means in procuring improvements, at the cost stated, upon the tract of land devised in the third clause of the will, upon the faith that old man Dunn would allow her an interest therein as fixed by the third clause of his will, and upon his advice to so expend her means, we think is reasonably certain from the evidence. If correct in this, and as to other facts found, it follows, we think, that she is entitled to protection. We are of the opinion, and so hold, that she is entitled to have the cost of her improvements, to the extent of which they enhance the value of the land, declared a lien thereon, and the property sold, if necessary, to discharge it. It does not appear with sufficient certainty what the exact sum expended by her in making said improvements was, nor does it appear to what extent these improvements enhanced the value of the land.

The decree of the chancellor will be modified as herein indicated, and the cause will be remanded to the court below for proof, and a report, as to the extent to which the improvements put by complainant on the land enhanced its value; and a decree therefor will be given the complainant, and the same declared a lien upon the land. The costs of the appeal will be paid by the defendant M. C. Dunn and by his trustee, B. H. Dunn; the latter, out of any trust fund in his hands. The costs below will be taxed as the chancellor hereafter, upon the coming in of the report, may adjudge. Under the facts of the case, the court being of opinion that old man A. G. Dunn intended this place, with the improvements placed thereon by complainant, as a home for herself and children, she should not be charged with rents as an offset against the enhanced value of the property covered by her improvements. The other judges concur.

Affirmed orally by supreme court, March 15, 1899.

BOZE et al. v. NICHOLS et al.

(Court of Chancery Appeals of Tennessee.
Nov. 19, 1898.)

FRAUDULENT MORTGAGE—PURCHASE BY OTHER CREDITORS.

One to whom a debtor gives a mortgage on his stock in trade, but who purposely withholds it from registration, and by agreement allows the debtor to remain in possession selling and disposing of the goods, whereby the mortgage is fraudulent, can have no relief in equity against one who, without notice, buys and obtains possession of the goods, though all the latter gives therefor is credit on an antecedent debt.

Appeal from chancery court, Smith county; T. J. Fisher, Chancellor.

Bill by H. C. Boze, trustee, and others, against H. B. Nichols and others. Decree for complainants. Defendants appeal. Reversed.

Garrett & Gold, for appellants. W. V. Lee, for appellees.

BARTON, J. This was a replevin bill filed by the complainants to recover a lot of personal property, consisting of a stock of goods located in the town of Elmwood, Smith county, which goods had been sold and conveyed by H. A. Nichols to his brother Harrison Nichols. The complainants claim under a deed of trust made by H. A. Nichols. The defendant Harrison Nichols claims under a bill of sale and conveyance to him of the goods. The facts are as follows: H. A. Nichols was a merchant doing a general merchandise business in Elmwood, Smith county, and on December 31, 1896, executed to H. C. Boze, as trustee, to secure the Bank of Carthage the payment of a note for \$220.36 of that date, due one day after date, a deed of trust on his stock of goods. The trustee was authorized to take immediate possession of the stock of goods, sell the same by ordinary daily sales for 30 days for cash, and the remainder of the stock at auction, to pay, first, the expenses of the trust, and then the debt secured by the deed of trust. Such were the provisions of the trust deed. But, at the time of the execution of the deed of trust, there was an agreement and understanding between the officials of the bank and H. A. Nichols that he (H. A. Nichols) should remain in possession and control of the goods, selling and disposing of them in the ordinary course of business, replenishing and carrying on his business as usual, and he was to make monthly payments to the bank. Under this arrangement, H. A. Nichols did remain in possession and control, selling and replenishing, and conducting his business as usual, until February 9, 1897, when he sold, conveyed, and turned over the stock of goods in question to his brother H. B. Nichols, for the sum of \$300, for which he was given a credit on a note held by H. B. Nichols against him. The deed of trust given to the bank had been retained by it in its custody, and was not registered until two days after the property had been sold and turned over to H. B. Nichols, the registration being at 8 p. m. on February 11, 1897. The weight of the proof is, as we find, that the brother H. B. Nichols, the purchaser of the property, had no notice of, and did not know of, the existence of the deed of trust made to secure the bank. The bank's debt secured by the deed of trust was a note at one day, as stated, which was given in renewal of a former note which had been given to cover an overdraft. But, at the time the last note secured by the deed of trust was given, it was given under a threat made by the officers of the bank to take steps for collection, and was an extension of the debt in consideration of the security given. It is a contested question of fact as to whether, at the time the deed of trust was given, there was an agreement for the maker, H. A. Nichols, to

remain in possession, and an agreement not to register the deed of trust. We think the weight of the evidence is that there was an agreement that H. A. Nichols might remain in possession and control, buying and selling as usual. In any event, he was allowed to do so, with the understanding that he was to make monthly payments, and the deed of trust was held up and not registered, with the view of not embarrassing H. A. Nichols. So, the case presented is where the bank purposely holds up and fails to register a deed of trust, and allows the mortgagor to remain in possession and control, selling and disposing of the stock of goods mortgaged, and doing business in the usual way, believing that the registration of the deed would bring Nichols' creditors down on him. During the continuance of this condition, H. B. Nichols became the purchaser of this stock of goods, and went into possession thereof, in ignorance of the deed of trust given to secure the bank, and of the bank's rights. But the only payment made by him for the stock of goods was by giving the vendor, H. A. Nichols, a credit for \$300 on an antecedent and existing debt, evidenced by note for \$880.62, made on March 8, 1891, and due at one day. Immediately after the sale and conveyance, to wit, on February 12, 1897, the replevin bill in this case was filed, and bond given in the penalty of \$800. The goods were delivered by the sheriff, under the writ of replevin, to the trustee, H. C. Boze. Defendants H. B. and H. A. Nichols answered, substantially setting out the facts as we have above stated; also filing cross bill raising question of usury, but which was subsequently settled, and need not be further noticed. We should state that in the answer H. B. Nichols pleads and relies upon the doctrine of innocent purchaser in due course of trade without notice. Proof was taken, the chancellor rendered decree in favor of complainants, giving as a reason for his decree that, by the deed of trust in question, the title to the property in question was vested in H. C. Boze, the trustee, and did not pass by the bill of sale to H. B. Nichols. On the stated facts above set out, we are of the opinion that the complainants are not entitled to the relief granted by the chancellor in this case; for, entirely aside of the question of innocent purchaser, the facts in the record, as we find them, show an arrangement made between the bank and H. A. Nichols which was fraudulent in its character as to all other creditors, and contrary to public policy. While the fraudulent character of the transaction does not appear on the face of the deed of trust, as a matter of fact it existed. The bank, having a deed of trust on the stock of goods consumable in their use, purposely withholds the deed of trust from registration, and by agreement allows the mortgagor to remain in possession, selling and disposing of them. H. B. Nichols, having a debt against his brother, which he

might have reduced to a judgment, and have levied on the goods, in ignorance of the facts buys the stock of goods, goes into possession, giving a credit on his debt. And even if it be true that, having taken the stock of goods in payment of an antecedent debt, he cannot rely on the doctrine of an innocent purchaser, still, we think it likewise true that, the arrangement between H. A. Nichols and the bank having been fraudulent and contrary to public policy, the complainants must be repelled from this court, and cannot be granted any relief. The decree of the chancellor will be reversed, and bill dismissed. Complainants will pay all the costs.

WILSON, J., concurs.

Affirmed orally by supreme court January 9, 1899.

BRADLEY et al. v. FREED et al.
(Court of Chancery Appeals of Tennessee.
Nov. 19, 1898.)

PAYMENT—EVIDENCE—DECLARATIONS.

1. Where complainant merely denies that defendant paid him certain money, as defendant testified, the testimony of the latter cannot be supported by a previous consistent statement made by him to another.

2. In support of defendant's contention that he made a payment to complainant, testimony of witnesses to particular instances in which complainant had forgotten payments made to him is not admissible.

Appeal from chancery court, Smith county; T. J. Fisher, Chancellor.

Bill by D. A. Bradley and others against J. M. Freed and others. Decree for complainants. Defendant Freed appeals. Affirmed.

John S. McMurphy and James T. Miller, for appellant. Ed T. Seay, for appellees.

WILSON, J. The bill in this case was filed to collect a balance alleged to be due on two purchase-money notes given by defendant Freed for a tract of land by an enforcement of a vendor's lien. It appears that Freed had sold a part of the land to his co-defendant Wright, and it is averred in the bill that the complainants had not waived or released their lien on the part so sold, and it is prayed that the whole tract be sold, if necessary, to pay the balance due from Freed. The chancellor declined to order a sale of the part of the tract sold by Freed to Wright, but ordered a sale of the part still retained by Freed, to pay the balance found by him to be due on the notes of Freed sued on. The action of the chancellor in declining to decree a sale of the part of the tract conveyed by Freed to Wright was not appealed from by the complainants, and we need not further notice this feature of the case.

The contest is over a credit of \$500 claimed by Freed. The chancellor disallowed this credit, and Freed appealed. Freed insists

that he paid this \$500 to complainant D. A. Bradley, acting for himself and wife, and as the agent of the other complainants, in March, 1892. This is denied by Bradley. The question is purely one of fact. The substance of the error assigned by Freed to the holding of the chancellor disallowing his contention is that the weight of the proof sustains his proposition that the payment was made between the 1st and 15th of March, 1892. He produces no receipt, or written evidence, signed by any one showing its payment. He is not certain whether he paid it in money, or by check on a bank. No check is shown in the evidence. He does, however, exhibit a statement prepared by Bradley, as he claims, in May, 1894, and this statement includes a credit of \$500 of March 1, 1892. Bradley admits that this statement is in his handwriting, but says, in substance, that it was put in to show the balance due upon the basis of Freed's contention, and that it was to stand if he produced any receipt or evidence, aside from his own remembrance, showing its payment; otherwise, it was not; and that, at the time, Freed said he was arranging to borrow the money to pay off the notes, and wanted to know the sum he must obtain to do so, upon the theory of finding satisfactory evidence that he had paid the \$500. Of course, if credit is allowed, it must be upon the idea that the weight of the evidence shows the payment. Pleading the payment, the burden is upon Freed to prove it. He affirms, and Bradley denies; and, taking each party to be equally entitled to credit, the case of payment is not sustained.

Freed swears that the money with which this payment was made was received from the sale of a lot of corn shipped to a Nashville firm. The deposition of William Freed, a brother of the defendant, was taken in the case. He testifies, in effect, that he and his brother were partners in business in Nashville; that they dissolved March 23, 1892; that a few days after this the defendant, his brother, came to his new business place, and told him that he would need money badly the next day, when the witness said, "What's the matter? I thought you got a whole lot of money just yesterday from corn,—a whole lot of corn down;" and he (the defendant) said, "Yes, that money is gone already; I have given that money to Bradley." All the material or relevant part of the deposition of this witness was objected to, and the objection sustained. The defendant also introduced several witnesses, who, in their depositions, testified to several instances in which they had paid money to Bradley, which he seemed to have forgotten entirely, and which he would not acknowledge until his receipts were produced, or such other evidence as he could not deny. This class of evidence was objected to, and the objection sustained. The action of the court in suppressing the evidence indicated was excepted to by defendant, and his exceptions properly preserved by bill of

exceptions. One or more of these witnesses testify, in substance, that Mr. Bradley had to some extent a defective memory in relation to business transactions. We do not understand from the record that the chancellor declined to consider this class of evidence. His ruling, as we understand it, excluded the testimony of witnesses giving particular instances in which Bradley had forgotten payments made to him, or that money had been left with him. Error is assigned here to the ruling of the chancellor in suppressing the evidence above indicated. It is insisted that the testimony of William Freed proving that defendant told him, in March, 1892, that he had paid Bradley the corn money, is competent, as it is proof of a previous consistent statement made by the defendant. *Queener v. Morrow*, 1 Cold. 125, *Dossett v. Miller*, 3 Sneed, 73, and *Bank v. Robinson*, 1 Baxt. 484, are cited in support of this insistence. A close and careful examination of these cases will show, we think, that they do not support the position of appellant. In the case of *Dossett v. Miller*, supra, Judge Carothers, in delivering the opinion of the court, announced the principle that, when the credit of a witness is attacked upon the ground that he had made statements inconsistent with those he makes in court, it is competent to sustain him by showing that at other times, and on other occasions, he had made statements consistent with those he makes in court. Says Judge Carothers: "Upon this question there is a very great conflict in the authorities. In 1 Greenl. Ev. § 469, such evidence is declared to be inadmissible, 'unless where a design to misrepresent is charged upon the witness, in consequence of his relation to the party or to the cause, in which case, it seems, it may be proper to show that he made a similar statement before that relation existed.' We think the case put by Mr. Greenleaf above is a proper one for the admission of previous consistent confirmatory statements, but would also allow it in all cases where the evidence given in court is impeached by proving former contradictory statements. It might be dangerous to further enlarge or relax the rule, as corroborative statements are of easy manufacture, and may be made the means of imposition by bolstering up false testimony." In *Queener v. Morrow*, supra, Judge McKinney, in delivering the opinion of the court, says: "It seems that, ever since the time of Lord Mansfield, the former consistent statements of a witness, to rebut his contradictions, are rejected by the English courts, except in a very few particular cases, though formerly it had been held otherwise by some of the authorities. It is laid down in 3 Starkie, Ev. p. 1758, that former statements of a witness, impeached, are not admissible for the purpose of confirmation, 'except in particular instances, where the statement was made at a time when the witness labored under no interest or influence to misrepresent the fact.' This rule has been departed from

by several of the American courts. Some of these cases go to the length of holding that such evidence is admissible wherever the witness is sought to be impeached by reason of contradictory statements, and others would seem to carry the doctrine still further. The case of *Dossett v. Miller*, 3 Sneed, 72-76, sanctions the principle that evidence of previous consistent statements is admissible, in all cases, where the testimony of the witness, given in court, is sought to be impeached by proof of contradictory statements. * * * The reason for rejecting confirmatory evidence of former declarations, according to some of the English authorities, is the seeming incongruity of holding that a representation, without oath, can be any confirmation of a statement upon oath. But there would seem to be some show of reason in the doctrine that where it was attempted to establish that the statement on oath is a fabrication of recent date, or where a design to misrepresent, from some motive, is imputed to the witness, or where it is sought to destroy his credit by proof of contradictory representations, evidence of his having given the same account of the matter, at a time when no motive of interest existed, and no influence had been brought to operate upon him, to misrepresent the facts, ought to be received, because it naturally tends to inspire increased confidence in the truth of the sworn statement. To this extent, we think, the principle is reasonable and just." *Bank v. Robinson*, supra, goes no further. The opinion of Judge McFarland in that case reaffirms the principle of the two preceding cases. The same question arose again in the case of *Hayes v. Cheatham*, 6 Lea, 1, 10. Judge Cooper, in the last-named case, thus states the rule: "The rule is that where it is attempted to be established that the statement of a witness on oath is a recent fabrication, or where it is sought to destroy the credit of the witness by proof of contradictory representations, evidence of his having given the same account of the matters at a time when no motive existed to misrepresent the facts ought to be received, because it naturally tends to inspire confidence in the sworn statement." It is thus seen, we think, that the facts of this case do not call for the application of the rule of evidence invoked. There is no reversible error in the action of the chancellor excluding this evidence.

The question, at last, comes to the point of settling the controverted matter upon the evidence of Bradley and Freed, interpreted in the light of the situation of the parties and the attendant circumstances. It is urged, in behalf of appellant, that he never took receipts for any payments made to Bradley, and such seems to be the fact. But we are unable to see how this avails him. He should have done so, unless he was willing to rely upon the honesty and accuracy and the correctness of the memory of Bradley. Courts cannot, in the absence of reasonably clear evi-

dence, and the applicability thereto of established law, always relieve parties from the results of their loose business methods. Defendant relies upon payment, and pleads it. It is his duty to prove the payment to the reasonable satisfaction of the court, by a preponderance of the evidence. We take it, from this record, that he and Bradley are equally credible as witnesses, and, this being so, the weight of the evidence does not lean to his side because he neglected to take receipts for payments which are not disputed. The other payments appear to be credited on the notes, and it is clear that Bradley could as readily have neglected to have credited these payments and denied their existence as the one in dispute. The case, as to the point in dispute, is, under the evidence, evenly balanced, and, this being so, the appellant must fail, as the burden is on him.

The chancellor heard the case March 9, 1898. He gave complainants a decree for \$1,693.62, and taxed defendant Freed with the costs, and declared the recovery a vendor's lien on the tract of land sold to Freed, except that sold by Freed to Wright, and ordered his master to sell the land upon which the lien was declared. The land ordered to be sold is particularly described in his decree. A decree will be entered here for the amount of the decree of the chancellor, with interest, and the same will be declared to be a vendor's lien on the land ordered to be sold by the chancellor; and unless the recovery herein granted is paid in 90 days from this date, with interest, the clerk of this court will, after advertising the time and place of sale and giving notice as required by law, sell said land for cash, free from the equity of redemption, to the highest and best bidder. He will report his action in the premises to the next term of this court. He will sell the land at Dixon Springs, Smith county, Tenn. The cost will be paid by the defendant Freed, or out of the proceeds of the sale. The other judges concur.

Affirmed orally by supreme court, December 19, 1898.

CUSTER et al. RUSSEY et al.

(Court of Chancery Appeals of Tennessee. Nov. 5, 1898.)

EXECUTION—SALE—REDEMPTION—ESTOPPEL—APPEAL.

1. An execution creditor purchased land of his debtor at execution sale for one dollar, the judgment being returned unsatisfied. Thereafter a third person purchased the land from the judgment debtor under an agreement to pay the judgment, which he did, to the execution debtor, paying a sum he and his attorney supposed was a full discharge of it, which sum the purchaser at execution sale accepted. *Held*, that he could not thereafter acquire legal title under a sheriff's deed, and assert it against the purchaser paying the judgment.

2. The failure of the prevailing party to appeal from a part of a decree against him seemingly inconsistent with the part favorable to

him does not affect his rights under the decree, there being nothing in the pleading to justify such unfavorable portion.

Appeal from chancery court, Franklin county; T. M. McConnell, Chancellor.

Bill by John Custer and another against C. B. Russey and another. There was a decree for complainants, and defendants appeal. Affirmed.

J. K. P. Pearson, C. B. Russey, and A. S. Colyar, for appellants. Banks & Embrey, for appellees.

WILSON, J. The original bill in this cause was filed August 1, 1896, by the complainants to recover possession of a tract or parcel of land in Franklin county. Complainant Custer claims title to the land in the original bill under a deed thereto from Peter G. Sells and wife, dated May 26, 1895, and acknowledged and registered the same day. Complainant George Edwards, it is averred in the bill, was a tenant of Custer, occupying this land; and it is alleged that Edwards recently, before the filing of the bill, temporarily moved out of the house on the premises, when defendant Russey, by his tenant, defendant Wilson, entered upon the premises, and forcibly opened the doors of the house and took possession. It is also alleged that Russey, within the last few days, had procured a deed to the land, claiming to have purchased it for the sum of one dollar. The procuring of this deed is alleged to be the result of a fraudulent scheme between Russey and Wilson, concocted and carried out to harass complainant Custer. It is also averred that complainant Edwards instituted an action of forcible and unlawful detainer against Wilson, before a justice of the peace; that this suit was heard by the justice, July 24, 1896, when it was decided in favor of complainant; that Russey was preparing to take the case to the circuit court by certiorari proceedings; that this course was taken to further annoy complainant, and to enable Wilson to continue in the possession, and waste and destroy the crops of complainant growing on the premises. After averring, in general terms, that there was fraud and collusion between Russey and Wilson, and that the deed to the land to Russey should be declared fraudulent, the bill prays for an injunction to restrain Wilson from entering on the land, and Russey from proceeding further under the detainer suit decided by the justice; that the deed to Russey be declared fraudulent, and a cloud upon the title of complainant; and that complainant be decreed to be the owner of the land. A limited injunction issued enjoining defendants, simply, from using, interfering with, or destroying any crops of complainant growing or standing on the premises. The writ of injunction issued, and it is agreed that it was served.

Russey answered the bill August 12, 1896. With his answer, he exhibits a deed to 130 acres of land made to him by the sheriff of the county. This deed is dated July 2, 1896, and

appears to have been acknowledged and registered the same day. This deed recites that Russey recovered a judgment against Peter G. Sells before a justice of the peace, December 5, 1893, for \$6.10 and costs; that an execution issued on this judgment, February 10, 1894; that it went into the hands of a constable of the county; that, said Sells having no personalty subject to levy, the execution was levied upon certain real estate, which is described in the deed; that after this levy the papers in the cause were certified into the circuit court of the county, which court at its April term, 1894, entered an order for the sale of the land; that an order for its sale issued to the sheriff, April 18, 1894; that after advertising and giving notice, as required by law, the sheriff sold the land, June 4, 1894, for cash, when it was bid in by Russey at the price of one dollar, which he paid; and that the process was returned into court unsatisfied July 17, 1894. To carry out and perfect this sale, the sheriff executed the deed to Russey. Russey avers, in his answer, that the tract of land conveyed to him as aforesaid by the sheriff covers and embraces the land claimed by complainant in his bill, and which complainant bought from Sells about September 1, 1895, over a year after he purchased at the sheriff's sale. He alleges that he had put Wilson in possession as his tenant, and agreed for him to rent and cultivate the place for 1897, but that he made no claim to the crops on the land for the year 1896. He denied all charges of fraud and collusion between him and Wilson. He denies that any doors or locks were broken in putting Wilson in the house on the premises, and avers that when his tenant entered no one was on the premises or in the house. He denies, generally, all charges of fraud or wrong, and says that, as this is a pure action of ejectment, he relies upon his perfectly legal title acquired under the sheriff's deed. Wilson, also, answered the bill. Aside from admitting that he was in possession, and the pendency of the unlawful detainer suit, he puts in issue all the averments of the bill. He also pleads, in defense, the pendency of the two suits, but alleges that, as the question is one of title to the land, he has no interest in the suit.

On January 28, 1897, complainant filed an amended bill. After repeating, in brief, the substance of the original bill, and that Russey had obtained the small judgment alleged by him against Peter G. Sells, that an execution issued thereon, and its levy, and the subsequent condemnation in the circuit court, and the purchase of the land at one dollar at the sheriff's sale by Russey, this pleading makes the contention that the execution was not levied on the land, that no levy was written on the execution, but that there appeared among the papers in the case a slip of paper on which there purports to be written a levy on the land. This amended bill avers that Sells, May 28, 1895, sold this land to complainant; that, under the terms of the sale, complainant was

to pay off the Russey judgment; that complainant and Sells that day, May 28, 1895, did pay off said judgment, which then amounted, with interest, to \$6.50, and the costs, amounting to \$18, and that these two sums were paid into the office of the circuit court clerk in full satisfaction of the said judgment and costs; that the records of the said clerk's office show said satisfaction on that date; and that Russey had receipted the clerk for the principal and interest of his judgment. It avers that the deed obtained from the sheriff by Russey was fraudulent and void, because there was no unsatisfied judgment for it to stand upon, and no consideration for the same. It further avers that complainant and Sells had paid to the clerk \$26.56, when, in point of fact, the judgment and costs amounted to only \$24.50. This pleading further alleges that the land is worth \$1,500, and that, if Russey failed to receive the one dollar bid by him at the sheriff's sale, it was purely an oversight on the part of the attorneys of complainant, who looked up the matter; that it was the purpose of Sells, complainant, and their attorneys, to pay every cent of the claim of Russey; that it is believed that this was done; and that, in view of these facts, it would be unconscionable to permit Russey to get this tract of land for the small consideration of one dollar, and it is asked that the deed of the sheriff to Russey be set aside as fraudulent. It is further alleged that the sale to Russey is void because there is no return of the officer on the execution, and no indorsement on said execution, and this being so renders the deed void.

Russey demurred to the amended bill on the following grounds: (1) The amended bill is devoid of equity, in that it shows that complainant was a purchaser pendente lite, and hence cannot complain of anything on the record. Moreover, he cannot attack the record in the circuit court in a collateral way, and is bound by the same. (2) Having a deed with covenants of warranty, complainant must rely upon his warranty of title. (3) Complainant, by the showing of the amended bill, purchased pendente lite, and, being affected with notice of the lis pendens, he cannot complain, and, having failed to redeem the land in time, he has no rights, legal or equitable, to it.

This demurrer was overruled, and defendant Russey answered. In his answer he relies upon his purchase at the sheriff's sale and the sheriff's deed. He denies that complainant intended to redeem the land. He avers that, when the time for redemption expired, he sent word to complainant Custer to come and pay him the dollar, with interest, and that if he did not he would take the deed from the sheriff and take possession of the land; that, instead of complying with this request, he refused, and sent word to respondent "to go ahead, pop his whip; he had paid all he intended to pay." The answer also says: "Thereupon this respondent got like the tick, and thought if complainant could stand it re-

spondent could, and he put Wilson in the house, the same being vacant." He says he was in Winchester and vicinity all the time, and was willing and tried to get complainant to redeem the land, but that he would not pay, and he alleges that complainant did not pay the sum stated in his bill to the clerk of the court, but paid it, through his attorney, to the sheriff on an execution from the circuit court, in satisfaction of the judgment and costs, and that there never was any redemption of the land, in respect to the sum bid for it at the sale made by the sheriff. He presents, with his answer, the record from the court, and avers that he had done no wrong, and had not tried to deceive and mislead the court, as had complainant in his effort to make the impression that he (respondent) had acted the Shylock, and was trying to get his (complainant's) land for one dollar. In this connection, he avers that, when he bought at the sheriff's sale, the land was sold to him subject to a lien on it for some \$500 or \$600, in favor of A. J. Skidmore, executor of Fielding Rice, in the case against Peter G. Sells, by virtue of a decree of the supreme court of the state, and that, instead of respondent trying to get the land of complainant for a dollar, the latter was endeavoring to get his (respondent's) land for nothing.

We need not notice the answer of Willson to the amended bill further than to say that he relies upon the fact that the unlawful detainer suit, which it seems the injunction in the case did not interfere with or stop, was dismissed in the circuit court as to complainant Custer, and that he (Willson) has no interest in this suit, except as the tenant of Russey.

A considerable volume of proof was taken in the cause pending the development of the case in the court below. Much feeling seems to have been engendered, and one or more affidavits were filed which are rather spirited in their charges. These charges relate, in the main, to certain depositions that were taken, and the methods adopted in connection with them. We are unable to see, however, that they shed much light upon the vital issues in the case, as it is presented to us in the record. The cause was heard before Chancellor McConnell on the pleadings and proof, February 2, 1898. He decreed that complainant had a valid title to the land in controversy, and was entitled to its possession. He held that the deed from the sheriff to Russey was fraudulent and void, and canceled it as a cloud upon the title of complainant. He further decreed that there was some doubt as to whether Russey had received the dollar he bid and paid the sheriff at the latter's sale of the land, and thereupon gave Russey a decree against Custer for the dollar and interest thereon amounting to 22 cents, and ordered an execution to issue against Custer in favor of Russey for \$1.22. He taxed Custer with one-fourth of the costs, and Russey with the other three-fourths. He ordered a writ to issue, if necessary, to put Custer in possession of

the land. The decree of the chancellor recites that the defendant excepted to his rulings permitting the master to amend his caption and certificate to the depositions of John Custer and George Edwards after the trial had begun, these depositions having been excluded at the July term, 1897, and the same not having been refiled. He excepted to all the rulings of the chancellor, and to his final decree, except in so far as it taxed Custer with one-fourth of the costs, and prayed and was granted an appeal to the supreme court. The errors assigned are, in substance: First. Neither the bill nor the decree in the case shows any ground to set aside the deed of the sheriff to Russey. Under this assignment, the insistence is that the general charge in the bill, that "said deed is a fraudulent scheme on the part of Russey and his co-defendant, Wilson, to harass and annoy your complainant," cannot be made the basis for avoiding a deed for fraud. In other words, the contention is that, in the absence of the averment of the facts constituting fraud, the ground for relief based on fraud is not laid, and that fraud, as the basis of relief, does not exist by virtue of its mere general averment. Second. That the chancellor evidently based his decree upon the small consideration of one dollar paid by Russey at the sheriff's sale, when, as is insisted under this assignment, the only question in the case is the legal title, and that the matter of consideration cuts no figure at all in the case. Third. The record shows a perfect legal title in Russey, which the chancellor apparently overlooked, or, perhaps, disregarded, because of the small consideration paid by Russey.

The controlling facts in this case are simple and few, as we view them in this record, and one of the dominant facts, as we think, controls its proper disposition. This, to our minds, would be clear beyond all doubt if the decree of the chancellor against Custer in favor of Russey for \$1.22, the sum, with interest, bid by Russey for the land at the sheriff's sale, was out of the way, and from which part of his decree complainant did not appeal. The difficulty in dealing with the case as it is before us comes from the fact that this part of the decree seems inconsistent with the finding of the decree in another part of it, that the sheriff's deed to Russey was fraudulent, and therefore should be set aside, and that complainant had a valid and perfect title to the land. The simple, plain facts, as we find them in the record, are: (1) That December 5, 1893, Russey obtained a judgment against Peter G. Sells before a justice for \$6.10 and costs. An execution issued on this judgment, and went into the hands of a constable, February 10, 1894. This official levied it February 12, 1894, on the place or farm on which Sells lived, known, or recited in his levy, as the "Fitzpatrick Place." This levy, as it states, was made subject "to the claim or lien of Fielding Rice's estate, and now in favor of Jack Skidmore, executor." The pa-

pers in the case, after this levy, were sent to the circuit court, and this court, at its April term, 1894, entered an order of condemnation, and the land was directed to be sold. An order of sale issued from this court, and the sheriff sold the land under it, June 4, 1894, when Russey bid it in at one dollar, which sum he paid to the sheriff. The sheriff made Russey a deed to the land, July 2, 1895. (2) Fielding Rice recovered, December 21, a decree in the supreme court against Peter G. Sells for \$447.47, and the decree of that court recites that this recovery was given for the annual interest on the amount of money paid by the complainant Rice for the Fitzpatrick tract of land and the Samuel Looney tract, described in the record, and it was further adjudged in the decree of the supreme court that during the lifetime of the complainant in the case the defendant therein should pay him annually the interest on the purchase price of said two tracts of land. It was further adjudged that the recovery above, of \$447.47 and accruing interest, was a lien upon the two tracts, and the land was ordered to be sold if the recovery was not paid in 90 days. The supreme court in this decree, also, gave judgment against Sells for \$225.95. This recovery, it seems, was not made, in the decree, a lien on any land. The cause was remanded to the chancery court of Franklin county for further proceedings to carry out the decree of the supreme court. It seems that an execution issued from the chancery court of Franklin county against Sells to collect a judgment of \$233.30 recovered by Rice, June 30, 1893. This execution issued January 4, 1894. It was levied on the Fitzpatrick place, March 14, 1894. The sheriff, it appears, sold the land, under this levy, April 23, 1894, when it was bid in by A. J. Skidmore, executor of Fielding Rice, at the price of \$266.30. It also appears that, after the cause above referred to was remanded from the supreme court, the death of Fielding Rice was suggested in the lower court, and admitted, and that the cause was revived in the name of said Skidmore, as his executor. No deeds were made, so far as is disclosed by the record, under the above sale to Skidmore, executor. (3) When Custer came to buy this land from Sells, May 28, 1895, the fact that the claims in favor of Russey and of Skidmore, executor, rested upon it, was known and recognized, and it was the purpose and intention of all parties to pay off and discharge these claims in full, so that Custer could get the land disincumbered of all claims against it. (4) The weight of the proof, read in the light of the situation of the parties and the circumstances surrounding them, and the end that was sought, leads us to the conclusion, and we so find as a fact, that Russey was cognizant of this purpose, and that he was in the office of the solicitors of complainant when his purchase from Sells was finally agreed upon, including the obligation of Custer to pay his claim. The circumstances go strongly to show that he was cog-

nizant of the sum they expected was necessary to discharge his claim and the court costs incident to it. So far as is disclosed by the record, neither his attorneys, nor Russey, thought of or mentioned the one dollar he bid at the sheriff's sale. We think the memory of Russey is in fault when he testifies, in substance, that he was not in or about the office of the attorneys of complainant when his purchase, and its terms, etc., were finally agreed upon and consummated. We are, moreover, not at all satisfied that the sum paid in or to the office of the circuit court clerk, or rather to the sheriff, was not sufficient to pay off the whole claim of Russey, including the dollar that he bid at the sheriff's sale. But, aside from this, if we are correct in our finding of fact—and we are reasonably satisfied that we are—that Russey knew that Custer purchased the land, and that he knew he was to pay off the claims on the land, and that his claim was taken into consideration, and was supposed to amount to so much, which sum was paid by Custer, it is determinative of the case. It would be contrary to all sound rules of equity, in this view of the case, to permit him, after the parties had paid in all that they supposed was due him, including the cost, and he had accepted the benefits of such payment, to resurrect this one dollar paid at the sheriff's sale, and make it the legal and equitable basis for a deed to the legal title to this land, which he knew was purchased by complainant, and which he knew complainant thought he had fully paid for, including the debt on it due the defendant. While it is true that, in an action of ejectment, the legal title is alone involved, it is still true that, in a court of equity, a defendant will be precluded from asserting a mere dry legal title, which, in equity and good conscience, he is not entitled to present, as a defense to a better claim and right on the part of the other party. Under the facts of this case, as we view them, the defendant is and ought to be estopped from asserting the legal title apparently vested in him by the deed of the sheriff. If he knew that complainant was purchasing this land, and that in this purchase he was to discharge the debt due the defendant, and did pay a sum which he and his attorney thought was a full discharge of such debt, and the benefits of which payments the defendant accepted, all of the elements of an estoppel exist. Of course, we would not hold that the mere purpose and intention of a party, unaccompanied by acts, can defeat the operation or the force of a legal title to the land, but certain acts, the benefits of which are accepted by a party, will estop him from acquiring the legal title, in contravention of the rights of the party, the benefit of whose payments and acts has been accepted.

In thus disposing of the case, we have not deemed it necessary to discuss the effect of the sale of this land made by the sheriff to Skidmore, executor, before the sale made by him to the defendant Russey. The control-

ling question of fact above indicated, in our opinion, settles the case.

We may remark, in passing, that we do not see, under the shape of the pleadings, just how the chancellor could render a decree against the complainant in favor of Russey for \$1.22, the amount of the bid made by the defendant at the sheriff's sale, with interest thereon. We presume, simply, as the chancellor so says in his decree, that he was in doubt as to whether the sum paid by complainant covered the debt, interest, and costs in the case of Russey against Sells, together with the dollar he bid at the sheriff's sale. We do not think the failure of the complainant to appeal from this part of the decree interferes with his rights, as affirmatively decided by the decree of the chancellor; that is, his holding that the complainant had a valid title to the land and was entitled to its possession. It is apparent that the chancellor gave this decree for \$1.22 in order that all the possible equities of the defendant might be met. There is nothing in the pleading to justify it. The result is that the decree of the chancellor will be affirmed, with costs. The other judges concur.

Affirmed orally by supreme court, December 20, 1898.

WILLIAMS et al. v. CLARK.

CLARK v. WILLIAMS et al.

(Court of Chancery Appeals of Tennessee.
Nov. 19, 1898.)

CHANCERY SALE—PROPERTY SOLD—CONSTRUCTION OF BILL.

1. A bill by the widow and heirs of deceased, alleging the insufficiency of the personal property to pay the debts of the estate; that a portion of the real estate should be sold to pay the same, and for division among the owners; that this consisted of lands on which were "180 good, merchantable poplar trees, 72 ash trees, 16 cucumber trees, ——— walnut trees, and a great many fine chestnuts and oak trees"; and that it was to the interest of all parties "to sell all merchantable poplar, cucumber, ash, and walnut timber off of said land, for the purpose of paying said debts, and for a division of the remainder of the proceeds of said timber among said heirs,"—is brought for sale, not of the number of trees mentioned, but of all the merchantable poplar, cucumber, ash, and walnut trees on the land, and the statement of the number found was mere inducement, for information of the court, to show that there would be enough timber to be sold, without its being necessary to sell the land.

2. Where a bill is filed for sale of all the merchantable trees of certain kinds on certain land, though stating the number of such trees, and the decree of sale orders all the merchantable trees of such kinds on the land sold, and the master does so, and makes his report to that effect, and the court affirms it, but divests and vests title only to the number of trees mentioned in the bill, though there are more than that number of merchantable trees on the land, so that the divesting and vesting of title are unavailing, for indefiniteness, the sale is complete as to all the merchantable trees of the kinds named, and all the beneficial interest passes to the purchaser.

Appeals from chancery court, Putnam county; T. J. Fisher, Chancellor.

Bill by J. C. Williams and others against T. J. Clark, and cross bill by him against complainants. Decree for complainants, and defendant appeals. Modified.

Algood & Finley, for appellant. T. L. Denney and A. W. Boyd, for appellees.

NEIL, J. The original bill was filed to recover of the defendant the value of certain timber alleged to have been cut by him from the land described in the bill,—more than was sold to him. The defendant filed an answer, insisting that the timber complained of was included in the purchase made by him from the complainants; and he also filed the answer as a cross bill, and asked for a decree passing title to all the timber purchased by him, or a credit upon his purchase-money notes, on grounds which will be hereinafter more particularly referred to. The sale was made in certain judicial proceedings, the substance of which will now be stated: On the 9th of November, 1895, the widow and heirs at law of Henry Williams, deceased, filed their bill, ex parte, in the chancery court of Putnam county, alleging, in substance, that the personal assets of the estate were insufficient to pay the debts thereof, and that a portion of the real estate should be sold to pay debts, and for division among the owners, and that this consisted of 300 acres of land situated in Putnam county (describing it); that the widow was entitled to a life estate therein. And the bill continues: "That said lands are wild, mountainous lands, and principally valuable on account of the fine timber thereon. That there are now standing on said land 180 good, merchantable poplar trees, 72 ash trees, 16 good cucumber trees, ——— walnut trees, and a great many fine chestnut and oak trees, and a large quantity thereof. Complainants also state and charge that it would be vastly to the interest of all the parties concerned to sell the merchantable poplar, cucumber, ash, and walnut timber off of said land, for the purpose of paying said debts, and for a division of the remainder of the proceeds of said timber money among said heirs; giving to complainant Sarah Williams one child's part therein, making 9 shares in all. Complainants all state that there would still be left a suitable amount of timber on said land, for any ordinary purposes, after selling said poplar, cucumber, ash, and walnut timber." All of the complainants were adults, except one (Mary Ann Williams), who appeared by her regular guardian, J. E. Nicholas. Sarah Williams was the widow of the deceased. He left a will by which he gave to his wife all his real estate during her own life, and at her death to be equally divided among all her children. Proof was taken in that case showing that there were 180 poplar trees on the land, that would measure from 20 inches across the stump up to 60 inches, and would

be worth, on an average, \$4 per tree, and 16 cucumber trees, worth \$4 per tree, and 72 ash trees, that would measure from 20 inches up across the stump, worth, on an average, \$4 per tree, and that there was a considerable number of good oak trees. The decree adjudges as follows: "That on said land there is a considerable amount of fine, merchantable poplar, cucumber, and ash timber, some walnut timber, and a considerable amount of oak and chestnut timber; * * * that it is to the best interest of all parties concerned to sell said timber for the purpose of paying off and satisfying said indebtedness against said estate, and for a division of the remainder of the proceeds arising from the sale of the timber among said heirs; giving to said widow one child's part thereof, making in all 9 shares or interests in said timber fund. It is further ordered and decreed by the court that all of the merchantable poplar timber, cucumber, ash, and walnut timber, on said land, be sold; that the clerk and master, after giving notice of the time and place of sale as required by law in such cases, offer said timber publicly for sale to the highest bidder, on a credit of 6 and 9 months, selling said timber in separate lots (the poplar and cucumber in one lot, the ash in one lot, and the walnut in one lot); taking notes, with security, and a special lien on said timber or lumber, wherever found, for said purchase money,—and report to the next term of this court." At the next term the order of sale was renewed with a direction to report to the following term. The master reported as follows: "I respectfully report: In obedience to a decree in this cause made at the last term, commanding me to sell the property therein mentioned, I advertised, as required by decree, and on the 7th day of September, 1896, in front of the court-house door at Cookville, sold said property at public sale. The ash timber was sold to W. N. Lee (he being the highest and best bidder) for \$16, for which he paid \$1.15, and for the remainder executed his promissory notes for the sum of \$7.20, dated September 7, 1896, due, respectively, 6 and 9 months after date, and bearing interest from date, with Lewis Johnson as his surety thereon. The poplar and cucumber was sold to T. J. Clark, at the price of \$485.50, and the walnut was sold to the same party for the price of \$7, or \$492.50 for the poplar, cucumber, and walnut; he being the highest and best bidder. Of said amount, he paid \$49.50 in cash, and for the remainder executed his two promissory notes, each for the sum of \$221.62, dated September 7, 1896, due, respectively, 6 and 9 months after date, and bearing interest from date, with W. T. Milligan and William Robertson, W. A. Tiley, and L. J. Garner as his sureties thereon. Said property so sold consisted of the merchantable cucumber, poplar, and ash on the farm which Mrs. Henry Williams now lives on, in the Third civil district of Putnam county, and touching the lands of Rush Hunter, William Shirley, T. L. Johnson, James Short, and

others." This report was confirmed by the court, in the following language: "Which report, being unexcepted to, is in all things confirmed by the court; and it appearing to the court, and from the record in said cause, and the report of the clerk and master, that the merchantable timber on the farm, described in complainants' bill, consists of 180 poplar trees, 72 ash trees, 16 cucumber trees,—walnut trees, it is therefore decreed by the court that all the right, title, and interest which all said complainants, as heirs of said Williams, deceased, have in the said 72 trees, be divested out of them, and vested in W. N. Lee, the purchaser, and that all the right, title, and interest that all of the said parties, as said heirs at law, have in and to said 180 poplar and 16 cucumber and—walnut trees be divested out of them, and vested in T. J. Clark, the purchaser thereof, subject to the lien retained on all of said timber for the payment of the purchase money." The contest is over the surplus trees alleged to be merchantable,—over the 180 poplar and 16 cucumber trees. In the advertisement of the sale the clerk gave notice to the public that he would sell "the merchantable timber on the tract of land in said decree described. * * * Said timber consists of cucumber, poplar, ash, and some walnut. The poplar and cucumber will be sold in one lot, ash in one lot, and walnut in another." While the sale was being cried by one Kerr, as deputy of the clerk and master, a question arose as to the amount of timber to be sold. Dan Nicholas, one of the complainants in that case, said that they had counted 180 poplar trees, 72 ash trees, and 16 cucumber trees, and he was satisfied that there were at least 300 poplar trees; that the count was incomplete, because night drew on while they were engaged in looking over the land for the purpose of ascertaining the number of trees. Defendant, T. J. Clark, became the purchaser of the poplar, cucumber, and walnut trees. From the foregoing statement made by Mr. Nicholas, and a previous conversation to the same effect with Mr. Williams, another complainant, and from the clerk and master's advertisement, he believed that his purchase included all of the merchantable poplar, cucumber, and walnut trees on the land. The purchase-money notes he executed to the master for the timber also showed that they were given for all the merchantable poplar and cucumber timber on the land. He had no actual knowledge of the terms of the decree limiting the divesting and vesting of title to 180 poplar trees and 16 cucumber trees until some time after he had moved his mill upon the land and had begun to use the timber. According to the complainants' contention in the present case, he was entitled to cut only 180 poplar and 16 cucumber trees; making 196 the aggregate of these two kinds of trees. He in fact cut 93 additional trees in excess of this number, and these 93 trees were worth \$1.25 per tree, amounting to \$116.25. The weight of the proof is that merchantable trees were

such as were 20 inches across the stump, and that there are no more trees upon the land of this dimension. The proof also shows that all of the 93 trees cut in excess of the 180 poplar and cucumber were of this dimension and over, except 7. These we find to be worth \$1.25 per tree, or \$8.75 for the 7.

After the defendant, Clark, had cut the 93 trees in excess, the original bill in this case was filed, enjoining the further cutting and sale of timber. It is alleged in this bill that the decree in the prior cause, to which we have just referred, limited the kind of timber that was to be sold,—in substance, that only 180 poplar trees and 16 cucumber trees were directed to be sold, and that title to only 180 poplar and 16 cucumber trees was vested in the purchaser Clark; that these were all of the poplar and cucumber trees that were treated by the decree as merchantable; that no more than these were bought or sold. In the answer, defendant, Clark, insists that the decree directed a sale of all the merchantable poplar, cucumber, and walnut timber on the land, and that the clerk and master sold in accordance with this construction of the decree, and that he himself so understood the property to be sold. He insists that he bought all of the merchantable timber of the character just mentioned. He further insists that the master so reported his sale to the court, and it was so confirmed. He files the answer as a cross bill, and therein asks that, if necessary to the protection of his rights, the title to all the merchantable poplar, cucumber, and walnut on the said land be divested out of said parties, and vested in him, and, if this cannot be done, that his purchase-money notes be abated to the extent of the merchantable timber bought by him, as to which the decree did not divest and vest title. He avers in the cross bill that there are about 50 merchantable trees still on the land. The substance of the alternative prayer of the cross bill is that he should have a credit for, or, rather, not be charged with, the 93 trees he cut in excess of the 186, and that he have a further credit for the 50 uncut merchantable trees. The chancellor rendered a decree against him for the 93 trees, and made the injunction perpetual as to the further cutting or removing of timber. For the \$116 he rendered judgment against defendant, Clark, and his sureties on his bond for the dissolution of the injunction, and denied all relief on the cross bill. Defendant, Clark, has appealed and assigned errors.

The case turns upon the proper construction of the ex parte proceedings above referred to. Of course, the purchaser must be bound by the terms of the bill and the decree. No decree could be made which would not be warranted by the bill, or, in general, by the issues made in the pleadings. The first matter for consideration is the bill. Was it brought to sell only 180 poplar trees, 16 cucumber trees, 72 ash trees, and an undefined number of walnut trees? It is true that the recitals of the bill

set forth that there were standing upon the land, at the time the bill was filed, "180 good, merchantable poplar trees, 72 ash trees, 16 cucumber trees, ——— walnut trees, and a great many fine chestnut and oak trees, and a large quantity thereof"; and upon this it is charged that it was to the interest of all parties "to sell all merchantable poplar, cucumber, ash, and walnut timber off of said land, for the purpose of paying said debts, and for a division of the remainder of the proceeds of said timber among the said heirs." Thus, we have the statement that there were a certain number of "good, merchantable" poplar, cucumber, and ash trees on the land, and an undefined number of merchantable walnut trees, followed by a charge that it would be necessary to sell all the merchantable timber of these various kinds. It is to be observed that the bill does not purport to contain any description of these trees, so as to identify the separate trees. The only identification is that they are merchantable. What is merchantable is a matter of proof, or a question of fact. The bill must then be construed either as having been brought to sell 180 poplar trees, 16 cucumber trees, and 72 ash trees, and these to be picked out of the 300-acre tract of land, and not otherwise identified than that they were merchantable, or we must construe it as having been brought to sell all of the merchantable poplar, cucumber, ash, and walnut trees upon the land, and that the statement of the particular number that had been found upon the land was mere inducement for the information of the court, for the purpose of showing that there would be a sufficiency of timber to be sold, without the necessity of selling the land itself. We think the latter is the more reasonable construction. The other construction would make the bill a nullity, because too vague and indefinite.

We come now to the decree of sale. This needs no construction. In direct terms it orders all of the merchantable poplar, cucumber, ash, and walnut timber on the land to be sold, which was fully warranted by the bill. It follows that the master acted in direct conformity with the decree when he sold all of the merchantable timber of the kind referred to, and made his report to the court to that effect.

It is insisted, however, that inasmuch as the court only divested and vested title to 180 poplar trees, 72 ash trees, and 16 cucumber trees, no title passed to any other trees than the number stated. So far as the divestiture and vestiture of title are concerned, there being no further description than is thus given (that is, 180 poplar trees, 16 cucumber trees, and 72 ash trees), it would be unavailing, for vagueness, as it would be impossible to identify the particular trees intended. However, if all of the merchantable trees in a particular tract were sold, the number included could be made certain by proof. "Id certum est quod certum reddi potest." This is a different question from the one suggest-

ed with regard to the bill. While it would be impossible by proof to ascertain what particular 180 poplar trees were intended in the bill, and so of the cucumber and ash trees, it would be possible by proof to ascertain all of the merchantable timber on a particular piece of land. Here a trade standard is referred to, but with regard to the bill a particular number is mentioned; and, if there should be more than 180 poplars, it would be impossible to select out of this number those which were intended to be sold, unless it appeared that there were only 180 merchantable trees, and this fact does not appear. A sale of all the colored sheep in a certain flock would be good. Here color, or its absence, would be the matter to be ascertained by proof, in case of disagreement, and the individuals falling within the designation could be identified. So a sale of all the bird's-eye maple in a forest, and so on.

Recurring now to the question of the vesting and divesting of title: The authorities in this state are that a chancery sale is not complete until confirmation of the report of the master, and it is then complete. *Eaken v. Herbert*, 4 Cold. 116; *Childress v. Hurt*, 2 Swan, 487; *Myers v. Lindsay*, 5 Lea, 334, 335; *Wood v. Morgan*, 4 Humph. 372; *Morton v. Sloan*, 11 Humph. 278; *Pearson v. Johnson*, 2 Sneed, 583; *Polk v. Pledge's Heirs*, 5 Cold. 389; *Johnson v. Johnson*, 2 Helsk. 526; *Atkinson v. Murfree*, 1 Tenn. Ch. 54, 55; *Reese v. Copeland*, 6 Lea, 192. It seems that, in case of personal property, the sale is complete without confirmation. *Saunders v. Stallings*, 5 Helsk. 65. It is held, with regard to both realty and personalty, that the divesting and vesting of title are not necessary to complete the sale, the report of the master being confirmed. *Jones v. Walkup*, 5 Sneed, 135; *Curd v. Bonner*, 4 Cold. 632, 639, 640; *Graves v. Keaton*, 3 Cold. 8, 13; *Young v. Thompson*, 2 Cold. 596; *Cowden v. Pitts*, 2 Baxt. 60; *Paul v. York*, 1 Tenn. Ch. 560. It follows from these authorities that, when the clerk and master's report was confirmed, the sale became complete. We have held that the divesting and vesting of title were too vague to be effective. The whole record in the old case is made a part of the present record, and there is nothing therein to identify the particular 180 poplar trees and 16 cucumber trees. We may add, further, with regard to the subject of divesting and vesting of title, that section 5915 of Shannon's Code provides as follows: "The courts of this state having jurisdiction to sell lands, instead of ordering parties to convey, may divest and vest title directly by decree or empower the clerk to make title." The next section reads: "The decree or deed of the clerk, as the case may be, shall have the same force and effect as a conveyance by the party, and shall be registered." Now, suppose that the court, instead of divesting and vesting title in the decree, should direct the master to make a deed to the purchaser. This, of course, could only be done

upon confirmation of the sale. Would it be held that the sale was not complete until after the master had made the deed? This position could not be tenable under the authorities above referred to. It is true that in a case where there is a confirmation of the master's report of sale, without a divestiture and vestiture of title in the purchaser appearing in the decree or a deed of the master, the naked legal title may be outstanding, but all the beneficiary interest is in the purchaser.

It is insisted in behalf of the defendant, under his cross bill, that he has a right now to have a decree entered against the complainants, directing them to transfer the title to him, or divest title out of themselves and into himself, as purchaser. He insists that this course may be pursued, under the authority of *State v. Keller*, 11 Lea, 400. In that case it appeared that a bill had been filed for division of lands, and the county surveyor had been directed to survey the lands sought to be sold for partition, and divide them into tracts. One tract was reported by the surveyor as containing 125 acres, and sold as such. It really contained 155 acres. The sale was reported to the court, and was confirmed to the purchaser. Some years afterwards it was discovered that the purchaser had 30 acres more than he was entitled to. Thereupon a suit was brought against the county surveyor on his bond, on the theory that, by his mistake in stating the number of acres in his report, the 30 acres had been lost to the complainants. The supreme court held that inasmuch as the sale was by the acre, and the boundaries were correctly reported in the surveyor's report, and a calculation would have shown the true amount of acreage, no real injury occurred to the complainants by reason of the surveyor's mistake. The court went on, however, to discuss, arguendo, the method of relief that complainants would have against the purchaser. The substance of the conclusion reached under that head was that inasmuch as a decree was, under the statutes above quoted, equivalent to a conveyance by the parties, using the court as an agent, a bill might be filed, and compensation recovered from the purchaser for the surplus of acreage. It was said that this might be done without impairing the efficiency of the decree in the former case, or changing it in any way. What is said in the above-mentioned case upon this subject is dictum, of course, but the principle seems to be a sound one. But it is unnecessary to consider the question in the present case. We have found that all of the poplar and cucumber trees cut in excess of the 180 (that is, all the alleged excess of 93 trees) were merchantable, except 7, and that the purchase included all merchantable poplar and cucumber trees on the land. It follows that the defendant was not chargeable with 86 of the 93 trees, and, having already secured these trees after the direction of the injunction, it would be idle to decree him the dry title thereto. As to the 7 trees, we have

found that he was not entitled to them, and for this reason title could not be decreed to him. The chancellor rendered a decree, as above stated, against the defendant, Clark, for \$115. This should be modified so as to make the decree for \$8.75. The decree is affirmed in so far as it makes perpetual the injunction restraining the defendant from cutting and removing any more poplar or cucumber timber from the lands described in the bill. The cross bill will be dismissed. The costs of this court and of the court below will be equally divided. All the judges concur.

Affirmed orally by supreme court, December 20, 1898.

GILBERT v. RICHARDSON.

(Court of Chancery Appeals of Tennessee.
Nov. 26, 1898.)

ESTOPPEL BY REPRESENTATIONS.

One who, though having an interest in land which has been sold on execution against her brother, requests R. to redeem it for her brother, and take a trust deed thereof from him, she representing that she will never claim the property, or interfere in any wise with the transaction, on the faith of which representations R. acts, is estopped to assert title against him, he having bought under the trust deed so taken.

Appeal from chancery court, Dekalb county; T. J. Fisher, Chancellor.

Bill by Mary Gilbert against T. H. W. Richardson. Decree for defendant. Complainant appeals. Affirmed.

John B. Robinson & Son and T. W. Wade, for appellant. Webb & Cantrell and Alvin Avant, for appellee.

NEIL, J. On the 7th of January, 1895, in the case of C. W. Anderson and others against T. H. W. Richardson and others, in the chancery court at Smithville, Mrs. Mary Gilbert filed her petition, stating, in substance, that she, in connection with C. W. Anderson and wife, Martha, filed their original bill in the above-mentioned chancery court in the above-named cause on the 7th of January, 1887, to recover their interest in two certain tracts of land described in that bill; that answers to said bill were afterwards filed by the defendants, and the pleadings and issues made up, and the proof on both sides taken, and the cause set for trial; that, when the bill was filed, she was the wife of R. V. Gilbert, but was living apart from him, and supporting herself; that, soon after the bill was filed, R. V. Gilbert, her husband, who had also been made a party complainant, filed his written order to dismiss the bill as to him, which was done by the chancellor; that an attempt was then made to dismiss the bill as to petitioner, but the court refused to do it except upon the written order of petitioner; that this was never filed; that the cause, as to her and the other complain-

ants, then stood for trial at the term of the court next before the filing of the present petition, and that, when the cause was reached on the trial docket and called for trial, it was announced by the counsel for defendants that the cause had been dismissed as to petitioner on her order filed with the clerk and master; that this was denied by petitioner's counsel, but, as the rule docket showed that petitioner had filed the written order, the court declined to hear the case as to petitioner, and so he decided it as to the other complainants, and in their favor a decree was entered accordingly; that the cause would have been heard and decided as to petitioner but for the false and fraudulent representations of defendants' counsel, and the entry on the rule docket, made by mistake; that she did not file any order with the clerk and master to dismiss her cause, and never authorized any one to do so for her, and that there never was any order made in the cause dismissing the same as to her. The purpose of the bill was to have the cause reinstated upon the docket as to petitioner, and have it tried upon the original record, and, at all events, to have her rights passed upon. The chancellor would not permit it to be filed as a petition in the original cause, but directed the pleading to be filed as an original bill, with the record in the cause of Anderson against Richardson as an exhibit thereto. An answer was filed by Mr. Richardson, admitting the filing of the original bill referred to above, and averring that that bill was dismissed in fact as to Mrs. Gilbert. It averred that a written order was filed by her, directing the dismissal of the bill. The answer further denied that the complainant had any rights whatever in the land, and averred that she induced the defendant to purchase, and pleads an estoppel against her on that account. The statute of limitations was also pleaded. There was also a demurrer filed by defendant, which was overruled by the chancellor, but, inasmuch as the defendant now insists that it should have been sustained. It is necessary to state the points made by it: First, that the bill or petition showed no grounds of relief; second, the defense of the statute of limitations of one year, three years, seven years, and the prescriptive defense of twenty years; third, that complainant's bill showed that she had abandoned whatever claim she had; fourth, that her bill in the original suit was brought in 1887, and that her order dismissing the same was duly entered for many years, and that with a knowledge of that fact she and her attorney allowed the cause to go to trial, and that she had, therefore, had her day in court; fifth, that she failed to bring her suit within 12 months after it was dismissed; sixth, that complainant had counsel present at the trial, and allowed the cause to go to trial as to the other complainants without reinstatement of the cause as to herself; seventh, that the bill sets forth no facts showing fraud or mistake in the entering of her order upon the rule docket; eighth.

that the bill does not show any title whatever to any land, does not describe any land, nor show any interference with the rights of complainants, and hence shows no merits; ninth, that there is a nonjoinder of parties as to C. W. Anderson and wife, Martha, who are necessary parties under the charges of the bill; tenth, that the bill failed to show the residences of the parties, as required by statute. The question raised by this demurrer will be considered along with the merits of the case, if necessary to be considered at all.

The bill in the original case of C. W. Anderson and wife et al. against T. H. W. Richardson, referred to in the petition just mentioned, charged, in substance, that the complainants therein were entitled to two tracts of land described as heirs at law of W. H. Cantrell, and that the defendant, Richardson, was claiming this real estate, and was in possession thereof, under sales made by the sheriff of Dekalb county, under executions issued on judgments purporting to have been rendered against W. H. Cantrell, of which in fact he had not had any notice, and rendered in cases to which he was not a party. It is also alleged that under these void judgments certain redemptions were had which were likewise void, and that the sheriff made a deed to the vendors of the defendant, Richardson, and that said Richardson had no title to the land. In this bill Anderson and wife claimed an undivided one-fourth of the land, and Mrs. Mary Gilbert an undivided one-fourth. This bill further charged that in July, 1897, O. B. Cantrell, a brother of the complainant in the case just mentioned, and owner of an undivided one-fourth interest in the land, made a deed of trust conveying this land to M. D. Smallman, as trustee, to secure the payment of certain debts set forth in the trust deed, with power in said Smallman to sell the land if the debts were not paid by the time therein specified; that the trustee sold this land as provided in said trust deed, and that defendant, Richardson, became the purchaser; that at the time of the sale of the land by the sheriff, in 1865, and at the time of the execution of the said trust deed and the sale thereunder, the complainants Anderson and Mary Gilbert were married women, and had continued to be; that they were not parties to the trust deed concerning said lands, and not, therefore, affected or prejudiced by the same. It is further charged that after the death of their father C. B. Cantrell held the land as tenant in common with the other heirs of his father, but not adversely to any of them; that he had no claim to any of said land except to his one-fourth; that, if defendant acquired any interest whatever under his purchases, it was to the one-fourth interest conceded to Cantrell. The prayer of the bill is that the sale made by the sheriff and the sale by trust deed should be declared void in so far as they affected the rights of complainants to that bill, and should be removed as clouds resting thereon.

Defendant, Richardson, filed his answer, denying that the sales above referred to were invalid, and averred that C. B. Cantrell took possession of the land in 1866, and held adversely up to the time he attorned to Harrison, from whom defendant, Richardson, claims, and to whom the sheriff's deed had been made; that C. B. Cantrell, as tenant of Harrison, so held under this conveyance in trust for Richardson, and that said Richardson has so held since his possession; and relies upon the statute of limitations of seven years. The answer further averred that the complainants were estopped from setting up any interest in the land, because complainants told respondent, Richardson, before his purchase, that they had no interest in the land, and urged him to purchase same, and he made arrangements with C. B. Cantrell by which he became the owner of said land, honestly believing he was getting a good title thereto; that they stood by, and knew that he was purchasing the same, and investing his means, without making known any claims of theirs, if they had any; and he insists that it would be a fraud on him now to permit them to take advantage of this conduct. In that case the following depositions were taken: C. W. Anderson identified the land in controversy as that which was conveyed to W. H. Cantrell by grants Nos. 5,656 and 5,409, issued by the state of Tennessee to W. H. Cantrell. He also identified it as the same land levied on in the cases above referred to (but not by name) of Thomas Potter against W. H. Cantrell, and J. S. Harrison against W. H. Cantrell; that W. H. Cantrell lived upon this land from 1843 up to his death, in 1867; that he had four children, C. B. Cantrell, W. J. Cantrell, Mary Gilbert, and Martha Anderson; that Martha Anderson married June 11, 1844, and Mary Gilbert married in 1861 or 1862; that they had continued married up to the time he gave his deposition; that W. H. Cantrell left a widow, who died in 1885 or 1886; that the widow had dower assigned to her in the land in controversy,—100 acres in all,—and that she lived upon the same as long as she lived; that C. B. Cantrell also lived upon the land, but not on the dower; that neither he nor his wife ever encouraged T. H. W. Richardson to buy the land in controversy; that Richardson had been in possession of the land, at the time his deposition was taken, five or six years (deposition being taken January 7, 1891); at the time said suit was brought complainant Mary Gilbert was living apart from her husband, and supporting herself, and is still so living and supporting herself. Martha Anderson testifies that she never encouraged respondent to buy the land, and never talked to him about it at all. R. V. Gilbert testified that he had never encouraged defendant, Richardson, to buy the land in controversy; that he was the husband of Mary Gilbert, but that he and his wife lived apart, and that she managed her own affairs. C. W. Anderson introduced as exhibits to his deposition

the records in the cases above referred to, which show that W. H. Cantrell was not a party to the cases in which judgments were rendered against him, and under which the land was sold, and under which judgments the defendant, Richardson, claimed through a sheriff's deed to Harrison, and the deed from the latter to the said Richardson. These exhibits show the following: That on the 6th of August, 1860, a warrant was issued by W. A. Dunlap, a justice of the peace for Dekalb county, and served against C. B. Cantrell and W. H. Cantrell, in favor of J. S. Harrison for the recovery of a debt, which was returned on the 17th day of August, 1860, executed on W. H. Cantrell, and returned for trial before Joseph Cantrell, a justice of the peace of that county. On the same day the justice of the peace gave judgment against both defendants named in that case for \$97.33. Execution was issued upon this judgment, and it was thereupon carried to the circuit court of Dekalb county by William F. Cotton, who purported to be a stayor upon the judgment. In the circuit court the petition for certiorari supersedeas was dismissed on motion, and judgment there taken, not only against W. F. Cotton and C. B. Cantrell, but also against W. H. Cantrell, who was no party to the certiorari proceeding. On this judgment execution was issued on the 1st of March, 1865. This execution was returned levied as follows: "On one tract of land, as the land of W. H. and C. B. Cantrell, in civil district No. 6, supposed to contain 500 acres, more or less, and bounded on the south and southwest by the lands of H. L. W. Capshaw and Widow Reems' old survey, on the west by Joseph Cantrell, on the north by the heirs of John M. Cotton, on the east by Adcock and Rankhorn, —being the place whereon the said W. H. and C. B. Cantrell had formerly lived." This levy was made on the 21st of April, 1865, and returned signed by C. Hill, deputy sheriff. On the 5th of June, 1865, he made the following additional return: "I this day sold the land described in the accompanying levy on an execution in favor of T. B. Potter to R. V. Gilbert, which being redeemed by J. S. Harrison, the plaintiff in this cause, who thereupon bid the further sum of \$172.40 on said land; making altogether the sum of \$177.45, bid thereon." On the 7th of August, 1860, it further appears from these exhibits, a warrant was issued by the aforesaid W. A. Dunlap, justice of the peace, against C. H. Cantrell, W. H. Cantrell, and E. H. Hudson, in favor of Thomas B. Potter, for the collection of debts due to him. This warrant was returned served on W. H. Cantrell, but not on C. B. Cantrell. However, on the same day the justice gave judgment against both defendants for \$48.58. On this an execution was issued, and thereupon the aforesaid W. F. Cotton, who purported to be a stayor on this judgment also, filed his petition for certiorari supersedeas with C. B. Cantrell as surety on the bond, and in this matter he also made de-

fault, and judgment was rendered against him and C. B. Cantrell, and also against W. H. Cantrell, for the amount of the debt and costs, although W. H. Cantrell was no party to this proceeding. Upon this judgment execution was issued and levied upon the same land as the property of W. H. and C. B. Cantrell. This levy was made on the 21st of April, 1865. The same deputy sheriff as in the other case returned that he had sold the land to R. V. Gilbert at \$5, and then appears the following: "Then came J. S. Harrison, an execution creditor, and redeemed said land, and bid the debt and costs on the same, to wit, the sum of \$172.40; making all together bid on said land the sum of \$177.45. This 5th of June, 1865. C. Hill, Deputy Sheriff." The following also appears: "Came Wm. H. Magness, agent of T. B. Potter, and bid the further sum of \$139.71 on the above-described land, it being interest and costs on same up to the 22d of July, 1865. T. B. Potter, by Wm. H. Magness, Agent." Then followed: "For value received, I hereby transfer all my right, title, claim, and interest, and demand in the above-described land to William Magness. This 14th of Nov., 1868. Thomas B. Potter." There is also exhibited in the record in the Anderson case a sheriff's deed made by C. Hill, as sheriff, to one Harrison. This deed, after reciting the proceedings above mentioned in the Potter case, purported to convey to J. S. Harrison all the right, title, and interest of W. H. Cantrell and C. B. Cantrell in and to the land now in controversy. This deed was made on the 17th of November, 1868. Another exhibit shows the deed from J. S. Harrison to T. H. W. Richardson, conveying the same land to him. There is also exhibited the trust deed before referred to. This was dated July 9, 1879. This instrument purports to convey the same land now in controversy for the following purposes: that is, to secure to T. H. W. Richardson the sum of \$260.73, due him by note, and an account due him in the sum of \$35, and cost bill in the sum of \$65.30, "and balance on old settlement, 35 cts." The trust deed then continues: "I am also indebted to said T. H. W. Richardson in the sum of \$238.31 on account of the assumption by said Richardson of a debt to Wm. H. Magness of \$280.91, and to J. S. Harrison for \$29.40, debts which they hold against me, which is a lien on the said land on which I now live. I am also indebted to Nesmith and Smallman, for writing this deed, the sum of \$5, and I am desirous of securing and making certain the payment of said debts." The instrument provided that if he should pay off the debts by the 1st day of June, with interest at the rate of 6 per cent., then the trust deed should be void; but, if he should fail to pay the same, then the trustee should sell the property, after due advertisement, subject to the right of redemption, and apply the proceeds upon the debts. No deed by the trustee is filed in the record, but, as already seen, it is charged in the bill, and admitted in the

answer in the case of Anderson against Richardson, that there had been a sale under this trust deed, and that Richardson had become the purchaser. The statement of the bill, however, is qualified by the further statement that in 1871 C. B. Cantrell attacked the trust deed and proceedings thereunder; that this case was decided against him in the chancery court, and appealed to the supreme court. This was admitted in the answer of Richardson, and both agreed that the property was, at the time the answer was filed, in the hands of the receiver in the suit referred to, brought by C. B. Cantrell.

In said Anderson case, Richardson gave his deposition, and testified, in response to questions, as follows: "State if you purchased the land involved in this cause, and, if so, how did you buy it, and from whom you bought it. A. I bought from C. B. Cantrell in this way: Said Cantrell was owing me a considerable debt, and conveyed it to Smallman as trustee to secure my debt, and, on said failure to pay my debt as provided for in said trust deed, said trustee sold it, and I bought it at the sale. Q. Did Smallman, as trustee, make his report to court showing you had bought it at the sale? If so, will you file a copy of said report on or before the hearing? A. Said trustee informed me he had made said report. If he did, I will file a copy of it on or before the hearing of this cause." He then testifies to a conversation had with C. W. Anderson and wife about C. B. Cantrell's right to sell the land before he bought it, and, in effect, that they told him to make his trade with Cantrell; that they would not disturb him. He does not, in this deposition, testify to any conversation with Mrs. Gilbert or her husband with regard to the land. This deposition was given on the 31st of May, 1892. Prior to that time,—that is, prior to the date of this deposition,—Mr. Richardson claims to have secured two orders, one from R. V. Gilbert, and the other from Mrs. Mary Gilbert, directing a dismissal of the case as to them. R. V. Gilbert's order is dated February 23, 1888. The order purporting to be from Mrs. Gilbert is dated February 25, 1888, and is in the following words: "M. A. Crowley, Clerk and Master: You are hereby authorized and directed by me to dismiss the bill of C. W. Anderson and others v. T. H. W. Richardson and others in the chancery court at Smithville, so far as I am concerned, if I am a party to the same, as I never authorized any one to make me complainant or party to said cause; and, if I am a party to said cause, I do not and will not prosecute it, and I want you to dismiss the bill so far as I am concerned. Mary Gilbert. Feb. 23, 1888. Test: Charlie Gilbert. T. H. W. Richardson." This order was entered upon the rule docket, but no order was made thereon by the clerk and master or the chancellor. All that appears upon the subject in the Anderson record is that some time in February, 1888,—the exact date does not appear,—an

order was entered stating that defendant Richardson had made an affidavit that complainants Anderson and wife had no authority to use the names of R. V. Gilbert and wife as complainants in the bill, and it was thereupon directed that Anderson and wife should show their authority for making R. V. Gilbert and wife complainants in the bill by 10 o'clock, Saturday, the 25th day of February, 1888, or that the cause would stand dismissed. The next order that appears is: "In this cause it appearing that at a former day of the term an order was entered of record, supported by affidavit, that complainant C. W. Anderson should show his authority for making R. V. Gilbert and Mary Gilbert complainants in his bill, and give other security, or justify his present security on his bond for the prosecution of this cause, and that he must do this by ten o'clock on Saturday, 25th day of February, 1888, it further appearing that said R. V. Gilbert has filed his written order that said cause be dismissed as to him, it is decreed that the bill be dismissed as to R. V. Gilbert. The motion as to Mary Gilbert is continued, and if she file an order with the clerk and master directing him to dismiss the bill as to her, he will dismiss the same as to her." The date of this order must have been after February 23, 1888, when the R. V. Gilbert order was given. It does not appear when the order purporting to have been executed by Mrs. Gilbert was presented to the clerk and master, and entered by him on the rule docket. The master was examined, but his recollection of it is very indefinite, but he says that he entered it.

After the deposition of Richardson before referred to, the cause remained in a quiescent condition, or substantially in that condition, until March 23, 1895. It was thereupon tried, and the chancellor decreed that Anderson and wife were entitled to a one-fourth undivided interest in the land in controversy; or, rather, the heirs of Mrs. Anderson, she having died in the meantime. In this decree the rights of Mrs. Gilbert were not noticed in any way whatever; in fact, she was wholly ignored. Her name does not appear in the decree at all. Evidently the chancellor, without directing a dismissal as to her, treated the case as if the filing of the order before mentioned upon the rule docket amounted to a dismissal. We say this because no mention whatever is made of her or her rights in the final decree. This cause was appealed to the supreme court by Richardson. It should be observed that the deposition of Mrs. Gilbert was not given in the case of Anderson against Richardson nor were her rights noticed in the deposition of Richardson. The next step was the filing of the petition before referred to, mentioned in the beginning of this opinion; this petition being filed, as stated, on the 7th of June, 1895. Upon the questions raised by this petition, and also upon the original controversy, or concerning her interest in the original controversy, the following

testimony was taken: Mrs. Gilbert testified, upon being shown the order which we have above copied, that she did not sign it, or authorize any one to sign it for her; that she had no recollection of ever seeing the paper before; that she never agreed with any one to dismiss the suit, and always refused to do so; that she did not authorize her son Charlie Gilbert to sign the order for her, nor did she authorize any one to write such an order for her. She also testified that she could not write, and that she did not know who signed her name thereto; that the first she knew that said order had been presented was a letter from her lawyer, Mr. Robinson, shortly after the case was tried, informing her that such an order had been brought to the attention of the court; that this was just a short time before she filed her bill or petition before referred to. Charlie Gilbert, who purports to appear as a witness upon the paper, testifies that he never saw the paper before; he did not sign his mother's name to the paper, nor did he sign his name to it as witness; that he did not know in whose handwriting the signatures of his mother and himself were; that his mother never authorized him to sign any such order, and he did not sign it. On cross-examination he wrote the names of his mother and himself, but, as the originals are not sent up, we cannot compare them. He further testifies that he was a business man, and his signatures could be easily procured for examination, if desired. M. A. Crowley, the clerk and master, testified that he entered the order purporting to be signed by Mrs. Gilbert on the rule docket, but he had no recollection about it. We infer that he judged by his own handwriting on the entry, as he appeared to have no recollection of the matter when her deposition was taken. John B. Robinson testified, and answered to questions as follows: "Q. State what you know about the bill not being dismissed as to R. V. Gilbert and wife, Mary Gilbert. A. At the first term of the court, if I remember right, after the bill was filed, steps were taken to dismiss the bill as to them. An order was brought into court, signed by R. V. Gilbert, but not by his wife. Judge W. W. Wade, who was the chancellor, held the bill should be dismissed as to R. V. Gilbert, but not as to Mrs. Gilbert, unless she should send a written order; that, under the facts, she had the right to maintain the bill without her husband joining in the bill. I heard of no other order until the case was called for hearing when the C. W. Anderson case was tried. At this time Richardson's counsel claimed that Mrs. Gilbert filed an order to dismiss, but they could not produce the order, but produced one signed by Mr. Gilbert. I then wrote to Mrs. Gilbert, telling her the situation, and she said she had filed no order to dismiss. I then filed a petition to reinstate her cause in court, which the court allowed done. I never saw the order purported to be signed by Mrs. Gilbert until to-day. The body of the order is in the handwriting of A. Avant. I do not know

who wrote Mrs. Gilbert's name to it, and signed her son's name, or 'T. H. W. Richardson.' All the names appear to me to have been written by the same person. The order, I hear, was and has been in the possession of A. Avant. I don't know where he got it, nor how long he has had it." When this witness speaks of the reinstatement of the cause, we infer that he has reference to the petition filed in the present litigation, and the order of the chancellor filed therein. There is no other evidence of reinstatement herein. C. W. Anderson's deposition was taken, and he testified substantially as already noted in the old case. A. Avant testified that he was solicitor for Richardson in the case of Anderson against Richardson. Upon the subject of the order he testified as follows: "I think it was at the February term, 1888, at Smithville, the defendant Richardson brought the order of R. V. Gilbert, directing said cause dismissed as to him. Said Richardson stated in open court that complainant Mary Gilbert also said she wanted said cause dismissed as to her. I think this was on the 25th day of February, 1888. The court directed said cause dismissed as to R. V. Gilbert on said order, and also decreed that, if defendant Richardson would file an order from Mary Gilbert directing the said cause dismissed as to her, the clerk and master would dismiss the cause as to her. I drew up an order for said Mary Gilbert to sign, directing said cause dismissed as to her, and gave it to Richardson, who took it off, and in a few days I received the order back, with Mary Gilbert's name signed to it. I took and filed it with the clerk and master. I think it was marked filed Feb. 28, 1888. I have said order, and here file it as Exhibit A to this deposition." The order is also copied above. On cross-examination he testified that he did not see the complainant sign the order; that he did not know how long he had had the order in his possession, nor why he kept it, nor whether it had ever been with the papers or not. Being asked where the order was when the case of Anderson against Richardson was tried, he testified: "I looked for said order before said cause was tried, and did not find it. After said cause was tried, I was looking through some papers in my desk, and found it. I did not know, when said cause was tried, that I had it. Q. When was it you found it? A. I don't remember the date. It was some time after said cause was tried. Q. Did you not have said order in your possession from the time it was first filed up to the time you found it? A. I do not know whether I did or not. Q. Why was not an order obtained in the cause when said order was filed dismissing the cause as to complainant Gilbert? A. I did not think it was necessary is the only reason I know of. Q. Was not such order filed during the February term, 1888? A. I think it was, but am not positive, as I do not remember what time court adjourned. Q. Did you see anybody sign said order as a witness, or do you know who did sign it? A. I did

not see any one sign it, and do not know who signed it, only from the names I see signed to the order." B. M. Webb testifies: "I was in the court house at Smithville when the written order to dismiss the cause of C. W. Anderson and others against T. H. W. Richardson was filed, and the cause dismissed as to him. Defendant's counsel in that cause also moved to dismiss as to complainant Mary Gilbert, but no written order was had, and the court declined to dismiss as to her without a written order. It being stated by defendant or counsel that she had ordered it dismissed, the court gave time in which to get her written order, directing that the cause should stand dismissed as to her upon presenting to the clerk and master a written order to dismiss. After this, and within the time given, defendant or his counsel presented the written order of complainant Mary Gilbert in court, upon which the cause was ordered dismissed by the court. This was several years ago, and about the time the written order appears dated that has been filed in this cause. Complainant Mary Gilbert's counsel was present on both occasions, representing the dismissal as to her. I never heard of her being in the cause after that, and all conduct of the case after that was had as if she was not in the cause, so far as I heard or saw; and I was counsel for defendant Richardson." Defendant Richardson testified upon the subject of the order as follows: "R. V. Gilbert gave me a written order to dismiss the suit so far as he was concerned. I brought it, and presented it to the court, and there was some discussion as to whether the suit should be dismissed as to Mary Gilbert upon the verbal order which she had given me. Finally, the court gave me until Saturday, at noon, to procure and file her written order to dismiss. Mr. Avant, my lawyer, drew up an order, and I carried it to Mrs. Gilbert. She said she couldn't sign it so they could understand it, and requested her son Charlie Gilbert to sign it for her, which he did, and he and I signed it as witnesses. There was nobody present but us three. * * * I sent the order to my attorney here, by mail, on Friday evening, and he told me he had it filed according to the directions of the court. That was on the Friday evening before the Saturday, the day the court had given me to file the order." On cross-examination, being asked where Mrs. Gilbert was when she signed the order, he answered: "It was signed at her own house. She then lived at the house known as the 'Dabner League Place,' once known as the 'Reems Place.'" Q. Why did she not sign it herself? A. She said she had not written in so long a time she did not believe she could write to be understood. Q. Why, then, did she not sign it making her mark? A. She asked, if Charlie signed it, if it wouldn't do as well. I told her it would if he signed it and witnessed it, and he did sign her name, and witnessed it. * * * I sent it up on Friday before the Saturday I was given in which to file the order,

and my attorney told me he had filed it in time. Q. After it was filed in time, why was the suit not then dismissed by the court as to Mrs. Gilbert? A. I do not know. I was not here. I do not know whether the court was in session or not. The court gave me until noon on Saturday, and I got the order here in time on Saturday before. Q. Do you know, of your own knowledge, if your attorney ever handed in that order to the court? A. I wasn't there. I never saw him hand it in. I understood it was on the minutes. My attorney told me he had handed it in, and had had it put on the minutes. Q. Did you write anything on the order, Exhibit A to A. Avant's deposition, besides your own name? A. I wrote the word "Test" and my name after Charlie Gilbert wrote his mother's name." After the date of the order of Mrs. Gilbert the cause seems to have been conducted on both sides without regard to her rights. Upon the subject of possession he testifies that the land was in possession of C. B. Cantrell from 1867 to 1886; that, after the sale made by the sheriff, C. B. Cantrell rented the land from Harrison, who had the sheriff's deed; that in January, 1886, he—that is, Richardson—went into possession of the land, and has been in possession ever since, claiming it as his own; that he went into possession under his purchase from the trustee; that he was induced to take the trust deed upon the land upon the request of the complainant Mrs. Mary Gilbert; that she urged him to buy the land from her brother, C. B. Cantrell, and assured him that she would never interfere with him, or in any way claim the land; that she was at this time living apart from her husband, and had been for some years. Upon being interrogated more closely upon cross-examination, he testified that what he meant by purchasing the land upon the request of Mrs. Gilbert was that it had been sold, as already stated, under the sheriff's sales, and purchased, as before stated, by Anderson; that C. B. Cantrell was in trouble on this account, and that he (Richardson) agreed to advance the money to relieve C. B. Cantrell of the sheriff's sales; that he did so advance the money, and took that land out of the hands of Harrison, and to secure the money so advanced for C. B. Cantrell, and also some other indebtedness that Cantrell owed him, he took the trust deed made to Smallman, his trustee; that he would not have entered into this arrangement but upon the solicitation and at the request of Mrs. Gilbert; that he did so upon the faith of her requests and promises. Subsequently he caused the trust deed to be foreclosed, and purchased the property thereunder. He testifies later, in re-examination, that he was not only claiming under the trust deed and the sale made to him by Trustee Smallman, but also under the deed made by Harrison; but the result of his testimony is that he bought the property from Harrison for the purpose of relieving C. B. Cantrell, and that he subsequently took a trust deed from C. B. Cantrell conveying to the

trustee this property as the property of said C. B. Cantrell. The substance of the matter is that he advanced the money to redeem the property from Harrison, and took the trust deed upon the request of Mrs. Gilbert, upon faith of her representations that she would never claim the property, or interfere in any wise with the transaction; that at her request he bought the land from her brother. Mrs. Gilbert does not deny this testimony.

Our conclusion upon the whole matter is as follows: First, that Mrs. Gilbert executed the order directing a dismissal of the cause; secondly, that she made to Mr. Richardson the representations above set forth, and that he entered into the arrangement that resulted in his taking a trust deed upon the property and selling same upon the faith of her representations and statements in that connection. These conclusions render it unnecessary for us to pass upon the several grounds of demurrer above set forth, and also unnecessary to consider the question whether the chancellor was correct in his refusal to reinstate the cause and in directing the complainant's bill to be filed as an original bill, with the whole record as an exhibit thereto. It is, perhaps, true that there was no technical dismissal of the case, inasmuch as the clerk and master had no power to dismiss the cause without payment of costs, and in fact did not undertake to dismiss it, and the chancellor made no order directing a dismissal, except that the clerk and master should enter an order dismissing the cause when Mrs. Gilbert's order should be filed with him; but, as stated, the clerk and master did not in fact make an order. Therefore it may be said that technically the cause still remains in court, and that it was the duty of the chancellor to pass upon the rights of Mrs. Gilbert at the time he tried the case in March, 1895. But, viewing the case in its most favorable light, as if the original cause was on trial, and the complainant was in a position to avail herself of all that appears in that case, we are of opinion that the second point is decisive against her, and that she is estopped. Even a married woman is estopped whenever her action, if permitted to prevail, would operate as a fraud, whether so intended or not. *Harris v. Smith*, 98 Tenn. 286, 297, 39 S. W. 343, and cases cited; *Howell v. Hale*, 5 Lea, 405; *Pilcher v. Smith*, 2 Head, 209; *Cooley v. Steele*, Id. 604; *Galbraith v. Lunsford*, 87 Tenn. 89, 97, 101-108, 9 S. W. 365; *Crittenden v. Posey*, 1 Head, 312; *Gates v. Card*, 93 Tenn. 334, 24 S. W. 486. The rule would be even stronger against the present complainant, because she was living apart from her husband, and was entitled to the privileges, and subject to the duties and responsibilities, of an unmarried woman. *Cocke v. Garrett*, 7 Baxt. 360; *Yeatman v. Bellmain*, 6 Lea, 488; *Leonard v. Mason*, 1 Lea, 384; *Yeatman v. Bellmain*, 1 Tenn. Ch. 589. The result is that the chancellor's decree dismissing the complainant's bill and taxing her with the costs was correct, and is affirmed, with

the costs of this court and of the court below. All the judges concur.

Affirmed orally by supreme court, December 2, 1898.

LOUD v. HAMILTON.

(Court of Chancery Appeals of Tennessee.
Dec. 3, 1898.)

COMPOUNDING FELONY—DURESS—RATIFICATION— CONFLICT OF LAWS.

1. A mortgage given by plaintiff to defendant, part of the consideration of which was the assignment of defendant's claim against an agent on account of embezzlement of funds of defendant, the main consideration, however, being the release of the agent from custody and from prosecution for the embezzlement, is not void on the ground of compounding a felony.

2. Absence of duress in giving a mortgage to settle the embezzlement of the mortgagor's son-in-law, for which he was under arrest, is shown by the deliberation with which the contract was made; the understanding between the mortgagor and his daughter that this should be considered an advancement; the fact that, before giving the mortgage, he maneuvered for a compromise; the fact that he afterwards had a conference and correspondence with the mortgagee as to whether he should keep notes given by the mortgagor, when the mortgage was in form a deed; and by his delay for four years to make objection to it on the ground of duress.

3. Ratification of a mortgage, though obtained by duress, is shown by the mortgagor's subsequent conference and correspondence with the mortgagee as to whether he should keep the notes given by the mortgagor, when the mortgage was in form a deed, and by his delay of four years to make objection to it on the ground of duress.

4. In the absence of proof to the contrary, it will be presumed that the law as to invalidity of a contract, on the ground of the compounding of a felony, is the same in the state in which the contract was made as in the state in which is the suit relative thereto.

Appeal from chancery court, Lincoln county; Walter S. Bearden, Chancellor.

Bill by Robert Loud against N. A. Hamilton. Decree for defendant. Complainant appeals. Reversed.

Chambers & Zarecor, for appellant. Holman & Carter, for appellee.

NEIL, J. The complainant filed his bill seeking to recover judgment of the defendant on four promissory notes, of \$247 each, and interest due. With the bill, and as an exhibit thereto, is filed an instrument executed by defendant to complainant, conveying certain real estate, and bearing the same date as the note sued on, which appears in form to be a deed, but which complainant insists is, in effect, and was at the time, intended to be simply security for the note, and hence should be construed as a mortgage, and the real estate subjected to the satisfaction of the judgment sought on the notes. The notes were each dated August 14, 1893, and due, respectively, at 6, 12, 18, and 24 months after date.

The bill was filed on December 5, 1895. On March 13, 1896, the defendant filed his answer, in which he denied that the deed was given merely as security for the notes, and averred that the deed and notes were given under the following circumstances, namely: That he had a daughter who had married one W. C. Murphy; that the said Murphy became the agent or salesman of the complainant for the sale of pianos and organs; that, after Murphy had acted as such agent or salesman for a while, a difference arose between the complainant and the said Murphy, in which the complainant charged said Murphy with not having accounted for the amounts received by him for the complainant; that complainant, at Decatur, Ala., had Murphy arrested, charged with felony in not accounting for what complainant alleged he was liable for; that defendant was telegraphed for to come to Decatur, where he went, and found there complainant and said Murphy; that defendant's daughter was then advanced in pregnancy, and was prostrated with grief on account of the arrest of her husband charged with felony; that, after some talk with complainant and Murphy and wife, defendant agreed to give the complainant a deed to the house and lot described in the bill, for the release of said Murphy from arrest, and from the charge of felony, and in full discharge of said Murphy's liability to complainant; that, upon this being agreed to by the complainant, the notes above referred to were drawn up and signed by the defendant for the purpose of showing an indebtedness of defendant to complainant upon which to base the consideration for the deed to the house and lot; that, so far as defendant was concerned, he gave the deed in full discharge of the notes, and for the discharge of Murphy, as above stated; that the reason the complainant did not deliver the notes to defendant, but, on the contrary, retained them, was that defendant agreed with Murphy and wife to give them this property as an advancement out of his estate, and Murphy and wife desired to repossess themselves of the house and lot conveyed in said deed, or get it by paying off the notes to complainant, the intention being to pay off the notes to complainant, and that complainant should make a deed thereto to said Murphy or Murphy and wife; that defendant's daughter Mrs. Murphy died in February, 1894, and that from that time Murphy ceased to manifest any desire to secure the house and lot by paying off the notes held by the complainant. It is further averred that the consideration above mentioned for the execution of said note, as well as said deed, was against public policy and illegal.

On the 8th of March, 1897, the defendant filed a cross bill, in which, after setting out the contents of the original bill and the answer, the following allegations were made: "That, in addition to the allegations contained in his said answer, this complainant states and charges that the defendant, Loud, had complainant's

son-in-law, Murphy, arrested on the charge stated in the answer above set forth, for the purpose of extorting the notes and deed referred to, and to extort money from this complainant; that said notes and deed were executed by this complainant without any consideration whatever, and were executed by compulsion and duress of this complainant by the defendant, Loud, in having complainant's son-in-law arrested, while complainant's daughter was in the condition set forth in the said answer, for the unlawful purpose of coercing payment, or a contract from the complainant to pay the whole of the alleged demand of the said Loud against complainant's son-in-law, the said Murphy." The prayer of the cross bill is that the notes and deed be declared void and canceled.

On the 8th of March, 1897, cross defendant, Loud, filed his answer, in which he denied that he had complainant's son-in-law arrested for the purpose of extorting the notes and the deed referred to, and to extort money from complainant, and that said deed and notes were executed by complainant without consideration, or under duress, or that Murphy was arrested for the unlawful purpose of coercing payment or a contract on the part of complainant to pay the whole of cross defendant's demand or any part thereof. The answer admits that Murphy had been arrested in Alabama, and at the instance of cross defendant, for having collected and for appropriating to his own use certain moneys belonging to cross defendant, and that Murphy was at that time cross complainant's son-in-law, but denies all knowledge as to the condition of Mrs. Murphy's health. It is also denied that the notes were for the release of said Murphy from arrest, but it is averred they were given in settlement of what Murphy really owed cross defendant, the amount he collected for the latter, and appropriated to his own use, and failed to account for. It is further averred that at the time of this settlement, at the earnest solicitation of Murphy and his wife and cross complainant, cross defendant did agree to withdraw the prosecution of Murphy, so far as he was concerned, but that no part of the consideration of settlement was paid, or agreed to be paid, to cross defendant for his withdrawal of said prosecution, and that in fact the settlement was made wholly upon the basis of what Murphy owed cross defendant; that what was done in the way of arranging said indebtedness was not of cross defendant's procurement or solicitation, but was done out of considerations moving between cross complainant and his son-in-law.

The facts are as follows: Mr. Murphy, the son-in-law of defendant, Hamilton, was agent of complainant, Loud, for the sale of pianos and organs, and at the time of his arrest, referred to in the pleadings, was short in his accounts the amount of the above-mentioned notes, being something over \$989. At the instance of complainant, Loud, he was arrested

on the charge of embezzling the funds of his employer, and had so embezzled them. At the time of his arrest, Mr. Murphy's wife was considerably advanced in pregnancy. She was deeply disturbed over the arrest of her husband, and telegraphed to her father, at Elora, Tenn., that she and her husband were in deep trouble, and asked him to come to Decatur. The proceedings at Decatur in behalf of complainant, Loud, were in the hands of his attorney, Mr. Oceda Kyle. Mr. Kyle gives the following account of the matter: "Murphy, who was Hamilton's son-in-law, had become indebted to complainant in the sum of \$989.21, as I remember now. This money had been embezzled by Murphy from Loud, and we were threatening Murphy with a criminal prosecution therefor. He (Murphy) begged for time, some three days, saying he had telegraphed for his father-in-law, Mr. Hamilton, and that he would come from Elora, Tenn., on the first train, and satisfactorily adjust the shortage. To the best of my recollection, within about two days thereafter, defendant, Hamilton, came to Decatur, and was introduced to me and complainant, Loud, as being Murphy's father-in-law. He at once agreed to make good the amount owing by Murphy to Loud, but claimed that he did not have cash money, but would give his notes, and would make his deed to certain real estate, situated in Elora, Tenn.; it being agreed by and between Loud and Hamilton that when the notes were paid, with interest thereon, the said real estate was to be reconveyed by Loud to Hamilton. In order that there should be a valuable consideration for the agreement, and before the same was put in writing, at my suggestion, Loud transferred and assigned to defendant, Hamilton, all of his right, title, and interest in and to the debt owing to him by Murphy, absolutely. This agreement was made, and Murphy was released from any obligation to Loud on account of said debt. * * * It was not agreed and understood that the house and lot were transferred absolutely in full settlement of Murphy's release. On the contrary, it was agreed and understood that, on the payment of the notes with interest, the property was to be reconveyed to Hamilton. It was agreed that Loud should give Hamilton credit on the notes for whatever amount the house and lot should rent for." Being asked at whose suggestion the matter was thus arranged, he said: "I do not know how to answer this question, further than to say that, when Murphy was confronted with embezzlement, he begged for time until his father-in-law could come, claiming that he would adjust it. When defendant, Hamilton, came, the principal negotiations were in trying to find out from Murphy the full amount and extent of his defalcation. Hamilton seemed willing to anything, except he was anxious to have the amount made as small as possible, and that the rents as received by Loud should be credited on the notes." Mr. Kyle further states that Mrs.

Murphy was not present at the time of the negotiations above referred to, and that they took place at his office in Decatur, Ala. He says that he had seen Mrs. Murphy a few days before at her home in New Decatur, when her husband was under arrest, and about two or three days before her father, Mr. Hamilton, came; that she looked worried about her husband's condition, but otherwise seemed well; that she seemed at this time about six or seven months advanced in pregnancy. He further states that Mr. Hamilton was not represented by any attorney or counselor in making the arrangements above referred to.

We adopt the foregoing statement of Mr. Kyle as setting forth the facts of the transaction, with the following additions and modifications: Mr. Loud testifies that, when the negotiations were first entered into, Mr. Hamilton wanted him to take the property in settlement for the claim, but he would not agree to this, as he did not consider that the property was of sufficient value. He says: "We refused to release Murphy from arrest on this settlement, and Mr. Hamilton then agreed to give his notes for the full amount of the claim." Mr. Hamilton testifies: "The consideration for the deed was the release of Murphy. Mr. Murphy was under arrest at Decatur, Alabama. The complainant stated that if this conveyance was not made, and Murphy released, he would have him put in the coal mines, and work it out at 40 cents per day, and he stated this in my presence, after I had got to Decatur." This statement is not denied by Mr. Loud. We find, then, as a fact, that the purpose of the transaction was to release Murphy from arrest, and to quiet his prosecution for the offense of embezzlement; and, further, that it was entered into after the above-mentioned threat was made.

Mr. Hamilton testifies that when the papers were executed by him he was very much excited, and hardly knew what he was doing, on account of the condition of his daughter. This statement, however, is not borne out by the other facts in the record. The negotiation was begun in the morning, and the terms agreed on, but the papers were not executed until the afternoon of the same day. Mr. Hamilton's daughter told him that, if he would execute the deed to the house and lot in Elora, she would consider it as her part of his estate, and would ask no more from him. When asked about this matter in cross-examination, as to why his daughter made such a proposition to him, and if he was hesitating about making the deed, he answered: "Well, I did not know what I would do. I did not know what kind of a compromise I could make with Mr. Loud." This is not the conduct of a man overwhelmed with grief, or whose self-poise is overthrown by mental excitement. It seems rather the act of one who was holding back, or feigning to do so, with expectation, or hope, at least, of getting better terms. In

addition to this, after he returned home, he went to Nashville to see Mr. Loud, and said to him that it was not right for him to hold both the property and the note. This was on the theory that seemed to be entertained by Mr. Hamilton at the time that the deed was an absolute conveyance. As he returned from Nashville, he consulted his attorneys at Fayetteville. These gentlemen, on the 28th of August, 1893, just two weeks after the transaction, addressed the following letter to Mr. Loud: "Dear Sir: Mr. N. A. Hamilton, of Elora, Tennessee, has submitted to us a copy of a deed made by himself and wife to you to property in Elora, and an assignment by you to him of one W. C. Murphy's indebtedness to you, and, if we understand the transaction had between you and Mr. Hamilton, an injustice has been done Mr. Hamilton, perhaps unwittingly, and we write to get your explanation of it, which we hope you will kindly give us, as you understand it. It appears that your have an absolute deed to the property in Elora covered by the deed, and also Hamilton's note, amounting to \$989.20, and that Hamilton only gets Murphy's indebtedness to you of \$800. What was Murphy indebted to you, and was the deed only to secure that? and, if it was, why was it that Hamilton gave you his note for the \$989.20? By giving us a full explanation, in your own way, you will oblige us very much. Was the deed intended as a security, or as absolute and unconditional? Let us hear from you on receipt of this." This letter was turned over by Mr. Loud to his attorney, Mr. Kyle, who on August 30, 1893, replied as follows: "Gentlemen: Mr. Robert L. Loud, of Nashville, Tenn., requests me to reply to your favor of the 28th inst., directed to him. W. C. Murphy was indebted to Mr. Loud in the sum of \$989.20. This was transferred by Mr. Loud to Mr. Hamilton. Mr. Hamilton makes a deed to certain real property, its estimated value being \$800, and Hamilton executes his notes for \$989.20. When the notes are paid, with interest, the real property is to be reconveyed to Hamilton. That was the oral agreement made, as I remember it, prior to the execution of the deed and bill of sale. I do not recollect what provision, if any, the notes provide in the event there is default in payment. You will see, from this, Mr. Loud does not claim \$1,789.20 from Mr. Hamilton, but only \$989.20." To this Mr. Hamilton's attorneys replied on September 2, 1893, to Mr. Kyle as follows: "Dear Sir: Yours of the 30 ult. received. Your explanation of the transaction between Mr. Hamilton and Mr. Loud comports with Mr. Hamilton's statement to us. The ground of complaint on the part of Mr. H. is that the papers do not properly express the transaction, nor the rights of the parties, in this: that the conveyance of the real estate of Mr. H. to Mr. Loud appears to be a deed in fee to the property, whereas it should have been, and was only intended as, a mortgage

security to the \$989.20 note. In the deed there should have been the expression of a defeasance to the effect that, upon payment of the note (\$989.20), the conveyance should be void, or reconveyance of the property. In the absence of such expression, it is within the power of Loud to transfer the note and the real estate to innocent persons without notice, thereby causing Mr. Hamilton to pay the note and also lose the real estate. We would suggest that this can be remedied by Mr. Loud making a deed to the real estate to Mr. Hamilton, retaining a lien, in the deed, for the payment of the \$989.20 note. If this meets your approval, we will draw the deed and send it to you for examination." The matter rested in this condition until the original bill was filed, on the 5th of December, 1895, more than two years thereafter. During all this time there was no intimation, so far as the record shows, that Mr. Hamilton had acted under duress, or while in such a state of mind as he testifies to in his deposition. When the answer was filed, also, on the 13th of March, 1896, nearly three years after the transaction, there was still no intimation of duress. In this pleading the defense was placed upon two grounds: First, that the defendant, Hamilton, was not liable on the notes, because the deed had been given in payment of them; and, secondly, that the transaction was illegal, as we infer from the answer, on the ground that the consideration given was that a felony was compounded. Finally, on the 8th of March, 1897, nearly four years after the transaction, the cross bill was filed, charging duress. This was the first intimation of duress in the record, and the first complaint of that character which Mr. Hamilton made. Under these circumstances, we cannot believe that he was so overwhelmed with excitement and grief at the time he gave the deed and notes that he hardly knew what he was doing, as he testifies. Nor can we believe that he was seriously influenced by the threat which he proves that Mr. Loud made about putting Mr. Murphy in the penitentiary, and thence in the coal mines, to work at 40 cents per day. We do believe, however, that, while Mr. Hamilton did purchase the indebtedness of Murphy to Loud, that was merely subsidiary to the main consideration, which was to release his son-in-law from custody and from prosecution for the embezzlement of which he was guilty, and we find that this was the chief consideration of the transaction, as understood by both Hamilton and Loud, and that in view of this the deed and notes were executed.

As to the contention that the deed to the land was given in satisfaction of the notes, the weight of the evidence is very decidedly to the contrary. This is shown both by the testimony of Mr. Loud and Mr. Kyle; also by the fact that Mr. Loud retained the notes, and that there was an agreement that the rents of the place should be collected by Mr. Hamilton,

and that he should have credit therefor on his notes when he should forward the amount to Mr. Loud; and also by the correspondence which we have above copied. The chancellor, upon the hearing below, dismissed the original bill, and taxed the complainant with all of the costs, except the costs of filing Hamilton's cross bill and of taking Hamilton's deposition. Upon the cross bill he decreed that Hamilton was not entitled to have the deed to the house and lot set aside, and the title reinvested in him, and as to this matter he decreed that the cross bill should be dismissed, but, further, that Hamilton was entitled to have the four notes above mentioned declared void and canceled, and a decree was so entered. He taxed Hamilton with the costs of filing his cross bill and with taking his own deposition. The complainant appealed from so much of this decree as dismissed the original bill. The defendant, Hamilton, appealed from so much of the decree as denied him relief against the deed. Both appeals were granted, but only the first was prosecuted. But the defendant assigns error upon the chancellor's failure to grant relief against the deed. The complainant's assignments are as follows: First, the court erred in dismissing complainant's bill, because the proof clearly shows that the instrument was intended as a mortgage; second, the court erred in not dismissing defendant's cross bill, because the proof fails to show that defendant signed the deed under any misapprehension or duress, and does show that the transaction was supported by a valid consideration, and was clearly understood and freely entered into.

First, as to the subject of duress. In the earliest case we have upon this question (*Blair v. Coffman*, 2 Overt. 176), it is said: "Upon an issue of duress, the inquiry must necessarily be as to the state of mind of the person pleading it, and not as to the existence of some fact, such as acts done or things which are susceptible of demonstration from the senses. Evidence of conversation, acts before, at the time, and after the supposed duress, would be proper to show the state of mind in which the act was done. In the nature of things, it is the best evidence of which the case is capable; for no man can swear particularly how another felt at the time he did an act. It is not the mere affair of a person, being in prison, or under circumstances of hardship, that will enable him to avoid an act. Such things may exist, and yet no coercion. Hence the necessity of the inquiry as to the state of the plaintiff's mind, and no evidence so proper as his own acts and conversation to show it." In the case of *McSween v. Miller*, 1 Heisk. 104, note, it is said: "The rule is, where a threat of unlawful mischief or injury to the person, property, or good name of a party is of sufficient importance to destroy his free agency, the law, because of such duress, will not enforce any contract which he may be induced by such threats to make. The controlling question is, was the threat of such

a character as, under the circumstances surrounding the parties at the time, was sufficient to overcome the mind and will, or, in other words, to destroy the free agency, of a person of ordinary firmness? and, his free agency being thus destroyed, was he thereby induced to give his assent to the contract? If so, the contract can have no validity whatever, because it is wanting in the essential elements of a valid binding contract, to wit, the free and voluntary assent of the minds of the parties making it." In the case of *Rollings v. Cate*, it was held that, in order to constitute "duress," in its legal sense, it must appear that the party acted under "some threatening of life, or member, or of imprisonment, or some imprisonment or beating of the party acting, or of his wife, with the view to procure the execution of the deed or other instrument, and that the danger existing or threatened should affect the person or goods or property." 1 Heisk. 97, reaffirmed in *Bogle v. Hammons*, 2 Heisk. 141, 142. In *McCartney v. Wade*, 2 Heisk. 369, 374, it is said: "It is not necessary, in the view of a court of equity, to show that a party acted under the influence of extreme terror in making a contract. If he acted under threats or apprehensions, short of duress, but under such circumstances as to show that he was not a free agent, and was unable to protect himself, the contract will be annulled." In *Johnson v. Roland*, 2 Baxt. 203, 206, it is said: "The threat must be of such a character as to overcome the mind and will, and destroy the free agency, of a person of ordinary firmness." To the same general effect, see *Be'ote v. Henderson*, 5 Cold. 471; *Wilkinson v. Bishop*, 7 Cold. 24; *Looper v. Phillips*, 1 Shannon, 269; *Coffman v. Bank*, 5 Lea, 232. The last-mentioned case is very striking in its facts. The substance of it is that a father was called into the back room of a bank, in the presence of some of its officers, and suddenly informed that his son had forged two notes, of \$900 each, and got the money on them from the bank, and the notes were exhibited to the father. He was greatly agitated, and, as the court said, "literally overwhelmed by the calamity." The bank officers said that he was greatly moved and distressed, and wept bitterly. He himself said in his testimony that during his interview with the bank, owing to the suddenness of the communication, and the nature of the calamity, he was incapacitated from entering into any contract with full knowledge of its scope. The proof of his brother and his neighbors was that he was thoroughly unnerved by the calamity: "almost in a state of mental aberration," to use the language of a neighbor and a physician; "and wellnigh crazy," to use the words of other witnesses. This was the state of mind in which he executed the note to the bank. Promptly, within a few days after the transaction, he repudiated it, and demanded back his note which he had given to cover the two \$900 notes. In this case it

seems that there was no imprisonment of the son, nor any threat to prosecute him, or promise to refrain from doing so. The case goes off on the idea that owing to the shock, surprise, and grief, under which the father labored when he executed the note, he was not in such a mental condition as to enable him to execute a contract.

We are referred by counsel to the case of *Bank v. Kusworn* (Wis.) 26 Lawy. Rep. Ann. 48 (s. c. 59 N. W. 564), and the full note attached thereto, and especially to pages 64 and 65, or the section of the note there appearing. The doctrine referred to in the pages last mentioned may be prefaced with this statement from Lord Bacon's maxims: "So, if a man menace me that he will imprison or hurt in body my father or my child, except I make unto him an obligation, I shall avoid this duress, as well as if the duress had been to my own person." In section 6 of the note referred to it is said that the doctrine applies to other relations besides those of husband and wife or parent and child. Continuing, it is said: "Yet, when such a state of mind ensues upon the prosecution or oppression of a brother, and the conveyance, or other obligation, is thereby extorted, relief will not be granted as readily as where the conveyance or contract has been extorted from either a father or son by the duress of the other. In such cases, circumstances of oppression or imposition must clearly appear, and it must not be simply a case where a party may have purchased immunity for his brother from lawful prosecution,"—citing *Davis v. Luster*, 64 Mo. 43. It is said in the same note that in *Town of Sharon v. Gager*, 46 Conn. 189, the court refused to foreclose a mortgage executed by an aunt to secure her nephew's defalcation as town treasurer, procured by one of the selectmen under threats and menace of the prosecution of the nephew; and that, in *Bradley v. Irish*, 42 Ill. App. 85, where the notes were extorted through fraud and duress, in connection with the criminal process issued against a grandson charged with embezzlement and forgery, the mortgage and notes in question being obtained by means of a scheme whereby a warrant was procured for his arrest, the accused being taken by the deputy sheriff to his grandmother's home, where, by threats of putting him in the penitentiary, knowing her great affection for him, the note and mortgage in question were procured, the court held the mortgage null and void, and directed it set aside as a cloud upon title, and delivered up for cancellation, and enjoined its enforcement. Referring, again, to the case of *Davis v. Luster*, it is said in the same note that this was a case where it was sought to set aside a conveyance procured by means of threats of prosecution of the plaintiff's brother, and that the court held that, in order to entitle the plaintiff to the relief sought, he must show that it was given for the express purpose of freeing his brother from prosecution upon an innocent charge, and that the

prosecution was unlawful, and also must show that the deed was executed upon the belief that its nonexecution would lead to a criminal prosecution. We are referred by defendant's counsel especially to the case of *Snyder v. Willey*, 33 Mich. 483, mentioned in the same note. In this case it appears that a joint and several promissory note was given, and a material part of the consideration was the stifling of two criminal prosecutions, one for forgery, commenced by the plaintiff against defendant's son-in-law, and it was held that the notes were void, and their collection could not be enforced, the consideration being illegal. In the case just referred to the father-in-law's signature was procured mainly by the entreaties of the daughter, urged on, and her fears played upon, by the plaintiff; the court admitting her evidence as to the inducement as part of the *res gestæ*. The case last cited does not go to the extent of holding that a son-in-law would stand in the same relation with regard to the question we now have in hand as would a son or wife, the case going off on a different ground altogether. But we are inclined to the opinion that where a son-in-law and his wife are living in harmony, and there is nothing to show any estrangement between the father-in-law and the son-in-law, the latter would stand in the same relation, so far as concerns the present question, as would the daughter herself. It is without doubt true that the danger to the son-in-law, and the consequent grief and terror of the daughter, would act upon the father's heart with substantially the same force as if the daughter herself were in danger, or, at least, nearly so. We may go further and hold, as was done in the case of *Coffman v. Bank*, 5 Lea, 232, that if a party's mind is so agitated from the peril in which a near relative stands, even though there is no prosecution or threat of prosecution, as that his free agency is substantially canceled, a contract made by him under such circumstances could not stand. But it is said in some of the cases that if a father is appealed to to take upon himself a civil liability, with the knowledge that, unless he do so, his son will be exposed to a criminal prosecution, with the moral certainty of conviction, even though that is not put forward by any party as a motive for the arrangement, he is not a free and voluntary agent, and the agreement he makes, under such circumstances, is not enforceable in equity. See cases cited on page 56 of 26 Lawy. Rep. Ann., and note. We cannot yield our assent to the full extent of the doctrine thus stated. We do not think it can be said with truth that, owing to parental affection, such a proposition made to a father for the release of his son,—that is, by the execution of the father's obligation,—would leave him no alternative but to execute the obligation, and thus substantially for the time destroy his free agency. If this were a sound view, few bail bonds, where the father executes them as surety for the son, could be

held good, and the same infirmity would exist in obligations executed for counsel fees. The principle would be the same. What we mean to say is that a proposition of the nature referred to, made to a father, would not be such as, under the normal operation of the principles and emotions governing human conduct, would necessarily command his compliance, or deprive him of his free agency. The situation referred to would no doubt be very strong evidence to support a charge of duress, and, in the absence of other evidence, sufficient, but not necessarily conclusive. In the face of these facts, it may yet be shown that the father was in such a state of mind as that he was able to consider the propriety of the act proposed, not only from the standpoint of parental affection, but also from the standpoint of moral and legal duty. This we say with regard to legal prosecutions. Of course, the same situation may also arise in case of the threat of a prosecution without legal justification. Whether obligations so obtained would not be invalid for another reason—that is, as being without consideration, and against public policy, as, in the case of legal prosecutions, the compounding of felonies—is another matter, the above observations being confined merely to the defense of duress.

And in this connection it is proper to observe that confusion occurs in citing cases under the law of duress, if we fail to distinguish between those instances in which obligations are given for the purpose of compounding criminal prosecutions and those in which a party may be lawfully released from custody upon the payment of a sum of money. It is said that, in order to put a party under duress by imprisonment,—that is, legal duress,—the imprisonment must be unlawful, or there must be an abuse of, or an oppression under, legal process or legal detention. 6 Am. & Eng. Enc. Law, 62. In a note to the above authority, it is said that where there is an arrest for an improper purpose without just cause, or where there is an arrest for a just cause but without lawful authority, or for a just cause but for an unlawful purpose, the rule is that, in either of the events, the party arrested, if he is thereby induced to enter into a contract, may avoid it as one procured by duress. Again it is said that it is a general rule that imprisonment by order of the law is not duress; but, to constitute duress by imprisonment, either the imprisonment, or the duress after, must be tortious and unlawful. If, therefore, a man, supposing that he has a cause of action against another, by lawful process cause him to be arrested and imprisoned, and the defendant voluntarily executes a deed for his deliverance, he cannot avoid such deed by duress of imprisonment, although in fact the plaintiff had no cause of action, but although the imprisonment be lawful, unless the deed be made freely and voluntarily, it may be avoided by duress; citing *Watkins v. Baird*, 6 Mass. 506. Again, it is said (page 64) a contract made by one under

arrest, through lawful process, as a condition of his deliverance from imprisonment, cannot be avoided on the ground of duress, although it be shown that no cause of action really existed; citing *Clark v. Turnbull*, 47 N. J. Law, 265, and numerous other authorities. The case last referred to was as follows: The plaintiff, Clark, advanced money to Henry E. Turnbull, in the city of New York, to the amount of about \$4,000. She insisted that he received the money, as her agent, to invest for her in good interest bearing security, and that he fraudulently appropriated the money to his own use. The defendant, who was a brother of Henry E. Turnbull, claimed that the money so advanced to him—that is, to Henry E. Turnbull—was placed with him as a stock broker, under instructions to invest in stock speculations on margins, and that it was used in such gaming transactions, and lost. To assert her claim for this money as a debt, the plaintiff brought suit against Henry E. Turnbull in one of the courts of New York, under which legal proceedings the defendant therein was arrested and taken into custody. While so in custody, in an arrangement to settle that suit, Walter A. Turnbull, his brother, the defendant in the case above referred to, was called in to participate, and did so by advancing for Henry \$1,200 in cash, and giving to him the promissory note sued on, which Henry indorsed to the plaintiff for the balance. Henry was thereupon released from his imprisonment, and the suit against him was subsequently discontinued. This state of facts it was held did not support the defense of duress. So, in this state, it is held that, under our statute, an agreement based upon the settlement of an embezzlement by a private agent of the funds of his principal would be a legal agreement, even if there were included in a part of it a stipulation not to prosecute the agent criminally. *Allen v. Dunham*, 92 Tenn. 257, 269, 21 S. W. 898. The making of a contract to be released from imprisonment in such a case could not be defeated by the defense of duress put forward by the embezzler himself, and a fortiori could not be defeated by a near relative who should execute such a contract for the deliverance of the prisoner.

To apply what has been said: We are of opinion that the facts stated fail to show that the defendant acted under duress, and that they also show that he ratified the contract. The absence of duress is shown by the deliberation with which the contract was made at Decatur; by the understanding had between the father and daughter as to the advancement; by his own statement that he was maneuvering for a compromise; by his trip to Nashville, and conference with complainant, Loud; by the correspondence instituted on his behalf by his attorneys, with his sanction; and by the long delay to bring forward any objection to the contract on the ground of duress. The ratification is shown by the same acts, above referred to, which

happened subsequent to the execution of the contract, and also by the delay mentioned. Where a contract is sought to be avoided as procured under duress, the party wronged must proceed promptly. If he remain silent, keeps the property received, or recognizes the contract by affirmative acts, he will be held to have waived the duress. 6 Am. & Eng. Enc. Law, 88. We have also an authority in this state to the effect that contracts procured by duress may be ratified. *Belote v. Henderson*, 5 Cold. 471, 476.

As to the point that the consideration of the obligation given was the compounding of a felony, and therefore that it was void on grounds of public policy, this is met by the case of *Allen v. Dunham*, supra, and the discussion in connection therewith. It is true that the transaction occurred in Alabama, but, there being no proof as to the law of Alabama in this class of cases, we must presume that it is the same as our own. We therefore hold that the contract was not void, as against public policy.

It is insisted by defendant that it was not proper to hear proof below to show on behalf of complainant that the deed above referred to was a mortgage, and not a deed. It is said that such proof is competent in favor of the maker of an instrument, but no authority authorizes its introduction in behalf of the vendee. No objection was urged in the court below on this ground. But the objection itself has no real weight, as we think, in any event. It was certainly competent for the complainant to defend the charge of the cross bill, and show, as a matter of fact, the notes were not paid, or intended to be paid, by the deed. We have held that this was very clearly proven. The defendant also insisted, in the correspondence which we have copied, that the deed was only intended as security for the notes, and the complainant admits that this was true. So it is established that the deed was in fact a mere security. It is established in the manner just stated, and also by the direct proof of two witnesses, as against the defendant's testimony alone. But if it be conceded that the deed was indeed absolute, inasmuch as it is shown that the notes were never paid the defendant could not be heard to object that the complainant should sell his own land for their payment. However, as stated, it is fully proven that the notes are unpaid, and that the deed was intended as a mere security.

The result is the decree of the chancellor dismissing the original bill, and decreeing relief against the notes under the cross bill, must be reversed, and a decree must be entered here in favor of the complainant, Loud, against the defendant, Hamilton, for the amount of the notes and interest, and also to sell the land described in the bill for the payment thereof. The decree will direct a sale on a credit of 12 months, and in bar of the equity of redemption, a special prayer to this effect appearing in the bill. The defendant

will pay the costs of this court and of the court below. All the judges concur.

Affirmed orally by supreme court, March 2, 1899.

ILLINOIS CENT. R. CO. v. NALL.¹
(Court of Appeals of Kentucky. May 25, 1899.)

ACTIONS—NEXT FRIEND—AFFIDAVIT.

An affidavit stating that affiant is the father of plaintiff, "who is an infant under 21 years of age, that he is a resident of Hardin county, Ky., and free from disability, and that he has no guardian, curator, or committee residing in this state known to affiant," is sufficient to authorize the prosecution of the action by affiant as next friend.

Appeal from circuit court, Hardin county.
"Not to be officially reported."

Action by Rodman Nall, by next friend, against the Illinois Central Railroad Company, to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

The affidavit of the next friend states that "he is the father of the plaintiff, Rodman Nall, who is an infant under 21 years of age, that he is a resident of Hardin county, Ky., and free from disability, and that he has no guardian, curator, or committee residing in this state known to affiant."

Pirtle & Trabue and James Montgomery, for appellant. J. P. O'Meara, for appellee.

GUFFY, J. This action was instituted in the Hardin circuit court by the appellee against the appellant to recover damages for injuries inflicted upon the appellee by the willful carelessness and negligence of the appellant in running its engine and train of cars into and against the plaintiff, bruising him, etc., to his damage in the sum of \$1,000. The defendant's demurrer to the petition was overruled, to which it excepted. The answer is a denial of all negligence upon the part of the appellant. A jury trial resulted in a verdict and judgment in favor of appellee for the sum of \$200; and, plaintiff's motion for a new trial having been overruled, it prosecutes this appeal.

It seems to us that the affidavit of the next friend was sufficient to authorize the prosecution of the suit. We are not of opinion that any error occurred as to the admission or rejection of testimony. The court did not err in overruling appellant's motion for a peremptory instruction to find for defendant, and we perceive no error in the giving or refusing of instructions. We think the testimony, although conflicting, sufficiently sustains the verdict of the jury; nor does it appear that the verdict was given under the influence of passion or prejudice. It does not appear that there was any error in the assessment of damages. Upon a careful consider-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ation of the entire record, we fail to perceive any error prejudicial to the substantial rights of the appellant, and the judgment is therefore affirmed, with damages.

INGRAM v. TURNER.¹

(Court of Appeals of Kentucky. May 25, 1899.)

EXECUTION — VENUE OF ACTION AGAINST OFFICER FOR NEGLIGENCE OF DUTY — PLEADING.

1. Under Ky. St. c. 46, art. 18, which operated to repeal the provisions of the Civil Code of Practice on that subject, the jurisdiction of an action against a sheriff for failure to discharge his duty under an execution is vested in the courts of the county in which the judgment was rendered.

2. Objection to a petition on the ground that it does not state the details of a fraudulent conspiracy relied upon must be taken by motion to make more specific, and not by demurrer.

3. Where it is manifest that a verdict was returned under the first paragraph of the petition, it is immaterial whether the second paragraph stated a cause of action.

Appeal from circuit court, Harlan county.

"Not to be officially reported."

Action by George B. Turner against E. Ingram to recover damages for defendant's breach of duty as sheriff with reference to an execution. Judgment for plaintiff, and defendant appeals. Affirmed.

W. B. Hays, for appellant. J. Smith Hays, for appellee.

GUFFY, J. Appellee, Turner, instituted this action in the Harlan circuit court. It is substantially alleged in the petition that the plaintiff had recovered a judgment in the Harlan circuit court against William Howard, the principal, interest, and costs of which amounted to something over \$100; and that on the 28th of November, 1896, he caused an execution to issue directed to the sheriff of Bell county, in which county Howard resided, which execution was placed in the hands of Ingram, who was then sheriff of Bell county. That the defendant in the execution was the owner of one steam sawmill, which was subject to execution, and which was worth more than plaintiff's debt, and for which plaintiff would have bid the amount of his debt. Before the sheriff would levy said execution, he required this plaintiff to execute a bond of indemnity as provided by law, which bond was executed by the plaintiff, and defendant was directed to levy said execution upon said property, which said defendant claims he did; but it is alleged in the petition that the defendant fraudulently, and immediately after and at the time he made said levy, entered into collusion and agreement with said Howard to manage, in some way unknown to plaintiff, to sell said mill, and have it bid in at a small sum, and, to further consummate this agreement, said sheriff did, on a day unknown to this plaintiff, and without plaintiff's

knowledge, make a sale of said property to some one for the sum of one dollar, which he either collected or took bond for, plaintiff does not know, but said purchaser at said sale did take possession of and now has and claims said property to be his own. He states, further, that said sheriff said he had the proceeds of said sale, and would pay over same, but has not done so. It is further alleged that said Howard is insolvent, and has no property subject to execution, and by the fraudulent acts of the defendant, Ingram, plaintiff has lost his debt, and been damaged thereby in the sum of \$50, with interest from October 1, 1872, and \$13.70 costs. In the second paragraph it is alleged that the sheriff failed to return said execution for more than 30 days after the return day; and judgment finally prayed for as set out, and 30 per cent. damages. The defendant filed the following demurrer: "The defendant, E. Ingram, demurs specially to the petition because this court has no jurisdiction of the subject of the action, and only now for the purpose of objecting to this court's jurisdiction does he appear,"—which demurrer was overruled by the court, to which defendant excepted. Afterwards the following demurrer was filed: "The defendant, E. Ingram, objects still to the jurisdiction of this court, and, without waiving said objection, now comes, and (1) demurs to the first paragraph of the petition, because same does not state facts sufficient to constitute a cause of action; (2) demurs to the second paragraph of the petition, because same does not state facts sufficient to constitute a cause of action; (3) demurs to the petition as a whole, because same does not state facts sufficient to constitute a cause of action; (4) especially objects to the jurisdiction of this court, and demurs to the jurisdiction of the court to hear said demurrer or hear the cause." Said demurrer was overruled by the court, and, defendant declining to plead, the plaintiff moved to take the allegations of the petition for confessed, which it seems was finally done, and a jury impaneled to assess damages, and, after hearing the evidence and instructions of the court, returned a verdict in favor of plaintiff for \$139.20, upon which verdict a judgment was rendered by the court. The defendant filed the following motion: "The defendant, E. Ingram, appearing only for the purpose of this motion, and not waiving his objection to the jurisdiction of this court, both now and hereafter, to adjudicate the above-styled cause, now moves the court to vacate and set aside the judgment herein (1) because the same is void for want of jurisdiction of the court to render same; (2) because the allegations of said petition will not support a judgment,"—which motion being overruled by the court, defendant prosecutes this appeal, and asks a reversal on several grounds.

It is earnestly contended for appellant that the Harlan circuit court had no jurisdiction of the subject-matter of the action. The petition shows that the judgment was rendered in

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Harlan circuit court, but that defendant was sheriff of Bell county, and the execution was placed in his hands as sheriff of Bell county. It will be seen, from an examination of the statute and Code, that the jurisdiction as to actions against public officers has sometimes been confined to the county of the officer's residence, and sometimes to the county in which the judgment was rendered upon which the execution issued, and was placed in the hands of the officer for collection. It will be seen, from an examination of article 18, p. 1027, Acts 1891-93, that suits against officers for failure to discharge their duties, under process issued and delivered to them, is vested in the courts of the county in which the judgment or proceeding was had, the execution of which was required to be executed by the sheriff; and this, being the last enactment on the subject, must govern, notwithstanding the provisions of the Code of Practice. It results, therefore, that the Harlan circuit court had jurisdiction of the subject-matter.

The remaining question to be determined is whether the petition stated a cause of action. It seems to us that the first paragraph of the petition states a cause of action. It may be that the plaintiff, on motion, would have been required to make the petition more specific, but taking the averment as true, which must be done upon demurrer, we think it showed that the sheriff was guilty of negligence, and fraudulently conspired and agreed with somebody to prevent the collection of the debt, and if he did so he would be liable for the damage plaintiff sustained; and, as there is no bill of exceptions showing the testimony or instructions of the court, it must be presumed that the evidence introduced before the jury was sufficient to authorize the verdict, and that the jury was properly instructed. It is not necessary to determine whether the second paragraph of the petition stated a cause of action, as it does not appear that any verdict or judgment was rendered for any damages for failure to return the execution. Indeed, the verdict and judgment indicates that it was based upon the first paragraph of the petition. Judgment affirmed, with damages.

In re WILSON et al.¹

(Court of Appeals of Kentucky. May 19, 1899.)

APPEAL AND ERROR — FAILURE TO FILE APPEAL BOND—PARTIES TO APPEAL.

1. Where no appeal bond was filed with the clerk of the circuit court, as required by Ky. St. § 2396, it was proper to dismiss an appeal from an order of the county court, in a proceeding to appoint viewers to view a proposed drainage ditch.

2. Persons interested, who file a remonstrance in such proceeding, as provided by Ky. St. §

2390, become parties to the proceeding, and are necessary parties to an appeal to the circuit court, and must be served with process.

Appeal from circuit court, Daviess county.
"Not to be officially reported."

Appeal to the circuit court from an order of the county court on a proceeding by M. G. Willson and others for the appointment of viewers to view a proposed drainage ditch. Judgment of the circuit court dismissing the appeal, and the petitioners appeal. Affirmed.

R. G. Hill, for appellants.

WHITE, J. The appellants, Wilson and others, filed their petition in the Daviess county court, as provided by the act of July 10, 1893, being section 2381, Ky. St., seeking to have appointed viewers to view a proposed drainage ditch, as therein provided. The county court appointed viewers, and they made a report, which was in favor of the proposed work. Upon the filing of this report, certain interested citizens filed in the county court a remonstrance, as provided by section 2390. The county court adjudged, on demurrer, that the petition and report were both insufficient. Appellants amended their petition, and moved the court to reappoint the same viewers theretofore appointed. The court declined to appoint the old viewers, but held that entirely new viewers should be appointed. Appellants declined to accept the appointment of new viewers, and declined to prosecute the case further, and the same was dismissed. An appeal was prosecuted to the circuit court. In the circuit court appellants moved the court to enter judgment directing the county judge of Daviess county to make an order as requested by appellants, i. e. re-appointing the old viewers. The circuit court refused to so adjudge or order, but dismissed the appeal. From that order this appeal is prosecuted.

Appeals in cases of this character, from the county to the circuit court, are provided for by sections 2396, 2397, Ky. St. From the record before us, it is not shown that an appeal bond was executed or that summons was ever issued. By subsection 4 of section 2396, an appellant appealing to the circuit court is required, within 10 days after judgment, to file with the clerk of the circuit court an appeal bond, etc. We are of the opinion that, this bond not having been executed, no appeal was taken, as the law provided by the act. We are also of opinion that, when the remonstrance was filed in the county court, the parties making such remonstrance became parties to such proceeding, and, on appeal to the circuit court, these remonstrators were necessary parties to the appeal, and were entitled to be served with process, as in other cases brought from an inferior to the circuit court. There was no appeal in the circuit court, and the same was properly dismissed. Judgment affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

THOMAS v. FEESE et al.¹

(Court of Appeals of Kentucky. May 19, 1899.)

**LIMITATION OF ACTIONS — AGREEMENT TO DEVISE
PROPERTY TO ANOTHER—STATUTE OF
FRAUDS — LIENS.**

1. Plaintiff's right of action for breach of a contract, whereby F. promised that upon the death of himself and his wife plaintiff should have all the property they left, did not accrue until the death of F.'s wife, who survived him.

2. As such a contract is possible of performance within a year, it is not within the statute of frauds.

3. Plaintiff is entitled to a lien upon the real estate agreed to be given or devised to her for the value of her services.

4. As against plaintiff's lien, one who purchased the land at a sale made to satisfy his debt against the decedent has no title, plaintiff not being a party to the action in which the sale was made.

Appeal from circuit court, Adair county.

"Not to be officially reported."

Action by Mary E. Thomas against Ma-linda Feese and others to recover damages for breach of contract. Judgment for defendants, and Harriet E. Thomas, executrix of Mary E. Thomas, appeals. Reversed.

J. F. Montgomery, for appellant. Garnett & Garnett, for appellee Dehoney. Rollins & Hurt, for other appellees.

GUFFY, J. Mary E. Thomas instituted her action in the Adair circuit court against the appellee Feese and others. It is substantially alleged in the petition that Loyd W. Feese, in 1880, entered into a contract with plaintiff, by which it was mutually agreed between them that she was to go and live with said Feese and wife (his wife being her sister) until the death of said Feese and wife, for which services said Feese was to furnish her board and clothing, and pay her doctor's bills, and at the death of said Feese and wife the said plaintiff should have all the property they left; and that pursuant to said agreement she did go to said Feese's home, and helped to take care of his wife, and worked as agreed, until the death of said Feese, which occurred in 1888 or 1889, and so continued to live with the widow until the death of the widow in the year 1894. The petition sets out and describes two small tracts of land as the property of said Feese at the time of his death, and which it seems he owned at the time plaintiff went to live with him, and she sought to have the land adjudged to her, or, if that could not be done, that she be adjudged a lien upon it to pay her for the services rendered under said contract with said Feese, which services she claimed to be of the value of \$1,077.50, credited by \$100 for personal property owned by the decedent and received by the plaintiff. The defendants denied the contract, as well as the services and the value thereof, and pleaded the statute of limitation as well as the statute of frauds and perjuries. It further appears that appellee Dehoney was seek-

ing in some manner and under some claim of purchase to be entitled to the possession of one of the five-acre tracts of land aforesaid, and the aforesaid plaintiff brought suit, and enjoined the execution of the writ under which he was seeking to obtain possession. The said Dehoney made similar defense in this action, and also claimed to have obtained a judgment and sale of the said tract of land under judgment of the Adair circuit court for the satisfaction of a debt owing to him from the decedent, Loyd W. Feese. The two suits were consolidated, and, after the issues were all made up, and proof taken, the court dismissed plaintiff's petition. It is proper, however, to remark that before the final hearing the plaintiff departed this life, and the suit was revived in the name of the present appellant, Harriet E. Thomas, who, it appears, is the executrix and sole devisee of said plaintiff; and from the judgment aforesaid appellant has appealed.

It seems to us that the contract declared on is established by the proof, and, while it is true that a conveyance of the land cannot be adjudged to the appellant, yet the plaintiff is entitled to an equitable lien upon the land for the payment of what her services were reasonably worth. The statute of limitation is unavailing in this case, because the action did not accrue until after the death of the widow of the said Loyd W. Feese; and it has been repeatedly settled by this court that similar contracts are not within the statute of frauds and perjuries, and, furthermore, it has been held in such cases that parties rendering services under similar promises or contracts are entitled to a lien upon the real estate agreed to be given or devised to them. *Speers v. Sewell*, 4 Bush, 239; *Myles' Ex'r v. Myles*, 6 Bush, 237; *Usher's Ex'rs v. Flood*, 83 Ky. 552. It is true that the proof as to the value of the plaintiff's services is conflicting, but, taking all the proof together, we are of the opinion that she was entitled to the sum of \$618, after deducting the credit of \$100 for the personal property received and credited upon her account, which sum should bear interest from the date of the death of Mrs. Feese, which was the 15th of December, 1894; and the same is adjudged to be a lien upon the two five-acre tracts of land mentioned in the pleadings, and a sufficiency of same should be sold to pay said sum, together with interest and costs. So far as the claim of appellee Dehoney is concerned, without determining whether he was entitled, in any event, to a sale of the land claimed by him, it is sufficient to say that the plaintiff was not a party to his suit, and that her lien was superior to his, if any he had, on the two five-acre tracts, and as to the claim of said plaintiff the sale and purchase by and under Dehoney's judgment is invalid, and of no effect. For the reasons indicated, the judgment appealed from is reversed, and cause remanded for proceedings consistent with this opinion.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

**MUTUAL FIRE INS. CO. OF NEW YORK
v. HAMMOND.¹**

(Court of Appeals of Kentucky. May 19, 1899.)

**CONSTITUTIONAL LAW—UNJUST DISCRIMINATION—
DAMAGES ON AFFIRMANCE OF APPEAL.**

The amendment to Civ. Code, § 764, providing for 10 per cent. damages on the affirmance of a judgment for money rendered against any insurance or railroad corporation, or against any foreign corporation, is unconstitutional, as an unreasonable and unjust discrimination, other appellants being required to pay such damages only where there is a supersedeas bond in the record.

"Not to be officially reported."

Motion for damages. Denied.

For opinion, see 50 S. W. 545.

HAZELRIGG, C. J. The motion before us is for damages because of the recent affirmance of the judgment in this case, although there was no supersedeas bond in the record when the case was disposed of. It is said the motion should prevail because of the amendment to section 764 of the Civil Code providing that, "upon the affirmance of, or dismissal of, an appeal from a judgment of money rendered against any insurance, railroad corporation or company or against any corporation not created by or organized under the laws of the commonwealth of Kentucky, ten per cent. damages on the amount of the judgment appealed from shall be awarded against the appellant, although such judgment be not superseded." In *Railway Co. v. Clark*, 11 Ky. Law Rep. 808, it was held by the superior court that this act was unconstitutional, because it was a discrimination in favor of the general class of litigants as against foreign corporations and domestic insurance and railroad companies. While there seems to have been no authoritative utterance to the same effect in this court, the unvarying practice here has been to refuse damages except where there is a supersedeas bond in the record when the case was decided. This practice, when the corporations embraced in the act were affected, proceeded on the theory that the views of the superior court were sound, and the act unconstitutional. We are inclined to the opinion that the law attempts an unreasonable and unjust discrimination, and cannot be upheld. Motion for damages denied.

BENGE'S ADM'R v. BOWLING.¹

(Court of Appeals of Kentucky. May 12, 1899.)

**HOMESTEAD — TIME OF CREATION OF LIABILITY —
COVENANT OF WARRANTY.**

A covenant of warranty in a deed creates a liability as of the date of the deed, and not as of the date of eviction, and therefore, as against that liability, the grantor cannot claim a homestead in land purchased after the deed was executed.

Appeal from circuit court, Clay county.

"To be officially reported."

Action by the administrator of Fred Benge against John Bowling to enforce a judgment. Judgment for defendant, and plaintiff appeals. Reversed.

A. W. Baker, for appellant. Lyttle & Jeffries, for appellee.

PAYNTER, J. By a deed made in October, 1881, the appellee, Bowling, was liable to the vendee, Benge, on the warranty contained therein. Before the covenant was broken by the eviction of the vendee, the appellee bought and paid for the land which is sought to be subjected to the payment of the judgment which was rendered against the appellee on the warranty. So the eviction of appellant's intestate took place after appellee had purchased the land to which he is entitled as a homestead, unless the warranty in the deed created a "liability," in the meaning of section 1702, Ky. St., part of which reads as follows: "But this exemption shall not apply to sales under execution, attachment or judgment, if the debt or liability existed prior to the purchase of the land, or of the erection of the improvements thereon." The question in this case is whether the covenant of warranty created a liability, or did the liability, in consequence of such warranty, arise when the eviction took place? If the liability was created by the warranty, then the land claimed as a homestead is subject to the payment of the judgment on the warranty. If no liability existed on the warranty until the eviction took place, then the land is exempt as a homestead, because it was purchased and paid for previous to that date. "Liability" is defined by Black's Law Dictionary to be "the state of being bound or obliged in law or justice to do, pay, or make good something; legal responsibility." Webster defines it to be "the state of being bound or obliged in law or justice; responsibility." Bouvier defines it to be "responsibility; the state of one who is bound in law and justice to do something which may be enforced by action." When the covenant of warranty has been broken by eviction, the liability on the warranty does not then accrue, but the cause of action then accrues on the liability which the vendor assumed by his covenant of warranty. It is by reason of the existing liability, resulting from the warranty, that the cause of action accrues. An obligation to pay money at a future time creates a liability, and when the promisor breaks his promise to pay the cause of action accrues. This court has held that, where the vendee has been evicted, he is entitled to recover the money which he paid, and interest thereon from the date of the deed containing the warranty, not interest from the date of the eviction. It treats it as a liability incurred as of the date of the deed. The moment the deed is executed and accepted, the vendor promises the vendee, in effect, that, if he is evicted from

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the land which he conveys to him, he will repay him the purchase money, with interest thereon from the date of the deed. This obligation, however, cannot be enforced, and no cause of action arises until the happening of the event which entitles the vendee to have his money, with interest, refunded, and, upon the failure of the vendor to do so, his right to maintain an action begins. If we should hold that no liability existed upon the covenant of warranty until eviction, the vendor could invest the purchase money in a homestead the same day or day after receiving it, and, although the vendee from whom he obtained it was evicted within 12 months thereafter, still the homestead in which he had invested it could not be subjected to the payment of such judgment as his vendee might recover against him for the breach of the covenant of warranty. The mere fact that years may elapse between the execution of the deed and the eviction does not affect the question as to whether the warranty created a liability, or lessen the legal or moral obligation of the vendor to refund, with interest, the amount which he received from the vendee. The liability imposed by a warranty is as just as, and the vendor should be no more permitted to hold his homestead against it than, any other debt or liability which he might have incurred prior to the purchase of the homestead. We think the evidence authorizes the court below to adjudge Mrs. Gray the 50 acres of land which her father sold her. We do not think there is any merit in the question of estoppel raised. The judgment is reversed, for proceedings consistent with this opinion.

SMITH et ux. v. SCANLAN.¹

(Court of Appeals of Kentucky. May 12, 1899.)

LANDLORD AND TENANT — PURCHASE BY TENANT AT EXECUTION SALE — SALE OF LEASEHOLD UNDER EXECUTION — FRAUDULENT CONVEYANCE.

1. A purchase by the tenant of the leased property under execution against the landlord does not inure to the landlord's benefit, and therefore the landlord is not entitled to rent from the time of such purchase.

2. The leasehold of a tenant, though he has sublet the property, is subject to sale under execution for his debts.

3. The assignment of a leasehold by the tenant to his wife, with intent to defraud his creditors, does not prevent the sale of the leasehold under execution against the tenant.

Appeal from circuit court, Jefferson county; chancery division.

"To be officially reported."

Action by Jerry Scanlan against W. C. and M. S. Smith to enjoin defendants from collecting rent from plaintiff. Judgment for plaintiff, and defendants appeal. Affirmed.

Lane & Burnett, for appellants. John Roberts and Wm. Furlong, for appellee.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

HOBSON, J. Appellant W. C. Smith leased of John Caperton and wife for 10 years from January 1, 1880, a lot of ground on Ninth street in Louisville, Ky. He then sublet the property to appellee, Jerry Scanlan, for a term ending in the year 1888, with the option to continue the lease two years longer. After this, on March 15, 1887, he assigned his leasehold to his wife, the appellant M. S. Smith, as is alleged, without consideration when he was insolvent, and for the purpose of defeating his creditors. In July following, Ainslie, Cochran & Co. caused an execution in their favor against W. C. Smith to be levied on his leasehold estate in this property, and had it sold on August 1st, under the levy. Appellee, Jerry Scanlan, became the purchaser. Some time after this appellants set up a claim against appellee for rent, on the grounds, among others, that, being in possession as tenant, his purchase under the execution inured to the benefit of the landlord. The court below having decided against them, and enjoined them from attempting to collect rent from appellee, they have prosecuted this appeal.

The evidence heard by the court below is not in the record, and it must be presumed that the chancellor's findings of fact are correct. This leaves in the case only the naked question of law as to the effect of appellee's purchase. In selling and conveying property under execution, the sheriff acts as the agent of the defendant. *Ror. Jud. Sales*, §§ 54-56. At such a sale the tenant in possession may buy to protect himself, and his purchase will no more inure to the benefit of the landlord than if he had bought from the landlord himself in person.

In *Taylor on Landlord and Tenant*, after stating some exceptions to the rule that a tenant cannot deny his landlord's title, the author adds: "And a tenant may acquire and set up a title consistent with that admitted by the demise; as, if he purchase the premises at a tax sale made during his term." And in a note to this he adds: "So, if he buy in the whole or a part of the lessor's title at a tax or execution sale, or by private purchase, it is a proportionate defense to suit for rent or ejectment. *Nellis v. Lathrop*, 22 Wend. 121; *Evertson v. Sawyer*, 2 Wend. 507; *Bettison v. Budd*, 17 Ark. 546; *Camley v. Stanfield*, 10 Tex. 546; *Elliot v. Smith*, 23 Pa. St. 131; *George v. Putney*, 4 Cush. 351."

The contract between W. C. Smith and appellee, as set out in the record, did not divest Smith of the title to his leasehold in the property; nor did it constitute any obstacle to the subjection of that estate to Smith's debt under the execution. The purchaser, so far as appears from the record, took the property under his purchase, acquiring all the rights that Smith had. The fraudulent conveyance to the wife was no obstacle to the subjection of the property under the execution against the husband. *Daniel v. McHenry*, 4 Bush, 277, and cases cited. Judgment affirmed.

SHRIVNER v. YOUNG et al.¹

(Court of Appeals of Kentucky. May 16, 1899.)

DEEDS — PAROL TESTIMONY TO SHOW THAT MORTGAGE WAS INTENDED — WEIGHT OF EVIDENCE.

Where a debtor conveyed land to his creditor, reciting the amount of his debt as the consideration, and the creditor took possession of the property and controlled it for more than five years, mortgaged it as his own, and allowed it to be sold for his individual debt without any notice or claim that it belonged to the debtor, these facts are inconsistent with the creditor's claim that there was a parol agreement that, if the land should not sell for enough to pay the debt, the debtor would make up the deficit; and therefore the chancellor's finding that there was such an agreement is palpably against the weight of the evidence, though supported by the creditor's testimony, corroborated to some extent by that of his bookkeeper.

Appeal from circuit court, Campbell county.

"Not to be officially reported."

Action by T. E. Livezey, surviving partner, and James H. Young, as assignee, against Henry A. Shrivner, to recover balance of a debt. Judgment for plaintiffs, and defendant appeals. Reversed.

Raison & Ahlering, for appellant. L. J. Crawford, for appellees.

BURNAM, J. I. W. and T. E. Livezey were engaged in conducting a saw and planing mill business under the firm name of I. W. Livezey & Co. H. A. Shrivner was a contractor and builder, residing in the same city. For many years intimate business relations had existed between the parties. Previous to the 8th of January, 1889, the credit of Shrivner had become impaired by reason of certain business ventures in which he had become involved, and on that day he was indebted to the firm of Livezey & Co. for \$1,000, which was evidenced by a note dated September 29, 1888, and the firm was also bound as his accommodation indorser upon notes for \$5,625. With the view of securing indemnity on this indebtedness, T. E. Livezey went to the home of appellant, and insisted that he and his wife should execute a mortgage to him, to protect them in this liability, on their residence, the title to which was in Mrs. Shrivner. This she refused to consent to, but, as a result of this visit and of the demands of Livezey, Shrivner and wife executed a warranty deed to the firm on lot No. 29, and part of lot No. 28, in Mayo's addition to the city of Newport, in consideration of \$6,625 paid cash in hand, and the assumption by the vendees of two notes for unpaid purchase money, for \$4,000 each, which were liens on the property, making the consideration, in the aggregate, \$14,625, this being the sum of the liens, debts, and the outstanding indebtedness of Shrivner on which appellees were bound; and a deed was prepared, signed, and acknowledged the same day in accordance with the agreement, and appellees took possession of the property. In November, 1889, they sold a

part of it to Mrs. Hoppensock for \$3,500, and in July, 1892, they sold another part to Dr. Phythian for \$9,500; and the balance was sold in May, 1895, under a judgment of the Campbell circuit court, as the property of the Livezeys, to satisfy a claim against them. In December thereafter, this suit was instituted by T. E. Livezey, as surviving partner, and James H. Young, as assignee, to recover a balance of money alleged to be due under a contemporaneous parol agreement which Livezey alleges was made at the time the deed was executed to him by Shrivner and wife, which is to the effect that the deed was made to him as trustee, to sell to the best advantage, and, after paying insurance and repairs, to apply the proceeds to the payment of Shrivner's indebtedness to him, the accommodation paper on which the firm of Livezey & Co. were bound, and the unpaid notes for purchase money; and it is alleged that it was agreed by appellant that, if the money realized from the sale of the property should be insufficient to discharge all of this indebtedness, he (appellant) would make up the deficiency to the firm of Livezey & Co. Appellant, in his answer, denies the alleged parol agreement; insists that the conveyance was absolute, without any conditions whatever; that Livezey & Co. assumed the payment of all the obligations recited in the deed as the purchase money. The proof in the case is confined to the testimony of T. E. Livezey and his bookkeeper, on the one side, and appellant, on the other. Livezey admits that he took possession of the property under the deed; that he sold and conveyed the bulk of it in his own name, and received the money therefor; that he mortgaged it to a building and loan association for borrowed money; that a part of the lot was sold, under judgment of the Campbell circuit court, more than five years after the conveyance of the deed to him, to satisfy an individual liability of the firm; that during all of this period he listed the property for taxation in his own name, paid the taxes, insurance, and repairs on same, sold and conveyed it, and managed it exactly as he would his own property; that he did not consult appellant at the time he mortgaged it to the building and loan association, and gave him no notice of the suit in which it was sold to satisfy a debt of the firm of Livezey & Co. His bookkeeper, Stein, corroborates this testimony, and says that, a short time after the execution of the deed, appellant informed him that he had conveyed property to Livezey & Co. to indemnify them against loss, and that they should never lose anything by it; that, by direction of T. E. Livezey, an account of this property was always kept separate and distinct from the books of the firm; and that the money received from the sales of the property was applied to the extinguishment of the liabilities of Shrivner, and the rents were used to pay the taxes and repairs. He also testifies that the obligations which Live-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

zey & Co. assumed for appellant were renewed several times in the form in which they existed when the deed was executed, before they were finally paid by a sale of the property,—while, on the other hand, appellant testifies that the sale was an unconditional one, and denies that there was ever any kind of an understanding or agreement by which Livezey was to sell and dispose of the property for him in any way; that the sale was made for the express purpose of extinguishing the liabilities on which Livezey & Co. were bound as his accommodation indorsers, and that it was a part of the contract that he should renew these obligations a few times, until Livezey & Co. could sell the property; that he was never consulted about the sale of this property, and had no connection whatever with it from the date of the sale; and that no demand was ever made upon him until in April, 1895, more than five years after the execution of the deed. He denies any conversation whatever with Stein, the bookkeeper. The trial resulted in a judgment in favor of appellees for \$1,950, and interest from May 2, 1894, from which judgment Shrivner appeals.

We have carefully read the testimony in this case, and it seems to us that the evidence does not support the finding of the chancellor. While it is true that the testimony of Stein corroborates in some degree the statements made by Livezey, yet, on the other hand, the deed certainly supports the contention of appellant. The fact that the recited consideration is the unpaid notes for purchase money, and the exact liability of the appellant to Livezey & Co., and that they took possession of the property, controlled and managed it for more than five years, mortgaged it as their own, and allowed it to be sold to satisfy their individual debts, without any notice or claim that it belonged to appellant, are facts which are wholly inconsistent with the claim set up by this action; and, in our opinion, the judgment of the chancellor is palpably against the weight of the evidence. The judgment is therefore reversed, and the cause remanded, with directions to dismiss plaintiffs' petition.

AITKEN et al. v. LANG'S ADM'R et al.¹
(Court of Appeals of Kentucky. May 20, 1899.)

GUARANTY—REVOCATION BY DEATH.

A continuing guaranty, revocable at the will of the guarantor, is revoked by his death, so that his estate is not liable for the price of goods thereafter sold on the faith of the guaranty, though without notice of his death.

Appeal from circuit court, Jefferson county, law and equity division.

"To be officially reported."

Action by Aitken, Son & Co. against Solomon C. Lang's administrator and others on

a contract of guaranty. Judgment for defendants, and plaintiffs appeal. Affirmed.

Garvin Bell, for appellants. Kohn, Baird & Spindle, for appellees.

PAYNTER, J. To guaranty the appellants, Aitken, Son & Co., for goods which they might sell Miss Emma Lang, S. C. Lang executed and delivered to them a writing which reads as follows: "New York, March 15, 1895. Messrs. Aitken, Son & Co.—Dear Sirs: In consideration of the sale by you to Miss Emma Lang, doing business under the firm name of Mme. F. Lang, at Louisville, Ky., of certain goods now or hereafter to be bought by her, and for one dollar to me paid, the receipt whereof is hereby acknowledged, I hereby guaranty the payment by her to you of the price of such goods; and, if she does not pay the same when due, I agree to promptly pay said price on demand. [Signed] S. C. Lang." On August 17, 1895, S. C. Lang died. For all the goods which the appellants sold Miss Lang previous to that date, she paid. The goods for which the appellants seek to hold the Lang estate liable were sold in September and November following his death. Assuming the averments of the appellants in the pleadings to be true, at the time the sales were made, in September and November, they were not aware of the death of S. C. Lang. We understand counsel to agree that the writing which is the basis of this suit was continuing in its nature, unlimited as to time, and was to cover future sales made to Miss Lang. The question is, what effect upon the guaranty had the death of the guarantor, with reference to sales of goods after his death; the guarantees acting without notice? It is insisted by counsel for appellants that it is an executed contract, and therefore the death of the guarantor did not revoke it, while counsel for appellees contend it is an open, continuing offer,—a unilateral, executory, severable contract,—subject to withdrawal before acted upon, and that, therefore, the death of the party was a revocation of it. There is a conflict of authorities upon the question involved. Those which hold such a guaranty is not revoked by death reach the conclusion that the relations created by the guaranty between guarantor and guarantee is that of parties to an executed contract, while those who hold to the opposing view conclude the relationship to be that of a continuing offer for a contract. The guaranty declared upon is not limited as to time, nor does it limit the quantity of goods to be sold. It is continuing in its nature. The guarantees were not obligated by its terms to sell goods to Miss Lang upon the credit of the guarantor. It was a unilateral contract, which could be terminated at the pleasure of the guarantor. It is of a severable character, because, if the guarantees sold goods upon the faith of it, the guarantor was bound to pay for such goods as had been sold upon his credit, but the guarantees could no longer sell goods upon his credit if their au-

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thority to do so had been revoked. A guaranty of the kind under consideration, in effect, is an offer by the guarantor to pay the guarantees for such goods as they might sell the purchaser named. It is somewhat in the nature of an offer by the guarantor to the guarantees for a contract, for no contract is consummated—no consideration passing—until the goods are sold. Therefore it cannot be said it is an executed contract, with reference to the future. It is wanting in one of the essential elements of a contract,—mutuality. No obligation is imposed on the guarantees. The guaranty could only continue during the will of the guarantor, as he could revoke it. Its continuing quality being terminable at the will of the guarantor, is it not unreasonable to suppose that it was intended by the parties that when the power to terminate ceased, by death, it was to continue until notice of death was in some way given the guarantees? This notice might not be received for a long time, as the real and personal representatives of the deceased might be ignorant of the guaranty, and in the meantime the estate might be bankrupted. In our opinion, as the guaranty was terminable at the will of the guarantor, when that will no longer existed, by reason of death, it was thereby revoked. It would not be profitable to review the authorities upon the question here involved, as the case of *Jordan v. Dobbins*, 122 Mass. 168, is a well-considered case, and sustains the conclusion we have reached. We quote from it as follows: "An agreement to guaranty the payment by another of goods to be sold in the future, not founded upon any present consideration passing to the guarantor, is a contract of a peculiar character. Until it is acted upon, it imposes no obligation and creates no liability of the guarantor. After it is acted upon, the sale of the goods upon the credit of the guaranty is the only consideration for the conditional promise of the guarantor to pay for them. The agreement which the guarantor makes with the person receiving the guaranty is not that I now become liable to you for anything, but that, if you sell goods to a third person, I will then become liable to pay for them if such third person does not. It is of the nature of an authority to sell goods upon the credit of the guarantor, rather than of a contract which cannot be rescinded except by mutual consent. Thus, such a guaranty is revocable by the guarantor at any time before it is acted upon. In *Offord v. Davies*, 12 C. B. (N. S.) 748, the guaranty was of the due payment for the space of twelve months of bills to be discounted; and the court held that the guarantor might revoke it at any time within the twelve months, and that the plaintiff could not recover for bills discounted after such revocation. The ground of the decision was that the defendant's promise by itself created no obligation, but was in the nature of a proposal, which might be revoked at any time before it was acted on. Such being the nature of a guaranty, we are of the

opinion that the death of the guarantor operates as a revocation of it, and that the person holding it cannot recover against his executor or administrator for goods sold after the death. Death terminates the power of the deceased to act, and revokes any authority or license he may have given, if it has not been executed or acted upon. His estate is held upon any contract upon which a liability exists at the time of his death, although it may depend upon future contingencies. But it is not held for a liability which is created after his death, by the exercise of a power or authority which he might at any time revoke. Applying these principles to the case at bar, it follows that the defendant is entitled to judgment. The guaranty is carefully drawn, but it is, in its nature, nothing more than a simple guaranty for a proposed sale of goods. The provision that it shall continue until written notice is given by the guarantor that it shall not apply to future purchases affects the mode in which the guarantor might exercise his right to revoke it, but it cannot prevent its revocation by his death. The fact that the instrument is under seal cannot change its nature or construction. No liability existed under it against the guarantor at the time of his death, but the goods for which the plaintiffs seek to recover were all sold afterwards. We are not impressed by the plaintiffs' argument that it is inequitable to throw the loss upon them. It is no hardship to require traders, whose business it is to deal in goods, to exercise diligence so far as to ascertain whether a person upon whose credit they are selling is living. The decision in *Bradbury v. Morgan*, 1 Hurl. & C. 249, upon which the plaintiffs rely, was rested upon reasoning which appears to us to be unsatisfactory, and inconsistent with the opinion of the same court, a year before, in *Westhead v. Sproson*, 6 Hurl. & N. 728, and with the decision in *Offord v. Davies*, *ubi supra*, at the argument of which *Bradbury v. Morgan* was cited; and it has not since been treated as settling the law of England. *Harriss v. Fawcett*, L. R. 15 Eq. 311, 8 Ch. App. 866. The reasons of the similar decision in *Bank v. Knotts*, 10 Rich. Law, 543, are open to the same objections." 2 Pars. Cont. (8th Ed.) p. 31, in a note, says: "A continuing guaranty contemplates a series of transactions. As each takes place, a separate obligation arises as to that, and to that extent what was a revocable offer becomes an irrevocable contract. As to the future, however, death or notice may revoke it." It is said in *Pol. Cont.* p. 21: "There is believed to be one positive exception in our law to the rule that the revocation of a proposal takes effect only when it is communicated to the other party. This exception is in the case of the proposer dying before the proposal is accepted. This event is in itself a revocation, as it makes the proposed agreement impossible, by removing one of the persons whose consent would make it." It is said in 1 *Brandt*, Sur. (2d Ed.) § 134: "It

has been held that the death of a person who has given a letter of credit authorizing another to draw on him to a certain amount for a limited period, and agreeing to accept the drafts drawn, and pay them if not paid by the drawer at maturity, will operate as a revocation of all authority to thereafter draw on his credit so as to bind his estate, though the person to whom, and for whose security, the letter was given has no notice of his death, and the period for which the authority was given has not expired."

We believe it is but the recognition of a just and sound principle to hold that the death of the guarantor revokes a guaranty like the one under consideration. The duty should be imposed upon one who attempts to sell goods upon the credit of another to ascertain that such one is living at the time of the sale. Slight diligence will always enable him to acquire such information, and it certainly works no hardship upon him to be required to do so. The judgment is affirmed.

MIDDLETON v. SHELBY COUNTY TRUST CO. et al.¹

(Court of Appeals of Kentucky. May 16, 1899.)

TRUSTS—FAILURE TO RESERVE POWER TO REVOKE.

The fact that a deed executed by a married woman, conveying her property to another in trust for herself for life, remainder to her children, does not reserve to her the power to revoke, does not render it invalid, where the purpose of the deed was to secure the grantor against the importunities and influence of her improvident husband, who was wasting her estate.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Action by Elizabeth Middleton against the Shelby County Trust Company and others to set aside a deed of trust. Judgment for defendants, and plaintiff appeals. Affirmed.

J. M. Chatterton and F. Hagan, for appellant. J. C. Beckham & Son and Gibson & Marshall, for appellees.

HAZELRIGG, C. J. This action was brought by the appellant to set aside a deed of trust made by her of all her property to the appellee trust company, on the ground that the same was procured by fraud and undue influence, and more especially because to have made such a deed without reserving the power to revoke it was unreasonable, unnatural, and improvident. The deed in question conveys the property to the company in trust for the appellant for her life, with remainder to her children; meaning, clearly, we may here say, such children as she then had, or might thereafter have, either by the husband she then had or any other she might have. It also contained a clause giving her the power to dispose of the property by last

will and testament. The grantor further reserved the right to occupy and enjoy with her family any of the real estate conveyed, or any that might be purchased thereafter, and she might also designate any other person who might occupy, use, and enjoy the income and profits of such real estate, upon such conditions as she might provide. Without reviewing the multitude of facts shown in this voluminous record, we are convinced that the conveyance, which was made during the grantor's minority, but ratified after she reached her majority, was in all respects a reasonable, natural, and provident disposition of her estate. The husband she had when the deed was made was a dissipated spendthrift, and was fast squandering the estate. Evidently, within a very few years, appellant and her children would have been penniless. Her second husband, to whom she was married within 30 days after the death of the first, is shown to be no improvement on the first one. There is not the slightest evidence of undue influence or fraud in the procurement of the deed or the ratification.

After a careful consideration of the whole case, we adopt the opinion of the learned special chancellor, who finds: "First. That the deed of trust from Horace Middleton and Elizabeth, his wife, to the Shelby County Trust Company, was made bona fide, without any fraud, collusion, or undue influence. Second. That the said deed was made for the purpose of protecting her against the domineering will, importunities, and influence of her husband, by whom her estate was being wasted. Third. That the deed of confirmation made by her, after she became discoverd and of age, was also made by her intelligently, and without any undue influence or improper influence. Fourth. The court is of opinion that these acts were wise and judicious on her part, and will redound to the benefit of herself and children, and that the deed of trust should not be set aside if valid when made. She has since married her present husband, the co-plaintiff, Taylor, and the court does not see anything in her present surroundings to justify any change in said deed. Fifth. The only remaining question is, is the deed valid? It is maintained by her counsel that it is void for want of a clause giving her power of revocation. There was one case cited—and there may be more—holding that the failure to insert such a clause in such a deed renders it invalid per se. Many cases have been cited on both sides giving every shade of opinion as to the effect of the failure to insert such a provision in a deed of trust. When boiled down, the reasonable doctrine gathered from all of them is that 'the absence of the power of revocation is a circumstance to be taken into question, the importance of which is determined by the other circumstances of each case.' The necessity for its insertion in a deed, not impeached by any undue influence, depends upon

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whether or not the settlement made is of such a nature, or was made under such circumstances, as to be unreasonable and improvident, unless created with the power of revocation. In *Keyes v. Carleton*, 141 Mass. 45, 6 N. E. 524, a married woman, for the purpose of putting her estate beyond the influence of her husband, conveyed it to a trustee for her benefit for life, and after her death to her children. She brought suit upon her husband's death, to have the trust set aside, and the court refused her petition; the court, by Chief Justice Morton, saying: "The plaintiff, acting deliberately and under the advice of counsel, executed the deed of settlement, and there was no pretense of any fraud, collusion, or undue influence. The deed contains no power of revocation, and it is clear that the power of revocation was intentionally omitted. As first drafted, the deed created a dry trust in favor of the settler. But, if she had retained a power of revocation, it would have defeated one of the principal objects of the settlement, which was to protect her from the threats or importunities or influence of her husband." It is evident that the power of revocation in this deed was intentionally omitted, because, for the reason stated in the cited cases, "it would have defeated one of the principal objects of the settlement, which was to protect her from the threats or importunities or influence of her husband." The chancellor dismissed the petition, and his judgment is affirmed.

BOARD OF COUNCIL OF DANVILLE v. FISCAL COURT OF BOYLE COUNTY.¹

(Court of Appeals of Kentucky. May 18, 1899.)

COUNTIES — PURCHASE OF TURNPIKE ROADS BY FISCAL COURT—RESPECTIVE JURISDICTION OF COUNTY AND CITY.

1. Under Act March 17, 1896, to provide free turnpikes and gravel roads, which provides that all turnpikes acquired by the county fiscal court "shall become public roads and shall be maintained and kept in repair by and through the provisions of the fiscal court," and that "said court may provide for keeping them up as directed and permitted under the general road law, or it may adopt other rules for the maintenance, repair and management of the same," that part of a turnpike road purchased by the fiscal court which lies within the limits of a city becomes a public way of the city under the general road law, and must be kept in repair by the city.

2. Statutes in pari materia must be construed together, and the legislative intention apparent from the whole body of the enactments must be carried into effect.

"To be officially reported."

Former opinion withdrawn, and new opinion delivered.

For former report, see 49 S. W. 458.

HOBSON, J. Under the act entitled an "Act to provide free turnpikes and gravel roads," approved March 17, 1896 (see Carroll's

Ky. St. pp. 1605-1609, § 4748B), the fiscal court of Boyle county purchased certain turnpike roads in that county. A part of the roads so purchased lay within the corporate limits of the city of Danville, and had been kept up by the turnpike companies to the width of 18 feet, without expense to the city, up to the time of their purchase, although used as streets of the city. The city insists that the fiscal court should still continue to keep up the portion of the turnpikes so purchased within the city limits just as the previous owners had done. The fiscal court, on the other hand, insists that the roads so purchased, in so far as they lie within the city limits, are streets of the city, and must be kept up by it. The parties being unable to agree upon their respective rights, this action was instituted to have them judicially determined. The lower court having decided in favor of the fiscal court, the city has appealed.

The question involves the proper construction, not only of the statute referred to, but of the other statutes in force at the time it was enacted, and with reference to which it was passed. At the time of the enactment of the statute the legislature had provided a system for the working and keeping in order of the public highways. Besides the ordinary public highways, there were a great many toll pikes in the state, and there was a general demand that these toll pikes should be made free. With this view section 1 of the statute provides for the holding of an election to take the sense of the qualified voters of the county upon the proposition to have free turnpikes; sections 2, 3, and 4 specify how this election is to be held; and section 5 provides that, if the vote is in favor of the proposition, the fiscal court may acquire all the turnpike roads in the county on the best terms consistent with public interest, and may provide for the construction of new turnpikes when the public good demands it. Section 6 then provides: "All turnpikes and gravel roads thus acquired or constructed shall become public roads and shall be maintained and kept in repair by and through the provisions of the fiscal court. Said court may provide for keeping them up as directed and permitted under the general road law, or it may adopt other rules for the maintenance, repair and management of the same. But said roads shall be free of toll to the traveling public." The mode of keeping up the roads under the general road law is given in sections 4306-4308 of the Kentucky Statutes. By section 4306 it is declared: "The fiscal court of each county shall have general charge and supervision of the public roads and bridges therein and shall prescribe necessary rules and regulations for repairing and keeping the same in order and for the proper management of all roads and bridges in said county. * * * The public roads shall be maintained either by taxation or by hands allotted to work thereon, or both, in the discretion of the fiscal court." By section 4307 the limit of tax to be levied

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

is given, and by section 4308 the mode of working the roads is prescribed. Section 3579, Ky. St., exempts every citizen of the city from working on the public roads, so that, construing this section in connection with section 4308, the latter section must be held only to apply to citizens of the county not living within the city.

Thus it will be seen that one of the ways of keeping in repair the roads purchased under the act is by the labor of the citizens liable to work on the roads, and the fiscal court, in its discretion, may follow this method without levying any taxes for this purpose. But the citizens of the county are only to work the county roads, and it would hardly be contended that it was contemplated by the legislature, when it passed the act referred to, that the citizens of the county at large were to come within the corporate limits of the city, and work the city streets, when the citizens of the city were exempted. Besides, by section 3560 of the Kentucky Statutes, governing the class of cities to which Danville belongs, it is enacted: "Public ways as used in this act shall mean all public streets, alleys, sidewalks, roads, lanes, avenues, highways and thoroughfares, and the same shall be under the exclusive management and control of the city, with powers to improve them by original construction, or to reconstruct them, as may be prescribed by ordinance." Section 3565 further provides: "The cost of reconstructing public ways, streets, or alleys, or repairing of the same and the cost of making footway crossings, shall be borne exclusively by the city." By section 4306, above quoted, the fiscal court has general charge and supervision of the roads which it is required to maintain, and by section 3560 the city is given exclusive management and control of all public ways within the city. Similar provisions are found in the laws regulating other classes of cities. In passing the statute referred to, the legislature could not have contemplated that both the fiscal court and the city should have control of that part of the pike lying within the city. Construing all these statutory provisions together, we think they mean simply that the turnpikes, when purchased by the fiscal court, become public highways, and the part lying within the city, being a public way, should be controlled by the city, and the part without the city, falling within the fiscal court's jurisdiction, should be controlled by it. Any other construction would create great confusion. To illustrate: Suppose the fiscal court undertook to keep the pike in repair, and, after it had fixed it as it thought best, the city council should conclude that the interests of the city required it should be fixed differently; it is very clear that, if the fiscal court has the power of control, it could require the city council to leave the way as it had fixed it, however much this might be to the detriment of the city. The city might require a vitrified brick pavement, or a smooth asphalt, when the fiscal court might

think that rough cobblestones were much to be preferred. Or, again, suppose the boundary of the city as now located includes no part of one of these pikes, and it should be extended so as to take in a mile of it 10 years from now; why should the mile of pike so taken in stand differently from any other county highway taken into the city by the extension of the boundary? Or, if a new town should be located on one of these turnpikes 20 years from now, why should not the part of the turnpike in the town used as a street stand just as any other county highway taken in its boundary? It is hard to believe the legislature contemplated that the pikes purchased under this act should stand differently from other highways. Such a construction would destroy the uniformity of our road system. It would take away from the towns and cities of the state powers absolutely essential to their well-being, and impose on the fiscal court a duty it should never be called upon to discharge. The words of the act, that the "turnpikes and gravel roads thus acquired or constructed * * * shall be maintained and kept in repair by and through the provisions of the fiscal court," must be read in connection with the other words of the act making them public roads, and directing that the fiscal court may keep them up under the general road law. Thus construed, it is manifest that the legislature intended the roads so purchased to be public highways, and that the duty of the fiscal court as to keeping them in repair is to be measured by the other statutes in force at the time, defining very clearly its jurisdiction, and committing to the city all that part of the public ways lying within its boundary.

The learned counsel insists that, as the statute expressly says that the turnpikes so acquired shall be maintained by the fiscal court, for this court to rule otherwise is for it to assume the powers of the legislative branch of the government. But the rule is elementary that the construction of a statute must be reasonable. Thus, in the old case where the statute forbade the drawing of blood in the street, it was held that a physician who bled a patient in the street, of necessity, to save his life, was not guilty, although within the words of the act. There is another elementary rule, equally imperative, that statutes in pari materia must be construed together, and that the legislative intention apparent from the whole body of the enactments must be carried into effect. Under these rules, the expression relied on for appellant cannot be detached from its connection, and, though general in its character, is to be read as part of the system of law regulating the highways of the state. It is true the words of a statute are to be given controlling effect in determining the legislative intention; but an isolated, general expression, where it is clear the legislature had not this in mind, will not be construed to set aside a settled legislative purpose clearly expressed in

a number of other carefully drawn enactments. Judgment affirmed. Whole court sitting.

SOUTHERN RY. CO. v. BARBOUR.¹

(Court of Appeals of Kentucky. May 18, 1899.)
RAILROADS—CARE REQUIRED AT PRIVATE CROSSINGS—INSTRUCTIONS TO JURY.

In an action to recover damages for injury to plaintiff caused by a collision of his wagon with defendant's train at a private crossing in the outskirts of a city, it was error to instruct the jury that it was the duty of defendant "to use and exercise the highest degree of care in running and operating its trains within the limits of the city"; but, instead, the court should have instructed the jury that, in the use of the railroad and the crossing, each party was bound to use ordinary care in the exercise of his rights.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by John Barbour against the Southern Railway Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

E. P. Humphrey and W. B. Dixon, for appellant. Young & Bland, for appellee.

HOBSON, J. While appellee was crossing appellant's track in the outskirts of Louisville, one of its trains ran into the hind end of his wagon, and threw him out against a wire fence, bruising and cutting him, but not causing very serious injury. The place where he was crossing the railroad track was not a public crossing. It was in the commons, about midway between Eleventh and Twelfth streets. A good many people crossed there and it would seem from the evidence it was used by the public generally with the knowledge and acquiescence of the appellant.

The court gave the jury the following instruction: "The court instructs the jury that it was the duty of the defendant, its servants and employes, to use and exercise the highest degree of care in running and operating its trains within the limits of the city of Louisville." Appellee's counsel, to sustain this instruction, refer us to several cases in which such language was used; but the facts in those cases were not like the facts in the case before us. This rule applies where the railroad runs along the street of the city in a locality where there is a crowded population. It has no application to a private crossing in the outskirts of a city, where the travel is necessarily limited. The railroad, having permitted the use of this crossing by the public, was bound to the exercise of reasonable care to avoid injury to persons on the crossing. *Taylor v. Canal Co.*, 113 Pa. St. 162, 8 Atl. 43; 3 Wood, R. R. § 344; *Shear. & R. Neg.* § 464. The degree of care to be exercised in such cases is not defined by statute, and must therefore be determined upon

common-law principles. In *Shear. & R. Neg.* § 463, after stating that the traveler on the highway must give way to the train, the learned author thus defines the degree of care to be exercised by each of them: "Both parties are, however, equally bound to use ordinary care,—that is, such care as a prudent man would usually take under similar circumstances; the one to avoid committing, and the other to avoid receiving, injury." In Wood, R. R. § 323, the rule is thus stated: "Neither party has the right to interfere with the proper use of the crossing by the other. The situation then creates mutual rights and obligations. Both parties must use ordinary care in the exercise of their own rights. They must have regard to the circumstances, and to the danger incident to a careless use of such a right of passage." This rule was declared by the United States supreme court in *Improvement Co. v. Stead*, 95 U. S. 164; and in *Railroad Co. v. Goetz's Adm'r*, 79 Ky. 440, this court said: "The same degree of care is required of both those in charge of the train and those traveling over a public highway crossing the track." The injury occurred when it was dark. The crossing is on a curve in the track, and appellee could not be seen by the engineer until within a short distance of it. The engineer and fireman both state that they first saw appellee as his horses came upon the track; that he was apparently whipping them along to get across before the train reached him. Under such circumstances, the highest degree of care in running and operating its trains might require appellant to approach this crossing at such speed that the train might be stopped before reaching it, in case of danger. In view of the other instructions given by the court, the jury would, we think, naturally have so understood the instruction quoted; and, in any event, it gave the jury a false idea of the rights of the parties, and the relative care required of each of them. Instead of this instruction, the court should have told the jury that, in the use of the railroad and the crossing, the law required of both parties the same degree of care; that each was bound to use ordinary care in the exercise of his rights. We see no error in the other instructions given by the court, but for this reason the judgment is reversed, and the cause remanded for a new trial and further proceedings in conformity to this opinion.

DEARING v. WILCOXEN.¹

(Court of Appeals of Kentucky. May 18, 1899.)
APPEAL AND ERROR—DISMISSAL OF APPEAL—PRESUMPTION AS TO ORDER GRANTING.

Where defendant executes a supersedeas bond, reciting that he "has taken an appeal," but fails to file the transcript in time, the court will, where the judgment does not show that an appeal was granted, presume that it was granted by a separate order, for the purpose of tak-

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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ing jurisdiction of a motion by appellee to dismiss the appeal in order that the supersedeas may be quashed, but will not award damages in the absence of the order granting the appeal.

Appeal from circuit court, Hart county.

"Not to be officially reported."

Action by G. T. Wilcoxon against George H. Dearing. Judgment for plaintiff. Defendant appeals. Motion to dismiss granted.

Jos. H. Lewis, for appellee.

HAZELRIGG, C. J. Appellee obtained personal judgment against appellant, and a decree for the sale of certain property to satisfy same, at the January term, 1898, of the Hart circuit court. No appeal from this judgment was granted by the lower court, so far as the judgment itself shows. But, as that court had the power to grant the appeal at any time during the January term, it must be presumed it did so in some order distinct from the judgment, as it might do, because on February 16, 1898, appellant executed a supersedeas bond before the clerk of the Hart circuit court, in which it is recited that: "Whereas, appellant, Geo. H. Dearing, has taken an appeal from the judgment," etc. Thus presuming, this court has jurisdiction of the motion now made by appellee to dismiss the appeal because the transcript has not been filed in this court within the time provided by section 738, Civ. Code; and, as the transcript has not been so filed, the appeal is dismissed. While the presumption against appellant will be thus indulged that an order granting the appeal has been entered,—a presumption based on the recital of appellant's bond,—as the order itself is not filed we are not authorized to dismiss the appeal with damages. It is hardly necessary to say that, if appellant was here with a judgment which did not show he had been granted an appeal, the presumption we have indicated would not be indulged in, and his appeal or attempted appeal would be dismissed. Motion to dismiss sustained.

CHESAPEAKE & O. R. CO. v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. May 19, 1899.)

INDICTMENT — JOINDER OF OFFENSES — CONSTITUTIONALITY OF SEPARATE COACH LAW.

1. An indictment against a railroad company for failing to furnish separate coaches for white and colored passengers, and failing to have each car bear appropriate words indicating the race for which such car was intended, states but a single offense.

2. The statute requiring railroad companies to furnish separate coaches for white and colored passengers does not violate either the commerce clause of the federal constitution or the fourteenth amendment.

Appeal from circuit court, Shelby county.

"Not to be officially reported."

The Chesapeake & Ohio Railroad Company was convicted of the offense of failing to fur-

nish separate coaches for white and colored passengers, and failing to have each car bear appropriate words indicating the race for which such car was intended, and it appeals. Affirmed.

P. J. Foree and John T. Shelby, for appellant. R. F. Peak, for the Commonwealth.

WHITE, J. The appellant, the Chesapeake & Ohio Railroad, was indicted and convicted in the Shelby circuit court for a failure to furnish separate coaches for both white and colored passengers, and failing to have each car bear, in some conspicuous place, appropriate words, in plain letters, indicating the race for which such car was intended. The fine assessed was the minimum fixed by the statute, \$500. From that judgment of conviction this appeal is prosecuted.

It is insisted that the indictment is defective, in that it charges two offenses,—one for failing to furnish cars, and one for failing to designate by lettering the cars for white and colored persons. It is also insisted that the separate coach law is unconstitutional, as being a regulation of interstate commerce, which is exclusively within the powers of congress, as given by the eighth section of the federal constitution. It is also insisted that there is no evidence to support the charge in the indictment, and that the verdict should therefore be set aside.

We are of the opinion that the indictment charges but one offense, and that but one offense is designated in the statute. It may be committed by a failure to have separate coaches, or by a failure, if more than one coach for passengers be in a train, to designate, by lettering, which coach is designated for white, and which for colored, passengers. It cannot be said that, if appellant had in each passenger train more than one coach for passengers, it would then be relieved from the duty of designating which of those cars were intended for the white, and which for the colored, race. The statute makes it the duty to not only furnish separate cars for the races, but also to designate for which race each car is intended. A failure to observe these provisions is a violation of the law, and subjects the offending party or company to the penalty prescribed. The validity of this statute has been before this court in the case of *Ohio Val. Ry.'s Receiver v. Lander*, 47 S. W. 344, 882, and it was there held that the act was not in violation of the federal constitution, either as to the commerce clause or the fourteenth amendment. The opinion of the court, by Mr. Justice Guffy, is a clear statement of the law of this case, and is decisive of all questions here raised as to the validity of the act. In the recent case of *Lake Shore & M. S. Ry. Co. v. Ohio* (decided by the supreme court of the United States, Feb. 20, 1899) 19 Sup. Ct. 465, in a decision by Mr. Justice Harlan, the doctrine of this court, as announced in the *Lander* Case, was reaffirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

As to the contention that there should be a reversal of the judgment on account of the evidence, this cannot be done. The rule in criminal and penal cases is that, if there be any testimony tending to prove the facts charged, it will be upheld. While the evidence in this case may not be as clear and convincing as might be desired, yet it cannot be said that there is an entire failure of any proof tending to show guilt.

We perceive no prejudicial error in the admission of testimony. The argument of the prosecuting attorney is complained of, but there appear no exceptions that will bring the matter before us for review. There appears no error in the judgment, and the same is affirmed, with damages.

COOPER v. WAIT, Treasurer.¹

(Court of Appeals of Kentucky. May 19, 1899.)

COUNTIES—PAYMENT OF CLAIMS OUT OF COUNTY LEVY—PRIORITY OF CLAIMS—REPEAL OF STATUTE—INTEREST ON CLAIMS.

1. Under Ky. Const. § 180, providing that "no tax levied and collected for one purpose shall ever be devoted to another purpose," and Ky. St. c. 52, regulating the collection and disbursement of county funds, claims against a county allowed by the fiscal court for one year cannot be paid out of the levy for a subsequent year; and therefore special acts authorizing such payments have been repealed thereby.

2. The county treasurer is not required to pay interest on claims allowed by the fiscal court, where no provision has been made therefor.

Appeal from circuit court, Pulaski county.

"To be officially reported."

Action by J. S. Cooper against George W. Wait, treasurer, for a mandamus to require defendant to pay plaintiff's claim. Judgment for defendant, and plaintiff appeals. Affirmed.

O. H. Waddle, for appellant. G. W. Shadon, for appellee.

GUFFY, J. It appears from this record that appellant was the county school superintendent for Pulaski county, and that at the April term, 1897, of the fiscal court of Pulaski county the following order was entered:

"It is ordered by the court that J. S. Cooper be, and he hereby is, allowed the sum of one thousand fifty-two and xx/100 dollars, payable out of the county treasury for salary for 1896. \$1,052. N. L. Barnett, Clerk F. C. P. C."

It is agreed that said order was presented to J. A. McGee, Treasurer, April 30, 1897, and numbered 904, and payment refused for the reason that the treasurer had no funds; but he indorsed the same as follows: "No. 904. April 30, '97. J. A. McGee, Treas." It is further agreed that the appellee is the successor of said McGee in the office of treasurer, and that both of them kept a memorandum of the claims presented to them in the order of their

presentment, and indorsed on the back of the warrants presented for payment that were not paid for the want of funds the number showing the numerical order in which the claims were presented and payment demanded; and the number 904 on the claim in controversy shows the numerical order in which said warrant was presented for payment, according to the memorandum kept by the then treasurer, McGee. It is further agreed that, since the appellee entered into office, he has received, and had at the time of the institution of this suit in his hands, from the general revenues of the county, the sum of \$8,879.90, which should be used and paid out by him on the claims allowed by the fiscal court, certified by the clerk, including the character of claim herein referred to. It is further agreed that the funds in the hands of appellee, as treasurer, were paid to him by the sheriff of the county from collection of the county levy made for the year 1898, and that there are no funds in his hands from collections for either the year 1896 or 1897; and that there are no available means out of which to pay plaintiff's claim, except the funds now in defendant's hands. And it is further agreed that, if appellant is entitled to have his claim paid out of the revenues of the county collected and paid into the treasury in the numerical order in which it was allowed by the court or presented to and demanded of the treasurer, he is entitled to have the same paid by the defendant out of the aforesaid funds in his hands; the said funds being now available for the payment of the same, and the said claim being entitled to be paid therefrom, numerically considered. It is also agreed that the appellant had demanded of the appellee payment of the said claim, with interest from the 30th of April, 1897, until paid, and, that being refused, demanded payment of the principal, which was also refused. It is further agreed that there are outstanding claims against the county, allowed for expenditures for the year 1898, amounting to more than the above amount of money in appellee's hands, and that the holders of the claims for the year 1898 are claiming that they are entitled to have their claims paid by appellee in preference to the claim of appellant.

The appellant sought in this action, upon the agreed facts, to obtain a mandamus from the circuit court of Pulaski county, ordering and directing the treasurer to pay his claim. Upon final hearing, the court adjudged that the plaintiff is not entitled to the specific relief prayed for in the petition, and adjudged that the cause be, and the same is hereby, dismissed; and it was further adjudged that the defendant, George W. Wait, treasurer, pay the claims allowed for each fiscal year out of the revenues levied and collected and paid to him for such year; and the court construes the order of the fiscal court for a levy of the taxes for 1898 as a levy made to pay the current expenses for said year; and it was further adjudged that the claims allowed and

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

certified each year should be paid out of the revenue for such year in the numerical order in which the same are presented to him and payment demanded; and it is further adjudged that the act of April 22, 1890, is repealed, and no interest is payable upon certificates of county indebtedness. To all of which judgment appellant excepted, and prayed an appeal to this court, which was granted.

It is the contention of appellant that the acts of April, 1885, 1886, and 1890, required the treasurer to pay the claim heretofore referred to.

It is the contention of appellee that said acts were repealed by the Kentucky Statutes, and in this contention we concur. Chapter 52, Ky. St., contains the general law regulating the collection, levy, and disbursement of county funds, and, under the well-settled rules of construction, operated to repeal the special acts heretofore referred to. It will be seen that the claim in controversy was payable out of the revenue of the county to be collected prior to 1898, and that the revenue collected for the year 1898 was levied for purposes exclusive of appellant's claim; and it seems to us that, under the provisions of section 180 of the constitution of the state, the revenue levied and collected for current expenses for the year 1898 could not be legally applied to the payment of appellant's claim. If the revenues intended to be applied to the payment of appellant's claim should not be available for that purpose, it would be the duty of the fiscal court to make other provisions for the payment thereof.

We do not deem it necessary to determine the question as to whether or not appellant will be entitled to recover interest upon his claim after the time it was legally due and payable. In our opinion, he could not demand from the treasurer interest, because there is no law requiring the treasurer to pay interest. Whether it be the legal duty of the fiscal court to provide for the payment of interest is a question not before us, and therefore not decided. Judgment denying the mandamus prayed for is affirmed.

WOOLDRIDGE et al. v. HARDING et al.¹
(Court of Appeals of Kentucky. May 19, 1899.)

APPEAL AND ERROR—CLERICAL MISPRISION—
INFANTS.

1. A judgment will not be reversed because it was rendered before the action stood regularly for trial, where no motion to vacate it was made in the lower court within the time required by Civ. Code, § 519.

2. In an action against the widow and infant heirs of the purchaser to enforce a vendor's lien on land, a judgment for the sale of land, rendered without service of process on the infants, must be reversed on their appeal, though a guardian ad litem was appointed to defend for them.

Appeal from circuit court, Marion county.
"Not to be officially reported."

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Action by Dave Harding and others against Mary E. Wooldridge and others to enforce a vendor's lien on land. Judgment for plaintiffs, and defendants appeal. Reversed.

S. A. Russell, for appellants. H. P. Cooper, for appellees.

DU RELLE, J. Appellee Harding brought suit, as assignee of a purchase-money note, for \$130 to enforce a lien retained in a deed to Samuel P. Wooldridge for four small tracts of land. According to the statements of counsel for both sides, the real name of the purchaser was Samuel B. Wooldridge, and the name signed to the note sued on was B. B. Wooldridge, though it appears in the record as signed "S. B. Wooldridge." Be that as it may, he died, leaving appellants, his widow and five infant children. Cooper was made a party to the suit, as holding a junior mortgage for \$25 upon one of the tracts. The petition does not show, nor does it elsewhere appear, whether any of the children were over or under the age of 14. The summons does not appear to have been served upon any of the infants except one, nor does the record show that it was served upon any one for the other four. A guardian ad litem was appointed to defend for the infants, who demurred, and, the demurrer being overruled, filed a report on behalf of the four not served. No copy of the deed was filed with the original petition, in which the lien was alleged to have been retained upon two of the tracts of land. An amended petition was filed, upon which no process was issued, asserting the lien upon the four tracts, and on the same day judgment was rendered for the amount not controverted by an answer filed on behalf of Mrs. Wooldridge, and sale was ordered of the property. It would seem that Mrs. Wooldridge is bound by this judgment, though erroneous; more than two years having elapsed after the rendition of the judgment before appeal was taken, and no motion to vacate the judgment because of its being rendered before the action regularly stood for trial having been made, under section 519 of the Civil Code. But in favor of the infant appellants the judgment must be reversed. A number of other errors are relied on, but it seems unnecessary to refer to them here, as the trial court will probably direct a repleader on the return of the case. After the land had been sold, the two lien claimants becoming the purchasers, the sale confirmed, and a deed ordered, and a year and a half after the judgment, an order was made, on motion of appellants, on notice to the appellees, setting aside as void the judgment, the sale, the report of sale, the order confirming it, the order for a deed, and all orders and judgments in the case after the judgment for the sale of the land. About five months later that order was itself set aside as null and void, upon motion of the appellees. The judgment of sale is reversed, and cause remanded for further proceedings consistent herewith.

SANDERS' ADM'R et al. v. BABBITT
et al.¹

(Court of Appeals of Kentucky. May 20, 1899.)

**WILLS — REVOCATION BY CUTTING OFF SIGNATURE
— MAKING ADDITIONS WITHOUT
RE-EXECUTION.**

Where the names of the testator and of the subscribing witnesses to a will were cut therefrom by testator's direction, and in his presence, with intention to revoke the will, there was a revocation, under Ky. St. § 4833, providing that a will may be revoked by destroying the signature thereto "with intent to revoke"; and, as the will was not re-executed as required by the statute after certain additions were made thereto, neither the original nor the new will is valid.

Paynter, J., dissenting.

Appeal from circuit court, Bullitt county.

"To be officially reported."

Contest by Mary J. Babbitt and others of a paper offered for probate as the will of G. N. Sanders. Judgment for contestants, and the propounders appeal. Affirmed.

J. W. Croan, J. F. Combs, and Fairleigh & Straus, for appellants. Chas. Carroll, for appellees.

BURNAM, J. This is an appeal from a judgment of the Bullitt circuit court refusing to probate a certain paper as the last will of G. N. Sanders. The facts in reference to the execution of the paper are as follows: In December, 1892, decedent, G. N. Sanders, had one of his neighbors, Mr. Gilmore, write his will at his dictation, which Sanders subsequently signed in the presence of S. D. Brooks and Wilson Summers, who attested same at his instance and request; and this will was delivered by Sanders to Summers, to be kept until his (Sanders') death. Some two years later, Sanders took the will out of the possession of Summers, saying that he wished to make some changes in it. Shortly afterwards he again sent for Gilmore, and notified him of his purpose to change his will; and, after some talk as to the best way to do it, Sanders directed Gilmore to cut his name and that of the subscribing witnesses from the paper, leaving the will above it unchanged; and then Gilmore, in the presence of Sanders, and by his direction, made several additional bequests to certain of his children, and the paper was then delivered to Sanders, who said that he would have it attested. After the death of Sanders, which occurred within less than a year from this time, this will was found among his papers, signed in his proper handwriting, but not attested; and, in addition to the additions made to the will by Gilmore, the fourth clause had been changed by erasing so much of same as devised \$300 in cash to his daughter Mrs. Roy, and deceased, in explaining the reason for this change, in his own handwriting interlined the will, adding these words: "The reason

that I cross out the above is that Theresa Roy has but one child, and he is a young man with a complete education, and Steve Sanders has three boys; and I gave Theresa Roy \$500 in cash, and nine acres of land, which she sold for \$300 cash, and for which I paid \$712 for the same land." He never called upon his neighbors to attest the will after the addition had been put to it, and, upon the offer to probate it, the court rejected the will on the ground that the cutting of the name of testator and the subscribing witnesses therefrom by testator's direction, and in his presence, was a revocation thereof; and, the paper never having thereafter been re-executed as required by law, it was adjudged that it was not entitled to be probated as the last will of decedent. We are asked, upon this appeal, to probate that part of the will which remained after the signatures of testator and the attesting witnesses were cut off, upon the ground that the cutting of the signatures from the will by direction of testator was not done with the intent to revoke the will, and that the addition should only be treated as a codicil.

Section 4833 of the Kentucky Statutes provides that: "No will, or codicil, or any part thereof, shall be revoked unless under the preceding section, or by a subsequent will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is required to be executed, or by the testator, or some person in his presence, and by his direction, cutting, tearing, obliterating, canceling or destroying the same, or the signature thereto, with the intent to revoke." This provision of our statute is a substantial re-enactment of the English statute of frauds (St. 29 Car. II. c. 3, § 6), and of the wills act of Victoria (St. 1 Vict. c. 26, § 20); and in construing the latter in the case of *Clarke v. Scripps*, 2 Rob. Eec. 567, the court said: "It is to be observed that the 'burning, tearing or otherwise destroying' the instrument must be done with the intention to revoke. It is not the mere manual operation of tearing the instrument or the act of throwing it in the fire, or of destroying it by other means, which will satisfy the requisites of the law. The act must be accompanied with the intention of revoking. There must be the animus as well as the act. Both must concur in order to constitute a legal revocation." And in *Giles v. Warren*, L. R. 2 Prob. & Div. 401, a testator, under the false impression that his will was invalid, tore it up. Immediately afterwards, on reconsideration he collected the pieces, and placed them together among his papers of importance, and preserved them until his death. It was held that, as the act was done when not accompanied by an intention to revoke a valid will, it was ineffectual; and the will was admitted to probate. Lord Penzance said: "The fact that a testator tears or destroys his will is not itself sufficient to revoke one properly executed; that is to say, the bare fact. If;

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

for instance, he tears it, imagining it to be some other document, there would be no revocation, for there would be no intention of revocation. He must intend by the act to revoke something that he had previously done. There can be no intention to revoke a will, if a person destroys the paper under the idea, whether right or wrong, that it is not a valid will. Revocation is a term applicable to the case of a person cancelling or destroying a document which he had before legally made. He does not revoke it if he does not treat it as being valid at the time when he sets about to destroy it. According to the evidence, the testator, in consequence of some conversation he had, was under the impression that he had made no valid will, and, as being useless, he tore the document up and threw it on the fire. That is no revocation." In the case of *Doe v. Harris*, 6 Adol. & E. 209, it was said: "There can be no doubt that, if the name of the testator had been burnt or torn out, the revocation would have been as complete as if the will had been torn in twenty pieces. If this were not the case, it would lead to many absurd consequences." Sir H. Jenner, in *Hobbs v. Knight*, 1 Curt. Ecc. 779, said: "The question then comes to this: Whether this be or be not a destruction of the will. I consider the name of the testator to be essential to the existence of a will, and that, if that name be removed, the essential part of the will is removed, and the will destroyed." In *Semmes v. Semmes*, 7 Har. & J. 388, it was held that: "A will deliberately canceled without accident or mistake is revoked, though the testator afterwards intended to make a new will, but omits to do so." In *Youse v. Forman*, 5 Bush, 337, it is said: "If the testator cut or tore off the signature to this paper [his will], the law presumes it to have been done with the intent to revoke, but this intent may be fortified or rebutted by extrinsic evidence."

It is apparent that the controlling fact to be ascertained in passing upon the question of revocation is, what was the intention of deceased in having the signatures of himself and the attesting witnesses clipped from the paper? The signature is certainly an essential part of the will. Without it there can be no will, and, if it was the purpose of deceased to revoke his will, no more effectual means of doing so could have been resorted to, short of the total destruction of the paper. The evidence of such intention is fortified by the fact that, in addition to cutting off the signatures, he made a number of important and material changes in the disposition of his property, both by adding other clauses, and by erasing provisions previously inserted. It is certain that the paper sought to be probated is essentially different from that from which the signatures were clipped, and this is in itself persuasive of the intention of deceased to revoke the other; and that he thought the old will was revoked is conclusively shown by the fact that he informed

the draftsman, after the additions had been made, that he would have the new document properly attested when the witnesses came out. After a careful consideration of all the facts and circumstances connected with the mutilation of the old will, we are of opinion that it was done by deceased with the intention of revoking it, and, as the new will has never been revived by a re-execution thereof as provided by law, it was properly rejected as the last will and testament of decedent. For the reasons indicated, the judgment is affirmed. .

DU RELLE, J., not sitting. PAYNTER, J., dissents.

LOUISVILLE & N. R. CO. v. COMMON-WEALTH.¹

(Court of Appeals of Kentucky. May 20, 1899.)²

CARRIERS—INEQUALITY OF RATES—LONG AND SHORT HAUL—COMPETITION—DUE PROCESS OF LAW.

1. Under Const. § 218, providing that it shall be unlawful for any common carrier to charge any greater compensation in the aggregate for the transportation "of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance," the fact that competition exists at the longer, and not at the shorter, distance point, does not constitute such a dissimilarity of conditions as will authorize the carrier to charge more for the short than for the long haul.

2. As the railroad commission is empowered to grant relief from the operation of that section in special cases, it is not to be presumed that it will refuse to do so where its refusal would result in arbitrarily depriving the carrier of the right to engage in competitive traffic, and therefore the provision does not deprive common carriers of their property without due process of law.

Appeal from circuit court, Marion county.

"To be officially reported."

The Louisville & Nashville Railroad Company was convicted of the offense of charging more for a short than for a long haul, and it appeals. Affirmed.

Wm. Lindsay, H. W. Bruce, Walker D. Hines, Edward W. Hines, W. C. McChord, W. J. Lisle, and John McChord, for appellant. H. W. Rives, W. S. Taylor, and M. H. Thatcher, for the Commonwealth.

HOBSON, J. Section 218 of the constitution is as follows: "It shall be unlawful for any person or corporation owning or operating a railroad in this state, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

² For dissenting opinion, see 51 S. W. 1012.

not be construed as authorizing any common carrier, or person, or corporation owning or operating a railroad in this state to receive as great compensation for a shorter as for a longer distance: provided, that upon application to the railroad commission such common carrier, or person or corporation owning or operating a railroad in this state, be authorized to charge less for longer than for shorter distances, for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation, owning or operating a railroad in this state may be relieved from the operation of this section." To carry the above into effect, the general assembly enacted the following statute: "If any person owning or operating a railroad in this state, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, such person shall, for each offense, be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the Franklin circuit court, or the circuit of any county into or through which the railroad or common carrier, so violating, runs or carries on its business. Upon complaint made to the railroad commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the commission to investigate the grounds of complaint, and, if, after such investigation, the commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order, the railroad or common carrier shall not be prosecuted or fined on account of the complaint made. If the commission, after investigation, fails to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order it shall be the duty of the commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad or common carrier may be indicted for the offense; and the commission shall use proper efforts to see that such company or common carrier is indicted and prosecuted." Ky. St. § 820. Ap-

pellant transported coal from Altamont to Louisville at \$1 per ton, and to Elizabethtown at \$1.30 per ton, while it charged \$1.55 per ton from Altamont to Lebanon, an intermediate station on its line of road. Complaint being made to the railroad commission, it investigated the matter, and made an order in writing, declining to exonerate appellant from the operation of the provisions of the section above quoted; and thereafter, at the suggestion of the commission, appellant was indicted in the Marion circuit court, as provided in the statute. The case was tried, and, appellant having been adjudged guilty, it prosecutes this appeal to reverse the judgment imposing a fine upon it of \$300.

Appellant justified the difference of the rate on the ground that at Louisville the coal hauled from Altamont came in competition with the coal brought down the Ohio river on boats, and that at Elizabethtown it came in competition with the Western Kentucky coal brought there by the Illinois Central Railroad. It insists that these rates could be made no higher on account of this competition, and that the rates to noncompetitive points like Lebanon were reasonable, and were unaffected by the reductions referred to which were necessary for the coal to be handled in those markets at all. The evidence offered by it to sustain this contention was excluded by the court below on the trial on the ground that competition is not one of the circumstances or conditions exempting the railroad from the operation of the section of the constitution above quoted. It is earnestly argued for appellant that the transportation is not under substantially similar circumstances and conditions when competition exists at one point and not at another, and we are referred to numerous decisions of the federal courts so holding. On the other hand, it is contended for the state that to adopt this construction is to emasculate the section, and deprive it of all practical operation and effect. The precise question thus presented was determined by this court in the case of Louisville & N. R. Co. v. Com., 46 S. W. 707, 47 S. W. 210, 598, where the construction of the section adopted by appellee was sustained. We are urged to overrule that case; but it was fully considered, and then reconsidered by the whole court, and we are disinclined, with substantially no new light upon the question, to set aside the conclusion of the court reached then after so mature deliberation. It is insisted for appellant that this construction of the section makes it an arbitrary interference with the right of appellant to engage in competitive traffic, depriving it of its property without due process of law, denying it the equal protection of the law, impairing the obligation of its charter contract, and unlawfully interfering with interstate commerce. All of these objections may be considered together.

A railroad is only an improved modern highway. It must, of necessity, be subject to

public control, like its predecessor, the turnpike; for the industry and commerce of the country are dependent upon it. To hold that only railroad men understand rates, or that they shall be allowed alone to fix the rates, and that no tribunal can review their decision as to what rates are reasonable, is to put in their hands a power dangerous to the welfare of the community, and utterly out of keeping with the doctrine that they are public agencies, and so have the right to appropriate to their use the property of the citizen against his consent upon making him just compensation. It has been notorious that the railroad managers have, by discrimination in favor of certain shippers or a given locality, brought ruin to others. It was the aim of the constitution to require the railroads in the state to treat all localities fairly and with equality; but, as differences of conditions ever varying would constantly arise, it prescribed no fixed rule, but created a tribunal to act as umpire between the railroads and the people, and decide when and to what extent a greater charge might be made for a short than for a long haul, under like circumstances and conditions, with full power in special cases "from time to time [to] prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this state may be relieved from the operations of this section." It is not confined in its power to each shipment as it may be made, but may prescribe, from time to time, a suspension of the section on freight of a given character between given points, as the public interest and the ends of justice may require. We are unable to see that as yet any right of appellant has been invaded, or that it has any just cause of complaint. If it be true that the public interests require the discrimination in rates shown in this case, and that no injustice has really been done, it may be that upon presentation of the facts to the railroad commission it would allow the rates to stand, and make an order exonerating appellant from the operation of the section. It does not appear that appellant has presented its case to the railroad commission, and we infer that it has not done so from the fact that this case seems to have been specially prepared to present these questions here, and there is no reference to a similar effort before the railroad commission. Although the commission refused to exonerate appellant on the evidence it had before it, it does not follow that it would still refuse to do so if proper evidence was offered. It represents the whole state, including the railroad and its stockholders as well as other people, and has always shown a laudable zeal for the interest of the entire state. The power to determine this matter must be vested somewhere, and, the constitution having created a special tribunal for this purpose, we cannot see that its provisions are subject to any of the objections raised by appellant. If the railroad companies are not to be allowed

to have exclusive control over the rates for the long and short haul, and the sole right to determine when competition exists, and to what extent special rates, for this reason, may be given, we do not see any more just arrangement that can be made than the selection of an impartial tribunal to hear and determine the matter. Since Adam's first-born dyed his hands in his brother's blood, self-interests have warped and controlled human judgment. However honest and faithful railroad managers may be, they necessarily look first to the interests of those they serve; and no principle of constitutional law is violated when the state, which has created these agencies for the public service, creates an impartial tribunal to prevent their great powers from being used to build up certain favored ones at the expense of others.

Counsel for appellant in effect concede in their brief that the state may prevent unjust discrimination, and that, if appellant's rates are judicially determined not to be reasonable, it may then be punished. Their argument, in effect, is that appellant may be punished under the section of the constitution, although its rates are reasonable, and the discrimination is made necessary by competition in trade over which it has no control. This assumes that the railroad commission will allow the interests of the state to suffer from an unjust rule, or that it will do injustice to appellee. We cannot see that a jury is better qualified to pass on the reasonableness of a rate than a skilled commission, nor is it by any means sure that a trial by jury would be, in practice, any more satisfactory to appellee. It is true, the commission may make mistakes; but we see no reason for the apprehension that an impartial tribunal will err more to the prejudice of one of the parties to a controversy than that party might himself to the prejudice of the other, if the solution of the question were left to him alone. It may be the commission, on the complaint referred to, from the evidence before it, concluded that the rate to Louisville was as large as it should be to afford a fair compensation for the haul to Lebanon, or that the competition with another railroad in the state did not justify the discrimination in favor of Elizabethtown. If it erred in any of its conclusions, it has power, from time to time, on further evidence; and a fuller hearing, to make such orders as the ends of justice may require; and, if the state may control the matter at all, we cannot see that the plan proposed is unfair, or in excess of the rightful police power of the state.

It is urged that this construction of the constitution will allow coal and other freights from without the state to be shipped cheaper than they can be hauled to the same point if shipped within the state, as under the interstate commerce act competition is held to exclude the carrier from the long and short haul clause. The constitutional convention no doubt had just such considerations in mind

when it gave the railroad commission the plenary powers conferred on it as above explained. It is the duty, and no doubt will be the pleasure, of the railroad commission to so regulate the matter that no injustice shall be done any industry in this state, and the true interests of the commonwealth as a whole shall be promoted. The interstate commerce act, under the construction that has been given it, has proved a sore disappointment to many of its friends. The subject is new. That act was an experiment. The provision of our constitution is an experiment in another direction. The subject is one of great difficulty, and, if experience does not find our provision to bring just results, it may lead to that system which will do justice to all, and bring these intricate questions to a just and fair settlement. Judgment affirmed.

DU RELLE and BURNAM, JJ., dissent.

LOUISVILLE & N. R. CO. v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. May 20, 1899.)

CRIMINAL LAW—RIGHT TO REQUIRE ACCUSED TO PRODUCE PAPERS AS EVIDENCE—HARMLESS ERROR—REPORT OF RAILROAD COMMISSION AS EVIDENCE.

1. The tariff sheet posted at a railroad station as required by law is not a private paper, and its production by an agent of the company may therefore be compelled upon the trial of a criminal prosecution against the company.

2. It was harmless error to require defendant to produce evidence against itself where the offense was otherwise made out.

3. On the trial of a prosecution against a railroad company for charging more for a short than for a long haul, the report of the railroad commission that defendant had been repeatedly guilty of the offense was admissible as evidence.

Appeal from circuit court, Marion county.

"Not to be officially reported."

The Louisville & Nashville Railroad Company was convicted of the offense of charging more for a short than for a long haul, and it appeals. Affirmed.

W. C. McChord, Walker D. Hines, W. J. Lisle, John McChord, and Edward W. Hines, for appellant. W. S. Taylor and H. W. Rives, for the Commonwealth.

HOBSON, J. This case is essentially similar in its facts to the cause of Louisville & N. R. Co. v. Com. (this day decided), 51 S. W. 164. One question, however, is made here that was not made there. The court required H. E. Hubbard, an agent of the appellant, under subpoena duces tecum to appear at the trial, and bring with him certain books and papers of appellant, in his possession as its agent, and then required him to testify in effect from these documents, over appellant's objection. Appellant complains of this as unwarranted, and in violation of its rights under the constitution not to bear evidence against itself, and to hold its papers free from search

or seizure. This is a very interesting question, but its decision is not necessary to the determination of this case. The tariff sheet which the agent produced was required by law to be publicly posted at the station, and was in fact so posted. This was not a private paper, and the court might properly compel its production on the trial. The tariff sheet, with the other evidence heard, made out the appellee's case. The substance of the charge in the indictment was proved without reference to the other papers to the production of which objection was made, and, as the jury could not have been misled by them, no substantial right of the appellant was prejudiced. The commonwealth is only required to prove the charge substantially as laid. This was done. There was no error in allowing the order of the railroad commission to be read. This has, in effect, been determined by this court in the preceding cases. Judgment affirmed.

SKINNER v. LYNN.¹

(Court of Appeals of Kentucky. May 18, 1899.)

HUSBAND AND WIFE—LIABILITY OF WIFE AS SURETY—PAROL TESTIMONY TO SHOW SURETYSHIP.

Though a note purports to be the joint obligation of husband and wife, the wife may show that she is a surety merely, and thus avoid liability thereon; a married woman not being personally liable as surety, under the act of March 15, 1894.

Appeal from circuit court, Cumberland county.

"Not to be officially reported."

Action by Mary Lynn against Mary S. Skinner and husband on a promissory note. Judgment for plaintiff, and defendant Mary S. Skinner appeals. Reversed.

Sandidge & Sandidge and T. L. Edelen, for appellant. Allen & Ewing, for appellee.

BURNAM, J. This suit was instituted by appellee upon a note which reads as follows: "\$192.07. One day after date we or either of us promise to pay Mary Lynn the sum of one hundred ninety-two and 07/100 dollars, for value received. This September 30, 1895. James Skinner. Mary S. Skinner." It is alleged that Mary S. Skinner is the wife of her co-defendant, and that she had been adjudged by this court (Cumberland circuit) a feme sole. The defendant, by way of answer, denied that she had been adjudged by the Cumberland circuit court a feme sole, and admitted the execution of the note sued on, but said, by way of defense, that she was at the time of its execution, and was at the date of the filing of this answer, a married woman, the wife of her co-defendant, James Skinner; that she signed and delivered said note as surety of her co-defendant, and not as principal; that no consideration passed to her for its execution or delivery; and she relied upon these facts and her coverture as a bar to any re-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

covery against her. To this answer of defendant a general demurrer was sustained, and personal judgment rendered for the amount of the obligation sued for.

It is insisted by counsel for appellee that under the act of March 15, 1894, known as the "Married Woman's Act," appellant is given the power to make contracts, sue and be sued, as a single woman; and that, as the note sued on purports to be the joint and several obligation of appellant and her husband, she cannot escape liability thereon unless she shall allege and prove that the debt for which the note was signed and delivered was not her debt; that she signed same only as surety for her husband, and that the payee knew this fact at the time of its acceptance; that, as the answer is lacking in these essential averments, the demurrer was properly sustained; and he relies in support of his contention upon the case of *Neel v. Harding*, 2 Metc. (Ky.) 248. We hardly think that this case supports the contention of counsel, but, if we are wrong in this view, it is certainly in conflict with numerous adjudications of this court, which both precede and succeed it. In the case of *Emmons v. Overton*, 18 B. Mon. 648, the same distinguished judge held: "Parol evidence is admissible to show who is principal and who was surety in a note which is joint and several on its face; that no statement or recital in the writing is contradicted by showing that one of the obligors is surety and the other is principal; that, in the absence of all testimony on the subject, the law regards them as equally liable, inasmuch as the writing itself does not furnish any grounds for discrimination; that, if this legal construction of the writing should be permitted to have the effect contended for, the statute in favor of sureties would become, in a great measure, a dead letter, except in those cases where the note stated on its face who was principal and who surety." And in the case of *Lewis v. Harbin*, 5 B. Mon. 564, it was held that a note like the present one did not create an estoppel, but that the fact of suretyship might be proved by parol testimony. This doctrine was reaffirmed in the case of *Bank v. Gaines*, 87 Ky. 601, 9 S. W. 396, in which it was expressly decided that, although the obligation read, "We jointly and severally promise," etc., any one of the obligors could show that he was only surety, so as to be protected in his rights as surety, without alleging and proving the scilicet on the part of the obligee, for the reason that such forms of expression in the obligation do not contradict the idea of his being merely surety, nor fix the legal status of the obligor. And the same statute which conferred upon married women the power to contract as single women expressly provides that "no part of her estate shall be subjected to the payment of any liability upon a contract made after her marriage to answer for the debt, default, or misdoing of another, including her husband, unless such estate shall have been set apart

for that purpose by deed of mortgage or other conveyance." While this statute clothes married women with many new rights and liabilities not theretofore enjoyed by them, it was the manifest purpose of the legislature that they should not contract obligations as sureties for their husbands or other persons, so as to charge their estate, unless such estate should be expressly set apart for that purpose by deed of mortgage or other conveyance. It seems to us that the averment of suretyship is sufficiently recited. Appellant does not content herself with merely alleging affirmatively that she signed the note as surety, but she goes further, and says that no consideration passed to her for its execution and delivery. We think the answer sufficiently sets out the defense relied upon, and that the court erred in sustaining a demurrer thereto. For reasons indicated the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

ILLINOIS CENT. R. CO. v. NALL.¹

(Court of Appeals of Kentucky. May 25, 1899.)
NEGLECT — FAILURE TO REPLY TO PLEA OF CONTRIBUTORY NEGLIGENCE.

Where there was no reply to a plea of contributory negligence, the court should have sustained defendant's motion for a peremptory instruction.

Appeal from circuit court, Hardin county.
 "Not to be officially reported."

Action by Jefferson Nall against the Illinois Central Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

Pirtle & Trabue and James Montgomery, for appellant. J. P. O'Meara, for appellee.

GUFFY, J. The appellee instituted this action against the appellant to recover damages for an injury to himself and to his wagon, etc. It is alleged in the petition as follows: The said defendant, by its agents and employes, so carelessly, recklessly, and negligently managed and operated a train of its cars, and engine attached thereto, that the same ran into and against plaintiff, injuring and bruising him about the face, head, limbs, and stomach, and the said defendant committed said injuries in a careless, negligent, and violent manner, to plaintiff's damage in the sum of \$1,000. A similar averment is made in charging injury to plaintiff's two horses, plow, and wagon, to the damage of \$200, judgment for \$1,200 being prayed for. In an amended petition, the following allegation is made: "He says that on the — day of —, 1897, the defendant did by its agents, servants, and employes, who he alleged was running and operating one of its engines, and cars attached thereto, upon its said track in this county, with willful carelessness, reck-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

lessness, and negligence, run its said engine and train of cars into and against and strike this plaintiff, bruising him on the face, head, and limbs and stomach, thereby greatly injuring him, both mentally and physically, to his damage in the sum of \$1,000." The defendant demurred to the petition as amended, upon the grounds that it did not state a cause of action, which demurrer was overruled by the court. The defendant's answer is a traverse of all the allegations as to the injury to the plaintiff or his property, as well as a traverse of all negligence and carelessness. A jury trial resulted in a verdict and judgment in favor of plaintiff for his personal injuries in the sum of \$325, and the sum of \$75 damages to his personal property, and, appellant's motion for a new trial having been overruled, it prosecutes this appeal. The appellant also filed an amended answer, to conform, as is claimed, to the proof after the introduction of the testimony, in which it pleaded contributory negligence. The grounds relied on for a new trial are, in substance, that the court erred as to the admission of testimony; error in refusing to give a peremptory instruction at the close of plaintiff's testimony; the damages are excessive; error of the court in refusing to give judgment notwithstanding the verdict; error of the court in giving instructions from 1 to 6, and in refusing instructions A, B, and C; that the verdict is not sustained by sufficient evidence; and error of the court in allowing the amended petition to be filed, and in overruling the demurrer to the petition as amended.

It seems to us that the instructions given correctly presented the law applicable to the case on trial, if the pleading had been perfected, and that no error occurred as to the rejection or admission of testimony; but the court permitted an amended answer to be filed pleading contributory negligence upon the part of the plaintiff, which amended answer does not appear to have been replied to or denied, and, according to former decisions of this court, a reply to a plea of contributory negligence is necessary. It therefore follows that the court should have sustained the motion for a peremptory instruction under the pleadings as then made up, and for that error the judgment is reversed, and cause remanded for a new trial and for further proceedings consistent with this opinion.

CRAFT et al. v. ALLEN.¹

(Court of Appeals of Kentucky. May 20, 1899.)

BILLS OF EXCEPTIONS—SIGNING IN VACATION.

A bill of exceptions which has been signed in vacation, and never filed in open court, cannot be considered, though signed pursuant to an order extending the time for filing to a day in vacation.

Appeal from circuit court, Breathitt county.
"Not to be officially reported."

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Action by W. S. Allen against Preston Craft and others to recover damages for trespass on land, and to enjoin defendants from cutting timber. Judgment for plaintiff, and defendants appeal. Affirmed.

W. W. Vaughn, J. J. C. Bach, and W. S. Pryor, for appellants. J. B. Marcum, for appellee.

PAYNTER, J. On June 24, 1897, the grounds for a new trial were overruled, and the appellants were given 60 days to prepare and file their bill of exceptions. The time in which they were authorized to prepare and have signed the bill of exceptions was during vacation, and the judge who tried the case did sign in vacation what was tendered to him as the bill of exceptions in the case. The document purporting to state them, and styled the "bill of exceptions," was neither signed nor filed in court, but was prepared and signed extrajudicially out of court. It has never been made part of the record, and cannot be considered on this appeal. *Freeman v. Brenham*, 17 B. Mon. 608; *Allard v. Smith*, 2 Metc. (Ky.) 298; *Corley's Ex'r v. Evans*, 4 Bush, 410; *Adkins v. Com.* (Ky.) 42 S. W. 834, and 44 S. W. 132. As there is no bill of exceptions in the record, there is nothing to show the court committed any error for which the appellants are entitled to a reversal. The judgment is affirmed.

EVERSOLE et al. v. FIRST NAT. BANK OF LONDON et al.¹

(Court of Appeals of Kentucky. May 20, 1899.)

GIFTS—BANK DEPOSIT.

Where money deposited in bank is, by direction of the depositor, placed to the credit of another, who accepts the deposit, there is a complete gift of the money deposited, though the depositor directs the cashier not to pay out the money without notifying him.

Appeal from circuit court, Laurel county.

"Not to be officially reported."

Action by Clarke Eversole and Pleasant Wood, administrators of George H. Steele, against Susan Pace and the First National Bank of London, Ky., to recover a deposit. Judgment for defendants, and plaintiffs appeal. Affirmed.

H. C. & John C. Eversole, for appellants. Tinsley & Faulkner and D. K. Rawlings, for appellees.

PAYNTER, J. It is unnecessary to discuss the question as to whether or not the petition states a cause of action, for, if it did, the evidence failed to establish it. On May 8, 1897, G. H. Steele placed to the credit of the appellee Susan Pace \$500 in the appellee bank. It was entered by the cashier of the bank to her credit, and he delivered to Steele a pass book in her name, showing that she was credited with that sum. It is insisted by counsel for

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

appellants, who are the personal representatives of Steele, that the money which he deposited belonged to himself, and that he retained control of it; hence never parted with his ownership or the right to withdraw it from the bank. It is also insisted that Mrs. Pace did not know the money had been deposited to her credit. The latter claim is not supported by the evidence, because it is shown that, within a month after the deposit was made, she wrote to the bank to ascertain whether or not money was on deposit to her credit. She could not have had any information on this subject, unless Steele had given it to her. It likewise appears that, immediately after Steele's death, she claimed that there was money to her credit in the bank, and that he held her pass book showing that fact. An examination of his papers showed that he had possession of the pass book which she claimed he had. It is insisted that it was not her money that was deposited in the bank, but that it, at the time, belonged to Steele. This may be true, but he parted with the possession of the money, and delivered it to the bank for her. He did not retain the money or the control of it. All he asked the cashier was for him not to pay out the money without letting him know about it. His purpose in that may have been to try to preserve the fund for her benefit. Subsequently he brought to Jackson, cashier of the bank, a slip of paper bearing her name, in her own handwriting, and told him that when a check was presented bearing her name, with his "O. K." on it, to pay the money. This tends to establish the fact that she was aware of the deposit to her credit, and that Steele did not intend that the money should be withdrawn from the bank except upon her check. He did not at the time of the deposit, or at the time the slip of paper with her name on it was furnished to him, pretend to claim that he retained the right to withdraw the money himself. In addition to these facts, one witness testifies that Steele told him that Mrs. Pace had on deposit in the appellee bank to her credit the sum of \$500. If the money deposited to her credit did not belong to her, or was not deposited to her credit for a valuable consideration, we are authorized, from the facts and circumstances of the case, to conclude that it was intended to be a gift to her, and the essentials which render the gift valid exist. The gift was to go into effect at once. It was delivered to the bank for her, placed to her credit, and she accepted it. We think the court properly adjudged the money to belong to Mrs. Pace. The judgment is affirmed.

HAMILTON et al. v. HAMILTON'S EX'R.¹
(Court of Appeals of Kentucky. May 23, 1899.)
**EXECUTORS AND ADMINISTRATORS—CONFIRMATION
OF SALE MADE BY EXECUTOR.**

The chancellor properly confirmed a sale of land made by an executor, though the sale was

made after suit brought against him for a settlement of the estate, it appearing that the land brought a fair price, and that the executor acted in good faith.

Appeal from circuit court, Bath county.

"Not to be officially reported."

Action by W. W. Hamilton and J. M. Tenney against John M. Elliot, executor of George Hamilton, to settle the estate of defendant's testator. Judgment affirming a sale of land made by defendant, and Nellie Hamilton and others appeal. Affirmed.

Tyler & Apperson and O. S. Tenney, for appellants. E. C. O'Rear and W. S. Pryor, for appellee.

GUFFY, J. George Hamilton died in Bath county in 1895, and on the 8th of April, 1895, his will was duly probated in the Bath county court. The testator directed that all of his just debts should be paid, and his executors were authorized and empowered to sell so much of his real and personal property as might be necessary for that purpose, and to make conveyance of same to the purchaser. Various special bequests were made by the testator, and he appointed W. W. Hamilton and John M. Elliot as executors and trustees to execute the various provisions of his will. It appears that both executors qualified as such, but afterwards W. W. Hamilton ceased to act, and either resigned, or was removed by the court. On the 18th of January, 1896, W. W. Hamilton and J. M. Tenney instituted suit in the Bath circuit court for a settlement of the estate of said decedent, and for a sale of a sufficiency of the property to pay the debts of the testator. It appears from the will that the testator owned, or at least claimed to own, a large amount of land in the state of Missouri, which was alleged to be worth at least \$135,000; and that he also, among other things, owned a tract of land in Bath county, consisting of about 486 acres. At the instance of the plaintiffs, the clerk of the Bath circuit court made an order referring the case to the master commissioner for settlement. The plaintiff Tenney was a creditor. W. W. Hamilton was not a devisee under his father's will, but was surety for a considerable sum of money for his father. Some of the other heirs, by answer, united in substance in the prayer for a settlement of the said testator's estate. At the February term, 1896, of the Bath circuit court, the defendant, John M. Elliot, filed his answer, giving many reasons why the parties should not be allowed to prosecute the suit, and why he should have further time for settlement, and on his motion the order of reference made by the clerk was set aside, and the court refused at that term to make any order of reference, and at the instance of said Elliot the cause was postponed from time to time. At the October term, 1897, on motion of plaintiffs, the court referred the action to the master commissioner for settlement, etc., and at the February term, 1898, the commissioner

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filed a report showing a large amount of indebtedness. The commissioner reported, in substance, that he had made several attempts to get the executor, Elliot, to appear before him, and make a settlement of his accounts, as well as a showing of the assets of the estate, and what he had done with the same, and that the executor promised and fixed times and dates to appear, but failed to do so. It further appears that on the 22d day of February, 1898, the executor made a report, and assigned sundry reasons why he had not appeared before the commissioner and made report, etc., which report he was allowed to file. The executor also reported that he had, by deed of date 9th of February, 1898, sold and delivered possession and title to the 486-acre tract of land mentioned herein to George G. and J. C. Hamilton at the price of \$67.50 per acre, one-third cash, and balance in one and two years, with interest from date, and asked the court to confirm and ratify said sale; to all of which appellants objected and excepted, but the court upon final hearing overruled the exceptions, and confirmed and approved the sale and conveyance aforesaid; and from that judgment this appeal is prosecuted.

It appears from the proof in this case that the executor had offered to sell the land to one Ewing and stated to Ewing that he asked about \$70 per acre for the land, and that Ewing offered about \$62 per acre for the said land; and that afterwards appellee Elliot, by telegraph correspondence with the Hamiltons, who were then in Florida, sold the land to them at the price heretofore mentioned. There is some conflict in the testimony as to exactly what communications were had or promised to be had with Ewing in regard to the sale of the land. It is, however, shown in the testimony that Ewing, at the time of the controversy, had guaranteed that he would pay \$72.50 per acre for the land on a resale of same, which is about all the testimony tending to show that the land was worth more than \$67.50 per acre. There is some testimony tending to show that \$67.50 was a fair market price for the land at the time it was sold. The vendees of the land do not appear to be parties to this appeal. It seems that the executor never advertised the land for sale, and, indeed, from the evidence it does not appear that he ever proposed to sell the land to any one except to Ewing and to the vendees. It is insisted for appellants that under the law the executor, after the institution of the suit, had no power to sell the land, except by special direction or judgment of the court. If, however, it be conceded that the executor, Elliot, after the institution of the suit for a settlement, etc., had no power to sell the land except by special direction or judgment of the court, yet it would seem that the court had power and authority to approve a sale made or proposed to be made by the executor after the institution of such suit; and it appears that in

this case the chancellor, after having heard the proof in respect to the proposed sale, confirmed and ratified same; and it would seem that the sale should be held to be as valid and efficacious as if it had been made under a special order or direction of the chancellor. If there was any evidence in this action conducing to show that the appellee had acted improperly in the matter, or with any desire to favor friends, or promote his own interest, we would not hesitate to reverse the judgment; but taking all the facts and circumstances in the case into consideration, and giving some weight to the judgment of the chancellor, who seems to have had the witnesses before him, we are not disposed to disturb the judgment rendered. Judgment affirmed.

BROWN v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. May 20, 1899.)

HOMICIDE—KILLING IN DEFENSE OF ANOTHER—INSTRUCTIONS TO JURY.

1. Where deceased was killed by accused in a difficulty which arose from the interference by accused to protect a woman against an assault by deceased, accused was entitled to an instruction as to his right to kill deceased in defense of the woman.

2. Where it appeared that accused interfered to protect a woman against an assault by deceased, it was error to give an instruction limiting the right of accused to defend himself in the event the jury should believe he provoked the difficulty by wrongfully assaulting deceased.

Appeal from circuit court, Jefferson county, criminal division.

"Not to be officially reported."

James Brown was convicted of manslaughter, and he appeals. Reversed.

Caruth, Chatterson & Bletz, for appellant. W. S. Taylor and M. H. Thatcher, for the Commonwealth.

PAYNTER, J. The appellant appeals from a judgment of conviction for manslaughter. Previous to the time the deceased, Joe Humble, was killed by the appellant, nothing had occurred between the parties to occasion ill-will, nor did the difficulty which resulted in the killing seem to have been anticipated by either party. The deceased and a woman became engaged in a quarrel over an umbrella, which, according to the uncontradicted testimony in the record, belonged to her, but which the deceased was attempting to take from her. The evidence strongly tends to prove that the deceased kicked the woman, and thereupon the appellant got down from the fence where he was sitting, and said to the deceased, "Do not hit that woman," and went where they were struggling over the umbrella. The testimony of the commonwealth is not satisfactory as to whether the deceased or the appellant struck the first blow, while the testimony for the appellant is positive that the deceased struck him, and knocked him

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down, again struck him, and at the time he inflicted the fatal wound with the knife deceased was again in the act of striking him. The testimony seems to be uncontradicted that the appellant received wounds on the head at the hands of the deceased which indicated that they were made by some instrument. It is perfectly manifest from the testimony in the case that the appellant went to rescue the woman from what he believed to be an assault upon her by the deceased.

Counsel for appellant insists that it was the duty of the court to give the whole law of the case, and that the appellant had the right to kill the deceased in the defense of the woman, and cites authorities to sustain his contentions. It is hardly necessary, owing to the numerous adjudications of this court, to cite authorities on either of the propositions. The court limited his right to slay the deceased in his apparently necessary self-defense, but refused to instruct the jury that he had the right to slay him in the defense of the woman. We think, under the facts of this case, the court should have submitted to the jury the question as to whether or not the accused took the life of the deceased in his own apparently necessary self-defense or in defense of the woman, Lila Hackney. Of course, in submitting the question as to whether the killing was in the defense of another, it should be done in language which is usual in such instructions. Instruction No. 4 which the court gave the jury reads as follows: "If the jury believe from all the evidence, to the exclusion of a reasonable doubt, that the accused, James Brown, provoked the difficulty in which the deceased, Joe Humble, lost his life, if he did so, by wrongfully and illegally assaulting the deceased, Joe Humble, and the danger to the accused mentioned in instruction No. 3, if any such existed, was caused by Joe Humble's repelling such wrongful and illegal assault made on him by the accused, James Brown, if such there was, and in repelling said assault, deceased, Joe Humble, used no more or no greater force than was reasonably necessary to defend himself from same, then the plea of self-defense will not avail the accused in this case." This instruction allowed the jury to infer that the appellant had no right to go to the rescue of the woman who was being assaulted by the deceased. They might have concluded that it was wrong for him to approach the deceased, and tell him not to hit her. The language of the instruction denies the appellant his right to have slain the deceased in self-defense "if he provoked the difficulty * * * by wrongfully and illegally assaulting the deceased, Joe Humble," etc. The jury doubtless concluded that the accused had no right to appeal to the deceased not to hit the woman, or to rescue her from an impending danger at the hands of the deceased, and therefore his conduct was wrongful and illegal; hence, under the instruction, must have concluded he provoked the difficulty. Such being the case, the jury

necessarily reached the conclusion that he was not entitled to the law of self-defense. In *Allen v. Com.*, 86 Ky. 648, 6 S. W. 648, the court had under consideration an instruction containing different language, but on the same question as the instruction here under consideration, and said: "Nor can he do so if he seeks the other party, not innocently, but with the intention of provoking difficulty, and does so. He must not, however, be deprived of the benefit of the plea of self-defense because words innocently spoken by him, or in jest, or some act done by him not calculated or intended to do so, and not resorted to as a shelter for intended wrong, may have contributed to bring on the difficulty." We do not think there is any evidence in this case which authorized the court to give instruction No. 4. *Wilcoxon v. Com.* (Ky.) 23 S. W. 195; *Martin v. Com.*, 93 Ky. 189, 19 S. W. 580. The judgment is reversed for a new trial, and for proceedings consistent with this opinion.

YARBOROUGH et al. v. FITZPATRICK.¹
(Court of Appeals of Kentucky. May 20, 1899.)
APPEAL AND ERROR — USE OF SUPERSADED JUDGMENT AS SET-OFF.

Where a judgment has been superseded, and an appeal therefrom is pending, the judgment cannot be pleaded as a set-off.

Appeal from circuit court, Bell county.

"Not to be officially reported."

Action by J. G. Fitzpatrick against J. D. Yarbrough & Co. and others on a promissory note. Judgment for plaintiff, and defendants appeal. Affirmed.

G. W. Saulsberry, for appellants. A. H. Cook, for appellee.

BURNAM, J. Appellee sought in this action to recover against appellants upon a note for \$500, which had been assigned to him by one A. H. Rennebaum. Appellants admitted the execution of the paper sued on, but pleaded as a set-off a judgment obtained by them against Rennebaum for certain personal property, if to be had, or, if not, its value, which was fixed at \$800, and \$100 damages for its detention. This is the only defense offered. Appellee, by way of reply, relied upon quite a number of defenses. Among them, he pleaded that the judgment in favor of appellants against Rennebaum had been superseded, and an appeal prosecuted therefrom to this court. There is no denial of this allegation, and the chancellor, upon motion, gave judgment for appellee upon the pleadings.

Where a judgment has been superseded and bond executed, it suspends all proceedings for the enforcement of the judgment, and such judgment cannot be pleaded or relied upon by way of set-off or counterclaim, as the bond is presumed to furnish adequate security to insure the collection of the judgment in the event of reversal; and, as this question is

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conclusive of the correctness of the chancellor in the judgment rendered in the court below, it is unnecessary for us to consider the other questions relied on and discussed. For reasons indicated, the judgment is affirmed.

VILEY et al. v. FRANKFORT & C. RY.¹
(Court of Appeals of Kentucky. May 23, 1899.)
CONSTRUCTION OF DEED — "CHILDREN" AS WORD OF LIMITATION.

A deed conveying land to V. "and his children," to have and to hold to him "and his children," conveys to V. the fee, and not merely a life interest.

Appeal from circuit court, Scott county.

"Not to be officially reported."

Action by John H. Viley and others against the Frankfort & Cincinnati Railway to recover damages for the taking of land. Judgment for defendant, and plaintiffs appeal. Affirmed.

The deed construed names Samuel Viley as the party of the one part, and John M. Viley as the party of the other part, and conveys the land to John M. Viley "and his children"; habendum, to have and to hold to him "and his children."

Owens & Finnell, for appellants. T. L. Edelen, for appellee.

GUFFY, J. It is alleged in the petition by the appellants that they were the owners of a tract of land in Scott county of about 230 acres (giving the boundary), and that the appellee had taken possession of a strip of land running through plaintiffs' said land, and made a roadbed thereon, and deprived plaintiffs of the possession thereof; that the land so taken, and the damages caused to the residue of the tract, amount to the sum of \$1,392.50, for which they prayed judgment. The answer of the defendant alleged a conveyance by the vendor of the present defendant to the land in controversy, the vendors being J. M. Viley and the plaintiff Susan Viley; and it is alleged that the vendor John M. Viley was the owner at the time of said land. In the amended answer it is alleged that John M. Viley, the ancestor of the appellants herein, died in Scott county on the 28th of April, 1891, after having first published his will, and on the — day of —, 1892, said will was duly and properly admitted to record in the county court of Scott county; that by the terms of the said will the plaintiff Susan A. Viley was given the entire landed estate of the said J. M. Viley, and his personal property, to hold during her life or widowhood, with the remainder to the children of said testator, and that the personal estate was worth largely more than the strip of land mentioned in the petition, with damages to the residue of the tract which are now asserted against defendant; that prior to the death of said Viley he

had made advancements to his children in value more than said strip of land and damages; that after the death of said Viley the heirs at law of said deceased and the widow entered into an agreement whereby the heirs conveyed to said Susan a life estate in the farm of said J. M. Viley, and his entire personal property, for the consideration of which she assumed the debts of the testator, and that after the payment of the same, and current expenses, the surplus, if any, should, after the death of the said Susan, pass over to, and be distributed among, the distributees of the said J. M. Viley, deceased, as if it were his personal estate; and that by reason of said agreement no inventory or appraisal of said estate had been made, and no settlement of the estate, showing the amount of the advancements. It is further averred that the amount of the advancements and the personalty bequeathed and conveyed by the will is largely in excess of the value of the plaintiffs' land taken, and the alleged damages to the residue of said tract, wherefore plaintiffs, and each of them, are estopped to assert the damages alleged in the petition. It is substantially alleged in the reply that John M. Viley only owned a life estate in said land, and that said Susan owned no estate whatever; that said Susan, since the death of her husband, has become the owner of an estate for life or widowhood in the land, and this is all the estate she ever owned in the land. In an additional reply the plaintiffs deny that they received from their ancestor John M. Viley any estate, real or personal, either by gift or advancement, of any value whatever, or that they have received any since his death, but allege that all his personal estate was consumed in the payment of his debts; that the personal estate was not sufficient to pay his debts, and the widow assumed the payment of the debts on condition that the personalty would be turned over to her, which was done; and that this personalty was not of sufficient value to pay his debts, and the same has been applied to them, leaving some unpaid. It seems that the court sustained a demurrer to the petition so far as the widow, Susan Viley, was concerned, and after the introduction of plaintiffs' testimony, and the introduction of some testimony by defendant, the court, on motion of defendant, gave a peremptory instruction to find for defendant, which was accordingly done; and, appellants' motion for new trial having been overruled, they prosecute an appeal to this court.

The grounds relied on for a new trial are as follows, in substance: (1) Error of the court in giving the peremptory instruction which was given on motion of the defendant immediately after it had introduced proof to the effect that John M. Viley had no children when the deed from Samuel Viley was made to him. (2) Error of the court in giving the peremptory instruction to find for defendant. (3) Error of the court in admitting testimony showing that John M. Viley had no children

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when the deed from Samuel Viley was made to him. (4) Verdict of the jury is not sustained by the evidence, and is contrary to law. (5) Error of the court in refusing to strike from the amended answer filed and noted May 20, 1897, the portions thereof included in brackets. (6) Court erred in sustaining the demurrer to the petition and reply of Mrs. Viley, widow of J. M. Viley.

It is the contention of appellants that the vendor, John M. Viley, took only a life estate in the land in controversy, and, this being true, he could only pass a life estate to the railroad company. It is the contention of appellee that the deed passed the fee-simple title to John M. Viley, and it is further contended that the heirs, by reason of the transaction set up, are now estopped to maintain and prosecute this action. It will be seen that the execution of the will of John M. Viley, and the agreement between the heirs and his widow, are not denied by the appellants; but they do deny that they received any property from their ancestor, or that any advancement had been made to them, or that there was sufficient personal property to pay his debts. It seems to us that the deed from Samuel Viley to John M. Viley conveyed the fee-simple title to the land in controversy. *Moran v. Dillehay*, 8 Bush, 434; *Hood v. Dawson*, 98 Ky. 285, 33 S. W. 75. This being true, the deed from John M. Viley and wife to the Kentucky Midland Railway Company passed the fee simple to the land in controversy, and the appellee, having succeeded to that title, is now the owner in fee of said land. This conclusion renders it unnecessary to discuss the other questions raised by the pleadings in this action. We are therefore of the opinion that the peremptory instruction was properly given, and the judgment appealed from is affirmed.

CALDWELL'S ADM'R v. HAMPTON.¹

(Court of Appeals of Kentucky. May 23, 1899.)

APPEAL AND ERROR — APPELLATE JURISDICTION.

As the law fixing the minimum jurisdiction of the court of appeals at \$200 took effect in June, 1898, no appeal lies from a judgment for less than \$200, rendered in October, 1898.

Appeal from circuit court, Bath county.

"Not to be officially reported."

Action by Mary F. Hampton against James Caldwell's administrator. Judgment for plaintiff. Defendant appeals. Motion to dismiss granted.

R. Gudgeon & Son and C. W. Goodpaster, for appellant. Ed. C. O'Rear, for appellee.

HAZELRIGG, C. J. This is a motion by appellee to dismiss the appeal (1) because "the judgment appealed from adjudges less than \$200 in favor of appellee M. F. Hampton against appellant"; and (2) because "a number of the appellees were defendants, and

were constructively summoned, never appeared in the action, and have not been actually summoned to answer this appeal, which was granted by the inferior court, and appellant has not filed an entire copy of the record." As to the first ground, it appears, from the statement filed by counsel for appellant pursuant to section 739, Civ. Code Prac., that the judgment complained of was rendered on April 12, 1898. As the law fixing the minimum jurisdiction in this court at \$200 did not take effect until June, 1898, it would seem not to apply to this judgment, which is over \$100, though less than \$200; and if, as stated by counsel for appellee, the state of case existed as set up by him in the second ground for dismissal, it would not furnish such ground, although the appellant would take the risk of an affirmance because of the absence of a complete record, as the law requires in such cases. As a matter of fact, however, counsel for appellant is mistaken in his statement that the judgment was rendered in April, 1898. It was rendered in October, 1898; and counsel for appellee is mistaken in saying that any of the appellees were constructively summoned, etc. There is but one appellee, and there is no complaint in this court of any judgment except the one in favor of appellee. Disregarding these inadvertences of counsel, an examination of the record discloses that the judgment complained of was one in favor of appellee for the sum of \$191.18, and no more. This is the amount, therefore, in controversy, and, as the law in force when the judgment was rendered and the appeal taken fixes the minimum jurisdiction at \$200, the motion to dismiss must prevail. The dismissal is without damages, as no supersedeas bond is in the record.

MAGEE et al. v. FRAZIER'S EX'R.¹

(Court of Appeals of Kentucky. May 23, 1899.)

APPEAL AND ERROR — DEATH OF PARTY — NECESSITY FOR REVIVOR.

Where the plaintiff in a judgment dies after an appeal has been granted therefrom, the defendant may abandon that appeal, and have an appeal granted by the clerk against plaintiff's executor, without revivor.

Appeal from circuit court, Harrison county.

"Not to be officially reported."

Action by N. W. Frazier's executor against Simon Magee and others. Judgment for plaintiff, and defendants appeal. Motion to dismiss appeal. Denied.

D. L. Evans and J. T. Simon, for appellants. Blanton & Berry, for appellee.

HAZELRIGG, C. J. In June, 1897, N. W. Frazier obtained a judgment against the Magees, from which, in the lower court, they prayed an appeal to this court. In September following, Frazier died, and appellee qualified as his executor. The Magees never per-

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fectured or prosecuted the appeal granted them in the lower court, but in June, 1898, were granted an appeal in this court, and had the executor summoned as appellee. The motion by appellee now is to dismiss the appeal because there has been no revivor. This must be overruled. Whatever might have been the result of an attempt to prosecute the appeal granted in the lower court, without a revivor it is manifest that when the appeal was abandoned the only remedy left to appellant was to take his appeal in this court; not, it is true, against the original appellee, but against his privy, as may be done under the provisions of section 734 of the Civil Code. The case of *Hopkins v. Hopkins' Adm'r*, 91 Ky 310, 15 S. W. 854, is in point, except that in that case there was no appeal granted below. Here the appeal granted in the lower court was abandoned, and the case must be considered as if no such appeal had been granted. Motion overruled.

LOUISVILLE RY. CO. v. RAMMACKER.¹

(Court of Appeals of Kentucky. May 23, 1899.)

CARRIERS—STARTING OF STREET CAR BEFORE PASSENGER HAS ALIGHTED—EVIDENCE.

1. Though a street car has been stopped without a signal, yet where the driver sees a passenger about to leave the car, when he ought to know that such is her purpose, it is negligence on his part to start the car before she has had time to alight.

2. Evidence that it is customary for passengers to leave the car while in motion is not admissible to excuse the act of the driver in starting a car before a passenger has alighted.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by Catherine Rammacker against the Louisville Railway Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Fairleigh & Straus, for appellant. Bennett H. Young, for appellee.

WHITE, J. This is an action for damages for personal injuries received by appellee when getting off a car of appellant. The negligence complained of is that the driver of the car, knowing that appellee was leaving the car, started the car with a jerk, while appellee was on the lower step, in the act of alighting, and by reason thereof she was thrown to the street and injured. The answer put in issue this charge of negligence, pleaded contributory negligence, and denied the damage. A trial resulted in a verdict and judgment for appellee for \$6,000. After motion and reasons for new trial were overruled, this appeal is prosecuted.

The reasons urged for a new trial, and argued by counsel in brief, are: Error of the court in giving instruction No. 5, as follows: "But if the driver saw her when she was

about to leave the car, and knew, or ought to have known, as a prudent man, that such was her purpose, then it was not necessary for her to give him further notice;" error of the court in refusing to permit the driver of the car to testify that it was usual and customary for persons to leave the car while in motion; error in refusing a peremptory instruction on account of proof of contributory negligence. There were other reasons assigned for a new trial, but they are not insisted on here.

The material facts of the case, as they appear in the proof, are that appellee was a passenger on appellant's car,—a horse car. When the car got along between Eleventh and Twelfth streets, on Chestnut, it stopped to let a lady get on, and, being within a few doors of where appellee desired to go, she got up, and started to get off. Appellee met the lady getting in, at the door of the car, and stepped aside to let her pass, and then appellee went over to get off. When she was on the bottom step the car started, and she was thrown and injured. It is insisted by appellee that the driver of the car (there was no conductor) saw her in the act of leaving the car, but started without giving her time to alight or any warning. It is insisted by appellant that the driver did not know of her intention of leaving the car, and he did not see her leave the car. It is not contended that appellee gave the usual notice, by ringing the bell, or by calling to the driver, or in any other way, but that, when the car stopped to let the lady get on, appellee went over to the rear end to get off.

Under the proof, we are of the opinion that instruction No. 5 was proper. The car had stopped, and signals to stop were unnecessary, and, if the driver saw appellee leaving the car, and knew, or, as a prudent man, ought to have known, she intended to get off, he had all the notice that the law required, under any case, for a passenger to give. The instruction is all based on the affirmative fact, which the jury must believe, that the driver saw appellee about to leave the car. If, thus seeing appellee, the driver knew, or ought to have known, as a prudent man, that she intended to leave the car, he owed her all the duty that he would if she had told him she wanted to get off at that point. If the driver did not see appellee, then she must have given notice of her intention to get off. This principle of law is announced in *Railway Co. v. Mills*, 105 Ill. 69, and *Rathbone v. Railway Co.*, 13 R. I. 709; also by *Booth, St. Ry. Law*, § 349.

There was no error in refusing to permit the driver to prove that it was usual for persons to leave the car while in motion, without giving notice to the driver. All this may be true, and yet it would not affect the right of appellee to recover, if she was injured by the negligence of appellant, in the failure to exercise due care towards her. That it is usual or customary for passengers to disregard their

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

own safety, and get off the car while in motion, will not justify or excuse an act of negligence in starting a car before a passenger has alighted, by reason of which the passenger is injured.

We deem it unnecessary to decide in this case whether it is negligence in appellant in not providing a conductor on its cars, whose duty it would be to look after the safety of its passengers, and, having failed to do so, the duty would fall on the motorman or driver, as, in our opinion, the jury were authorized to find from the evidence that the driver saw appellee, and knew she intended to leave the car, yet disregarded her safety, and started the car before she alighted.

The peremptory instruction was properly refused. There was no proof of contributory negligence that would have authorized such an instruction. There appears no error in the judgment, and the same is affirmed, with damages.

HOFFMAN v. HOFFMAN.¹

(Court of Appeals of Kentucky. May 24, 1899.)
ACTION TO ANNUL MARRIAGE — DISMISSAL WITHOUT PREJUDICE—NEW TRIAL.

1. It was proper to dismiss without prejudice an action to annul a marriage, where it appeared that the parties were again living together as husband and wife.

2. Where an order of dismissal was proper, plaintiff cannot have a new trial because he did not consent to the order as recited therein.

3. Where an action to annul a marriage was dismissed pursuant to defendant's motion, on the ground that the parties were living together as husband and wife, the order is to be regarded as dismissing the cause without prejudice.

Appeal from circuit court, Bullitt county.
"Not to be officially reported."

Action by J. A. Hoffman against Myra B. Hoffman for a new trial. Judgment for defendant, and plaintiff appeals. Affirmed.

Chapeze & Halstead, for appellant. J. F. Combs, for appellee.

HOBSON, J. On March 11, 1895, appellant filed his petition in equity in the Bullitt circuit court asking a divorce from the appellee, his wife, to whom he had been married on the 9th of January, 1895, in Jeffersonville, Ind. The ground of divorce alleged was that the marriage was void, because the wife then had another husband living. To this the wife answered, in effect, that her first husband had abandoned her many years before, and was supposed to be dead, but that before she married the second time she had applied for a divorce; that the appellant well knew all the facts, and assisted her in the application for the divorce; that the divorce proceedings were pending at the time of her marriage; and that a judgment of divorce was rendered three days after the marriage. She denied that, under the laws of Indiana, her marriage was void, and alleged that her first husband

was in fact dead when it took place. At the March term, 1896, when very little had been done in the action, the following order was entered: "This day came the defendant, by counsel, and moved the court to dismiss this cause, which motion, by agreement of plaintiff, is sustained, and this cause is dismissed, at the cost of the plaintiff." Thereafter, on August 21, 1896, appellant filed this suit for a new trial, alleging that the above order was made without his knowledge or consent, and was not authorized by him. He alleged that he did not know of it until after the court adjourned, and that it was a surprise to him, which ordinary prudence could not have guarded against. The allegations of the petition were denied by appellee, evidence was taken, and on final hearing the court dismissed the petition.

The evidence showed that, in the fall of 1895, perhaps in the month of November, appellee was delivered of a child, and that after this, in February, 1896, she returned to her husband's home with the child, and they lived there together, apparently as husband and wife, from that time until the March term of the court. When that term approached, appellant said to his attorney not to call the case up. During the term appellee's counsel moved to dismiss the case, stating that the parties were living together as husband and wife, and, appellant's counsel having the same information, the order was made as above quoted, but without any express consent on the part of counsel, so far as the proof shows. Excluding the depositions that were clearly incompetent, the testimony abundantly sustained the action of the court in dismissing this petition, and the order, being proper when made, should not be set aside afterwards, by reason of a change of circumstances, if such has taken place. If the parties were living together as husband and wife at that time, the court ought to have dismissed the petition, and, having done what was right at the time, there was no reason for granting a new trial because appellant did not consent to the order. We do not regard the order as dismissing the case settled. The motion was to dismiss the case, because the parties were living together, and the consent evidently referred only to a dismissal of the cause without prejudice; for that was all that was naturally included in the motion. If appellant still desires to have the marriage annulled, he can bring a new suit for this purpose. Judgment affirmed.

PLOTZ v. MILLER.¹

(Court of Appeals of Kentucky. May 23, 1899.)
VENUE OF ACTION AGAINST COMMON CARRIER—
DECLARATIONS OF AGENT AS EVIDENCE—
PROXIMATE CAUSE OF LOSS.

1. An action against a common carrier to recover damages for loss of property, resulting from breach of a contract to carry the proper-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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ty, was properly brought in the county in which plaintiff resides, that being a county into which the carrier passes, and also the county in which the contract was made and the injury occurred.

2. The declarations of the agent of a common carrier to deliver a barge as to the disposition and management of the barge were admissible as evidence against the principal.

3. The delay of a carrier in furnishing a barge to transport lumber, and in transporting the lumber after it was loaded, was the proximate cause of the loss of the lumber by a flood which wrecked the barge.

Appeal from circuit court, Hardin county.
"Not to be officially reported."

Action by Charles Miller against John Plotz to recover damages for the loss of property, resulting from breach of a contract. Judgment for plaintiff, and defendant appeals. Affirmed.

Marriott & Faurest, for appellant. J. P. Hobson, for appellee.

GUFFY, J. It is alleged in the petition in this action that the defendant was a common carrier engaged in the boating business on the Ohio and Salt rivers, and that in consideration of \$50 defendant agreed to bring a barge to Clark's landing, on Salt river, and transport a barge load of lumber for plaintiff from that place to Louisville, Ky.; that defendant, by gross negligence and carelessness, failed to bring said barge to said landing in a reasonable time, or to transport said lumber to Louisville in a reasonable time, and by reason thereof said lumber was lost or destroyed, to plaintiff's damage in the sum of \$900; that the above agreement was made on or about the 20th of June, 1895, and that the barge was to be delivered at said landing on the next day, or the day after, and when delivered was to be loaded by plaintiff; that the barge was not brought there within a reasonable time, but when it was brought plaintiff loaded it at once, but defendant did not transport it to Louisville within a reasonable time after it was loaded,—all of which was caused by defendant's gross negligence, and by reason of which plaintiff's said load of lumber was lost, and was of the value of \$900. In an amended petition it was alleged that the plaintiff was a resident of Hardin county, and that defendant was a common carrier, and passes into said county, and the injury to plaintiff's property sued for occurred in said county, and the contract was made in said county. At the March term, 1897, the defendant filed a special demurrer to the plaintiff's petition, which is, in substance, as follows: The defendant demurs to the petition herein because this court has no jurisdiction of the defendant, nor of the subject of this action, which demurrer was, on the 5th of March, 1897, overruled, with exceptions. The answer may be treated as a denial of all the averments of the petition upon which plaintiff based a right to recover. It is further alleged by the defendant that he is a common carrier of certain kinds of goods upon the Ohio river, but is not a common carrier of the class of goods

mentioned by plaintiff, and is not a common carrier upon Salt river, but only makes special trips up Salt river when said river is at a stage that he can do so, and then only under special contract; that at the time mentioned in plaintiff's petition the water was at such stage that he could not make the trip up Salt river, and he specially refused to make said trip; that he had agreed with plaintiff to furnish him a barge for the shipment of his said lumber, and agreed to deliver said barge at the mouth of Salt river, at West Point, and that plaintiff agreed to take said barge, and load and return to him at said place, and defendant agreed to transport same from there to Louisville, and this was the contract attempted to be set up by plaintiff; that in compliance therewith he delivered said barge at West Point, in good order, at the time agreed on, and plaintiff took possession and control of same, and carelessly and negligently failed to return it to him as agreed, and failed to return it at West Point at all, and defendant was compelled to go up Salt river after said barge, and incurred much expense and loss of time, to his damage in the sum of \$500, which he pleads as a counterclaim, and asks judgment therefor. The reply is a traverse of the answer and counterclaim. A jury trial resulted in a verdict and judgment in favor of plaintiff for \$833, and defendant's motion for a new trial having been overruled, he has appealed to this court, and asks a reversal. The grounds relied on for a new trial are, in substance: (1) The verdict is contrary to law, and not supported by the evidence; (2) error of the court in giving instructions 1 to 10, inclusive; (3) error of the court in refusing to give instructions A to J, inclusive, asked by defendant; (4) error in admitting incompetent evidence; (5) the damages are excessive, appearing to have been given under the influence of passion or prejudice.

It is insisted for appellant that his special demurrer should have been sustained, it being claimed that the service of process was in Jefferson county; and he also contends that the Hardin circuit court had no jurisdiction of the subject-matter. It is the contention of appellee that the Hardin circuit court had jurisdiction both of the subject-matter and of the defendant, but that, if the service of summons was even subject to be quashed, the appellant had not entered a proper motion or proceeding to avail himself of that defect, and that, having demurred to the jurisdiction of the court as to the subject-matter of the action, as well as answered to the merits, he waived the question of personal jurisdiction, even if it had otherwise been available. It seems, however, to us, that the circuit court of Hardin had jurisdiction both of the subject-matter, and of the defendant; hence the demurrer was properly overruled. Section 73, Civ. Code.

It appears to us, taking all the evidence into consideration, that those in charge of the

barge mentioned in the pleadings were agents of the appellant as to the delivery of the barge; hence the statements made by them concerning the disposition and management of the barge was competent evidence; hence we are of the opinion that no error of the court occurred as to the admission of testimony.

It is the further contention of appellant that the court erred in giving and refusing instructions, but upon a careful consideration of the instructions given we are of the opinion that, taken as a whole, they are as favorable to appellant as he was entitled to. It may be conceded that the evidence is conflicting, but the jury heard the testimony of all the witnesses, and it was the province of the jury to consider the testimony, and to arrive at the truth of the matter; and, inasmuch as there was testimony introduced sufficient to authorize the finding of the jury, we are not disposed to disturb the verdict on account of the insufficiency of the testimony.

We cannot concur in the appellant's contention that the failure of defendant to comply with the contract was not the proximate cause of the damages or injury. If appellee's theory of the contract is true, it is reasonably certain that appellee would not have sustained the loss complained of if appellant had complied with the contract; and it does not appear that appellee was guilty of negligence in his attempt to comply with the directions alleged to have been given by the appellant as to the management and delivery of the barge after it was loaded, even if it be conceded that the loading of the barge at the time and place mentioned was a waiver or compromise of the original contract. It is reasonably certain that, if appellant had complied with the contract claimed and testified to by appellee, the damage would not have occurred, and the jury must have found as a fact that some such contract was entered into, and, this being true, appellant is responsible for the damages caused by the failure of appellant to perform his part of the contract. See *Railroad Co. v. Brownlee*, 14 Bush, 599, and *Hernsheim v. Mississippi Val. Co.* (Ky.) 35 S. W. 1115. Judgment affirmed, with damages.

SMITH v. BRANNON et al.¹

(Court of Appeals of Kentucky. May 24, 1899.)

PARTNERSHIP—SET-OFF.

1. Where N. purchased from A., who owned a stallion jointly with B., his half interest in the use of the stallion for a certain season, and subsequently entered into a contract with B. to stand the horse in partnership, N. to pay all expenses, and to reimburse himself out of moneys collected for the services of the horse, the profits, if any, to be divided equally between them, there was a partnership.

2. As an individual account due from one member of a partnership cannot be set off against an account due the firm, one who ad-

vanced money to B. prior to the partnership, under an agreement that he might breed two mares to the stallion, cannot set off his claim for the money advanced against the fees due by him to the partnership for the services of the stallion.

Appeal from circuit court, Daviess county.

"Not to be officially reported."

Action by J. H. Brannon & Co. against W. J. Smith to recover for the services of a stallion. Judgment for plaintiffs, and defendant appeals. Affirmed.

Walker & Slack, for appellant. H. M. Has-kins, for appellees.

BURNAM, J. J. H. Brannon and W. W. Adams were the joint owners of a stallion. In the spring of 1894, appellee Nall purchased from Adams his half interest in the use of the stallion for the season of 1894, and subsequently entered into a contract with Brannon to stand the horse in partnership at a season fee of \$50 to insure a colt. By agreement between them, Nall paid the license fee, feed bill, and keep of the horse, amounting to \$325, under an agreement that he was to have the right to collect all moneys for the services of the horse, and to first apply same to the payment of this money disbursed by him for the benefit of the firm, and then, if there was any profit, it was to be divided equally between them.

Appellant bred two mares to the stallion during the season, both of whom produced a colt in the spring of 1895, but he refused to pay for the services of the stallion, because, as he alleges, he had advanced to Brannon, one of the partners, \$75 in the year 1893, under an agreement that he might breed two mares to his stallion, which agreement he alleges was previous to the partnership between appellees, and at a time when Brannon was the sole owner of the horse. The trial resulted in a verdict and judgment against appellant, which we are asked to reverse. The only ground relied on is that the court erred, to the prejudice of appellant, in the instructions given the jury, and in refusing to give instructions asked by his counsel.

The only question submitted to the determination of the jury by the instruction was that of the alleged partnership between appellees. There can be no question, from the testimony in the case, that appellee Nall had purchased from Adams his half interest in the use of the stallion for the year 1894, and that he and Brannon, who at that time owned the other half interest, entered into a contract to stand the horse as partners during the season of 1894, and that the mares of appellant were bred while this partnership existed. There is no contention that Nall was liable to appellant for the money advanced to Brannon in 1893, or that he had any knowledge of the alleged contract between appellant and Brannon at the time the mares were bred. The law is well settled that an individual account due from one member of a partnership cannot be set off against an account due the firm. See

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Story, Partn. § 128; Gow, Partn. § 59; Daniel v. Daniel, 9 B. Mon. 195; Warder v. Newdigate, 11 B. Mon. 173. The fees for the services of the stallion for the year 1894 belonged to the firm, and were first chargeable with the payment of the moneys advanced by appellee Nall for the benefit of the firm. Nall did not become liable for the antecedent debts of Brannon when he entered into the contract to stand the stallion with him for the year 1894, and moneys due the firm for the services of the horse cannot be made liable for individual debts of the firm, without an express understanding to that effect. See Meador v. Hughes, 14 Bush, 652; Elkin v. Green, 13 Bush, 612; Colly. Partn. § 515.

The controlling question in the case was the genuineness of the alleged partnership of appellees. If such partnership existed, then, as a matter of law, the defense relied upon by appellant was not a good one against a claim due the firm; and, this question having been properly submitted to the jury, we perceive no error to appellant's prejudice. Wherefore the judgment is affirmed.

FRANKFORT CHAIR CO. v. BUCHANAN.¹
(Court of Appeals of Kentucky. May 24, 1899.)

SALES — FAILURE TO DELIVER POSSESSION — ASSIGNMENT OF CONTRACT.

Under Ky. St. § 1908, providing that every unrecorded transfer of personal property shall be void as to a purchaser without notice, or any creditor, where the actual possession does not accompany the same, where one who had a contract for the entire output of chairs manufactured at a state penitentiary assigned the contract to another, to whom the chairs were actually delivered by the state, the transaction was valid, as against creditors of the assignor.

Appeal from circuit court, Franklin county.
"Not to be officially reported."

Action by Lytle Buchanan, assignee, against A. D. Martin. Intervention by the Frankfort Chair Company, claiming property levied upon under attachment, and the Frankfort Chair Company appeals from a judgment subjecting the attached property. Reversed.

L. J. Crawford and W. H. Holt, for appellant. Cromwell & Franklin, for appellee.

PAYNTER, J. The appellee, Buchanan, instituted this action against A. D. Martin, obtained an order of attachment against him, and had it levied upon certain chairs, as his property. The appellant, Frankfort Chair Company, interpleaded, and claimed the property levied upon under the attachment belonged to it. The question to be determined in this case is whether the property belonged to Martin or the chair company. The facts are: The sinking-fund commissioners of the state entered into a contract with Martin, by the terms of which they sold to him the entire output of chairs manufactured at the Frankfort penitentiary for a certain number of

years. In December, 1896, he transferred and assigned to the Frankfort Chair Company, an Ohio corporation, all the rights he had under the contract with the sinking-fund commissioners. This transfer was made without any consultation with the sinking-fund commissioners, and without having obtained their consent. As a consideration of the assignment and the transfer of the contract, the chair company was to receive and pay for the chairs which the commissioners had agreed to furnish him, and it assumed his liability to the state, and paid for such chairs as it received, according to the terms of his contract. It appears from the evidence in the case that, when the state was ready to deliver chairs under the contract, they were delivered to, and received by, the chair company, and stored in the warerooms, where Martin was authorized to place them under the terms of the contract. The chair company executed its receipt for such chairs as it received, but the account which the state kept was in the name of Martin; a manifest reason therefor being that the state held an obligation which he executed, with sureties, to the effect that he would perform his contract. The uncontradicted testimony in the record shows that he never had possession of the chairs levied upon, but that they were delivered direct, by the sinking-fund commissioners, through the warden of the penitentiary, to the chair company. There is no reason why he could not assign to the chair company all the interest which he had under the contract with the state, and direct to whom the chairs should be delivered. This could be done without obtaining the consent of the sinking-fund commissioners, and, so long as the chair company received and paid for the chairs according to the terms of the contract, the state could have no complaint against him. Presumably, the chairs which he was to obtain under the contract were to be resold, and if he chose to sell them as a whole, by transferring his interest in the contract, he had the same right to do so as he would have to sell any specified quantity which the sinking-fund commissioners had been obligated to deliver to him.

The court peremptorily instructed the jury to find for the plaintiff. We would be at a loss to know upon what grounds the court gave the peremptory instruction, except for the brief of counsel for appellee, in which it is said that the court acted properly in declaring the transaction between Martin and the chair company fraudulent or void as to the appellee, a creditor of Martin, "for want of actual, visible change of possession from Martin to appellant, as required by section 1908, Ky. St.," which reads as follows: "Every voluntary alienation of or charge upon personal property, unless the actual possession, in good faith, accompanies the same, shall be void as to a purchaser without notice, or any creditor, prior to the lodging for record of such transfer or charge in the office of the county court for the county where the alienor or person creat-

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ing the charge resides." We think the court was in error in assuming that the transaction came within the inhibition of the statute quoted. We do not think it applies to this transaction. As we have said, the chairs were never delivered to Martin, but, by virtue of the assignment which he made of his contract, they were actually delivered to the chair company. The benefits to be derived from the contract of the state had been vested in the chair company, and this included the right to receive the chairs from the sinking-fund commissioners which he would have been entitled to have received under his contract. Not only had his right in the contract been vested in the chair company, but there had been an actual delivery of the property levied upon to it. So far as this record shows, the transaction between Martin and the chair company was in the utmost good faith. We think the court erred in giving the jury a peremptory instruction. The judgment is reversed for proceedings consistent with this opinion.

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**BELL & COGGESHALL CO. et al. v.
KENTUCKY GLASS-WORKS CO.**

(Court of Appeals of Kentucky. May 12, 1890.)

"To be officially reported."

Dissenting opinion. For former opinions, see 48 S. W. 443 and 50 S. W. 1092.

PAYNTER, J. The glass-works company discounted at various times notes at the Kentucky National Bank, in the aggregate amounting to about \$48,000. On November 20, 1885, it, having failed to pay its notes at maturity, executed a mortgage to the bank on certain real estate to secure the total of the indebtedness to the bank. Desiring to buy a Cohenev bottle grinder, and not having money to pay the full amount of the purchase price, it procured at the Kentucky National Bank an advance of \$625 for that purpose, and to secure which it gave the bank what the parties called a "warehouse receipt" on the machine. This was in 1887. Needing soda ash for use in the manufacture of glass, the Kentucky National Bank advanced to it \$650 to pay for 29 barrels of ash, and upon which was issued another warehouse receipt. The Kentucky National Bank, also in 1887, advanced the glass-works company \$850, to secure which the company gave the bank a warehouse receipt on 200 gross of quart jars. In —, 1887, the glass-works company was indebted to Bridgford & Co. Bridgford & Co. brought suit upon their claim, and obtained an attachment against the property of the glass-works company. Thereupon, under the advice of counsel, the glass-works company made an assignment for the benefit of creditors. In the Bridgford & Co. action, upon the hearing, the court discharged the attachment. In the meantime the assignee brought suit to settle the trust estate, and appellants, creditors of

the glass company, filed their answers, in which certain defenses are interposed. It is contended that the assignment was made to defraud creditors; that the glass company is a corporation organized under the General Statutes of Kentucky, with a capital stock of \$12,000, with a provision in its articles of incorporation that the indebtedness to which the corporation was authorized to subject itself should not exceed \$8,000; and that the debts of the bank, which exceeded \$8,000, were not enforceable, because of the provision mentioned. There is nothing in the statute which declares that, if the corporation incurs or creates an indebtedness in excess of that which is authorized, the contract is void. Neither is there anything in the articles of incorporation which so declares. The money was received by the corporation, and used in its business. Some of the assets which were assigned were acquired by the money which it obtained from the bank. There is no evidence that the bank knew that the authority of the glass-works company was limited in the matter of contracting an indebtedness. The record shows that the bank advanced money to the company in the utmost good faith. When a corporation enters into a contract in violation of its charter, either party is allowed to withdraw from it, so long as a rescission can be effected without injustice. When one party has performed the contract, public policy can be best conserved by compelling the other party to make compensation for a failure to perform the obligations imposed by the contract. When money has been borrowed, as in this case, common honesty demands that the borrower be adjudged to pay it. The corporation received the money borrowed; hence, the stockholders necessarily enjoyed the benefit of it. The corporation having received and retained the money, neither it nor its creditors can be heard to question its authority to borrow the money. It may be said here that the glass-works company, or its shareholders, do not deny its liability to the bank for the sums borrowed. The complaint is from its creditors, most if not all of whose debts were contracted after the mortgage had been executed to the bank. If a debtor cannot plead that the debt was contracted in violation of a law, and thus defeat its enforcement, the creditors of the debtor cannot do so. If the debts due the bank are valid, then it follows that the mortgage executed to secure it should be enforced. To allow a corporation to borrow money and use it for its benefit, and to defeat an action to recover it on the ground that it exceeded its authority in borrowing it, is placing a premium upon dishonesty. Public policy will not justify such an injustice. *Morawetz* (Priv. Corp. § 680) says "that a provision in a charter prohibiting it from creating an indebtedness in excess of a certain amount does not render debts incurred in excess of that amount null and void, by force of the legislative act, unless this be the plain meaning of the pro-

vision." The same authority says in section 685: "It seems but reasonable that a contract which is forbidden by law, and which may subject the company making it to the penalty of dissolution, should not be held obligatory, except for strong reasons of equity. Either party should be allowed to withdraw, so long as a rescission can be effected without injustice. Accordingly it has been held that a contract entered into by a corporation in excess of its charter may be avoided by either party so long as it remains unexecuted by both parties." It is said in section 688: "A court of equity will even decree the specific performance of a contract entered into by a corporation in violation of its charter, if relief of that character is required in order to protect the rights of a party who dealt with the company in good faith and without notice." In section 689 of the same authority the following language is used: "If a contract is made by a corporation in excess of its chartered powers, either party to the contract may withdraw, so long as a rescission can be effected without injustice; but after a contract of this character has been performed by either of the parties, the requirements of public policy can best be satisfied by compelling the other party to make compensation for a failure to perform the agreement on his side." In section 695 this doctrine is announced: That, when money is borrowed or loaned by the corporation in violation of an express prohibition in its charter, the contract may be enforced. Sedgwick (St. & Const. Law, p. 73) says: "Where it is simply a question of authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract, the fruits of which he retains." In *Auerbach v. Mill Co.*, 28 Minn. 298, 9 N. W. 801, it was held "that when an unauthorized contract has been executed by a corporation, and it has reaped the benefit of it, public policy does not require the courts to refuse to administer justice between the parties in accordance with the plain principles of law. In such a case the remedy for the violation by the corporation of its charter power lies elsewhere."

We are here seeking to administer justice as between these contracting parties. If justice did not demand the application of other principles of law, the defense of ultra vires might be sufficient, but the doctrine of estoppel, as a principle of law, is as positive and well-recognized as is the law that a corporation may not exceed its corporate power; and, although the defendant exceeded its authority, it should be denied the right to assert the fact of its own wrong, when to allow its plea would work injustice and wrong to a party who has been misled by its acts performed within the general scope of its power. In

Manufacturing Co. v. Canney, 54 N. H. 295, it was said: "In this case the statute under which the corporation was organized, forbidding the corporation to contract debts or incur liabilities to exceed one-half of its capital stock actually paid in and unimpaired, and of its other property and assets, is directory. Debts contracted and liabilities incurred in excess of that amount are binding upon the corporation." *Garrett v. Plow Co.*, 70 Iowa, 697, 29 N. W. 395, held that the debt of a corporation beyond the limit prescribed by its charter is not invalid, but enforceable. In *Steamboat Co. v. McCutcheon*, 13 Pa. St. 13, a corporation had taken a lease of real estate without authority in its charter, and in an action for rent the court enforced the contract. The judge, in delivering his opinion, said: "Some things lie too deep in the common sense and common honesty of mankind to require either argument or authority to support them; and this, I think, is one of them." The court, in the case of *Navigation Co. v. Weed*, 17 Barb. 382, said: "When it is a simple question of capacity or authority to contract, arising either on a question of regularity or organization, or of powers conferred by the charter, the party who has had the benefits of the contract cannot be permitted to question its validity in an action upon it." In *Arms Co. v. Barlow*, 63 N. Y. 62, it was said: "The plea of ultra vires should not, as a general rule, prevail, whether interposed for or against a corporation, where it would not advance justice, but, on the contrary, would accomplish a legal wrong." In *Town Co. v. Morris* (Kan. Sup.) 23 Pac. 569, the charter of a corporation provided, "The indebtedness of the company shall not exceed \$500 at any one time," and the suit was for an amount nearly four times in excess of the charter limit. The company received and used the merchandise, but undertook to plead ultra vires against the payment of the excessive note, and also claimed that the president and secretary were unauthorized by the board of directors. The court said: "After a corporation has enjoyed the benefit of a contract or other arrangement made in good faith with any of its regular agents, it is but fair that every reasonable presumption should be made in order to hold the transaction binding upon the company. Under these circumstances the acquiescence of the shareholders may often be presumed. * * * While an executory contract made by a corporation without authority cannot be enforced, yet, where the contract has been executed, and the corporation has received the benefit of it, the law interposes an estoppel, and will not permit the validity of the contract to be questioned. * * * Where a contract results to the benefit of a corporation, very slight evidence of acquiescence or application will be sufficient to give it validity. * * * We think that the limitation of five hundred dollars in the charter of the corporation cannot be regarded of any more force

than a by-law. * * * Therefore the limitation of five hundred dollars is for the direction of the officers and agents of the corporation, and may be considered directory only. It does not annul the contract." In *Thomp. Corp.* § 5705, it is said: "There is an implied warranty upon the part of the corporation, through its officers, that the power has not been exhausted, and that the conditions do not exist which render it unlawful for the corporation to contract the debt; so that, to allow the corporation to avoid the repayment of the debt on this ground, where it has had and enjoyed the benefit of the contract, would be to allow it to make its own wrong the means of defrauding the innocent public. It is immaterial on what ground the courts which hold the corporation cannot be permitted to repudiate an honest debt upon such a plea place themselves,—whether they say that the statute is directory merely, or that the corporation is estopped from setting up the defense after having enjoyed the benefit of the contract,—especially where the money borrowed has been used in conducting the legitimate corporate business, with the knowledge and consent of all its officers and stockholders. The judges are in all cases driven to the conclusion by the mere stress of justice." In *Jones, Mortg.* § 127, it is said: "But even if the directors exceed their authority in borrowing money for the corporation, and executing a mortgage to secure the repayment of it, the corporation cannot, after enjoying the benefit of the loan and acquiescing in the transaction, question their authority. The stockholders may restrain the directors or other officers in any attempt to transcend their powers; but if they remain silent, and permit them to make contracts or execute mortgages upon their property, and receive the benefits of the loan, they will be estopped to say that the officers were not authorized to do these acts." In *Allis v. Jones*, 45 Fed. 148, the court said: "The money was received by the companies, and used in conducting and carrying on their legitimate corporate business, with the knowledge and consent of all the officers and stockholders. On these facts the banks are entitled to be repaid their money, and the companies could execute a valid security for its payment. * * * Skeen cannot be heard to urge this objection, because he is not a creditor of the milling companies; and *Allis* became such, if at all, after the debts to the banks had been created, and it would seem, therefore, that he is in no plight to raise the question. The written promise of the milling companies, executed by their secretary and treasurer, to pay the plaintiff's debt, under all the circumstances of this case, made it the debt of the companies. But an application to the plaintiff's case of the strict rules which he seeks to have applied to the bank's claim and mortgages would undoubtedly undermine his own case, and leave him without any claim against the companies." In *Sloux*

City Terminal Railroad & Warehouse Co. v. Trust Co. of North America, 27 C. C. A. 82, 82 Fed. 133, the court said: "Can the mortgagor, under these circumstances, avail itself of its violation of the statute to defeat the mortgage upon which it has borrowed this money? If not, have its subsequent creditors any better standing to assail it? These are the crucial questions in this case. This is a suit in equity. The terminal company has received the full benefit of the proceeds of these bonds, and it obtained this money upon the faith of this mortgage. The creation of the debt and mortgage was not without the general scope of its powers, but it was the result of the excessive exercise of one of those powers. * * * The statute, whose provisions the bonds and mortgage violate, prescribed no penalty for such a violation. It did not declare that bonds and mortgages issued to secure an indebtedness in excess of the limitation it fixed should be void. Since the legislature imposed no such penalty, it is not the province of the courts to do so. The remedy for the violation of this statute is not the destruction of the contracts which evidence it, but the ouster and dissolution of the corporation at the suit of the state. The state alone can complain of it, and the debtor cannot usurp its functions. * * * A man cannot plead his own wrong to relieve himself from the obligations of an executed contract whose benefits he retains; nor is it any defense for a private corporation, against the enforcement of an executed contract whose benefits it holds, that, while its execution was within the general scope of its powers, it involved an excessive exercise of one of them. While it retains the benefits of such contract, it silently affirms, and may not be permitted to deny, its validity. * * * These decisions do not rest upon the principle of estoppel, nor depend upon the creditor's ignorance of the excessive indebtedness. They stand upon the rule that he who seeks equity must do equity, and upon the principle that one may not at the same time accept the benefits and repudiate the burdens of his contracts." In *Haldeman v. Ainslie*, 82 Ky. 399, the corporation was limited by its articles to incur a liability of \$15,000. It contracted an indebtedness of over \$30,000. This indebtedness was largely to banks, and the court said: "In this case we think it clear that the banks could have recovered of the stockholders, for the reason that those conducting the business of the corporation had created this indebtedness for the benefit of the corporation." In *German Nat. Bank v. Louisville Butchers' Hide & Tallow Co.* (Ky.) 20 S. W. 882, the notes were discounted by the corporation at the German National Bank, and upon these notes suits were brought. It was sought to defeat a recovery upon them upon the ground that the act of discounting notes was ultra vires. The corporation got the proceeds of the notes, and the court held that a corporation could not

hold onto the money, and repudiate the act by which it had got it. The court approved what Brice on *Ultra Vires* said (2d Eng. Ed. 769), to wit: "In every case a corporation must account for benefits which it has received in an ultra vires transaction. This is a well-known equitable doctrine. It has been applied, not only to persons of full age, and under no disability, civil or mental, but also to those who are under some incapacity,—infants and lunatics. From these persons the principle has been extended to corporations."

It is suggested the conclusion which I have reached is in conflict with the case of *First Nat. Bank of Covington v. D. Kiefer Milling Co.*, 95 Ky. 104, 23 S. W. 676. In that case it appeared that the corporation became indebted to the bank in the sum of \$77,000, in violation of its articles of incorporation, which only authorized it to incur an indebtedness not to exceed \$30,000. The corporation was insolvent, and the court below adjudged that the bank should participate ratably in the distribution of the estate on \$30,000 of its debt, and this court concurred in that view. The court in that case did not decide what would have been the effect of the violation of the provision of the articles of incorporation if it had been simply a question between the bank and the corporation. As the reason for sustaining the judgment of the court below, the court said: "But the enforcement of that provision is demanded by the assignee for the benefit of other creditors, who have been prejudiced by the unauthorized and illegal dealing of the bank with an unfaithful officer of the milling company, whereby its insolvency was precipitated, if not actually caused; and in such case a participant in the fraudulent transaction, not other innocent creditors, should suffer." It appears from the opinion that the fraudulent conduct to which reference was made in the part of the opinion just quoted was that of George M. Kiefer, in discounting at the bank, and receiving the proceeds of, drafts purporting to have been signed by the corporation. If the bank was a participant in the fraudulent transaction of an officer of the corporation in discounting drafts purporting to have been drawn by the corporation, the court properly adjudged that innocent creditors should not suffer. Indeed, if the alleged indebtedness had been created by the bank participating in a fraudulent transaction with one of the officers of the corporation, it should not have been permitted, to any extent, to participate in the distribution of the estate. If the *Bank-Kiefer Case* be construed to mean that a creditor, who has not been guilty of participating in a fraudulent transaction by which his debt was created, cannot enforce his debt, because the corporation debtor, in making it, exceeded the limit fixed by its articles of incorporation, it is in conflict with *Haldeman v. Ainslie and German Nat. Bank v. Louisville Butchers' Hide & Tallow Co.* If it can be construed as holding that, although

the creditor was not guilty of participating in a fraudulent transaction, its debt cannot be enforced in the settlement of the estate of its insolvent debtor, then it is neither supported by reason nor authority, and is in conflict with the legal deduction which logically flows from the *Haldeman and German Nat. Bank Cases*. The evidence in this case does not tend to show that the bank participated in any fraudulent transaction, or that any officer of the glass company was guilty of any fraudulent conduct, as all the money which was obtained from the bank by the officers of the corporation was used for its benefit. If the bank's debt could have been enforced against the corporation before it became indebted to the other creditors, the mere fact that it so became indebted would not invalidate its claim; neither would the insolvency or subsequent assignment of the glass company's property affect its validity. If the rule enunciated in this case is to prevail, who should suffer in the settlement of the estates of insolvent corporations which have violated the provisions of the charters? Is it to be the creditor who has the largest debt, contracted before the debts of the other creditors? Why single out such a creditor, and say, because the indebtedness of the insolvent corporation to it is greater than the amount of indebtedness which it is authorized to contract, that such creditor shall participate in the distribution of the trust estate only to the extent of an amount equal to the liability which the corporation was authorized to incur, and then say to all creditors whose debts are contracted after the corporation has exceeded its limit of authorized indebtedness that, "as your several debts are less than the amount of the indebtedness which the corporation is authorized to contract, you may participate in the distribution of its insolvent estate to the full amount of the debts which you hold"? If the court is to lay down a rule that the charter provision limiting the indebtedness is to be enforced, it reasonably follows that the creditor whose debt was contracted within the limit of, and before the corporation exceeded, its authority, should alone participate in the distribution of the estate, because the debts of all other creditors were contracted at a time, when the corporation was not authorized to do so, and would be unenforceable. If the large creditor is presumed to be acquainted with the articles of incorporation of its debtor, and to know whether or not it is exceeding its authority in incurring it, the subsequent and small creditor is bound by the same presumption.

SWERTMAN v. VOSS.¹

(Court of Appeals of Kentucky. May 24, 1899.)

TRIAL—SUBMISSION—DEPOSITIONS.

Where defendant objected to plaintiff's motion to submit the cause, and the cause was

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

"submitted on plaintiff's motion to submit for judgment," and the attorneys given leave to file briefs, there was not a final submission; and depositions thereafter filed by defendant were properly considered on the trial, there being nothing to show that plaintiff was taken by surprise.

"Not to be officially reported."

Petition for rehearing. Denied.

For former report, see 50 S. W. 832.

HOBSON, J. On January 2, 1897, appellee served notice that he would take depositions in this case on Monday, January 4, beginning at 1 o'clock. The depositions were taken, pursuant to notice. Appellant and her attorney were both present at the taking. The witnesses were cross-examined, and there appears no objection to the taking of the depositions, which were then filed with the clerk on January 6th. On January 4th, the same day the depositions were taken, this order was made: "Come plaintiff, and moved to submit this cause for judgment, and defendant objects. Come plaintiff, and objected to rejoinder filed; and this cause is submitted on plaintiff's motion to submit for judgment, and the attorneys have leave to file briefs." It is now urged that this order submitted the action finally, and that, after the submission of the case on the merits, it was improper for the depositions to be filed, or to be considered on the trial. But we do not so understand the order. We understand it only as submitting the action on the motion, and not as a final submission of the case. The court below evidently so treated it, and the appellant would seem so to have understood it at the time, as there was no objection to the taking of the depositions. The defendant no doubt objected to the submission of the case, because his notice was out to take depositions the same day; and after this notice was served the court was perhaps disinclined to submit the case on that day, before the depositions could be taken. At any rate, the defendant's objection to the submission of the case was not overruled, and it appears from the judgment of the court that he in fact considered these depositions. It must therefore be presumed that his proceedings were regular, and the order must be given the construction that will sustain them, if it is fairly capable of it. If appellant were in fact taken by surprise, this should have been shown to the court below by affidavit on motion for a new trial; and, this not having been done, the action of the lower court cannot be disturbed here. Petition overruled.

STONE v. HILL et al.¹

(Court of Appeals of Kentucky. May 25, 1899.)
MONEY PAID—DEFECT IN PLEADING CURED BY VERDICT.

A verdict for plaintiff in an action to recover money paid cures a defect in the petition in failing to allege a promise to pay, it being

averred that the money was paid for defendant at his instance and request, from which the law implies a promise to pay.

Appeal from circuit court, Grayson county.
"Not to be officially reported."

Action by Hill & Roberts against W. F. Stone on an account for money paid. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. C. Graham and J. P. Hobson, for appellant. J. S. Wortham, for appellees.

WHITE, J. The appellees brought this action on an account for money paid for appellant at his special instance and request. The answer denies the indebtedness, denies that the sums set out on the account were paid at his instance or request, or for his benefit. On a trial before a jury the issue was as to whether appellees were partners with appellant in a certain contract for piling, for which the sums claimed were paid. In the testimony it was admitted that the sums had been paid out, the only controversy being whether they were paid for appellant or on a joint venture. The court instructed the jury on the issue of partnership as made by the proof, and a verdict for appellees was returned. Appellant moved for a judgment notwithstanding the verdict, which was overruled, and judgment rendered. After reasons and motion for new trial had been overruled, this appeal is prosecuted.

It is seriously contended for appellant that the motion for a judgment notwithstanding the verdict should have been sustained, as the petition does not aver a promise to pay the sums alleged to have been paid at appellant's instance and request. There was no demurrer to the petition. Mr. Newman, in his work on Pleadings and Practice, lays down the rule: "Where work and labor are done by plaintiff for defendant at his request, or where the plaintiff, by the request of the defendant, has paid, laid out, or expended money for the defendant, it will be sufficient to allege the request of the defendant, and the performance of the work and labor or the payment of the money for the defendant." This court, in the case of *Drake's Adm'r v. Semonin*, 82 Ky. 291, said: "An averment that the defendant is indebted to the plaintiff in the sum of \$1,963 for goods bought of the plaintiff by the defendant, and delivered to the defendant at his instance, would have been a good petition." While these two authorities are not directly decisive of the question as to the sufficiency of the petition, they are agreed that where work and labor is performed, goods sold and delivered, or money paid at the instance and request of another, the law will imply a promise to pay by the party receiving the benefit. It is always best to plead this promise to pay, though it be only the implied promise of the law, and was not in fact made. After verdict, this omission to plead what the law will imply cannot be taken advantage of. The motion for judgment

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notwithstanding the verdict was properly overruled. We are also of opinion that the instructions given properly present the issue as made by the testimony as to the question of partnership, although there is no issue of that kind formed in the pleadings. The verdict cannot be said to be flagrantly against the evidence, and we do not feel authorized to disturb same. There appears no error in the judgment, and the same is affirmed, with damages.

LOUISVILLE BRIDGE CO. v. LOUISVILLE & N. R. CO.¹

(Court of Appeals of Kentucky. May 24, 1899.)

RAILROAD BRIDGES—RECOVERY OF TOLLS PAID—CONSTRUCTION OF CONTRACT.

Where a bridge company contracted with various railroad companies, in consideration of the use of its bridge by them, to fix such charges for the use of the bridge as should produce in the aggregate no more than a sum sufficient to pay the interest on its bonds and certain other fixed charges, and agreed that these charges should be the same to all the contracting railroad companies, the bridge company having kept its tolls at an excessive rate, the surplus thus illegally accumulated by it belongs to the contracting railroad companies in the exact proportion in which the excessive tolls were paid by them to the bridge company, and each of them is entitled to recover its share of this excess, with interest thereon from the time the bridge company had accurate information of the amount due.

Appeal from circuit court, Jefferson county, law and equity division.

"To be officially reported."

Action by the Louisville & Nashville Railroad Company against the Louisville Bridge Company and others to recover tolls paid. Judgment for plaintiff, and defendant appeals. Affirmed.

Gibson, Marshall & Gibson and Humphrey & Davie, for appellant. Helm, Bruce & Helm, for appellee.

BURNAM, J. This suit was instituted by appellee against the Louisville Bridge Company, the Jeffersonville, Madison & Indianapolis Railroad Company, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, the Ohio & Mississippi Railway Company, the Louisville, New Albany & Chicago Railway Company, and the Louisville, Evansville & St. Louis Consolidated Railway Company to recover, under a contract made on the 5th day of June, 1872, excessive tolls alleged to have been collected from it by the Louisville Bridge Company for the years 1892, 1893, 1894, and 1895. The clauses of that contract which are essential to the determination of this case are the first, second, third, fifth, and sixth, which are as follows:

"Agreement made this fifth day of June, 1872, between the Louisville Bridge Company,

party of the first part, the Jeffersonville, Madison & Indianapolis Railroad Company, party of the second part, the Ohio & Mississippi Railway Company, party of the third part, and the Louisville & Nashville Railroad Company, party of the fourth part, witnesseth:

"Whereas, the first party owns the bridge over the Ohio river at Louisville, between the commonwealth of Kentucky and the state of Indiana, with the approach thereto on the south or Kentucky side thereof, its capital stock being fifteen hundred thousand dollars, and its mortgage debt eight hundred thousand dollars, bonds for said debt being issued, for one thousand dollars each, dated the first day of December, 1868, and payable twenty years after said date, with interest at seven per cent. per annum, payable semiannually in gold on the first day of June and the first day of December, principal and interest payable at the Bank of America, New York City; and whereas, the second party owns the approach to said bridge on the north or Indiana side thereof, and the railroad connecting therewith; and whereas, the third party owns a railroad connecting with the railroad of the party of the second part at or near the north end of said approach; and whereas, the party of the fourth part owns a railroad terminating in the city of Louisville and connecting with the track over and across said bridge. Now, this agreement witnesseth, in consideration that the second, third, and fourth parties agree respectively to use said bridge as is herein-after covenanted, the first party hereby covenants and agrees jointly and severally with the second, third, and fourth parties, their successors and assigns, respectively, that the tolls and charges over and for the use of said bridge and its tracks owned by the first party, in the transportation of freights, passengers, mails, and other goods received from or delivered to the roads of said second, third, and fourth parties, per ton, and per passenger, or per car, engine, or other means of transfer, over said bridge, shall be fixed on signing this agreement, and shall not be in excess of a toll or charge sufficient to produce in the aggregate a sum equal to the cost and expense of keeping in repair and taking care of said bridge and the said approach owned by the first party, paying a dividend semiannually of six per cent. on said capital stock of fifteen hundred thousand dollars, the interest upon said bonds as the same matures and becomes payable, a sinking fund sufficient to pay off said bonds of eight hundred thousand dollars at maturity, the amount necessary to keep up the corporate organization of the party of the first part, with its proper officers and servants, and such taxes as may be chargeable against such bridge company on said bridge or other property pertaining thereto or otherwise; and it is understood and mutually agreed that the said charges and tolls shall from year to year be reduced in proportion to the reduction of interest on said

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bonds by the operation of said sinking fund, and that said toll and charges shall always be the same to each of the second, third, and fourth parties, and that the tolls and charges to other railroads or railroad companies for like use of said bridge and the approach owned by the first party shall not be less than those charged to or incurred by the parties hereto. And all such tolls and charges paid by other railroads or railroad companies shall be applied to and form a part of the fund hereinbefore provided for the payment of expenses, sinking fund, interest, dividends, and taxes, the same as if paid by the second, third, and fourth parties.

"Sec. 2. The first party shall keep in repair, maintain, and renew such bridge and its appurtenances and the tracks and approach thereto, owned by the first party. If, however, said bridge or its appurtenances shall be injured by flood, ice, or other casualty, or by crystallization of the iron or other inherent decay, so as to render the same useless or dangerous, and it shall become necessary to rebuild the whole or any material part thereof, involving an expenditure greater than could be realized from a judicious amount of current rates and charges, then and in every such case it is mutually agreed between the parties that the first party shall issue bonds secured by mortgage on said bridge and its appurtenances and appendages owned by the first party, at a rate of interest not exceeding seven per cent. per annum in gold, payable semiannually, principal payable in forty years, and to an amount sufficient to yield a fund equal to the expenses of renewing and repairing said bridge; and the proceeds of said bonds shall be applied to that purpose, in which event the tolls and charges for the use of said bridge, as hereinbefore provided, shall be increased so as to cover and provide for the payment of the interest on said bonds, and a sinking fund to retire and take up said bonds at maturity.

"Sec. 3. In consideration of the premises, the second and third parties each severally covenant for itself, its successors and assigns, with the first party, its successors and assigns, that it will pass over the said bridge all the freight, passengers, mails, express matter, and other goods carried on and over their roads to and from Louisville, and to and from points which require their passage over the Ohio river at or near Louisville during the existence of this agreement, and will pay punctually to the party of the first part the tolls and charges hereinbefore provided for the use by them, respectively, of said bridge, and the tracks and approaches thereto, owned by the first party; and the party of the fourth part for itself, its successors and assigns, covenants with each of the parties of the first, second, and third parts, their respective successors and assigns, that it will deliver to the said party of the first part, to be passed over the said bridge, or to the parties of the second part or third part, or to such other rail-

road company or companies as may for the time being be transporting freight, passengers, mails, express matter, and other goods over the said bridge, all the freight, passengers, mails, express matter, and other goods carried on and over its road or any part thereof, destined for Jeffersonville, in the state of Indiana, or any other points which require their passage over the Ohio river at or near Louisville during the existence of this agreement, and will charge on said traffic, in addition to its rates for transportation service, the then established rates of toll and charges hereinbefore provided for the use of said bridge and approaches, and punctually pay the said tolls and charges to the first party."

"Sec. 5. Accounts of all expenditures, tolls, and charges and payments required by the terms of this agreement shall be kept by the party authorized by this agreement to charge the same against either of the parties hereto, the account of tolls, however, to be kept by the respective parties chargeable therewith; and all such accounts shall be rendered to the proper parties during the month next succeeding the accruing of the items thereof, and the same shall be settled and paid within thirty days after the rendition of each monthly account.

"Sec. 6. If it is found, during the month of May or November in any year, that the tolls and charges herein provided are not sufficient to meet the said interest and dividend due the first day of the next succeeding month, the parties of the second and third parts each covenant and agree separately with the first party, and mutually covenant each with the other, to advance and pay the deficit immediately and pro rata according to the aggregate amount of tolls and charges for the use of said bridge against each for the current six months. The said advance, with interest thereon at the rate of seven per cent. per annum, shall be refunded by the party of the first part out of tolls first thereafter accruing."

Under this contract the bridge company was authorized to fix such rates and charges for the use of the bridge as should produce in the aggregate not more than a sum sufficient to pay (1) the cost and expense of keeping the bridge and its approaches in repair; (2) a semiannual dividend of 6 per cent. on the capital stock of \$1,500,000; (3) the interest upon the bonds of the company, amounting in the aggregate to \$800,000, and establishing a sinking fund sufficient to pay off the bonds at maturity; (4) the amount necessary to keep up the corporate organization of the company; (5) such taxes as may be charged against the company or its property. It was expressly agreed that these tolls and charges should be reduced from year to year as the outstanding bonds were paid off and discharged, and the interest charge thereby extinguished; that these tolls and charges should always be the same to the second, third, and fourth parties, and that the tolls and charges to other rail-

roads for the like use of the bridge and its approach should not be less than those charged to the parties to the contract, and that all such tolls and charges paid by other railroad companies should form a part of the fund provided for the payment of the expenses, sinking fund, interest, dividends, and taxes, the same as if paid by the second, third, and fourth parties; and in consideration of this agreement the railroad companies agreed to pass over the bridge all the freight, passengers, mails, express matter and other goods carried on and over their road to and from Louisville, and to and from points which required their passage over the Ohio river at or near Louisville, during the existence of the agreement, and to punctually pay to the party of the first part the tolls and charges due by them for the use of the bridge, tracks, and approaches thereto. On the 1st day of February, 1882, the bridge company entered into an agreement with the Louisville, New Albany & Chicago Railroad Company for the use of the bridge, which was substantially in accord with the agreement between the original contracting parties, and subsequently a similar contract was entered into with the Louisville, Evansville & St. Louis Consolidated Railroad Company for the use of the bridge. Plaintiff alleges that it had lived up to the letter and spirit of its agreement continuously from the execution of the contract until the institution of this suit, and had delivered to the bridge company and to the several railroad companies using said bridge all passengers, freight, mail and express matter to be passed over said bridge carried on and over its road, or any part thereof, destined for any points which required their passage over the Ohio river at or near Louisville; that with the consent of the bridge company and the other railroad companies using the bridge it had, up to the filing of this suit, punctually paid for the use of the bridge, paying to the defendant railroad companies the tolls due from it on traffic passing over the bridge hauled by plaintiff, and delivered to the bridge company or to the respective railway companies; that its contributions and tolls at some times had been only such parts thereof as its mileage bore to the total mileage over which the traffic was transported, but at other times it had contributed the total amount thereof. Plaintiff charges that the bridge company, upon the signing of the contract, fixed its tolls and charges, and had from time to time changed same, but had, in violation of its contract, for the years 1892, 1893, and 1894, maintained said tolls and charges at such rates as to produce a sum more than sufficient to raise the sums mentioned and declared in the contract, and had illegally refunded the whole of this excessive toll to the defendant railroad companies, and had refused to pay any part thereof to plaintiff; and that of this excess so illegally collected from the plaintiff the Pittsburgh, Cincinnati, Chicago & St. Louis had received \$76,878.92, Baltimore & Ohio Southwest-

ern Railway Company \$12,488.82, Louisville, Evansville & St. Louis Consolidated Railway Company \$43,968.70, Louisville, New Albany & Chicago Railway Company \$34,697—making the aggregate \$168,033.44,—for which it seeks to hold the bridge company responsible. The bridge company denies that plaintiff had paid to it directly any tolls on the traffic sent by it over the bridge for the years 1892, 1893, and 1894, or that it had received such tolls and charges as if paid to it by the plaintiff; and alleges that plaintiff had refused to make any reports of such traffic prior to the year 1892, and had since that time failed to pay to them the tolls due on traffic sent by it over the bridge, but had permitted this traffic to be reported by the connecting lines to whom it was delivered, who paid the tolls thereon without informing defendant what proportion thereof had been contributed by plaintiff. Defendant admits that it had maintained its tolls at a higher rate than was necessary to pay the fixed charges provided by the contract, but avenges that this was done with the assent of all the parties to the contract, and avers that plaintiff would have received its proportion of this excess if it had furnished the necessary information to enable defendant to ascertain what this proportion was as provided by the contract.

It appears that the business between the bridge company and the railroad companies was conducted in accordance with the agreement up until about the year 1879 or 1880, the surplus tolls being applied, in accordance with the terms of the contract, to the extinguishment of the bonded debt of \$800,000; that, after this was done, representatives of the bridge company and of the railroads north of the Ohio river held a meeting, of which plaintiff was not advised, and agreed that the bridge company should maintain its rates and charges at the excessive amounts, and that the surplus created by these excessive rates should be rebated back to the roads north of the river; and that from that time on large amounts were each year credited back to the roads on the north of the river. The effect of this, of course, was to deprive plaintiff of large sums of money to which it was entitled under that provision of the contract which declared that the tolls and charges should always be the same to each of the contracting railroads. The testimony shows that the contract was forgotten or overlooked by plaintiff company until about the year 1888, when plaintiff began to make demands for its proportion of the surplus earnings, and to insist upon a reduction of the tolls to a point where they would yield only a sum sufficient to pay the amounts provided by the contract. The negotiations which followed these demands on the part of plaintiff culminated in a meeting between the parties in January, 1892, in which plaintiff's contention was admitted by the Pittsburgh, Cincinnati, Chicago & St. Louis, and subsequently by the Baltimore & Ohio Southwestern Railway Company and the Louisville,

Evansville & St. Louis Consolidated Railway Company, who thereafter paid to the bridge company the various sums of money which had been previously credited to them by the bridge company, and which, under the contract, was due to plaintiff; but the Louisville, New Albany & Chicago Railway Company refused to pay back the proportion of this excess which had been credited by the bridge company to it upon several grounds: First, they insisted that plaintiff was not entitled to share in these excessive tolls at all; second, that, if they were, they had not been apportioned upon the proper basis; and, third, that by a contract made by them with the bridge company subsequent to the date of the original contract the bridge company had agreed to charge them a lump sum, which was not to exceed \$5,000 per month for the use of the bridge during a considerable period of time in lieu of the tolls originally agreed to be paid, and which, under the contract made with the plaintiff, the bridge company was bound to collect. The testimony shows that by reason of this agreement, and the failure of the bridge company to require the Monon to pay its tolls promptly, they had fallen behind in tolls due the bridge company in a very large amount. The evidence of the secretary of the bridge company shows that beginning with the 1st day of January, 1892, a full account of the tolls paid by each railroad company was kept by the bridge company from information furnished by the railway companies, and at the end of each quarter of a year thereafter the bridge company issued quarterly reports showing the total amounts of tolls so collected, by whom they were paid, and the amount of the surplus, and the proportion due to each company from this excess. These reports indicate that plaintiff is entitled to the precise amount of money sued for in this action, provided the apportionment of the excess is made among the railway companies in the same proportion in which the tolls were paid by each of them to the bridge company. Originally there was a difference in gauge between the tracks of plaintiff and the other companies, and for this reason, and with consent of all the parties, plaintiff reported its traffic to the connecting lines, and at the same time paid to them its proportion of the tolls due the bridge company, and each of them in turn reported and paid the tolls to the bridge company. It does not seem to us to be important that the freight contributed by plaintiff was delivered to connecting lines, who paid the tolls thereon to the bridge company, and this fact cannot affect the right of plaintiff to recover this excessive toll which the bridge company had exacted in violation of their contract, as it appears that at least for the period covered by this suit the bridge company had as accurate information on this point as though it had

been directly furnished by plaintiff. It was the duty of the bridge company, under its undertaking with plaintiff and the other railroad companies, to make its charges uniform, and to collect its tolls. If it has failed to do so, the loss occasioned by such default should fall upon it, and not upon innocent parties. Its contract expressly required that all tolls and charges to other railroad companies for the use of the bridge and its approach should be the same as those charged to and incurred by the railroad companies who were parties to the contract; and that all such tolls paid by other railroad companies which should afterwards use the bridge would become a part of the common fund for the payment of the fixed charges to which it was entitled under the contract.

The defendant also complains that plaintiff failed to collect the bridge tolls in excess of its transportation charges. The testimony shows that plaintiff was forced by competition to abandon this extra charge, in order to do business. This provision was inserted for the benefit of the plaintiff, and its omission was not in any wise prejudicial to defendant, and is a matter about which defendant has no right to complain, as it is evident that they lost nothing by such omission, but, on the contrary, were greatly benefited by the receipt of business which would otherwise not have passed over the bridge. The dominant idea which runs through the entire contract originally entered into between the parties was that there should be absolute equality in charges made against the railroad companies for the use of the bridge, and that these charges should be limited, as far as practicable, to such rates as would produce a sum sufficient to pay off the fixed charges provided for in the contract; and it seems to us that there can be no reasonable doubt of the soundness of appellee's contention that, as the bridge company kept their tolls at an excessive rate, and in this way illegally accumulated a surplus, it belonged to the railroad companies in the exact proportion in which it had been paid by them to the bridge company, and each of them are entitled to have this excess paid back in exactly the same proportion in which it was paid. It was the plain duty of the defendant bridge company to have restricted its charges to such rates as would have produced a sum of money sufficient to pay its legitimate charges under the contract; and as it has violated this contract, and collected from plaintiff tolls in excess of the amount authorized by the contract, it is liable therefor, with interest from date of such illegal exactions, at least from the time it had accurate and distinct information of the amount due plaintiff from this excess. As the judgment rendered in this case is in accordance with the views expressed in this opinion, it is affirmed.

**BREATHITT COAL, IRON & LUMBER CO.
v. STRONG et al.¹**

(Court of Appeals of Kentucky. May 26, 1899.)

**VALIDITY OF LAND PATENT—FAILURE TO DESCRIBE
EXCLUDED BOUNDARIES.**

A patent is not void merely because it excludes prior grants without identifying or describing them.

Appeal from circuit court, Breathitt county.

"To be officially reported."

Action by the Breathitt Coal, Iron & Lumber Company against G. T. Strong and others. Judgment for defendants, and plaintiff appeals. Reversed.

W. S. Pryor, B. M. Burdett, Matt Walton, and John E. Patrick, for appellant. Marcum & Pollard, for appellees.

PAYNTER, J. This appeal calls in question the validity of a patent issued by the commonwealth of Kentucky to Stephen G. Reid on June 15, 1872, for 154,800 acres of land, which excluded 25,000 acres "of patented and otherwise appropriated land, which is deducted from the calculation." The courses and distances are given in describing the outer boundary of the patent, most of the lines of which call for the meanders of streams of water. The others call for rocks and trees and the dividing lines of certain counties. The lines are so designated by the calls of the deed that any person familiar with the country where the patent is located could follow most of them without a compass, and a surveyor would have but little trouble in locating the lines designated by other calls in the patent. So it seems to us there is no uncertainty in the lines describing the boundary of land so as to even suggest the patent is invalid by reason of any uncertainty in the description of the land embraced in the patent. The only question which merits consideration is whether the patent is void by reason of its failure to describe the excluded boundaries. In 1805, in the case of *Drake v. Ramsey*, Hardin, 34, and in 1808, in *Craig v. Cogar*, Id. 386, this court held that patents containing exclusions without defining the boundaries of the land thus excluded were valid. The question again arose in 1815 in *Overton v. Roberts*, 4 Bibb, 156, where this court said: "It is also objected that the entry under which the appellee derives claim, in calling for the exclusion of prior entries, is vague and invalid upon its face. Whatever doubts might exist as to the validity of this entry, were the objection now taken of the first impression, since the repeated decisions of this court sustain entries with like calls, it cannot now be permitted to prevail. See *Drake v. Ramsey*, Hardin, 34; *Craig v. Cogar*, Id. 384; *Jackson v. Johnson's Heirs*, 1 Bibb, 60. With respect to land claims, the interest of the community

certainly requires in an imminent degree uniformity of decisions; and this court, acting in obedience to that interest, as well as from a due respect to their former adjudications in the consideration of analogous cases, should yield to their influence." There seems to have been no change in the opinion of this court with reference to such patents, unless it can be said to have occurred in 1881, when the opinion was delivered in *Hamilton v. Fugett*, 81 Ky. 366, where it is claimed a contrary doctrine is announced. However, this court, in *Hall v. Martin*, 89 Ky. 9, 11 S. W. 953, construed the opinion in *Hamilton v. Fugett* as not meaning to hold that a patent would be void because of its failure to describe the boundaries excluded. In *Hall v. Martin* the court reannounced its early doctrine upon this question, and held that a patent is not void merely because it excluded prior grants without identifying or describing them, and that where a patent is indefinite, both as to the exterior boundary and to the exclusions, it is void for uncertainty. It was held in *Ballowe v. Hillman* (Ky.) 87 S. W. 950, that a patent for 75,000 acres of land, giving the outer boundary, and then excluding "all those surveys of land to which there is now a lawful title," without designating the boundaries excluded, is not void for uncertainty, but passed the title to all the vacant and unappropriated land in the boundary called for by the patent. It is unnecessary to go into a discussion of the question as to whether the doctrine announced by this court on this question almost a century ago is correct. It is sufficient to say that this court, in *Hall v. Martin*, and in *Ballowe v. Hillman* reaffirmed it with elaboration, and it must be accepted as the settled doctrine of this court. On such an important question as is here involved, the opinion of the court should be so certain in its meaning that the legal profession will not be in doubt as to what is the settled doctrine; hence we have said that the early cases of the court and those of *Hall v. Martin* and *Ballowe v. Hillman* enunciate the settled doctrine of the court. The court erred in sustaining a demurrer to the petition. The judgment is reversed for proceedings consistent with this opinion.

SHERLEY v. MATTINGLY et al.¹

(Court of Appeals of Kentucky. May 26, 1899.)

**RECEIVERS—DISCRETION OF COURT AS TO AMOUNT
OF ALLOWANCE.**

As it is proper, in fixing the compensation of a receiver, to take into consideration, not only the work done, but the result accomplished for the estate, it was not an abuse of discretion to allow a receiver only \$500, that being about 25 per cent. of the amount realized by him, and the entire assets available for general creditors being worth no more than \$6,000 or \$7,000, the remainder of which is yet to be converted into money.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by J. G. Mattingly and others against A. R. Sutton for the dissolution of a partnership and appointment of a receiver. Order of allowance to Thomas H. Sherley, the receiver, and he appeals. Affirmed.

Matt O'Doherty, for appellant. Kohn, Baird & Spindle, for appellees.

HOBSON, J. This is an appeal from the order of the court below fixing the compensation for appellant's services as receiver at \$500. The only question raised is as to the sufficiency of the allowance. The court below, in a written opinion, said this: "The pleadings, exhibits, and testimony show that the questions here involved grew out of the following state of facts: The plaintiffs, J. G. Mattingly, P. J. Mattingly, and L. D. Mattingly, and the defendant, A. R. Sutton, in the month of February, 1892, formed a partnership under the firm name of J. G. Mattingly & Sons, for the purpose of conducting the business of distillers, and did conduct such business until the spring of 1893, when it was discovered that the defendant, Sutton, was largely insolvent, and had been guilty of gross irregularities in the management of the affairs of the firm. On the 6th day of April, 1893, Sutton executed a general deed of assignment for the benefit of his creditors, and on the 13th day of April, 1893, the said J. G. Mattingly, P. J. Mattingly, and L. D. Mattingly instituted this action, in their petition alleging the insolvency of Sutton, and praying for a dissolution of the partnership, and the appointment of a receiver to take charge of the assets and affairs of the partnership. There was filed with the petition a request in writing, signed by a number of the unsecured creditors of the firm, asking that the prayer of the petition be granted, and that T. H. Sherley be made receiver. On the same day the plaintiffs, through their counsel, entered a motion in the common pleas division of this court for the appointment of a receiver. The motion was sustained, and T. H. Sherley was appointed receiver by the Honorable Emmet Field, judge of that division. Subsequently, by allotment of cases, the action fell into this division, and Sherley continued to act as receiver, under the orders of this division, until his removal, as above stated. Upon the removal of Mr. Sherley, the Fidelity Trust & Safety-Vault Company was appointed receiver in his stead. At the time of Mr. Sherley's appointment as receiver, the assets of the estate consisted of the following property, to wit: (1) A lot of land on which the distillery and warehouses are situated, the land and improvements being incumbered to their full value. The incumbrancers were made parties to this suit, and set up their claim by cross petitions filed herein, praying for the enforcement of their liens, and on these cross

petitions a judgment was entered enforcing said liens, and directing a sale of the property above mentioned. The property was afterwards sold by the commissioner, and failed to bring the amount of the liens. There was nothing realized for the benefit of the general creditors from this estate. (2) There was what Mr. Sherley calls an 'equity' in about four thousand barrels of whisky. The court presumes that means that J. G. Mattingly & Sons had pledged this amount of whisky to certain of their creditors to secure the payment of their indebtedness to said creditors, and the equity, if any, would be such sum as this whisky might be sold for over and above the amount for which it was pledged. Mr. Sherley reports, however, that he was unable to sell any of this whisky for an advance, and nothing was realized, therefore, from this asset, for the benefit of the general creditors. (3) Two hundred feet of ground upon which the cattle pens were built, and which is unincumbered. This property was sold by the commissioner, and was bid in by W. H. Slaughter for \$2,000, but the sale was set aside on the ground that the title to the property was defective. Nothing, therefore, has as yet been realized, for the general estate from this property. (4) Three hundred and forty-seven barrels of whisky, which is unincumbered. This whisky is worth, according to Mr. Sherley's statement, \$8 or \$9 per barrel. Putting it at \$8.50 per barrel would make this asset worth \$2,950. This whisky was not disposed of, however, by Mr. Sherley, but was turned over by him to his successor. (5) Mr. Sherley reports that there is a claim in favor of the estate for storage on 2,000 barrels of whisky, which he estimates at 70 cents per barrel up to this time. This asset is of uncertain value, because much of it may be made unavailable by claims of excessive outage made by the owners of the whisky, but, whatever its value may be, it was not realized on by Mr. Sherley, but was turned over by him to his successor. (6) Mr. Sherley's report shows that he has collected storage on whisky, other than the 2,000 barrels above mentioned, amounting to \$2,404.50, which sum constitutes the entire receipts reported by him to the commissioner, and out of this sum he has already disbursed, in payment of expenses incurred by him, not including any portion of the compensation claimed for himself and his counsel, the sum of \$1,518.36. Of this sum, \$500 was paid to Mr. Thomas J. Batman, Mr. Sherley's bookkeeper. After deducting this sum, and \$24.75 paid in to court by him, from his receipts, it leaves a balance in his hands of only \$861.39. It will be seen, from the foregoing statement of facts, that the assets belonging to the estate of J. G. Mattingly & Sons that are available for general creditors, estimated at their highest value, are not worth more than \$6,000 or \$7,000, of which sum Mr. Sherley has realized, by converting assets into cash, only the sum of \$2,404.50. The remainder of said assets

have yet to be converted by the present receiver, and it must be borne in mind that the present receiver and its counsel must be compensated for their services in converting the assets turned over to said receiver by Mr. Sherley. Under these circumstances, is \$3,000, nearly or quite one-half the value of the entire estate available for general creditors, a reasonable sum to allow Mr. Sherley as compensation for himself and his counsel? Or is it reasonable to allow Mr. Sherley, for his expenses and compensation to himself and counsel, not only the entire \$2,404 realized by him, but \$2,200 out of the assets turned over by him to his successor in addition thereto? The commissioner seems to be of opinion that such allowance is reasonable, but the court cannot agree with him. In view of the extraordinary services rendered by Mr. Sherley, as shown by his report to the commissioner, he is allowed \$500 as compensation for his services. It is true that this sum is more than 25 per cent. of the entire amount realized by him for the estate, and, when added to the expenses allowed him by the commissioner, will very nearly absorb that sum; but, under all the circumstances, the court is of opinion that such an allowance is reasonable."

The amount to be allowed, in cases of this character, is peculiarly a question within the chancellor's discretion, and it will not be interfered with in matters of doubt. The chancellor, from the nature of the case, must understand, much better than this court, the nature of the services rendered by the officer, the value of such services in the community, and equities of the whole case. In this case, we have only appellant's report and a partial transcript of the record to guide us. It would seem that he has done a good deal of work, and been at considerable trouble, involving both loss of time and mental labor, and, if the estate were larger, we would think he ought to have a larger sum. But the whole amount collected by him, and more, will be absorbed in paying his costs and the allowances already made, leaving a deficit to be paid by his successor. In appointments of this character, it is understood that if the receiver is fortunate in his management, and realizes for the estate a large sum, his allowance will be swelled; but if, on the other hand, the amount coming into his hands is small, although it is due to causes beyond his control, where a great loss will inevitably fall on the creditors in any event, the court should cut down the cost of administering the fund as low as justice to the officer will permit. In measuring the value of services, it is always proper to take into consideration, not only the work done, but the result accomplished for the estate by it. In view of the other allowances made by the court, the amount received by appellant, and the condition of the estate, we do not feel warranted in saying, on the record before us, that there was an abuse of discretion in the allowance made. Judgment affirmed.

MONARCH v. BREY.¹

(Court of Appeals of Kentucky. May 25, 1899.)

RULES OF COURT—POWER TO SUSPEND—JUDGMENT IN CIVIL ACTIONS AT CRIMINAL TERM—JUDGMENT NUNC PRO TUNC.

1. As the court had power to suspend a rule setting apart a certain term of the court for the trial of criminal cases exclusively, it was not error to render judgment in a civil case at such criminal term.

2. An entry in the clerk's minutes, giving the style of the case and the case number, followed by the abbreviation "Judgt.," is a sufficient basis for the entry of a judgment nunc pro tunc.

3. Where the clerk has failed to enter a default judgment pursuant to an entry in his minutes, the court may at a subsequent term, without notice to defendant, enter judgment nunc pro tunc.

Appeal from circuit court, Daviess county.

"To be officially reported."

Action by J. W. Brey against R. Monarch and others on a promissory note. Judgment for plaintiff, and defendant Monarch appeals. Affirmed.

Walker & Slack, for appellant. Little & Little, for appellee.

DURELLE, J. Suit was brought in the circuit court by appellee against Thomas, Simmons, and appellant Monarch upon a promissory note, and process executed in time for a judgment at the October term, at which time the court directed judgment to be entered by default; but, the papers having been mislaid, the judgment was not entered. Subsequently, at the December term, a judgment was entered reciting that the defendants had been summoned to the October term, that judgment had been rendered against them, but not entered because the papers were mislaid, and that "this judgment is entered as of the first day of the October term, 1896, and execution may issue forthwith." Execution accordingly issued, and was replevied by Thomas and Monarch, with S. Monarch as surety. At the June term, 1897, appellee gave notice of a motion to enter a judgment nunc pro tunc as of the first day of the October term, and the defendant gave notice and moved to set aside as void the judgment which had been entered, appellee's motion being obviously intended to secure a judgment in the event the former judgment should be set aside as void. Both motions were overruled, and this appeal is prosecuted both from the judgment entered at the December term and the order overruling the motion to set aside.

Appellant contends that the judgment was void for several reasons: First. Because it was rendered as of October 1st, at which time no court was in session. The record before us shows it to have been rendered as of the first day of the October term, and the question must be decided by that record. Second. Because, by rule of the Daviess circuit court, it

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

was provided that certain terms of the court, including the December term, should be known as the criminal terms, "and no civil business, either common law or equity, will be prosecuted at said terms, unless in case of actual emergency," etc. In the case of *Iron Co. v. Cochran* (Ky.) 37 S. W. 67, it was held, with reference to this rule, that the judge could undoubtedly have set aside or suspended it, and that an order made in a civil suit at such criminal term was not error. Third. That there was not sufficient evidence upon which to enter the judgment *nunc pro tunc*. The clerk's minutes showed an entry as follows:

"Brey
12,435 vs. Judgt.
Thomas."

—This entry gives the style of the case, the case number, and abbreviation for "judgment," is quite as full as such entries upon the minutes usually are, and we think sufficient upon which to base the entry of the judgment *nunc pro tunc*. Fourth. It is further urged that the court had no right to make the *nunc pro tunc* order, and hear evidence authorizing it, without notice having first been given. The court might, having the jurisdiction both of defendant and the subject-matter, have entered the judgment on the first day of the October term. And so it might have entered the judgment at the December term, in spite of the rule setting that term apart for criminal business, though such a judgment would doubtless have been set aside upon the defendant's showing that, through surprise or for other reasons, it had operated to his prejudice. It might also have ordered immediate execution. This being so, it is difficult to see wherein appellant was prejudiced by the order entering the judgment as of the October term, especially as it is not pretended that he had any defense to the merits, and the fact of its rendition is shown by an entry in a record recognized by the statute (Ky. St. § 378), as part of the records of the court. The rule of court relied on was adopted by the court for the guidance of the clerk and as notice to litigants and counsel of what the court intended to do. If the court had power to make it, it had power to rescind it, and by entering the order did rescind it, if such entry was in violation of the terms of the rule, or must be supposed to have acted on an emergency within the terms of the rule.

It is claimed that this was the correction of a clerical misprision, and under section 519 of the Civil Code of Practice must be done upon notice to the adverse party. Section 517 of the Civil Code of Practice provides that certain enumerated things shall be deemed clerical misprisions, and there are others. It is conceded that the omission of a part of a judgment in entering it—the failure to allow interest or credits admitted, the allowance of too much interest, etc.—comes under this head; but we do not think the failure to enter a judgment directed by the court comes un-

der this head, or requires notice to be given of a motion for its entry. Wherefore the judgment is affirmed.

BUFFINGTON et ux. v. MOSBY et al.¹
(Court of Appeals of Kentucky. May 26, 1899.)
HOMESTEAD—PLEADING—CONCLUSIVENESS OF JUDGMENT.

1. An answer averring that defendant is the owner of a homestead in the land claimed by plaintiff, and that he is a housekeeper with a family residing on the land, is not good on demurrer; there being no averment that he is the owner of the land, and it appearing that he could not have derived the homestead through his wife, as she is still living.

2. Where the defendant failed to claim a homestead in a proceeding to subject land fraudulently conveyed to his wife, the judgment subjecting the land is a bar to his right to a homestead.

Appeal from circuit court, Boone county.

"Not to be officially reported."

Action by Mosby, Raum & Gogreve against R. W. Buffington and Mary Buffington for partition. Judgment for plaintiffs, and defendants appeal. Affirmed.

S. W. Tolin and John S. Gaunt, for appellants. G. G. Hughes, for appellees.

PAYNTER, J. The purpose of this proceeding is to have partitioned three tracts of land between the appellees and the appellant Mary Buffington. It is averred in the petition that the appellees (plaintiffs below) owned an undivided half of the land "by and under the judgment and deed of the Boone circuit court and the court of appeals of Kentucky," and the appellees filed a commissioner's deed with the petition, purporting to have been made by the Boone circuit court, as evidence of their title to one-half of the land. It is insisted that the petition is not good, because the exhibit does not contain exactly the same description of one of the tracts of land which the petition gives of it. It is sufficient to say that the description contained in the deed does not indicate but what it is the same tract of land described in the petition. In our opinion, the petition is good.

The appellant B. W. Buffington averred that he was the owner of a homestead in the half of the land claimed by the appellees; that it is exempt to him by the laws of Kentucky, and that he is entitled to have it set off to him; that he is a housekeeper with a family residing upon the land. He nowhere alleges in his answer that he is the owner of the land (that is, the fee-simple title, or a life estate therein), but alleges that he is the owner of a homestead in it. His wife is living, as appears from the pleadings, and, of course, he did not derive his alleged homestead interest through her. Not having thus derived it, then, if he had a homestead, it was by reason of the fact that he either owned the fee-simple title, or an estate in it, out of which a home-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

stead could be assigned to him. Having failed to make an averment to this effect, his allegation that he had a homestead interest in the land is a mere conclusion of the pleader, and he failed to manifest his right to a homestead in the land sought to be partitioned. For this reason the court properly sustained a demurrer to his answer as amended.

Counsel for appellees state that, in a former suit instituted in the Boone circuit court by the appellees against the appellants, it was adjudged B. W. Buffington had fraudulently conveyed to his wife, Mary Buffington, the undivided interest in the land which appellees claim; that the judgment was affirmed by this court, the land sold to satisfy appellees' claim and they became the purchasers, and the deed filed in this proceeding was made by the commissioner of the Boone circuit court for that interest in the land. If this be true, then the appellant B. W. Buffington is not entitled to a homestead interest in it, because the judgment would bar his right to it. *Snapp v. Snapp*, 87 Ky. 554, 9 S. W. 705; *Hill v. Lancaster*, 88 Ky. 338, 11 S. W. 74.

It is unnecessary to pass upon the question as to whether or not the facts claimed to exist by counsel for appellees are sufficiently shown by the petition and the record in the case of *B. W. Buffington, etc., v. Mosby, Raum & Gogreve*, which are filed with the record in this case, as we have decided that the answer did not allege facts which showed the appellant Buffington was entitled to a homestead. The judgment is affirmed.

HARRISON v. TAYLOR'S ADM'R.¹

(Court of Appeals of Kentucky. May 25, 1899.)

ABATEMENT AND REVIVAL—DEATH OF PARTY PENDING APPEAL—ACCEPTANCE BY WIDOW OF HUSBAND'S WILL—HOMESTEAD AND DOWER.

1. Where the plaintiff died pending an appeal from a judgment in her favor, it was not error, after reversal of the judgment, to revive the action in the name of her administrator, although more than a year had elapsed since her death: the delay being due to the failure of defendant to file the mandate promptly.

2. Where a widow accepts the provisions of her husband's will, she takes the entire property subject to his debts, and cannot claim either homestead or dower against his creditors.

Appeal from circuit court, Marion county.

"Not to be officially reported."

Action by Octavia S. Harrison against Elizabeth Taylor and others. Judgment for Elizabeth Taylor's administrator, and plaintiff appeals. Affirmed.

Finley Shuck, for appellant. J. T. Collins, Garnett Graves, and J. P. Thompson, for appellee.

GUFFY, J. It appears from this record, including two former transcripts filed with this record, that W. B. Harrison departed this life in Marion county in 1891, having

first published a will by which he devised to the appellant, Octavia Harrison, who was his wife, all his property, of every description, and appointed her executrix, and requested that no bond be given. It further appears that said will was duly probated in the Marion county court in June, 1891, and appellant qualified as executrix, and in February, 1892, instituted suit in the Marion circuit court, as executrix, against Elizabeth Taylor; R. W. Clark, John S. Harrison, and W. B. Meadows. There is some controversy between the parties to this appeal as to what was the object of the suit instituted as aforesaid. It will, however, be seen from the petition that the execution of the will was alleged. It is further alleged that the testator, at the time of his death, owed defendant Elizabeth Taylor two notes, aggregating about \$2,000, and owed Clark about \$320, and John S. Harrison an amount not then ascertained, and that he also owed other debts, which plaintiff has paid. It is further alleged that there were no other debts known to plaintiff, except as follows: Several years before his death, said W. B. Harrison was considerably involved in debt, and plaintiff owned considerable property, in real estate and bonds, as her separate estate, free from her husband's debts; that she permitted her husband to sell the bonds and real estate, and appropriate the proceeds to the payment of his debts, in consideration whereof the said W. B. Harrison executed to her his note for \$6,000, and agreed to convey to her, in payment thereof, his farm in Marion county, which will be hereafter described. Said note has never been paid. That testator left no personal estate subject to descent or distribution, but left two farms; one, in Hart county, containing 305 acres, 2 rods, and 24 poles. It is set out that the Hart county tract of land was occupied by the defendant Meadows, and a sale of that tract of land is prayed for, and that so much of the money as may be necessary be appropriated to pay said W. B. Harrison's debts, and the balance be paid to her. It is alleged that the Hart county land is worth at least \$4,000. The residue of the land is alleged to be worth \$12,000, and was his homestead, upon which he resided. It is further alleged that the Hart county land would be sufficient to more than pay all testator's debts; that she does not set up her debt or contract with W. B. Harrison. She, however, describes the land in Marion county. Plaintiff further stated that, if she learns of any other claims than those set out against the estate of the testator, she will report same; but she does not desire this cause to be referred to a commissioner, as there will be no controversy as to the claims, and a reference will be an expense without necessity therefor. Her prayer is for all general and equitable relief. It, however, seems that a controversy arose between Mrs. Taylor and this appellant in regard to the amount that the testator owed

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Mrs. Taylor, which was finally settled by a judgment of the Marion circuit court adjudging to Mrs. Taylor the amount of the two notes referred to, but disallowing a \$750 claim that she asserted against the estate of decedent; and from that judgment Mrs. Taylor appealed to this court, and the judgment of the Marion circuit court was affirmed May 13, 1896. During the pendency of the appeal some efforts were made by Mrs. Taylor to collect her judgment by execution levied upon the land left by the testator, which levy was enjoined by the circuit court upon the idea that the land was not subject to levy and sale under execution, it being the opinion of the circuit court that the land was not assets in the hands of the executor, and from that judgment no appeal was prosecuted; but Mrs. Taylor sought to obtain a judgment to sell a sufficiency of the land of testator to satisfy her judgment, which motion was resisted by the appellant in this case, and she also offered to file a reply asserting certain claims of her own against the estate. The circuit court refused to allow the pleadings offered by appellant to be filed, and rendered a judgment for a sale of enough of the land to pay Mrs. Taylor's claim, and from that judgment this appellant appealed, and the same was reversed. 43 S. W. 723. The opinion reads as follows: "We see no reason why appellee is not, in this action, entitled to judgment for sale of the land left by W. B. Harrison, deceased, to satisfy her debt, amount of which was ascertained and determined by judgment rendered in the action brought by appellant, as administratrix, to settle the estate, and affirmed by this court. But it was error of the lower court to refuse reasonable time for appellant to file her reply to the answer and counterclaim of appellee asking such sale. The judgment of sale was defective, because the land directed to be sold was not properly and sufficiently described. For these reasons that judgment is reversed, and cause remanded for further proceedings consistent with this opinion." Upon a return of the cause to the Marion circuit court, the action was revived in the name of Atkinson, administrator of Mrs. Taylor; she having died pending the appeal. The appellant in this action again sought to file an amended reply, attempting to set up a very large claim against the estate of the testator, asserting that it was a mortgage lien upon the land owned by the testator during his lifetime. She also claimed a homestead and dower—one or both—in the land. It seems that the court sustained a demurrer to the pleading, and rendered judgment in favor of the appellee for a sale of a sufficiency of the land in question to pay her judgment heretofore referred to, and from that judgment appellant prosecutes this appeal.

It is insisted for appellant that the action could not be revived in the name of the appellee, because Mrs. Taylor, as is alleged, had

been dead more than one year before the attempted revivor. It may be true that the pendency of the appeal would not have prevented a revivor, but until the appeal was settled there was apparently no necessity for a revivor; and it may well be said that it was the duty of the appellant, who succeeded on the appeal, to have promptly filed the mandate, and to have taken the proper steps to proceed with the litigation. We are, however, of the opinion that the court did not err in allowing the revivor to be made. We do not think that the court erred in allowing the mandate to be filed at the time, and holding that the action was ready for steps to be taken. It was within the power of appellant, who succeeded in the court of appeals, to have filed the mandate as soon as issued; and we are not inclined to the opinion that she could take advantage of her own delay to postpone the trial or protract the litigation, which seems to have already been unreasonably protracted.

It is well settled that a person cannot claim under a will, and also against it; and, inasmuch as appellant accepted the provisions of the will of her husband, she takes the entire property subject to his debts, and cannot claim either homestead or dower against his creditors. If she had a valid claim against her husband's estate, she would, of course, be entitled to enforce the same according to law, the same as any other creditor; but the pleading which the court sustained a demurrer to failed, as we think, to show a cause of action, and, inasmuch as she has so failed, she cannot now be allowed to assert that claim as against the appellee in this case. It, however, seems to us, from the pleadings in these various suits, that the land devised by the testator, if properly managed, would have been more than sufficient to have paid all his debts, including the claim that appellant intimated that he owed her. Upon a careful consideration of the record in this case, we are of the opinion that no error was committed by the court below to the prejudice of appellant's substantial rights, and the judgment appealed from is therefore affirmed.

AHRENS & OTT MFG. CO. v. HOEHER.¹
(Court of Appeals of Kentucky. May 26, 1899.)
MALICIOUS PROSECUTION—MALICE DEFINED—PROBABLE CAUSE—QUESTIONS FOR COURT AND JURY.

1. As the motive must be improper or wrongful to constitute malice in malicious prosecution, it was error to instruct the jury that malice means "the intentional doing of a wrongful act to the injury of another, without justification or legal excuse therefor."

2. The court should tell the jury what facts constitute probable cause, that being a question of law for the court, and allow the jury to determine whether those facts are proved.

3. If the agent of defendant corporation, when he instituted a criminal prosecution

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

against plaintiff for grand larceny, believed, and had such ground as would induce a man of ordinary prudence to believe, that plaintiff had entered into a conspiracy with certain of defendant's employes to get illegally its secret process of enameling, and in furtherance of that design, either by himself or one of such employes, had forced open the door of defendant's mixing room, or taken therefrom some of its secret mixtures, without its consent, for the purpose of appropriating it to his own use, there was probable cause for the prosecution, and the court should have so instructed the jury.

4. The court should grant defendant's request for an instruction to the effect that he is not liable, although the plaintiff was in fact innocent, unless the prosecution was both malicious and without probable cause.

5. Any information defendant had tending to connect the plaintiff with the offense is admissible in evidence to show probable cause and absence of malice.

6. The advice of counsel will constitute probable cause only when reasonable diligence was used to learn the facts on which the advice of counsel was sought.

Appeal from circuit court, Jefferson county, law and equity division.

"To be officially reported."

Action by Joseph Hoeher against the Ahrens & Ott Manufacturing Company for malicious prosecution. Judgment for plaintiff, and defendant appeals. Reversed.

R. H. Blain, R. C. Kinkaid, and Zach Phelps, for appellant. Kohn, Baird & Spindle, for appellee.

HOBSON, J. Appellee instituted this action against appellant to recover damages for an alleged malicious prosecution. The jury having found for him \$5,000 damages, and the court having overruled appellant's motion for a new trial, it seeks by this appeal a reversal of the judgment against it for that amount. The case arose in this way: Appellant is a corporation engaged in the business of manufacturing plumbers' supplies, such as bath tubs, lavatories, sinks, etc., in the city of Louisville. In this business it possessed a secret process of enameling, by which it is claimed it manufactured a very superior article of bath tubs and the like. It paid \$3,000 for the secret process, and expended quite a large sum in introducing and developing it. In February, 1895, it received information that appellee and two of its employes, Louis Link and Theodore Zeutslus, were engaged in a conspiracy, the object of which was to discover this secret process, and sell it to another firm. To prevent this secret from being known, appellant allowed nobody in its mixing room except Charles Ahrens, its inspector, Oscar Marschutz, its superintendent, and Aloysius Massman, its enameler, unless in their presence, and by their orders. The door was kept locked, and the windows barred. When the materials were mixed in the mixing room, they were taken to the furnace, and, after passing through the furnace, could not be separated so that the process might be discovered by chemical analysis or otherwise. But before the mixture passed through the furnace,

an expert, by analyzing it, if he had some of the mixture, could ascertain the ingredients, and so discover the secret. The proof tends to show that it was Link's duty to oil the machinery in the mixing room when required, and that appellee, who was anxious to learn the secret process of enameling possessed by appellant, had in his possession some of the mixture which Link had brought to him, and afterwards confessed to appellant that appellee had procured him to do this so that he might learn the secret. Letters written by appellee, strongly confirming this confession of Link's, were delivered by him to appellant. On this information, acting under the advice of its counsel, appellant had a warrant issued against all three of the men for burglary; Zeutslus being also implicated, and the door of the mixing room showing signs of having been forced open. Appellee was arrested when an express wagon was awaiting at the door to take his trunk to the station for the purpose of his leaving the state. The mixture referred to was in his trunk. When the case came before the grand jury, they found an indictment against the three defendants for grand larceny, the change in the charge being perhaps due to the advice of the counsel for the prosecution. Link was tried on the indictment, and acquitted. It was then dismissed as to the other two defendants, and appellee then filed this suit. He was under arrest for perhaps an hour and a half before giving bond, but was not imprisoned. He testified on the trial that he knew the secret of appellant's process, and had known it for some time; that he was only trying to get from Link information where appellant bought its material; that the mixture he had did not come from appellant's factory, but was bought at a drug store by Link for 35 cents. In view of the fact that his testimony shows that the ingredients he had could be bought at any drug store, and the other facts in the record, his explanation as to what he and Link were after is very unsatisfactory, and from the letters and the other undisputed circumstances it is hard to escape the conclusion that the conspiracy existed as charged by appellant. Still, under the rule adopted in this state, there was some evidence tending to sustain appellee's version of the transaction, and the court properly refused to instruct the jury peremptorily to find for the defendant. After telling the jury that appellant was not liable unless the prosecution was malicious, and without probable cause, the court thus defined malice: "The court instructs the jury that by the terms 'maliciously' and 'malice,' as used in these instructions, is meant the intentional doing of a wrongful act to the injury of another, without justification or legal excuse therefor." In Bish. Noncont. Law, § 231, the learned author says that the meaning of the word "malice" depends largely upon the subject to which it is applied, and that in a general way its meaning is as above defined. He then adds: "In

the law of malicious prosecution it requires the mental condition or purpose, which judicial decision has made an indispensable element in the wrong. It is not a mere fiction of law, but it must be malice in fact. Taking these views for our guide, the malice in malicious prosecutions is not necessarily, while it may be, ill will to the individual; but it is any evil or unlawful purpose, as distinguished from that of promoting the justice of the law." The same rule is laid down in *Cooley Torts* (1st Ed.) 185, where it is said that the motive must be improper or wrongful. Tested by this rule, the instruction quoted should not have been given. The court properly told the jury that malice might be inferred by them from the want of probable cause; but this is an inference that the jury may or may not make. The existence of malice is a question for the jury on all the facts and circumstances of the case, and the jury, from the definition of malice given them, may have understood that they must regard the prosecution to be malicious in law if without justification or legal excuse, although there was, in their judgment, no malice in fact. The court properly defined probable cause, but he did not tell the jury what facts constituted probable cause in this case. What facts constitute probable cause is a question of law for the court. *Lancaster v. Langston* (Ky.) 36 S. W. 521; *Meyer v. Railway Co.* (Ky.) 33 S. W. 98. The court shall tell the jury what facts constitute probable cause, and let them determine, in a case like this, whether these facts are proved. *Anderson v. Trust Co.* (Ky.) 50 S. W. 40. The court should have instructed the jury that there was probable cause in this case if appellant's agent, when he instituted the criminal proceeding, believed, and had such grounds as would induce a man of ordinary prudence to believe, that appellee had entered into a conspiracy with Link or Zeutsius to get illegally their secret process of enameling, and in furtherance of that design, either by himself or one of them, had forced open the door of appellant's mixing room, or taken therefrom some of its secret mixture, without its consent, for the purpose of appropriating it to his own use. On another trial the court should give the jury the instruction asked to the effect that appellant was not liable, although appellee was in fact innocent, unless the prosecution was both malicious and without probable cause. In a case like this the party making the complaint is liable only for an abuse of the process of the court, and, unless their attention is called to it, a jury may fail to observe the distinction, and conclude that, if the party charged with crime was in fact innocent, he ought to recover. The court should also allow all statements made to appellant's officers or agents before the warrant was sworn out either by Link or Zeutsius to be proven as well as any other information appellant had then, tending to connect appellee with the offense. Though

this evidence may not show that he was guilty, it might serve to show that appellant was warranted in doing what he did, or was not actuated by malice. The court properly instructed the jury that the advice of counsel would constitute probable cause only when reasonable diligence was used to learn the facts on which the advice of counsel was sought. We are referred to *Johnson v. Miller*, 69 Iowa, 562, 29 N. W. 743; *Dunlap v. Insurance Co.*, 109 Cal. 365, 42 Pac. 29, and several other cases, holding otherwise; but the instruction given by the court is sustained by the leading text writers. See *Bish. Non-cont. Law*, § 236; 3 *Lawson, Rights, Rem. & Prac.* § 1096; 14 *Am. & Eng. Enc. Law*, 55, 56, and cases cited. It follows the rule heretofore announced in this state. *Burke v. Rhodes*, 13 Ky. Law Rep. 431; *Anderson v. Trust Co.*, 50 S. W. 40. This is not only the weight of authority, but it seems to us the necessary result of legal principles. He who consults an attorney about a matter affecting a third person, ought to use that care which men of ordinary prudence would ordinarily use in matters of like magnitude. Less than this would not show good faith. Of course, it is absolutely necessary, in questions of this sort, that people should act upon the advice of counsel; but they must exercise, in doing so, reasonable care to get the truth before the counsel. On another trial the court should define reasonable diligence as that care which men of ordinary prudence would usually exercise under like circumstances. Judgment reversed, and cause remanded for a new trial and further proceedings not inconsistent with this opinion.

FAIRMOUNT GLASS WORKS v. GRUNDEN-MARTIN WOODENWARE CO.¹

(Court of Appeals of Kentucky. May 24, 1899.)

SALES — QUOTATION OF PRICES — ACCEPTANCE OF OFFER.

1. Plaintiff wrote to defendant: "Please advise us the lowest price you can make us on our order for ten car loads of Mason green jars. * * * State terms and cash discount." Defendant replied: "We quote you Mason fruit jars, complete [stating prices], for immediate acceptance, and shipment not later than May 15, 1899; sixty days' acceptance, or 2 off, cash in ten days." Held, that there was a present offer by defendant, the immediate acceptance of which closed the contract, and defendant could not then withdraw the offer.

2. The fact that in the specifications mailed, referred to in the telegram of acceptance, plaintiff stipulated that the goods should be "strictly first quality," did not invalidate the acceptance, as defendant declined to furnish the goods before it received this letter, and in the subsequent correspondence did not complain of these words as an addition to the contract; thus confirming the evidence tending to show that these words, as generally understood in the trade, did not constitute a variance from the offer.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

3. As the expression "ten car loads" has a definite meaning in the trade, it was a sufficient specification of the quantity sold.

4. It is immaterial that the quantity of each size of the jars was not fixed, as the offer to sell the different sizes at different prices gave the purchaser the right to name the quantity of each size.

5. As the offer was to ship not later than May 15th, the buyer had the right to accept the goods to be delivered on different days prior to that time.

Appeal from circuit court, Jefferson county, law and equity division.

"To be officially reported."

Action by the Grunden-Martin Woodenware Company against the Fairmount Glass Works to recover damages for breach of contract. Judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Thum and Humphrey & Davie, for appellant. O. A. Wehle and A. M. Rutledge, for appellee.

HOBSON, J. On April 20, 1895, appellee wrote appellant the following letter:

"St. Louis, Mo., April 20, 1895. Gentlemen: Please advise us the lowest price you can make us on our order for ten car loads of Mason green jars, complete, with caps, packed one dozen in a case, either delivered here, or f. o. b. cars your place, as you prefer. State terms and cash discount. Very truly, Grunden-Martin W. W. Co."

To this letter appellant answered as follows:

"Fairmount, Ind., April 23, 1895. Grunden-Martin Wooden Ware Co., St. Louis, Mo.—Gentlemen: Replying to your favor of April 20, we quote you Mason fruit jars, complete, in one-dozen boxes, delivered in East St. Louis, Ill.: Pints \$4.50, quarts \$5.00, half gallons \$6.50, per gross, for immediate acceptance, and shipment not later than May 15, 1895; sixty days' acceptance, or 2 off, cash in ten days. Yours, truly, Fairmount Glass Works."

"Please note that we make all quotations and contracts subject to the contingencies of agencies or transportation, delays or accidents beyond our control."

For reply thereto, appellee sent the following telegram on April 24, 1895:

"Fairmount Glass Works, Fairmount, Ind.: Your letter twenty-third received. Enter order ten car loads as per your quotation. Specifications mailed. Grunden-Martin W. W. Co."

In response to this telegram, appellant sent the following:

"Fairmount, Ind., April 24, 1895. Grunden-Martin W. W. Co., St. Louis, Mo.: Impossible to book your order. Output all sold. See letter. Fairmount Glass Works."

Appellee insists that, by its telegram sent in answer to the letter of April 23d, the contract was closed for the purchase of 10 car loads of Mason fruit jars. Appellant insists that the contract was not closed by this tele-

gram, and that it had the right to decline to fill the order at the time it sent its telegram of April 24. This is the chief question in the case. The court below gave judgment in favor of appellee, and appellant has appealed, earnestly insisting that the judgment is erroneous.

We are referred to a number of authorities holding that a quotation of prices is not an offer to sell, in the sense that a completed contract will arise out of the giving of an order for merchandise in accordance with the proposed terms. There are a number of cases holding that the transaction is not completed until the order so made is accepted. 7 Am. & Eng. Enc. Law (2d Ed.) p. 138; Smith v. Gowdy, 8 Allen, 566; Beaupre v. Telegraph Co., 21 Minn. 155. But each case must turn largely upon the language there used. In this case we think there was more than a quotation of prices, although appellant's letter uses the word "quote" in stating the prices given. The true meaning of the correspondence must be determined by reading it as a whole. Appellee's letter of April 20th, which began the transaction, did not ask for a quotation of prices. It reads: "Please advise us the lowest price you can make us on our order for ten car loads of Mason green jars. * * * State terms and cash discount." From this appellant could not fail to understand that appellee wanted to know at what price it would sell it ten car loads of these jars; so when, in answer, it wrote: "We quote you Mason fruit jars * * * pints \$4.50, quarts \$5.00, half gallons \$6.50, per gross, for immediate acceptance; * * * 2 off, cash in ten days,"—it must be deemed as intending to give appellee the information it had asked for. We can hardly understand what was meant by the words "for immediate acceptance," unless the latter was intended as a proposition to sell at these prices if accepted immediately. In construing every contract, the aim of the court is to arrive at the intention of the parties. In none of the cases to which we have been referred on behalf of appellant was there on the face of the correspondence any such expression of intention to make an offer to sell on the terms indicated. In Fitchugh v. Jones, 6 Munf. 83, the use of the expression that the buyer should reply as soon as possible, in case he was disposed to accede to the terms offered, was held sufficient to show that there was a definite proposition, which was closed by the buyer's acceptance. The expression in appellant's letter, "for immediate acceptance," taken in connection with appellee's letter, in effect, at what price it would sell it the goods, is, it seems to us, much stronger evidence of a present offer, which, when accepted immediately, closed the contract. Appellee's letter was plainly an inquiry for the price and terms on which appellant would sell it the goods, and appellant's answer to it was not a quotation of prices, but a definite offer to sell on the terms indicated, and could not be with-

drawn after the terms had been accepted. It will be observed that the telegram of acceptance refers to the specifications mailed. These specifications were contained in the following letter: "St. Louis, Mo., April 24, 1895. Fairmount Glass-Works Co., Fairmount, Ind.—Gentlemen: We received your letter of 23rd this morning, and telegraphed you in reply as follows: 'Your letter 23rd received. Enter order ten car loads as per your quotation. Specifications mailed,'—which we now confirm. We have accordingly entered this contract on our books for the ten cars Mason green jars, complete, with caps and rubbers, one dozen in case, delivered to us in East St. Louis at \$4.50 per gross for pint, \$5.00 for quart, \$6.50 for one-half gallon. Terms, 60 days' acceptance, or 2 per cent. for cash in ten days, to be shipped not later than May 15, 1895. The jars and caps to be strictly first-quality goods. You may ship the first car to us here assorted: Five gross pint, fifty-five gross quart, forty gross one-half gallon. Specifications for the remaining 9 cars we will send later. Grunden-Martin W. W. Co." It is insisted for appellant that this was not an acceptance of the offer as made; that the stipulation, "The jars and caps to be strictly first-quality goods," was not in their offer; and that, it not having been accepted as made, appellant is not bound. But it will be observed that appellant declined to furnish the goods before it got this letter, and in the correspondence with appellee it nowhere complained of these words as an addition to the contract. Quite a number of other letters passed, in which the refusal to deliver the goods was placed on other grounds, none of which have been sustained by the evidence. Appellee offers proof tending to show that these words, in the trade in which parties were engaged, conveyed the same meaning as the words used in appellant's letter, and were only a different form of expressing the same idea. Appellant's conduct would seem to confirm this evidence.

Appellant also insists that the contract was indefinite, because the quantity of each size of the jars was not fixed, that 10 car loads is too indefinite a specification of the quantity sold, and that appellee had no right to accept the goods to be delivered on different days. The proof shows that "10 car loads" is an expression used in the trade as equivalent to 1,000 gross, 100 gross being regarded a car load. The offer to sell the different sizes at different prices gave the purchaser the right to name the quantity of each size, and, the offer being to ship not later than May 15th, the buyer had the right to fix the time of delivery at any time before that. *Sousely v. Burns' Adm'r*, 10 Bush, 87; *Williamson's Heirs v. Johnston's Heirs*, 4 T. B. Mon. 253; *Wheeler v. Railroad Co.*, 115 U. S. 34, 5 Sup. Ct. 1061, 1160. The petition, if defective, was cured by the judgment, which is fully sustained by the evidence. Judgment affirmed.

NEWMAN et al. v. AULTMAN, MILLER & CO. et al.

(Court of Chancery Appeals of Tennessee.
Jan. 28, 1899.)

BILLS AND NOTES—INNOCENT PURCHASERS—IMPUTED NOTICE.

1. A corporation holding a note, with notice of an equitable defense of the maker, before maturity transferred it as collateral security to another corporation, of which its president was an officer. It did not appear that he knew anything about the note, or that his duties as an officer of the transferee corporation brought him in contact with its financial affairs. *Held*, that the transferee was not chargeable with notice of the maker's equities.

2. Negotiable paper taken as collateral security for an antecedent debt, in consideration of the surrender of other collaterals for the same debt, which were given to the creditor at the time of creating the debt, is taken for value, in due course of business, and without notice.

Appeal from chancery court, Rutherford county; Walter S. Bearden, Chancellor.

Action by J. T. Newman and others against Aultman, Miller & Co. and others. There was a decree for defendants, and complainants appeal. Affirmed.

McLemore & Richardson, for appellants.
Palmer & Ridley, for appellees.

WILSON, J. The bill in this case was filed May 18, 1896, by complainants to enjoin two suits pending against them before a justice of the peace on two notes given in payment for a threshing machine bought from C. Aultman & Co. The central ground of relief relied upon is that the machinery was defective and worthless, and failed to come up to its warranty. The chancellor dismissed the bill, and gave decrees against the complainants and the sureties on their injunction bond, and they have appealed and assigned errors.

The bill, in substance, avers: (1) That complainants, in June, 1893, purchased from C. Aultman & Co., a corporation of the state of Ohio, a certain threshing machine, giving in payment therefor their three promissory notes, the dates, amounts, and maturity of which are stated. (2) A copy of the order for the machine is exhibited, and it is alleged that the machine was delivered to them by Neilson & Saunders, local agents of C. Aultman & Co., through whom they purchased it. (3) That C. Aultman & Co., though a foreign corporation, had offices and a regular place of business in Tennessee, and had on hand at Murfreesboro other machinery for sale at the time of their purchase, and that, at the time of the sale to them, it had not registered its charter with the secretary of state, and an abstract thereof in Rutherford county, as required by our statute, and that, this being so, it could not enforce the payment of their notes. (4) That said machine so sold them was defective in material and construction, and worthless for the purposes for which it was sold and bought, and certain defects are enumerated in the bill, and by reason of which, it is alleged, its war-

ranty to the effect that it would do as good work as any other machine of the same size was broken. (5) That upon its failure to do proper work they, in accordance with the terms of the warranty, notified C. Aultman & Co. and their local agents, Neilson & Saunders, when parties were sent out to remedy the defects, but that their efforts proved unavailing. (6) That they would again notify them of the failure of the machine, and they would again do work on it, when complainants would again try it, but without getting it to do proper work. (7) That, after repeated repairs and efforts to make it do proper work, without success, they hauled it to Murfreesboro, and tendered it to the local agents of C. Aultman & Co., who refused to receive it; that it was again offered to another agent of C. Aultman & Co. in 1894, and again refused; and that since its final demonstrated failure, and the refusal of the corporation to receive it back, the machine has been under a shed at the home of the complainant J. T. Newman, subject to the order of its vendor. (8) That C. Aultman & Co. became insolvent, and its affairs went into the hands of a receiver, and that in 1894 one Babcock, an attorney at law, purporting to represent C. Aultman & Co. and its receiver, came to Rutherford county, and tried to get them to sign papers in regard to the machine, which they refused. (9) That they had been sued on two of the notes given for said machine before a justice of the peace,—upon one in the name of the defendant, the Importers' & Traders' National Bank of New York, and upon the other in the name of Aultman, Miller & Co. (10) That these parties, suing on said notes, are not bona fide owners thereof, in due course of trade, for value received, and that, if they hold and own them at all, they hold them merely as collateral security, and it is not admitted that the notes have ever been transferred to them. (11) That, in addition, said notes are not negotiable, and that this is shown on their face; that the statements, on their face, rendering them nonnegotiable are that "they were given for one 24x36 thresher, #20,488," and "that, if this note is not paid at maturity, I agree to pay its holder 10 per cent. additional upon the amount due, as attorney's fees for collecting the same, if collected by an attorney in a court of record or otherwise, same to be taxed up in judgment." (12) That they have, in view of these facts, the right to have their said notes delivered up and canceled, and the pending suits before the magistrate to enforce their payment enjoined. The prayer of the bill is in accordance with its averments. A fiat for an injunction was granted upon condition that bond was given, and that complainants agree that all matters of controversy between them and defendants, in the suits pending before the magistrate, or involved in the notes sued on and sought to be enjoined, might be finally adjudicated, and proper decrees be entered in this case. The fiat further provides that the filing of the injunction bond was to

be deemed conclusive evidence of the acceptance of the conditions imposed. The injunction bond was given and filed. Aultman, Miller & Co. and the Importers' & Traders' National Bank of New York filed their answer to the bill on October 16, 1896. In this answer they aver that they each purchased a note of C. Aultman & Co., which were executed to said C. Aultman & Co. by complainants, but that they know nothing as to the consideration of the notes, further than what appears on their face. They admit that C. Aultman & Co. was a corporation of Ohio, but say that they do not know whether it had agents at Murfreesboro, Tenn., nor anything as to the negotiations leading up to the purchase of the machinery for which the notes were given. They alleged that they purchased the notes before their maturity for a valuable consideration, and without notice of any equities existing between the original parties, and they aver the fact to be that the machinery was bought directly from the home office of C. Aultman & Co., at Canton, Ohio, and that the purchase from said corporation by complainants was strictly interstate commerce. It is not, however, admitted by them that C. Aultman & Co. had not registered its charter, as required by the laws of this state. They say that they know nothing as to the nature or character of the machinery for which the notes were given, but that, if they are to be affected by defects in the same, they require full and strict proof thereof. They further allege that they know nothing in respect to the warranty of said machinery, and as to whether it failed to come up to its requirements, and that they know nothing as to notice being given to C. Aultman & Co. and Neilson & Saunders of its defects and of efforts to repair them, if any existed. They admit that C. Aultman & Co. became insolvent, and went into the hands of a receiver, but say they cannot state the date. They allege that they know nothing of the visit of one Babcock, attorney, to Rutherford county, and of the representations made by him, and of the papers said to have been prepared by him, and which are exhibited with the bill. They admit that they had brought suit on the notes as averred in the bill, and allege that they are the bona fide owners of the notes, in due course of trade, for value, and that they are negotiable. They admit that the notes were transferred to them as collateral security, but say it was for a large sum of money,—more than the amount of the notes,—advanced at the time, and they insist that, under these facts, they are innocent purchasers of the notes, before their maturity, for value, and hence protected against any equities that might exist against them as between the original parties, inasmuch as they had no notice of the alleged equities and defenses. Under the pleadings as thus made up, the parties took their proof; it being agreed that C. Aultman & Co. had registered its charter in this state, in compliance with our statutes. A considerable volume of evidence was produced. Chan-

cellor Bearden heard the cause upon its merits July 30, 1893. He held that Aultman, Miller & Co. and the Importers' & Traders' National Bank of New York were entitled to recover upon the notes respectively held by them, and thereupon gave them a decree for the amounts of their notes, with interest, and attorney's fees; the decree in favor of Aultman, Miller & Co. being for \$173.60, and that in favor of said bank being for \$175.26. These decrees were given against the complainants and the sureties on their injunction bond. The complainants and the sureties on their cost bond were taxed with the costs. The complainants, as before stated, appealed, and have assigned errors.

The errors assigned are, in substance: First, that the chancellor erred in holding that the defendants were innocent holders of the notes, for value, in due course of trade, and therefore protected against equities existing in favor of complainants; and, second, that he erred in not holding, under the facts, that Aultman, Miller & Co. was affected with notice of the equities against the note it held. We take it, therefore, from the assignment of errors, that counsel for appellants makes no question as to the negotiability of the notes. We briefly state the facts appearing in the record raising the questions presented by the assignment of errors. C. Aultman & Co., a corporation of the state of Ohio, sold complainants, J. T., Andrew, and William Newman, a threshing machine. It gave a written warranty that the machine was well constructed, etc., and would do as good work as any machine of its size, etc. The complainants gave three notes in payment for it, —two for \$122 each, due, respectively, September 1, 1893 and 1894, and the other for \$121, due September 1, 1895. One of these notes went into the hands of Aultman, Miller & Co., and one into the hands of the Importers' & Traders' National Bank of New York, under the following circumstances and in the following way: C. Aultman & Co. became indebted to said bank, in the early part of 1888, for borrowed money in the sum of \$100,000, and, to secure the same, deposited with it a large number of notes as collateral. These collateral notes, or some of them, from time to time before their maturity, were surrendered by the bank to C. Aultman & Co., and other notes taken in their place. September 23, 1893, the note of complainants held by it was received, along with other collaterals, in place of those surrendered at the time. In June, 1893, C. Aultman & Co. borrowed from Aultman, Miller & Co. \$52,500, and placed with the lender company a lot of notes as collateral security. September 21, 1893, some of these collateral notes were surrendered, being replaced by other notes, and among the notes put in place of the surrendered collaterals at the date stated was the note of complainants held by it, and involved in this controversy. There is no evidence that either of the defendants had, at the time, or

before they accepted the notes of complainants, any actual notice of any equities or defenses against them. It is sought to affect Aultman, Miller & Co. with constructive notice of equities and defenses, by proof that C. Aultman & Co. had notice of these equities, and that as Lewis Miller, who was president of C. Aultman & Co., was superintendent of works of Aultman, Miller & Co., the notice to him as president of the former company was notice to the latter, because of his official relation to it. It is to be stated in this connection that C. Aultman & Co. and Aultman, Miller & Co. were separate and distinct corporations, and that their home offices and plants were in different cities. It is true that one Lewis Miller was president of C. Aultman & Co. when these notes were deposited with Aultman, Miller & Co., and, also, superintendent of works of the latter company. We infer, also, that he was president of C. Aultman & Co. when the machine was sold to complainants, and their notes taken therefor. But the evidence wholly fails to show that he knew anything about the notes taken, in the first instance, as collateral to secure the loan made by Aultman, Miller & Co. to C. Aultman & Co., or the notes thereafter taken in place of the first collaterals surrendered. There is no proof that his position as superintendent of works of Aultman, Miller & Co. brought him in contact with its financial affairs, or that he was called in to pass upon paper offered to it. This is insufficient to bring home notice to Aultman, Miller & Co. of infirmities in the notes, even if it be assumed that C. Aultman & Co. had such notes. Bank v. Christopher, 29 Am. Rep. 262, and cases cited; Wickersham v. Zinc Co., 26 Am. Rep. 784; Le Neve v. Le Neve, 2 White & T. Lead. Cas. Eq. 171, note, and cases cited; Story, Ag. § 140; Rosemond v. Graham (Minn.) 56 N. W. 38. The proof very satisfactorily discloses that the machine sold to complainants by C. Aultman & Co., and for which the notes in issue were given, was seriously defective, and that in many respects it failed to come up to its warranty. Indeed, the weight of the proof is that it was for the most part worthless and unfit to do the work for which it was sold and bought. Its defective character was discovered soon after it was delivered, and notice was given to C. Aultman & Co. and its local agents at Murfreesboro. They sent men to repair or put it in shape. After it was thus repaired or worked on, complainants attempted to and did use it, but it still failed to do good work, and they again notified the local agents. Efforts were again made by the representatives of C. Aultman & Co. to make it do effective work; but, upon another trial, it still failed to do the work for which it was guarantied. After, perhaps, another effort at repair and another trial, its unfitness was finally demonstrated, in the opinion of complainants, and they tendered it to the local agents of C. Aultman & Co., who refused to receive it, and it

was thereupon put under a shed on the premises of one of the complainants, where it has since been subject to the orders of the vendor company. There is no evidence that any notice of defects was sent to the home office of C. Aultman & Co. after the first effort to repair it proved to be a failure. The foregoing presents all the material facts in the record bearing upon the issues raised by the assignment of errors.

The main question in the case is as to whether the appellees are innocent holders and purchasers of the notes, for value, in due course of trade. It is settled law that a party taking negotiable paper before its maturity, as collateral security for a loan or advance of money made at the time, is an innocent holder, for value, in due course of business, and is protected against equities existing in favor of the original parties to it, of which he has no notice. *Swift v. Tyson*, 16 Pet. 1; *Oates v. Bank*, 100 U. S. 239; *Griggs v. Day* (N. Y. App.) 32 Am. St. Rep. 709, 730, note, and cases cited (s. c. 32 N. E. 612); 4 Am. & Eng. Enc. Law (2d Ed.) 289, note 1, and cases cited; *Martin v. Bank*, 94 Tenn. 176, 28 S. W. 1097. If the paper is taken after its maturity, it is open, in the hands of the taker, to equities against it. *Martin v. Bank*, supra. Whether the holder of a bill or note, taken as collateral security for a pre-existing debt, is a holder, for value, in due course of trade, and therefore entitled to protection against equities, presents a question about which the authorities are in hopeless conflict. The authorities in favor of the affirmative are cited in 4 Am. & Eng. Enc. Law (2d Ed.) 189, 293, and notes. See, also, *Griggs v. Day* (N. Y. App.) 32 Am. St. Rep. 704, 730, note, and cases cited (s. c. 32 N. E. 612). The negative of the proposition is the law of this state and many others. *Martin v. Bank*, 94 Tenn. 176, 28 S. W. 1097; *King v. Doolittle*, 1 Head, 77; *Rhea v. Allison*, 3 Head, 176; *Craighead v. Wells*, 8 Baxt. 38; *Richardson v. Rice*, 9 Baxt. 290; *Ferriss v. Tavel*, 87 Tenn. 386, 11 S. W. 93.

Appellees insist that appellants are not innocent holders of the notes under the rule, because they did not take them as collaterals to secure a loan or debt contracted at the time, but that they took them as security for antecedent loans made to C. Aultman & Co. As said in the statement of facts, appellees made the loan to C. Aultman & Co. before these notes were received by them as collateral, but when they received them they surrendered collaterals of equal value, taken at the time the loans were made. Under this state of facts, are appellees innocent purchasers, for value, under the rule, and protected against equities and defenses available to the makers, as against C. Aultman & Co.? Chancellor Kent, in the early case of *Bay v. Coddington*, 5 Johns. Ch. 54, held that the transfer of negotiable paper as collateral security for a pre-existing debt of the transferor did not put the transferee in the position

of an innocent holder, for value, in due course of trade. This decision seems to have been the origin of this line of decisions in this country, and the doctrine has been followed or recognized in quite a number of the states. It has not received the approval of the supreme court of the United States and the courts of a number of the states. But Chancellor Kent did not decide that a party taking negotiable paper before maturity as collateral security for an existing debt, in consideration of the surrender by him of valuable collaterals taken at the time the debt was contracted, was not a holder, for value, as to the substituted collaterals taken by him. In *Stalker v. McDonald*, 6 Hill, 93, Chancellor Walworth said: "In *Coddington v. Bay*, 20 Johns. 637, this court did not, so far as I have been able to discover, run counter to any decisions which have been made in this state, or in England, previous to that time; for the decision admits that the bona fide holder of negotiable paper, who has received it for a valuable consideration, without notice or reasonable ground to suspect a defect in the title from the person from whom it was taken in the usual course of business or trade, is entitled to full protection, but that where he has received it for an antecedent debt, either as a nominal payment or as a security for payment, without giving up any security for such debt, which he previously had, nor paying any money, or giving any new consideration, he is not the holder of the note for a valuable consideration, so as to give him any equitable right to detain it from its lawful owner. This principle of protecting the bona fide holder of negotiable paper who has paid value for it, or who has relinquished some available security or valuable right on the credit thereof, is derived from the doctrine of the courts of equity. In other cases, where a purchaser has obtained the legal title without notice of the equitable right of third persons to the property, it has been uniformly held by the courts of equity in such cases that the purchaser, who has obtained the legal title as a mere security or payment of the pre-existing debt, without parting with anything of value, is not entitled to hold the property, as against the prior equitable owner; and, if he has paid but a part of the consideration or value of the property, he is only entitled to be considered as a bona fide purchaser pro tanto."

Numerous authorities hold that, when the collateral is given, any sum or valuable consideration passes,—such, for instance, as a further loan or advance, or an agreement for further time to pay the original debt, or an exchange of other securities then held for the new collateral,—the taker of the new or additional collateral is a holder for value, and protected against latent equities. *Goodman v. Simonds*, 20 How. 343; *Payne v. Bensley*, 68 Am. Dec. 318; *Crawford v. Spencer* (Mo. Sup.) 4 S. W. 713; *Roxborough v. Messick*, 87 Am. Dec. 346; *Depeau v. Waddington*, 36 Am.

Dec. 216. See other cases cited in 4 Am. & Eng. Enc. Law (2d Ed.) pp. 295, 296, and notes. *Cherry v. Frost*, 7 Lea, 1, 6; *Gosling v. Griffin*, 85 Tenn. 737, 3 S. W. 642; *Bank v. Stockell*, 92 Tenn. 255, 21 S. W. 523; and *Bank v. Looney* (Tenn. Sup.) 42 S. W. 149,—are not in conflict with the authorities just cited on the point under consideration. We think under the clear weight of authority, as well as sound reason, the appellees, in taking the notes in controversy, in consideration of the surrender of other collaterals of value held for the security of their debts, took them as innocent holders, for value, in due course of trade, and that the defenses interposed by appellants are not available against them. It results that the decree of the chancellor must be affirmed, with costs. The other judges concur.

Affirmed orally by supreme court, March 8, 1899.

EAST TENNESSEE, V. & G. RY. CO. v. NASHVILLE, C. & ST. L. RY. CO. et al.
(Court of Chancery Appeals of Tennessee. Oct. 20, 1897.)

RAILROADS—DEPOT—JOINT OWNERSHIP—PURCHASE OF INTEREST—ESTOPPEL BY DEED—ACTION AGAINST ONE STATE IN COURTS OF ANOTHER.

1. A passenger depot erected on land of one railroad company was owned by it jointly with two others, a fourth company having a leasehold interest therein. The first company leased its road, and, while its lessee was jointly using the depot with the other companies, extensive improvements were made; the fourth company paying a portion of the cost thereof. As to the agreement under which these improvements were made, an officer of one of the other companies testified that it was merely for the use of the depot, and not for a sale of any interest therein or in the land. Letters of the manager of the fourth company to the authorities thereof, written pending the negotiations for the agreement, suggested that such company should buy an interest, instead of continuing to rent, and that an opportunity was then offered of doing so. Such manager testified that his company purchased an interest, though he did not recollect whether the contract was in writing, and that, in addition to its share of the cost of the improvements, his company paid a certain sum, which payment was made to the superintendent of the depot, whose receipt stated the purchase, but who had no authority to sell any interest in the depot. The lessee of the company owning the land had no authority to act for the latter in making the improvements, nor were the other companies authorized to sell any interest in the property. *Held*, that there was no purchase of an interest in the depot or land, but merely an agreement for a continued joint use.

2. One railroad company made a written contract to build on land owned by it a passenger depot, for the accommodation of itself and two other roads, which were each to pay a certain sum, and take a certain interest therein. A subsequent deed of the first company, conveying half the land on which the depot was located to one of the others, recited the making of said contract, and that the depot was erected by the first company under it. Subsequently the first company sued to compel the others to pay their share of repairs made by the former; the bill charging that the three companies joint-

ly used the depot, and were jointly bound by written contract to pay for repairs. The other companies admitted the joint use, but denied the contract. A decree was entered reciting that the three companies jointly owned the depot in certain proportions, as shown by their written contract. *Held*, that the decree merely declared a joint ownership in the depot itself, and not in the land.

3. The governor of a state owning a railroad was authorized by law to sell and convey only such land as was not necessary to the road for any purpose. He made a deed purporting to convey half of the land on which a depot had been erected; the deed reciting that such depot had been erected under a contract with other roads, the grantee in the deed being one. The deed also recited that the governor did not consider the land as necessary to the road. *Held*, that the deed was not binding as an estoppel, but its recitals were merely evidence.

4. Where a railroad depot is used and owned jointly in certain proportions by certain roads, the expenses being borne proportionately, and another company has the right to use the same on payment of a certain sum and its share of the expense, one or more of the companies which have ceased to use the depot cannot, without consent of all, have it sold and the proceeds divided, or the whole matter wound up as a partnership concern.

5. Acts 1847-48, c. 195, authorizing the state of Georgia to build a railroad in the state of Tennessee, gave the former state the same rights, with the same restrictions, as were previously granted to a railroad company by Acts 1845-46, c. 1, which made that company liable to be sued. The state of Georgia owned, jointly with certain railroad companies, a depot in the state of Tennessee. *Held*, that the state of Georgia could be sued in the courts of Tennessee by the other owners of the depot, seeking to compel a sale of the depot, and division of the proceeds.

Appeal from chancery court, Hamilton county; H. A. Chambers, Special Chancellor.

Bill by the East Tennessee, Virginia & Georgia Railway Company against the Nashville, Chattanooga & St. Louis Railway Company and others. The Memphis & Charleston Railroad Company, a defendant, filed a cross bill. From a decree for complainant in both bills, the other defendants appeal. *Reversed*.

Brown & Spurlock, for appellant Nashville, C. & St. L. Ry. Co. Garnett Andrews, W. P. McClatchy, and W. A. Wimblish, for appellant state of Georgia. Cooke, Swaney & Cooke, for appellee East Tennessee, V. & G. Ry. Co. F. P. Poston, for appellee Memphis & C. R. Co.

NEIL, J. This case presents a contest between the Southern Railway Company (representing and owning the rights of the company named as complainant in the caption), and the Nashville, Chattanooga & St. Louis Railway Company (representing and owning the rights of the Nashville & Chattanooga Railway Company), and the Memphis & Charleston Railroad Company, and the state of Georgia, owner of the Western & Atlantic Railroad. The subject of the contest is the Union Passenger Depot on Ninth street, in the City of Chattanooga. The Southern Railway Company appears by an original and amended bill filed in the name of its predecessor, and adopted by it. The Memphis & Charleston

Railroad Company was made defendant to the original bill above referred to, and filed its cross bill. The state of Georgia appears by demurrer and answer, and the Nashville, Chattanooga & St. Louis Railroad Company appears by answer. These various companies will be hereinafter designated (as may be most convenient) by their proper titles, or as follows: The Nashville, Chattanooga & St. Louis Railroad Company will be called the "Nashville Company," the Memphis & Charleston Railroad Company will be called the "Memphis Company," the Southern Railway Company will be called the "Southern Company," and its predecessor will be called the "East Tennessee Company."

The state of Georgia insists in her demurrer that she cannot be properly sued in the state of Tennessee, because she is a sovereign state. We will not consider this matter at present, but will now treat the case as if that point, with respect to the present litigation, were not well taken. In a general way, the rights of the Memphis Company and of the Southern Company stand on the same footing, while the rights of the Nashville Company and of the state of Georgia stand on substantially the same footing. The general purpose sought to be reached by the original bill is to have the Union Passenger Depot, above referred to, sold, for division of proceeds among the alleged owners. It is charged in the original bill and amended bill and the cross bill that this property is owned, one-fourth by the Southern Company, and one-fourth by the Western & Atlantic Railroad, designated in the pleadings of the complainant as a quasi corporation, or that this one-fourth is owned by the state of Georgia, one-fourth by the Nashville, Chattanooga & St. Louis Railroad Company, and one-fourth by the Memphis & Charleston Railroad Company. This claim of ownership in the Memphis Company and in the Southern Company is denied in the answers.

The facts are as follows:

On the 12th of September, 1857, the following instrument was executed by the parties whose names are signed thereto:

"Chattanooga, September 12th, 1857. We, the undersigned, on the part of the roads we respectively represent, do hereby agree as follows: That the W. & A. R. Road authorities shall, as soon as the same can be reasonably accomplished, have erected a passenger house in Chattanooga for the accommodation of the different railroads meeting at that point. The house to be, in plan, size, and finish, in all respects the same as the passenger house at Atlanta, with the privilege, however, of making the walls of stone, in whole or in part, at the option of the superintendent of the W. & A. R. R. The Nashville and Chattanooga R. R. Company agrees to pay \$10,000 towards the cost of said house, to be advanced from time to time, as the work progresses, in such sums as the engineer of the N. & C. R. Road may consider properly due; and for which

the said N. & C. Railroad shall be entitled to one-third of the building when completed. The house to cover the site heretofore designated for a joint passenger house. The W. & A. R. R. shall have control of two-thirds of said house, and the right to use and receive the proceeds of one-third. [Signed] J. M. Spurlock, Supt. W. & A. R. Rd. Signed in duplicate. [Signed] Jno. H. Lumpkin. [Signed] V. K. Stevenson, Prest., by J. A. Whiteside, Director for the N. & C. R. R. Company."

On March 24, 1858, the following additional instrument was made:

"Chattanooga, March 24, 1858. The Nashville and Chattanooga Railroad Company consents to a modification of the contract of the 12th of September, 1857, between James Spurlock, superintendent W. & A. R. R., and the Nashville and Chattanooga Railroad Company, for building a joint passenger house at Chattanooga, as follows: First. The W. & A. R. R. shall build a house with all due economy. 2nd. The Nashville and Chattanooga Railroad Company shall own one-fourth, embracing the Western track, and pay \$10,000. 3rd. The E. T. V. & G. R. R. to take one-fourth at \$10,000. * * * 5th. The remaining fourth to belong equally to the three. But, if the cost of the house exceeds \$30,000, the W. & A. R. R. shall, out of the proceeds of the sale of the remaining fourth, be reimbursed the amount of the excess, but this excess or reimbursement shall in no event exceed \$5,000; and the balance of the proceeds of sale of the one-fourth shall belong equally to, and be so divided between, the three parties named. 6th. The roof may not be covered with tin, but with other good, substantial, durable material, suitable to its slope. [Signed] James A. Whiteside, Director, and Member of the Executive Committee, N. & C. R. R.

"I agree, on the part of the Western and Atlantic Railroad, to the above modification, if approved by the executive of Georgia, and concurred in by the East Tennessee and Georgia Railroad. [Signed] John W. Lewis, Supt. W. & A. R. R."

The above two instruments appear as Exhibits A and B to the amended bill. There is another instrument, filed as Exhibit C to that bill, which is without date; but the proof shows that it opened the negotiations upon the subject, and was certainly prior to the paper last copied above, and we infer from the testimony of Campbell Wallace that it opened the negotiation,—that it was the first of the series of papers. This paper contains but little additional to what is in the other papers, but is useful for construction. It is as follows:

"The undersigned, for the respective railroad interests under their charge, agree as follows: 1st. That a passenger shed or house shall be erected at Chattanooga for the joint accommodation of all their roads, to be paid for and owned equally by each, and to be constructed on a plan agreed on, not to cost

more than \$30,000, to be located on the site occupied by the foundation of the passenger house heretofore commenced. 2nd. After satisfying the wants of the W. & A. R. R. at the depot grounds, the E. T., V. & Ga. R. R. Co. shall, for access to and occupation of the passenger house, have sufficient suitable ground for their tracks, and conducting the passenger transportation into and through it, also, sufficient grounds, to be hereafter designated, for railroad tracks, and for conducting their freight business with connecting roads, by paying to the superintendent of the W. & A. R. R. the original cost of such portion of the depot grounds as may, under this agreement, be obtained by the E. T., V. & G. R. R. Company. [Signed] V. K. Stevenson, Prest. N. & C. R. R., by J. A. Whiteside. James Spurlock, Superintendent W. & A. R. R."

There is introduced in evidence by the complainant an instrument of writing between Joseph E. Brown, as governor of the state of Georgia, and the Nashville & Chattanooga Railroad Company, by which Gov. Brown undertook to convey to the Nashville & Chattanooga Railroad Company one-half of the depot grounds in controversy in this case. The deed, however, is introduced for the purpose of using the recitals therein which precede the conveyance. These recitals are as follows:

"Whereas, on the 13th day of November, 1855, V. K. Stevenson, as president of the Nashville and Chattanooga Railroad, and James F. Cooper, as superintendent of the Western and Atlantic Railroad, agreed in writing, subject to the ratification of the board of directors of the Nashville and Chattanooga Railroad Company, and of his excellency, H. P. Johnson, then governor of Georgia, to exchange certain lands belonging to said company and to the state of Georgia, in the said city of Chattanooga, at and about the place now known as the 'Passenger Depot,' near the Crutchfield House, upon certain terms specified in said agreement, with a view to the erection of a passenger depot, which said contract was ratified by his excellency, H. P. Johnson, the 13th of December, 1855, and by the board of directors of the Nashville and Chattanooga Railroad Company on the 24th of December, 1855; and whereas, on the 24th day of March, 1858, a contract was entered into between James A. Whiteside, director, and a member of the executive committee, of the N. & C. R. R. Company, and John W. Lewis, the then superintendent of the W. & A. R. R., in modification of the former contract between the authorities of said road for the building of a passenger depot upon the lien [land] of [or] the grounds which were to belong to the said company and said state of Georgia under said first-mentioned contract, which said depot has been erected by the said John W. Lewis, as superintendent of said W. & A. R. R., under said contract last mentioned, which was ratified by me, as governor of Georgia, on the 5th day of April, 1858, which said depot is now own-

ed by the authorities of said two roads and by the East Tennessee, Virginia & Georgia Railroad Company, which said company, by its president, C. Wallace, by a writing on the back of said agreement, agreed to take an interest in said depot. The said Western & Atlantic Railroad, under the said contract, has one of the four tracks in said depot; the Nashville & Chattanooga Railroad Company, one track; the East Tennessee, Virginia & Georgia Railroad Company, one; and the remaining or fourth track is leased to the Memphis and Charleston Company for thirty years, if said company wishes to keep it so long, which lease has been about one year for the use of said track. Said Memphis and Charleston Railroad Company is to pay interest on \$10,000 at seven per cent., or \$700 per annum. Of this sum, one half, or \$350, belongs to the Western and Atlantic Railroad, and the other half, or \$350, is to be divided equally between the Western & Atlantic Railroad, the Nashville and Chattanooga Railroad Company, and the East Tennessee and Georgia Railroad Company, if last-named company claims, and at the end of said lease said track is to belong to the said three roads in the proportions above mentioned, to wit, the W. & A. R. R. to have half of it; the other half to belong jointly to the three roads, if the E. T., V. & G. R. R. Co. claims any interest in said track. Now, for the purpose of settling all difficulties and misunderstandings between the authorities of said roads, and of carrying out the contract entered into by my said predecessor in office, for and in consideration of the facts above recited, and of the sum of \$8,000 by said Nashville and Chattanooga Railroad Company to be immediately paid into the treasury of the Western and Atlantic Railroad, and for the further consideration that the said last-named company is to convey to the state of Georgia, for the use of the W. & A. Railroad, before this deed shall take effect," etc.

Here follows a description of $\frac{20}{100}$ of an acre, which is to form part of the consideration, and then follows the conveyance above referred to, or the conveying part of the instrument. This deed is dated August 17, 1860.

On the 4th of October, 1873, a bill was filed by the governor and comptroller general of the state of Georgia against the Nashville & Chattanooga Railroad Company, the East Tennessee, Virginia & Georgia Railroad Company, and the Memphis & Charleston Railroad Company. This bill charged that the Western & Atlantic Railroad was the property of the state of Georgia; that prior to the year 1871 it was operated by the state; that the governor for the time being was charged by law with the appointment of a general superintendent, who operated the road for the benefit of the state; that the road, at the time the bill was filed, was under lease to a company called the Western & Atlantic Railroad Company; that the governor and comp-

troller general were charged by law with the collection of all moneys due from all sources to the road on account of dealings prior to the lease. The bill then continues: "Complainant further shows and charges that complainant and defendants occupied and used jointly a certain building in the city of Chattanooga, in said county, known as the 'Union Passenger Car Shed,' or 'Passenger House,' which was at one time the property of complainant, or may have been built by complainant and the Nashville and Chattanooga Railway Company. All of said railroad companies and said Western & Atlantic Railroad of Georgia are bound jointly by some written contract for the payment of all expenses incurred in repairing said building, the roads, streets, and approaches thereto. * * * It further charges that in the year 1870 one Foster Blodgett was a superintendent of the Western & Atlantic Railroad, and as such, by virtue of the said written contract, and by the consent, approval, and request of the other roads named, caused certain improvements, repairs, etc., to be made on said joint property at the cost of \$15,000, or other large sum of money, all of which was then necessary for the use and protection of said property, and that said superintendent had full authority to make said repairs at the joint expense of the roads named. * * * Complainants charge that each of the respondents is justly indebted to them for one-fourth part of said expenses, and that they refuse to pay the same." The complainants ask to recover the amount so alleged to be due from each. Subsequently the bill was so amended as to cause the suit to stand in the name of the Western & Atlantic Railroad of Georgia, for the use of the state of Georgia, as the party complainant, against the defendants named.

The East Tennessee, Virginia & Georgia Railroad Company answered, saying: "It is true that the state of Georgia and the respondent did jointly use the passenger or car shed by an arrangement between them, but it is not true that all of said railroad companies or that this respondent is bound, jointly with the Western & Atlantic Railroad, or in any other manner, by any written contract, for the payment of all or any expenses incurred in repairing said building, the roads, streets, and approaches thereto. It is not true that this respondent has or ever had a copy of any such contract, or any contract, in relation to said repairs, for the reason that none ever existed, so far as the present officers or agents of respondent have any knowledge, or so far as they have been able to learn from their predecessors, and hence cannot file any such copy, as required by the bill, and deny that any such ever existed, so far as they or respondent have or has any knowledge, information, or belief." This defendant further denies having consented to any such repairs, or to be in any way bound therefor.

The Nashville & Chattanooga Railroad Company answered, admitting "that the Western & Atlantic Railroad and the East Tennessee, Virginia & Georgia Railroad jointly used and occupied a certain building in the city of Chattanooga, Tennessee, known as the 'Union Passenger Car Shed,' which was built by the said Western & Atlantic Railroad and this respondent. The terms and conditions under which said building was erected are set forth in two contracts made by the said parties. Copies of the same are filed herewith, marked Exhibits A and B, and prayed to be taken as part of this answer,"—exhibiting a copy of the two instruments first copied in this opinion. But this road denied all liability for the repairs.

A pro confesso was taken against the Memphis & Charleston Railroad Company. Subsequently the complainant in that bill filed an amended bill against the same defendants, in which bill it recited the contents of the former bill in this language: "In which it is alleged, among other things, that complainants and said several defendants were joint owners of, or jointly occupied, a certain building, situated in the city of Chattanooga, and known as the 'Union Passenger Depot'; that said building originally belonged to the Western & Atlantic Railroad, or to the Western & Atlantic Railroad and Nashville & Chattanooga Railroad jointly, but that the other defendants had each purchased a one-fourth interest in said building, and that said four railroad companies were joint owners thereof at the time of the filing of said bill.

* * * Complainant, having first obtained leave of the court so to do, now files this as an amended bill in said case, and now, by way of amendment, shows and charges that said original bill was filed under a mistake of facts as to the rights of the Memphis & Charleston Railroad Company; that in fact said Memphis & Charleston Railroad Company has no interest in said passenger depot and grounds, and owns no part of the same, nor ever had, but that said property is owned by the other parties to said bill, and that the said Memphis & Charleston Railroad Company is a tenant of the other companies, and occupies said property under some contract of renting, or under a lease, and is bound to pay rents to the other companies. Complainant files this bill to prevent the statements made in the original bill from operating by way of estoppel against complainant."

Upon this bill being filed, the Memphis & Charleston Railroad Company waived process and entered its appearance, and agreed to defend the suit; and, after the appearance of this defendant was duly entered, the complainant then dismissed both the original bill and the amended bill, as to the Memphis & Charleston Railroad Company.

There was a consent decree entered in the cause, but it was subsequently set aside, and a decree entered as follows: That it appeared

from the pleadings and proof "that the East Tennessee, Virginia & Georgia Railroad Company and the Nashville, Chattanooga & St. Louis Railroad Company are each joint owners with the state of Georgia in the depot in Chattanooga known as the 'Union Passenger Depot,' fronting on Ninth street, in said city, and running back in a southerly direction, and that each of said respondents owns a one-fourth interest in the same, and complainant one-half, as is shown by the written contract of the parties. And because it further appears to the chancellor that since the respondents have been such joint owners of said depot and premises used and known as such 'Union Passenger Depot,' as aforesaid, the complainant has made large expenditures of money in the necessary and proper repairing said depot and premises, for which each of the aforesaid respondents is justly and equitably liable, and bound to contribute each one-fourth of the same." Thereupon each of the defendants agreed that the true amount due from each was \$1,250, and a decree was entered therefor in favor of the complainant against each. This decree was rendered on the 3d day of November, 1875.

Prior to this time the state of Georgia had leased the Western Atlantic Railroad to a corporation styled the Western & Atlantic Railroad Company. This lease was made on the 27th day of December, 1870, to run for 20 years; that is to say, till the 27th day of December, 1890. During this period of 20 years the road was used and occupied by the company last named. The road itself went by the name of the Western & Atlantic Road, being the name used to designate a property owned by the state of Georgia; not being a corporation or a quasi corporation, as stated in some of the pleadings. During the period of this lease the large extension and improvements of the property were made. It was extended about 60 feet on the front, and about 100 feet on the rear, and was otherwise very greatly improved and beautified. We need not go into this matter particularly, but may adopt the language of one of the bills, which the answers admit to be true, namely: "It was made a splendid depot, with all modern improvements and conveniences; and, when completed, it was the admiration of all who saw it, and thoroughly delighted the enthusiastic citizens of Chattanooga, who, in their vaulting ambition and pride, imagined that there was no city which had a brighter future for greatness and glory than Chattanooga." Prior to this time the Memphis & Charleston Railroad Company had been paying annually \$700 rent for the use of the Union Depot, along with the other railroads; that is to say, the other railroads prorated the expense, as shown by the decree before mentioned, while the Memphis & Charleston Railroad Company paid rent, as stated. It thus appears that, before the new improvements were made, all of the roads now involved in the present controversy used the Union De-

pot as a joint terminal. How far this antedated the year 1875 does not clearly appear from the proof, but certainly this joint use was in existence as far back as 1875. A part of the time the Memphis & Charleston Railroad Company seems to have paid one-fourth of the expenses of operating the Union Depot, and a portion of the time the \$700 rent. It was paying the latter at the time the new improvements were made. And it seems that it had a lease for thirty years, at a rental of \$700 per annum, one-half of which was to go to the Western & Atlantic Railroad, and one-half of the remaining half to the same, and one-fourth of this remaining half to the East Tennessee, Virginia & Georgia Railroad, and one-fourth to the Nashville, Chattanooga & St. Louis Railroad."

The situation at the time the new and extensive improvements were made, then, was that all four of the roads were using the Union Depot as a terminal. It was a mere shed, and totally inadequate to the business of the road. It was thereupon determined by the four roads to make the new and costly improvements referred to, so that they might have a handsome and commodious joint terminal. The Memphis & Charleston Railroad Company understood that it was buying an interest and abandoning the lease. It paid one-fourth of the expense of the repairs and improvements, and in addition to this it paid \$5,000 to Maj. G. C. Connor, who was at the same time the agent of the Western & Atlantic Railroad Company (the old corporation that had the lease from 1870 to 1890), and superintendent of the Union Passenger Depot. But as such superintendent he had no power to sell any portion of the property or to make contracts. His duties in this capacity were merely to collect what was due to the depot, and to prorate its expenses among the companies. What became of this \$5,000 does not appear from the proof. It does not appear that the state of Georgia ever received it, and the records of the Western & Atlantic Railroad Company show no trace of it; and Mr. Connor is dead, and the parties are deprived of the benefit of his testimony to explain this item and the course it took. It is obvious, under these circumstances, that no rights can be predicated upon the payment of the \$5,000. But the Memphis & Charleston Railroad Company paid an equal portion of the expense of the repairs and improvements; they, with the Nashville & Chattanooga Railway Company and the East Tennessee, Virginia & Georgia Railroad Company, each paying about \$14,000, while the Western & Atlantic Railroad Company paid only about \$9,100. After this time (the year 1882) each of the four roads continued to pay, pro rata, the expense of operating the Union Depot, until about the year 1891, when the Memphis & Charleston Railroad Company and the East Tennessee Company left this depot and sought other quarters.

But to return to the acquisition of interests

in the property: It must first be stated that the Western & Atlantic Railroad Company, which was operating the road at this time under the lease of 1870-90, had no authority to act for the state of Georgia in the matter of the repairs and improvements, and had no title to the property, other than the lease title. It had no right or power to sell the Union Passenger Depot, or any interest therein, other than to permit a joint use, as had previously been permitted. The title to the property on which the depot stood was in the state of Georgia. That state had nothing to do with the negotiations concerning the repairs and new improvements of 1881-82. Under the terms of the lease to the Western & Atlantic Railroad Company, that company was to return the property to the state in as good condition as at the beginning of the lease. That state had nothing to do with the terms of joint occupation during the years 1870-90, being then out of control of the property; its lessee having control. So during only a short space of the time after the expiration of that lease has it had control, inasmuch as it appears in the proof that during the year 1890, after the expiration of that lease, it again leased the property (this time to the Nashville, Chattanooga & St. Louis Railroad Company, for the period of 29 years); and that company has since been operating it under the designation of the Western & Atlantic Railroad Company. So it is apparent that no rights whatever, as against the state of Georgia, can be based upon the repairs and costly improvements of 1881-82.

We next inquire as to the persons among whom negotiations for the repairs and improvements of 1881-82 were carried forward. We have found that the state of Georgia had no part in them. The proof shows that these persons were the Western & Atlantic Railroad Company (as then operating under the lease of 1870-90), the Nashville & Chattanooga Railroad Company, the East Tennessee, Virginia, & Georgia Railroad Company, and the Memphis & Charleston Railroad Company. None of these companies had any authority to contract for a sale of the property or any interest therein, if we exclude such inferences as may be drawn from the documents adverted to in the beginning of the opinion, which we shall presently consider. We may, however, in passing, say with regard to the deed of Gov. Joseph E. Brown, of date —, 1860, that on a cursory examination it would (treating it as valid) seem to vest a half interest in the Nashville & Chattanooga Railroad Company; but it will be observed that, by the terms of that deed, certain things were to be done before title vested, and it does not appear from this record that these things (the paying of \$8,000, and the conveying of the $\frac{2}{100}$ of an acre of land) were done. So that, leaving out of view the documents referred to, we come to consider the actual transaction of 1881-82, as it went forward between the parties. As stated, the parties were the West-

ern & Atlantic Railroad Company (of 1870-90), the East Tennessee, Virginia & Georgia Railroad Company, the Nashville & Chattanooga Railroad Company, and the Memphis & Charleston Railroad Company. The only witnesses who testified to the transaction were Mr. Grant and Maj. J. W. Thomas,—the former, superintendent of the Memphis & Charleston Railroad Company; the latter, superintendent of the Nashville & Chattanooga Railroad Company. Mr. Grant's testimony was stricken out by the master, and this action was not changed by the chancellor, and no ruling was made by him upon the matter, so we cannot look to his testimony. The same thing must be said of the testimony of Col. McShee, and the exhibits to his deposition, the latter of which speak to the same point. The only testimony left, then, as to the actual transaction, is that of Maj. Thomas. His testimony upon the point is as follows: "Q. Did you make an agreement or agreements with the other roads under which the improvement or extension of the Union Depot was made in 1880 and 1881? Ans. Representing this company [Nashville & Chattanooga Railroad Company], I was a party to the agreement. Q. What was the agreement between the roads in regard to that extension? Ans. Each road was to pay one-fourth of the cost of the extension. Q. Was this extension made under, and according to the terms of, the original contract between these different roads? Ans. It was not. It was a new agreement. Q. State if any agreement was made with the Memphis & Charleston Railroad Company, and, if so, what that agreement was, so far as the Nashville, Chattanooga & St. Louis Railroad Company was concerned. Ans. They were to pay one-fourth of the cost of the extension. Q. Please state whether or not you ever made for the Nashville, Chattanooga & St. Louis Railway any agreement to sell to the Memphis & Charleston Railroad Company a one-fourth interest in the Union Passenger Depot property. Ans. I did not. Q. If you ever had any negotiations to this effect with Jno. A. Grant, or any one else representing the Memphis & Charleston Railroad Company, please state what they were. Ans. I had a consultation with Mr. Grant with reference to plans of the building, but none with reference to the sale of any interest in the property. As superintendent, I had no authority to sell any property belonging to the company. Q. Did the board of directors of this company ever take any action or consider any proposition authorizing such sale to be made? Ans. No such action was ever taken by the board of directors of this company, except with reference to the original contract made in 1858, when I think some action was taken,—possibly about 1860. Q. Please state when you first heard that the East Tennessee, Virginia & Georgia Railroad Company, or its officials, or the officials of the Memphis & Charleston Railroad Company, were claiming any interest in the land upon which the Union

Depot is located. Ans. Not until the commencement of the present suit. Q. Was any such claim ever made by the officers of the original company entering into the agreement? Ans. Not that I am aware of. Q. Please state, under the agreement of 1882 to extend the Union Depot, what rights and interest each company were to have, and whether it had any reference to the fee in the lands on which the erections were to be made. Ans. It had no reference to the fee in the lands,—only for the use of the depot; each party to contribute one-fourth to building the addition, and pay one-fourth to the expense of operating the depot. Q. Who was present at the time the agreement was made between the different roads for the extension of the Union Passenger Depot at Chattanooga? Ans. My recollection is, Jno. A. Grant [superintendent of Memphis & Charleston Railroad Company], R. A. Anderson, of the Western & Atlantic Railroad, and myself. I do not remember who represented the East Tennessee, Virginia & Georgia Railroad. Q. Was anything said at that time about the fee in the land, at all? Ans. None that I have any recollection of. Q. At that time the Memphis & Charleston Railroad was using the Union Passenger Depot under a contract of lease for thirty years, extending from what time? Ans. 1858 to 1883. Q. Was the Memphis & Charleston Railroad Company in 1881 using the Union Depot under that lease? Ans. Yes, sir. Q. Please state what were the inducements to the Memphis & Charleston Railroad Company to pay \$14,000, or about that sum, for the extension of the Union Passenger Depot, and what consideration moved it. Ans. Because the original depot was a mere shed, and totally inadequate to the business of the roads. Q. Was any agreement made at the time the extension was agreed upon as to how long the Memphis & Charleston Railroad Company should use the depot? Ans. None. Q. Did you ever hear any of the officials of the said road [East Tennessee, Virginia & Georgia Railroad Company] ever say anything about the land, as separated from the Union Depot building itself? Ans. No, sir. Q. Did not all the officials of the East Tennessee, Virginia & Georgia Railroad, and its successor, the Southern Railway Company, always claim that that road owned a one-fourth interest in the Union Passenger Depot at Chattanooga? Ans. I have always heard the officers of the East Tennessee, Virginia & Georgia Railroad Company claim one-fourth interest in the building, but never discussed the question with the officials of the Southern Railway."

Nor would the result be different if we could properly consider the exhibit to Col. McGhee's deposition and the testimony of Mr. Grant. The exhibit referred to consists of a letter from Mr. Grant to the authorities of the Memphis & Charleston Railroad Company suggesting that that company should buy an interest in the property, instead of continuing to rent, and saying that an opportunity was

now offered of buying an interest. And his testimony is to the following effect: He states, in round terms, that a purchase of a one-fourth interest was made, which purchase he says was either verbal or in writing, but he cannot say which; that his company was to pay \$10,000 for that interest, and was to pay one-fourth the cost of operating the depot. He says: "I cannot now remember from whom the purchase was made, but I had conferences with J. W. Thomas, president and general manager of the Nashville, Chattanooga & St. Louis Railway Company, and with Gen. McCrea, the general manager of the Western & Atlantic Railroad, about this purchase, and it must have been made from them. At about the time of this purchase I also had conferences with Mr. Thomas, president of the Nashville, Chattanooga & St. Louis Railway Company, and Gen. McCrea, of the Western & Atlantic Railroad, about the plans of the depot to be built, and the other improvements placed upon the property, and we finally agreed upon and adopted plans therefor. I represented the Memphis & Charleston Railroad Company and the East Tennessee, Virginia & Georgia Railroad Company in the adoption of these plans. Q. Was this purchase in writing? And, if so, state what, if you know, became of the writing evidencing the same. Ans. My recollection is not clear as to whether the contract was in writing. It was, however, recognized and stated in the written receipt signed by G. C. Connor, superintendent of the Union Passenger Depot at Chattanooga, for \$5,000, dated August 13, 1881. Mr. Connor was at this time agent of the Western & Atlantic Railroad Company." We have already stated the value of this receipt as an evidential fact, and the extent of Maj. Connor's authority.

As already stated, if we could treat this testimony as properly before the court, it would fall far short of establishing the fact that there was any valid purchase. The statute of frauds is pleaded by the state of Georgia and the Nashville, Chattanooga & St. Louis Railway Company; and, besides, the state of Georgia, even under the foregoing testimony, was no party to the agreement. And, in addition to this, the burden of proof would be upon the Memphis & Charleston Railroad Company to establish the proposition, and this testimony is denied by Maj. Thomas. And, besides all this, the proof in this record fails to show that the Nashville & Chattanooga Railroad Company, or its successor, the Nashville, Chattanooga & St. Louis Railway Company, had any title to the ground on which the depot stood, unless such title arose from the documents which we shall presently consider. So we must conclude that this testimony fails to establish that there was any purchase by the Memphis & Charleston Railroad Company, so that it follows there is no proof to sustain the claims of the Memphis & Charleston Railroad Company to the purchase of any interest in the depot and

depot grounds. Its claim to such purchase is rested upon the transaction of 1881-82, and, having failed to establish the claim, we must find that it made no purchase of the depot or depot grounds. It does not claim any part in the prior transactions arising under the document referred to. And, as to all the parties, our conclusion is that the transaction of 1881-82 amounted only to an agreement between the Western & Atlantic Railroad Company (operating under the lease of 1870-90), the Nashville & Chattanooga Railroad Company (or its successor, the Nashville, Chattanooga & St. Louis Railway Company), the East Tennessee, Virginia & Georgia Railway Company, and the Memphis & Charleston Railroad Company, to jointly make the repairs and improvements, and to jointly use the building as a joint terminal, with the right in each road to lay and use a track for its convenience and use, and that each was to have equal facilities in the building and its use, and that this right of joint use was to continue so long as either one of the companies desired, and that this right of use has been recognized by the present company operating the Western & Atlantic Railroad, but that it was a condition of the contract that the companies enjoying the right should equally contribute, in the proportion of one-fourth each, to the expense of constructing the building and keeping it up. The state of Georgia, however, was not a party to this agreement. We may add that the proof shows that no objection has ever been made by any of the roads to the use of the building and tracks under the above contract by the Memphis & Charleston Railroad Company or the East Tennessee, Virginia & Georgia Railway Company, that they voluntarily ceased to use their rights under this contract in 1891, and that in the pleadings of the defendants, except the state of Georgia, their right to resume this use on complying with the terms of the contract is admitted.

We now proceed to consider what rights, if any, were acquired by the East Tennessee, Virginia & Georgia Railway Company and the Nashville & Chattanooga Railway Company by virtue of the documents copied into the opinion:

First, as to the recitals in Gov. Brown's deed. This deed was not excepted to, and it must be taken for what it is worth. As already stated, the proof shows that the property known as the Western & Atlantic Railroad (not company) is merely a piece of property or an investment owned by the state of Georgia. The governor had no authority, under the Georgia law, to sell any land pertaining to that property, except such as was given him by section 1008 of the Code of that state. This section reads as follows: "The governor or superintendent shall not sell any part of the right of way, nor any property or land of the road, that may be necessary for the erection of depots, wood-yards, water stations, or for any other improvement, to the con-

veniences or interest of said road; but they may sell any land of the road, if of no use to it, in the manner iron is sold—advertising it in a public gazette at Atlanta and in the county where it lies, and in a public gazette thereof, if one, and the superintendent shall execute deeds thereto in his official capacity." It does not seem, from this section, that the governor had any authority to make the deed, although he recites therein: "Which [the property he is attempting to convey] I do not consider necessary to the W. & A. Railroad for depots, wood yards, nor water stations; nor do I consider that it will be now or at any other time necessary or convenient to said road." The recitals, then, even though unobjected to, would amount to no more than a private letter from Gov. Brown to a third party; that is, not binding upon any party by way of estoppel, but only as testimony. And in considering this testimony we must carefully distinguish between the statements of fact therein contained and the conclusions of law introduced with the facts. Having this in view, then, we state the substance of the recital there contained, as follows: That on the 24th day of March, 1858, the contract of that date, already copied above, was entered into; that the depot there provided for had been erected by John W. Lewis, as superintendent of the Western & Atlantic Railroad, under and in pursuance of that contract; that the action of Mr. Lewis was ratified by the governor on April 5, 1858; that the East Tennessee, Virginia & Georgia Railroad Company, by an entry on the back of the agreement of March 24, 1858, by its president, Campbell Wallace, "agreed to take an interest in said depot." This is all that is material, except what we have already stated, as drawn from other sources. What is said in Gov. Brown's deed as to the ownership of the property and tracks is a mere conclusion of law drawn by him from the agreement of March 24, 1858. With these additional facts, then, the case is left to stand on the three contracts copied into the former part of this opinion, and the record in the above-mentioned case of Western & Atlantic Railroad, for Use of State of Georgia, against the Nashville & Chattanooga Railroad Company et al. The binding effect of these proceedings is not denied by the state of Georgia in its answer, but that record is referred to for its contents. We must then construe the decree in that case, and, in order to a proper construction, we must consider with it the two contracts of September 12, 1857, and March 24, 1858, and the undated contract above copied, all of which were before the court in that case, together with the pleadings in that case. The purpose of that litigation was to enforce the liability of the Nashville & Chattanooga Railroad Company and the East Tennessee, Virginia & Georgia Railroad Company to make contribution to certain repairs done upon the depot house. The ground of liability charged is that complainant and defendants "occupied

and used jointly a certain building in the city of Chattanooga, in said county" (the depot in question); that complainant and defendants "are jointly bound by some written contract for the payment of all expenses incurred in repairing said building, the roads, streets, and approaches thereto"; that many repairs and improvements have been made; and that defendants should contribute. The East Tennessee, Virginia & Georgia Railway Company admitted the joint use, but denied the contract for contribution. The Nashville & Chattanooga Railroad Company did the like. The contracts above referred to were exhibited in evidence. Upon all these the court decreed "that the East Tennessee, Virginia & Georgia Railroad Company and the Nashville, Chattanooga & St. Louis Railroad Company are each joint owners with the state of Georgia in the depot in Chattanooga known as the 'Union Passenger Depot,' fronting on Ninth street, in said city, and running back in a southerly direction, and that each of said respondents owns a one-fourth interest in the same, and complainant one-half, as is shown by the written contract of the parties." And thereupon the court enforced contribution. The contract referred to in the decree required the Western & Atlantic Railroad (meaning thereby the state of Georgia) "to build a passenger house in Chattanooga for the accommodation of the different railroads meeting at that point." The Nashville & Chattanooga Railroad Company was to own one-fourth of the "house," "embracing the western track," and pay \$10,000. The East Tennessee, Virginia & Georgia Railroad Company was to take one-fourth of the house. Taking all these points together, we are of opinion that the extent of the decree was simply to declare the joint ownership of the three interests in the house itself as follows: Western & Atlantic Railroad (state of Georgia), one-half; East Tennessee, Virginia & Georgia Railroad Company, one-fourth; and Nashville & Chattanooga Railroad Company, one-fourth,—with a joint obligation for repairs and improvements. We concede the proposition that usually a conveyance of a house, describing it, without more, will carry the land on which the house stands; but this rule does not hold good as to trade fixtures, and does not apply where the court is enforcing the estoppel of a decree. In the latter case the court will construe the decree, and find out its true meaning, without regard to the technical rules that obtain in the law of conveyancing. Then we have here a case where the state of Georgia, as owner of one road, built a depot house for the accommodation of the different railroads meeting at Chattanooga, to be used as a joint terminal, in which the state of Georgia was to own one-half, and the East Tennessee, Virginia & Georgia Railroad Company one-fourth, and the Nashville & Chattanooga Railroad Company one-fourth, and the expenses were to be borne equally in this proportion; that is, the expense of main-

tenance. As a necessary incident to this use, the right of ingress and egress over the land passed with the interest in the building. These joint owners of the house so used it until 1881-82; in the meantime crediting on the joint expense account the \$700, or annual rental, from the Memphis & Charleston Railroad Company, for one-fourth interest, for use of the property. In 1881-82, as already stated, they conceived the plan of very greatly improving the building, and agreed verbally to admit the Memphis & Charleston Railroad Company into the arrangement, upon its paying one-fourth of the expenses of the improvements upon the structure, and one-fourth of future expenses; and, upon its agreeing to this, the rights of the parties were arranged upon that basis, and the money was paid for the new building or improvements, and the parties continued to use the property until 1891, each paying its portion of the joint expenses. But in 1891, as already stated, the Memphis & Charleston Railroad Company and the East Tennessee, Virginia & Georgia Railway Company ceased to use their rights in the building and approaches.

Now, what are the rights of the parties under this state of facts? The complainant insists that it has the right to have the property sold for division of proceeds, or to have the whole matter wound up as a partnership concern. Can either of these things be done? We think not. Though, in terms, the parties are spoken of as owners of the building, the whole scheme or plan amounted to an agreement for joint use of the property as a common terminal. To sell the property itself would destroy the very purpose for which the plan was entered into, and the buildings erected. All the parties have the right of continued use of the property under the contract, but not the right to sell the whole, and destroy the very species and nature of the property. Whether any one of the parties could and would have the right to sell its interest to another company, we need not inquire, as that point is not before us. What rights the Memphis & Charleston Railroad Company may have, as against the state of Georgia, by reason of that state getting the benefit of the improvements previously made, when it leased the property to the Nashville, Chattanooga & St. Louis Railway Company, in 1891, for 29 years, we need not inquire, as that lease is not before us. But certain it is that as against the Nashville, Chattanooga & St. Louis Railway Company, successor to the rights, obligations, and duties of the Nashville & Chattanooga Railroad Company, and now lessee of the property just stated, the right of the Memphis & Charleston Railroad Company for use of the property under the contract of 1881-82 still continues.

Only one other question remains, and that is whether the state of Georgia is properly before the court; that is, should its demurrer for want of jurisdiction be sustained? We are of opinion that the demurrer is not

well taken. This is a suit concerning the administration of property of that state in Tennessee, for the purposes for which the right to enter the state of Tennessee was given. The Tennessee statute which extended rights to Georgia with regard to constructing the road in Hamilton county, this state, is found in chapter 195, Acts 1847-48. That statute gives to the state of Georgia all the "rights, privileges and immunities, with the same restrictions which were previously granted to the Nashville & Chattanooga Railroad Company by the act of December 11, 1845." That act is chapter 1, Acts 1845-46. That act includes among the rights and restrictions the right to sue and be sued. This includes, namely, the courts of Tennessee along with other courts. Reverse the decree of the chancellor, and enter a decree here declaring the rights of the parties as above set forth. The costs of this court and of the court below will be paid, one-half by the Southern Railway Company, and one-half by the Memphis & Charleston Railroad Company.

WILSON, J. I concur in the statement of the case, and the finding of facts, and the verdict reached, and I think the same verdict could have been well reached on another and independent process of legal reason.

BARTON, J., having been of counsel, did not sit in this cause, or participate in the decision thereof.

NEIL, J. "It is agreed in this cause that the depositions of Wm. Hawn, J. N. Mitchell, Chas. M. McGhee, A. H. Plant, O. H. Johnson, and John A. Grant were used as evidence by the complainant on the trial before the chancellor. Brown & Spurlock, for N. C. & St. L. Ry. Co. Cooke, Swaney & Cooke, for So. Ry. Co., and M. & C. Co., and Receivers." Immediately upon the reading of the opinion of this court in this case, the foregoing agreement was entered into by the parties whose names are signed thereto. The court therefore treats the foregoing as a waiver of the objection to those depositions appearing in the record, and treats those depositions as part of the record. But the result is not different. So far as concerns the proof made by Hawn, Mitchell, Plant, and Johnson, the substance of the proof is already found in the opinion drawn from other sources, to the effect that the Memphis & Charleston Railroad Company paid \$14,000 (actual amount, \$14,254.66) and over to the improvement of the depot, and that the East Tennessee, Virginia & Georgia Railway Company paid about the same amount, and that the Memphis & Charleston Railroad Company paid the \$5,000 mentioned in the opinion to G. C. Connor, or that these two companies paid their full proportion of the expense of keeping up the Union Depot until 1891; also, they paid their full proportion of the taxes. As to the testimony of McGhee and Grant, that is already

set out in the opinion, so far as material, and we have found it does not, even upon the theory of its competency, change the result. This will be filed as an additional finding of facts in this cause.

WILSON, J., concurs.

CALDWELL, J. Modify the decree of the court of chancery appeals so as to strike out that clause adjudging that the Southern Railway Company and the Memphis & Charleston Railroad Company "are still entitled to use the privileges secured to them by the contract," etc., because the question of their present right to use such privileges is beyond the pleadings affirmed otherwise. The relief allowed as to the state of Georgia does not touch her sovereignty, but concerns only her contracts, etc., as to the operation of a railroad depot.

Affirmed orally by supreme court, October 26, 1898.

SEGARS v. STATE.

(Court of Criminal Appeals of Texas. May 17, 1899.)

INTOXICATING LIQUORS—ILLEGAL SALE—INFORMATION—SUFFICIENCY.

An information charging accused with the unlawful sale of intoxicating liquors by means of a "blind tiger," but omitting to state the name of the seller, or that his name is unknown, is defective.

Appeal from Brown county court; Charles Rogan, Judge.

J. R. Segars was convicted of the unlawful sale of intoxicating liquors, and appeals. Reversed.

Jenkins & McCartney, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of running a "blind tiger" in a local option territory. Several objections were urged to the information. Omitting formal parts, the information reads as follows: "Did then and there unlawfully keep and run, and was then and there interested in keeping and running, a 'blind tiger' in a place where intoxicating liquors were then and there sold, by a device whereby the party selling and delivering the same was then and there concealed from L. P. Baugh, who was then and there buying the same, and to whom the same was then and there delivered, after the qualified voters of a subdivision of said county and state, described as follows," etc. We are of opinion this information is fatally defective, in that it fails to allege the name of the seller. In cases of this character it is necessary to allege the name of the seller and the name of the purchaser. If, as a matter of fact, the name of the seller was unknown, that fact should have been stated. If appellant was in fact running and keeping a "blind tiger," and intoxi-

cating liquors were sold therein in violation of the law, it would make him guilty, provided there was a sale, whether he made the sale or not. If he ran the "blind tiger" for the purpose of selling liquor in violation of law, and anybody sold it there with his knowledge or assent, he would be guilty as a principal, whether present or not when the sale was made. In misdemeanors all parties connected with the offense are principals. *Houston v. State* (Tex. Cr. App.) 47 S. W. 468. But it will be observed that this information fails to allege either the name of the seller or that it was unknown. For this reason this information is fatally defective. The judgment is reversed, and the prosecution ordered dismissed.

CLAY v. STATE.

(Court of Criminal Appeals of Texas. May 17, 1899.)

CRIMINAL LAW—ACCOMPLICE—CORROBORATION—EVIDENCE—HEARSAY—THEFT—CONTINUANCE—ABSENT WITNESSES—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—INSTRUCTIONS.

1. An accomplice cannot be corroborated by proving statements made by him in the absence of the party against whom he is testifying.

2. Where a conversation between a prosecuting witness and a sheriff was admitted to show that the witness was a detective, and not an accomplice, an instruction should be given limiting the consideration of the evidence to such purpose only.

3. In a prosecution for horse theft, evidence as to what became of the horses after defendant's arrest is inadmissible.

4. Testimony of witness that he notified two deputy sheriffs of accused's whereabouts prior to his arrest is not inadmissible as being hearsay.

5. A refusal of a continuance because of the absence of a witness will be sustained where, in the light of the record, the expected testimony is not probably true.

6. It is proper to submit the issue of an accomplice to the jury's consideration.

Appeal from district court, Dallas county; Charles F. Clint, Judge.

John Clay was convicted of horse theft, and he appeals. Reversed.

Hudson & Woody, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of horse theft, and his punishment assessed at confinement in the penitentiary for a term of two years; and he appeals.

On the trial the witness Hugh Chamberlain was permitted to testify, over the objections of appellant: That about six weeks before appellant was arrested he came to witness, and told him that he had some stray horses out on the range that he wanted to let witness have, and asked him if he could use them, and he told appellant he could; and appellant arranged with witness to meet witness at Mesquite with the horses the following Sunday, but did not do it. That afterwards appellant came to witness, and informed witness that he did not get off with the horses as he ex-

pected, and wanted to know of witness when he was going with another bunch, and witness told him he was going that week. Thereupon appellant said he would go out and get the horses, and bring them in the next morning. Witness notified Sheriff Ben Cabell of this fact. Thereupon the witness details what he told Sheriff Cabell. Then the state, over the objections of appellant, was permitted to prove the same facts, in substance, as detailed by the witness Harry Chamberlain,—by Sheriff Cabell. Without reviewing all the facts detailed by the sheriff to the jury, we think it sufficient to say that an accomplice cannot be corroborated by proving statements that said accomplice made in the absence of the party against whom he is testifying. While it was proper to permit the witness Chamberlain to testify as to all that appellant told him about bringing in the horses, it certainly was not permissible for the witness Chamberlain to testify as to all the facts that he detailed to Sheriff Cabell. Upon the issue as to whether or not the witness Chamberlain was an accomplice, it might have been permissible for the court to admit testimony of Sheriff Cabell in those particulars wherein he testified to facts indicating that the witness Chamberlain was not an accomplice, but merely a detective; but, if the testimony was admitted for this purpose, it would be the duty of the court to instruct the jury that it was admitted for this purpose alone. We have heretofore held that, if a party is acting as a detective, he would not be guilty as an accomplice. And certainly, where the evidence tends to show a witness was an accomplice, it would not be permissible to allow the witness to corroborate himself by detailing the facts he proposed to testify to, to another witness, to wit, the sheriff, and have that witness repeat said conversation, thereby corroborating the accomplice. We notice in this connection that the court, in the eighth subdivision of the charge, instructed the jury, as follows: "In passing upon the defendant's guilt or innocence in this case, you will not consider that part of Sheriff Cabell's evidence, if any, that relates to what the witness Chamberlain may have said to him about the defendant bringing to him strays, stolen, or other stock, and what he was to do about it. Such evidence, if any, was admitted solely for the purpose of assisting you, together with all the other witnesses, if any, in passing upon the credibility of the said Chamberlain as a witness, and in weighing his evidence." It will be readily inferred from what we have heretofore said that this charge is erroneous, in that the same proposes to admit the testimony of Sheriff Cabell on the issue of the credibility of the witness Chamberlain, whereas we have uniformly held that an accomplice cannot corroborate himself in any such way. The other evidence tending to show that the witness Chamberlain was an accomplice, the state certainly would have the right to show facts indicating that the witness Chamberlain

was not an accomplice, but a detective. In other words, if the state could show that the witness Chamberlain was acting as a detective, in conjunction with the officers, and only that, he would not be an accomplice; and, if the evidence was introduced for this purpose, it would be the province and duty of the court to limit the same to that specific purpose. *Stanford v. State*, 34 Tex. Cr. R. 89, 29 S. W. 271; *McKenzie v. State* (Tex. Cr. App.) 32 S. W. 543; *Riojas v. State* (Tex. Cr. App.) 36 S. W. 268; *Woods v. State*, Id. 96; *Doucette v. State* (Tex. Cr. App.) 45 S. W. 800.

Appellant contends that the court erred in permitting the witness Chamberlain to testify that Sheriff Cabell came to his place, and took three of the horses away that defendant brought to his place. This identical question was decided by this court in *Cannada v. State*, 29 Tex. App. 537, 16 S. W. 341, in which the court laid down this principle: Evidence that the alleged owner of the stolen property pointed out, claimed, and took possession of the same when the defendant was not present, is hearsay, res inter alios acta, and inadmissible to establish the allegation of ownership. It follows, therefore, that it would not be permissible to prove what became of the horses after appellant's arrest.

Complaint is also made of the court permitting Chamberlain to testify that one Black came and identified the horses and took them away, and also of permitting Whit Webb, for the state, to testify that he took three of the horses out on the range near Letot, and turned them loose. Under the principle annunciated above, we do not think it was proper to admit this testimony.

Appellant also contends that the court erred in permitting the witness Chamberlain to testify that Sheriff Cabell came to him, and told him to trade for any horse that defendant brought to him, and that he would see him right. As stated, it was error for the court to admit this testimony, unless it was on the issue as to whether or not the witness Chamberlain was an accomplice.

Appellant complains "that the court erred in permitting the witness Chamberlain to testify that defendant came and waked him up, and he went to the jail and waked Rhodes and Work, two deputy sheriffs, and one of them 'phoned somebody, and they went to the stable where defendant was arrested. Without reviewing this question further than as stated, we think there was no error, because it does not appear that any conversation was detailed by the witness Chamberlain with the deputy sheriffs, nor that any conversation the deputy sheriffs had with the witness Chamberlain was testified to, except the bare notice. We do not think it would be error to permit the witness to testify that he notified the officers, and then to state that the officers were present.

We do not think the court erred in overruling the application for postponement or continuance of this case. No diligence was

shown as to the witnesses, and, in the light of the record before us, the evidence is not probably true. Nor do we think the court erred in failing to grant a new trial for the want of the testimony of W. F. M. Hines, on the ground that he was a newly-discovered witness, and was not known to defendant before the trial. This does not come within the rules as to newly-discovered evidence.

Nor do we think the court erred in his charge on alibi, but we believe the same is a proper presentation of the law of alibi. Nor do we think the court erred in charging the law of principals. We do not think the court erred in failing to charge on recent possession of stolen property, nor that the witness Chamberlain was an accomplice. We have uniformly held that it was proper for the court to submit the issue of accomplice to the jury, for their consideration.

We have reviewed all of appellant's assignments of error, and, other than as stated above, we find no error in the ruling and action of the court. For the errors discussed the judgment is reversed, and the cause remanded.

CARLTON v. STATE.

(Court of Criminal Appeals of Texas. May 3, 1899.)

DISORDERLY HOUSE — CONTROL OF PREMISES — SUFFICIENCY OF EVIDENCE.

In a prosecution for keeping a disorderly house, it appeared that accused did not own the house or furniture, but, under an agreement with the owner, occupied two rooms rent free, rented the remainder, receiving a portion of the receipts as his compensation, had full control of the premises and the prices charged for rent, paid the running expenses from the receipts, but that the owner paid for repairs. Held sufficient to show that the house was conducted by accused.

Appeal from McLennan county court; J. N. Gallagher, Judge.

John Carlton was convicted of keeping a disorderly house, and appeals. Affirmed.

Saml. H. Clayton, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for keeping a disorderly house. Appellant's contention is that the evidence does not show he was the lessee or tenant of the premises, and hence a conviction could not be had. Several charges were requested, and exceptions reserved to their refusal. We believe the criterion given the jury in the charge in regard to the issue of tenancy was correct, and it was not error to refuse the special instructions. Defendant took the witness stand in his own behalf, and testified that he had leased the premises in question, which lease was canceled on November 15, 1896. That he entered into an agreement with the landlord, which took effect at once, the terms of which were that he was to manage and control the house and rent the rooms to lodgers. He was

to have two rooms for himself and family, and there was no length of time stipulated as to his occupancy. These rooms were rent free, and he was to receive, in addition, one-third of the proceeds derived from renting the remaining rooms, after deducting expenses. He was required to live in the house, and it was shown that he occupied the two rooms reserved. The witness Bagby testified that he was the agent of one Dunnica, the owner of the house, and represented him in making the contract. By the terms of the agreement, appellant was "to run and manage the house," and rent out the rooms to lodgers. He was not to pay any rent for the two rooms occupied by his family. There was no time stipulated as to how long he should occupy the place or have charge of it. There was nothing said as to whether he could occupy other rooms for himself and family, but something would have been said if he had occupied other rooms for his family. He was to control and manage the whole building. He received one-third of the net proceeds for his services, and was to receive two-thirds for Mr. Dunnica. He agreed to account to Bagby every week for the proceeds of the house, and did so. The furniture in the house, except that used by defendant's family, belonged to Dunnica. Repairs were paid for by Dunnica, and the expenses of the house, such as laundry, light, and fire for the rooms rented out by defendant, were paid out of the gross receipts by defendant. Appellant was not directed as to the price of rent for the rooms, but some advisory suggestions were made to him, and he had full control of that matter. If defendant had not agreed to live in the house, he would not have been allowed to run it and rent the rooms. After this arrangement had been in operation for awhile, appellant was granted the further right to use the dining room and servant's room, and he did so, and kept boarders awhile. This was his business, and the owner had no interest in the board money. We are of opinion this was a rental contract, and that appellant was occupying the house as the lessee or tenant of Dunnica. See *Frelberg v. Improvement Co.*, 63 Tex. 449. The phase of the law applicable to this state of case was sufficiently given by the court, and there was no error in refusing the requested instructions. The proof is overwhelming that the house was kept as one of prostitution. We do not think it is necessary to enter into a discussion of the various assignments. The judgment is affirmed.

SHAW v. STATE.

(Court of Criminal Appeals of Texas. May 3, 1899.)

CRIMINAL LAW — APPEAL AND ERROR — REVIEW — STATEMENT OF FACTS.

1. In the absence of a statement of facts, the sufficiency of the evidence to sustain a conviction cannot be reviewed on appeal.

2. A conviction will not be reversed on appeal on the ground that the complaint was made prior to the commission of the offense, in the absence of a statement of facts.

Appeal from McLennan county court; J. N. Gallagher, Judge.

Mollie Shaw was convicted of aggravated assault, and she appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of an aggravated assault, and her punishment assessed at a fine of \$25.

There are two grounds of the motion for new trial: (1) The evidence is insufficient to sustain the conviction; and (2) the testimony shows the complaint was made about 10 o'clock in the morning, and the assault was actually made about 1 o'clock in the afternoon of the same day. In the absence of a statement of facts, we are not able to revise these matters. The judgment is affirmed.

AIRHART v. STATE.

(Court of Criminal Appeals of Texas. May 3, 1899.)

HOMICIDE—SELF-DEFENSE.

The fact that accused sought deceased, intending to assault him, does not prevent accused from availing himself of the law of self-defense, if, before deceased was assaulted, and without provocation by accused, deceased made an assault, and was killed by accused while defending himself.

Appeal from district court, Kaufman county; J. E. Dillard, Judge.

Nat Airhart was convicted of manslaughter, and appeals. Reversed.

Gossett & Young and Lee R. Stroud, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

In the view we take of this case, it is only necessary to notice the exceptions to the charge of the court on self-defense, in connection with a charge on provoking the difficulty. In order to a proper understanding of the court's charge on this subject, we will state substantially the case as presented by the testimony. The testimony shows that deceased and appellant both lived at or near the town of Kemp, in Kaufman county; that, a few days before the homicide, deceased had used some abusive language with reference to defendant, in his absence. It is shown that the trouble grew up between them in reference to an election of one of the precinct officers, and that deceased told several parties that on the Saturday before the homicide he met defendant, and told him that he was a "son of a bitch," or a "damn son of a bitch," and that "he took it like a man." Defendant was informed of this

on the same day, or a day or two afterwards. On the succeeding Wednesday, appellant, some time in the evening, approached deceased, who was sitting or standing near his brother, Joe Keith, and another party, stating that he wanted to see him. Deceased made no reply to this, and appellant repeated his request. Deceased went out to where he was, when appellant asked him if he used the language about him that he had heard. Deceased said that he had, and that he would say to his face what he had said to his back. So far, we do not believe there is any controversy between the state's witnesses and the defendant's witnesses. Some of the state's witnesses testified that at this juncture deceased advanced a step or two towards appellant, and appellant stepped back, and immediately drew his pistol and fired at deceased. Deceased was in the act of turning from defendant at the first shot, and turned and retreated, and defendant fired on him three times after he retreated. Further than merely advancing on appellant, the state's witnesses indicate no hostile demonstration on the part of deceased. Some of them state that he had his left hand twirling his mustache, while his right was hanging by his side. Some of the defendant's witnesses, however, state that he had his right hand in the neighborhood of his right pants pocket. None of them, however, except the defendant himself, suggest that he ran his hand in his pocket. Defendant himself testified that when deceased advanced on him he put his hand in his pocket. We quote from the defendant's testimony on this point as follows: After appellant had called deceased out in the street, he said: "Ira, what about this talk you have been making about me?" And he said, "What about it?" And I said, "That talk that you made to Bill Grubbs. He said you told him you cussed me out, and called me a God damn son of a bitch right up to my teeth, and I took it like a man." And Keith said, "God damn you! you are one." And when he said it he stepped towards me just one step, and I stepped back just one step, and he said, "I called you that, and, God damn you! you are one." And he started towards me, and I stepped back and told him to stand back two or three times, and he kept advancing on me. When we first went out in the street he had his left side just a little bit to me, and had his right hand on his right pants pocket, and was trying to work something out of his pocket with his fingers; and when he called me a damn son of a bitch he run that hand right square in his pocket, and I drew my pistol and fired as fast as I could shoot." Appellant also stated that Frank McKinney had told him on the preceding Sunday that deceased said he was a son of a bitch, and that he was going to kill him "before next Saturday." Appellant also testified that he went to see deceased in order to get him to explain himself and to take back what he said, if he said it; that he intended to make him take it back, and, if he would not take

it back, he intended to have a fist and skull fight with him. We have thus stated sufficient of the testimony to show the nature of the homicide, and the element of self-defense in the case. As stated, the court gave a charge on self-defense, but, in connection with that charge, gave a charge on provoking a difficulty, and also, in the same connection, instructed the jury on the right of appellant to go and see deceased on a peaceful mission with reference to the remarks he had heard deceased had made in regard to him. This was in accordance with the doctrine announced in *Shannon v. State*, 35 Tex. Cr. R. 2, 28 S. W. 687.

It is insisted, however, by appellant, that the court committed material error to his prejudice in the charges referred to. We will not quote the charges in extenso, but merely enough thereof to indicate the vice complained of. The court announced as a legal proposition that, if one seeks a meeting with another for the purpose of provoking or bringing about a difficulty for the purpose of killing such person, then such party seeking the difficulty, if the encounter ensues, is not allowed to avail himself of the law of self-defense, although in the difficulty he may have acted upon the defensive, and then instructed the jury, in substance, that if they believed, etc., that Nat Airhart sought the meeting with Ira Keith with the intent of provoking or bringing about a difficulty for the purpose of killing deceased or doing him some serious bodily injury, then the law will not permit him to avail himself of the law of self-defense, although he may have been compelled to act on the defensive during the progress of the difficulty. Now, it will be seen that the court, in this charge, makes the guilt of the defendant depend on the act of seeking the difficulty by appellant for the purpose of slaying deceased, and his guilt or innocence is not at all made to depend upon what he may have done when he found or met deceased, whereas, in our view of the law, the whole question of his guilt or innocence depends on his acts then done. Of course, we would look to his preceding conduct to characterize or lend significance to his conduct at the time of the meeting. And in the succeeding charge the same vice is manifest. This charge is predicated on the idea of appellant seeking the deceased in order to engage in a fist fight or affray with him, and proceeds on the idea that, if such was his purpose, and the difficulty ensued between him and deceased after they met, he could not set up self-defense, but would be guilty of manslaughter. Now, no matter what his purpose was in seeking deceased, if, when he met him, he did nothing to provoke a difficulty, and deceased assaulted him, under our view of the law his right of self-defense would be perfect. Both of said charges were upon a critical phase of the case; that is, if appellant was entitled to a charge on self-defense at all, he was entitled to a fair charge (and we cannot say that he was not, in view of his own tes-

timony), presenting this view of the case according to the rules of law. Where the doctrine of provocation is to be given in any case, we have heretofore held that the court should be able to lay his hand on the testimony which authorized such a charge. We believe there was such testimony here, for the appellant not only sought the meeting, but his language and conduct after he found deceased indicated that he had sought that meeting for the purpose, and by his own testimony he concedes that he intended to make deceased take back the remark, or have a fist and skull fight with him. He was not to be tried for merely seeking out the deceased, but for his acts after he had found him. The judge's charge should have presented this issue squarely to the jury, and not have authorized them to convict him for merely seeking deceased, regardless of whether he did any act after he found him calculated to provoke a difficulty. As said by this court in *Cartwright v. State*, 14 Tex. App. 502: "In order to provoke a difficulty, the defendant must also willingly and knowingly use some language or do acts reasonably calculated to lead to an affray or deadly conflict; and, unless the acts are clearly calculated or intended to have such effect, the right of self-defense is not compromised, even though the party armed himself, and went there for the purpose of a difficulty." And see *Morgan v. State*, 34 Tex. Cr. R. 222, 29 S. W. 1092; *Winters v. State* (Tex. Cr. App.) 40 S. W. 304. It is not necessary to discuss other assignments, but, on account of the errors above pointed out, the judgment is reversed, and the cause remanded.

FLOWERS v. STATE.

(Court of Criminal Appeals of Texas. May 3, 1899.)

CRIMINAL LAW—REVIEW—CONTINUANCE—NEW TRIAL—DENIAL.

1. Refusal to grant a new trial for error in denying a continuance of a criminal case cannot be reviewed where the testimony produced on the trial is not in the record, and no bill of exceptions was reserved.

2. The sufficiency of the evidence to support a conviction cannot be reviewed where the record does not contain the evidence.

Appeal from district court, Caldwell county; H. Teichmueller, Judge.

Berry Flowers was convicted of burglary, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for three years.

The first ground of the motion for new trial urges error on the part of the court in refusing to continue the case upon appellant's application. There are two reasons

why this ruling of the court cannot be revised: (1) The testimony adduced on the trial is not before us; and (2) a bill of exceptions was not reserved. The second ground of the motion for new trial is predicated upon the alleged insufficiency of the evidence to support the conviction. The evidence is not before us. The judgment is affirmed.

COLLINS v. STATE.

(Court of Criminal Appeals of Texas. May 3, 1899.)

CRIMINAL LAW—EVIDENCE—ADMISSIBILITY—BRIBERY—TESTIMONY OF ACCOMPLICE—WEIGHT—FAILURE TO CHARGE.

1. Where certain letters written by defendant related to the offense of which he was charged, it was not error to admit them in evidence, though their date was subsequent to the commission of the offense.

2. Where a prosecution for bribery could not have been maintained but for the testimony of the person paying the bribe and another, claimed by defendant to have been accomplices, failure of the court to charge on the law of accomplice testimony was error.

Appeal from district court, Falls county; Sam R. Scott, Judge.

W. M. Collins was convicted of receiving a bribe, and he appeals. Reversed.

J. J. Swann and Rice & Bartlett, for appellant. F. M. Boyles and Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of receiving a bribe, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

Appellant made a motion for continuance, which was overruled; but, in view of the disposition of the case on another question, we deem it unnecessary to review the action of the court in overruling the motion for continuance.

By his second bill of exceptions, appellant objected to the introduction of three certain letters shown to have been written by appellant. These all bear date subsequent to the alleged offense, but they appear to have a bearing on the case, and we do not believe the court erred in their admission.

In the motion for new trial, appellant excepts to the action of the court in failing to charge on the law of accomplice testimony; claiming that S. R. Watson and M. C. Harris were accomplices in the offense of bribery, if any was committed. We have examined the record carefully in this regard, and in our opinion the contention of appellant is correct. Watson and Harris were the main state's witnesses, and without their testimony the state could not maintain this prosecution. Certainly, if appellant, Collins, is guilty of having received a bribe, Watson was guilty of paying him the bribe, and consequently was an accomplice. The court should have given a charge presenting the law in regard to accom-

police testimony with reference to said two witnesses. For the error of the court in failing to give such a charge, the judgment is reversed, and the cause remanded.

HARPER v. STATE.

(Court of Criminal Appeals of Texas. May 8, 1899.)

GAMING IN PUBLIC PLACE—EVIDENCE—SUFFICIENCY.

Evidence that defendant engaged in a game of cards on the outside, near a private residence, in which there was a dancing party, and near which, at a different point, there was also another game in progress, and at or near which there was one other game played subsequently, it not appearing that such residence was a place for retailing intoxicating liquor, is insufficient to convict under an indictment for playing cards at a public place, where people assembled for amusement and to dance, or where people commonly resorted for gaming.

Appeal from Karnes county court; F. Theo. Barnes, Judge.

Robert Harper was convicted of playing cards at a public place, and he appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged by indictment with playing cards at a public place, to wit, at a place where people were assembled for amusement and to engage in a dance, and, in the second count, with playing at a game with cards at a place where people commonly resorted for the purpose of gaming. There are several matters suggested for revision, but, under the view we take of the case, it is only necessary to consider the question of the sufficiency of the evidence to support the conviction. We think it is not sufficient. The card playing occurred just outside and near one corner or side of a private residence. There was also another game at the same time, in which appellant was not engaged, at a different point near said residence. There seems to have been a dancing party in the residence at the time. The testimony indicates that subsequently there was another game of cards played at or near this residence. This evidence does not support the allegations of either count. If the card playing could be construed to be at or in the private residence, then it would not be a violation of the law, unless such residence was a place for retailing intoxicating liquors. If the state relied upon the second count,—that it was a public place by reason of people resorting there for the purpose of gaming,—then the evidence fails to show but the two games played there at different points on the occasion in question, and none before. So, in either event, the state has failed to prove a case. We are also inclined to think the indictment is vicious. The judgment is reversed, and the cause remanded.

HAMILTON v. STATE.

(Court of Criminal Appeals of Texas. May 8, 1899.)

CRIMINAL LAW—APPEAL—CHANGE OF VENUE—BILL OF EXCEPTIONS—JUDGES—WITNESSES—FORMER CONVICTION—EVIDENCE.

1. Where the order changing the venue is not in the record, and the statement of facts on which the court may have acted is not embodied in the bill of exceptions, as required by Code Cr. Proc. art. 621, so that it is possible the court may have granted the change, of its own motion, as authorized by article 613, it cannot be said that granting the change, where the state had made a motion therefor, was error.

2. The fact that a trial cannot be had at the current term of court to which the venue is sought to be changed is no reason for a refusal to change the venue.

3. The bill of exceptions should be so full as to show all the proceedings involved in the motion for a change of venue, where the granting of such change is alleged as error.

4. The hearing and granting of a change of venue on the same day, but after the granting of a motion for a continuance, is equivalent to a setting aside of the continuance.

5. A party cannot object that a de facto judge tried the cause in the lower court.

6. A witness introduced to impeach the prosecutrix by showing her testimony on a former trial cannot be cross-examined by asking him if he believed the testimony of prosecutrix on the former trial.

7. Especially was the error prejudicial where the witness had been a juror in the first trial, and he answered in the affirmative, and the state's attorney then asked, "Notwithstanding what you say D. [prosecutrix] testified to on the former trial, the jury convicted defendant?"

8. Code Cr. Proc. art. 823, providing that a former conviction of the offense shall not be alluded to in argument on the new trial, applies also to proceedings at the trial.

Appeal from district court, Jackson county; Wells Thompson, Judge.

John Hamilton was convicted of rape, and he appeals. Reversed.

Fly & Hill, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of rape, and his punishment assessed at confinement in the penitentiary for a term of 25 years; hence this appeal.

The record is in a remarkable condition. We have a bill of exceptions regarding the change of venue from Victoria to Jackson county. The indictment shows that it was presented in Victoria county. The record shows that it was tried in Jackson county. But we have none of the proceedings and no order of the court making the change of venue. No point, however, is made on this phase of the case.

A bill of exceptions shows that on the 25th of May, 1898, the cause was called for trial in Victoria county and continued. The order for said continuance was entered in the forenoon of said day. In the afternoon of the same day a written motion was made by the state to change the venue for the reason that the case had been twice tried in Victoria county, and there would be difficulty

in obtaining a jury, and for the further reason that the continuance this day granted would necessitate a further delay of the trial until the next fall term: Appellant objected to this action of the court because it was then too late to obtain a trial at a term of the district court in Jackson county, which was then in session, that the attendance of the witnesses could not be procured in time to try said case, and for the further reason that the court had no occasion to change the venue, because there was a large number of jurors in Victoria county who knew nothing of the case, and offered to prove same by the sheriff and assessor of Victoria county. The court, however, overruled the objections, and ordered the venue changed to Jackson county. This bill is signed by Judge James C. Wilson, of the Twenty-Fourth judicial district, which includes Victoria county. As far as this bill is concerned, we see no error in the action of the court. As stated, we have not the order of the court changing the venue, nor have we the statement of facts on which the court may have acted, embodied in the bill of exceptions. This is required by article 621, Code Cr. Proc. As far as we are advised, the court may have made the change of venue of his own motion, ignoring or treating as merely persuasive the motion for that purpose made by the district attorney. Article 613, Code Cr. Proc., authorizes the court to make such change of his own motion whenever he shall be satisfied that a trial alike fair and impartial to the accused and to the state cannot, from any cause, be had in the county in which the case is pending. The fact, as stated in said bill, that a trial could not be had at the then term of the district court of Jackson county, furnished no reason for a refusal to change the venue. It appears, however, that the trial was had at that term of the court, and no application for continuance was made.

By a succeeding bill, appellant complains that the court erred in making the change of venue, because the case had been continued on the same day prior to the order changing the venue, and said order of continuance had not been set aside. This bill is also signed by James C. Wilson, judge of the Twenty-Fourth district court. It would appear to be a correct practice to take a bill of exceptions at the court where the order for the change was granted. *Krebs v. State*, 8 Tex. App. 1. But the bill should be so full as to show all the proceedings involved in the motion for change of venue. Here we have neither the order for change of venue, nor any of the prior orders of the district court of Victoria county. Of course, the court should, in regularity, have set aside the order continuing the case before he took up and ordered the change of venue. This was not done, so far as the record discloses. We are not, however, prepared to say but that the effect of the subsequent order changing the venue was to set aside the order for continuance, which

had previously been made on the morning of the same day. Article 617, Code Cr. Proc., provides: "The application for change of venue may be heard and determined before either party has announced ready for trial; but in all cases before the change of venue is ordered all motions to set aside the indictment and all special pleas and exceptions which are to be determined by the judge, and which have been filed, shall be disposed of by the court, and if overruled the plea of not guilty entered." This article apprehends that the court may take action on the change of venue before either party has announced ready for trial, or it may take action after all preliminary motions have been overruled and the plea of not guilty entered. But it does not apprehend that the court should take up a motion for change of venue after the cause has been continued. A continuance of the case is a final disposition of the same for the term. The court has control of its orders during the term, and is authorized to set aside the continuance of a case previously made, and to try the case or make some other disposition thereof; and the action of the court in this regard was tantamount to setting aside the continuance previously granted for the purpose of acting on the motion for a change of venue.

Appellant excepted to the Honorable Wells Thompson trying said cause on the ground "that T. S. Reese, who had formerly been the judge of the district court for Jackson county, had resigned the office of district judge, and that prior to the last general election, which occurred on the 8th of November, 1898, the Honorable Wells Thompson had been appointed by the governor to fill the unexpired term of Judge Reese, as the term of Judge Reese expired on the 8th of November, 1898, when the general election was held, and there was no election for district judge at said election, and no appointment had been made since said last general election to fill the vacancy." To support the contention of appellant, we are referred to *Royston v. Griffin*, 42 Tex. 566. In that case the office was directly involved, and the court merely held that Griffin held an unexpired part of a four-years term, terminating on the 17th of August, 1874, and that consequently the appointment of Royston on the 10th of September, 1874, was proper. Also, in the case of *State v. Cocke*, 54 Tex. 482, the question of the office was directly involved between two contestants, and this has no particular bearing on the question here presented. Here the question is presented collaterally, and, although Judge Thompson may not have held the office de jure, yet, if he was a de facto judge of that district, this would be sufficient. We would not be understood, however, as holding that he was not a de jure officer. Section 28 of article 5 of our constitution provides "that vacancies in the office of district judge shall be filled by the governor until the next succeeding general election." Section 17 of article 16 provides

that "all officers within this state, shall continue to perform the duties of their office until their successors shall be duly qualified." Our statutes on this subject are as follows: Article 1065, Rev. St., provides, "The judge of the district court shall hold his office for the term of four years, and until his successor shall have duly qualified." This article of our Civil Statutes construes section 28 of article 5 of the constitution in accordance with the last-cited provision of the constitution, so far as the tenure of elective judges is concerned, and it would seem to follow that the same rule would apply to appointive judges. Certainly an appointive judge is an officer within this state, and, without any enabling statute, section 17 of article 16 would embrace such an officer, and authorize him to hold until his successor should be duly qualified. On this subject we quote from 19 Am. & Eng. Enc. Law, 432, the general rule on this subject, as follows: "Under provisions permitting an officer to hold his office for the prescribed term and until his successor shall have been elected and qualified therefor, a failure to fill the position at the expiration of the term, does not create a vacancy which can be filled by appointment; and the failure, through death or otherwise, of a duly elected or appointed officer to qualify, does not create a vacancy,—the old incumbent holding not merely as a de facto officer but as an officer de jure until the power upon which the duty of election or appointment is devolved can regularly act and the successor is duly elected and appointed and qualified." We are not informed when the office of district judge of that district became vacant. It may have been so near to the date of the election as not to permit of the election of his successor. At any rate, it is not contended that the original appointment of Judge Thompson was void, but that it became and was void on the 18th of November, 1898,—10 days after the general election,—because no one had been elected to fill the office at that time, and because Judge Thompson had not been reappointed after said general election. Certainly, if some other person had been elected district judge at said general election, he could not have qualified until 40 days after said election; and the holding over by Judge Thompson, the appointee, would in that event have been unquestionably legal. Now, would the fact that no one was elected at said general election to fill the office vacate the office of the appointee? We think not. On the contrary, the appointee would hold the place until his successor was duly qualified. If his successor had been elected, he could not qualify until on the fortieth day after the election, when the secretary of state is authorized to open and count the returns of the election; and, in accordance with said count, the governor is authorized to make out and deliver certificates of election, etc., and afterwards commissions are authorized to issue. See articles 1758, 1759, Rev. St. And it would seem to us that there could be no question as

to the tenure of an appointee until such time as his legally elected successor could qualify.

It appears in bill of exceptions reserved during the trial of the case that one A. Bursa was introduced on behalf of defendant to impeach the prosecuting witness, Dollie Daniels, as to what she may have testified on a former trial of the case. On cross-examination the attorney for the state asked the witness if he believed what the prosecutrix, Dollie Daniels, said when she testified on the former trial. This was objected to on the ground that it was immaterial and improper to prove by said witness what he believed as to her testimony. The objection was overruled, and the witness testified that he believed the evidence of the said Dollie Daniels to be true. In this same connection, the next bill of exceptions shows that J. Vandenburg, the private prosecutor, in cross-examining this witness, asked him the question: "Notwithstanding what you say she [Dollie Daniels] testified to on the former trial, the jury convicted defendant?" This remark was excepted to by defendant on the ground that the question as to whether the jury had convicted defendant on the former trial was improper, immaterial, and calculated to prejudice the rights of defendant. In our opinion, both exceptions are well taken. While it is competent to impeach a witness by showing conflicting statements made at a former trial to those made at a subsequent trial, or conflicting statements made at the same trial, yet we know of no rule that would authorize such witness so impeached to be bolstered up by showing that the impeaching witness believed one or the other statement. And the fact that this witness, Bursa, was a juror, rendered his statement that, notwithstanding the conflicting statements of the prosecutrix, he believed her testimony against defendant, more prejudicial to him. And when to this was added the suggestion of the private prosecutor that, notwithstanding such conflicting statements of the prosecutrix, the jury convicted defendant, it was calculated not only to introduce before the jury the witness' own belief in the integrity of said prosecuting witness, but the belief of the entire jury, and the effect was unquestionably to strongly re-enforce her before the jury then trying the case. Article 823, Code Cr. Proc., provides: "The effect of a new trial is to place the cause in the same position in which it was before any trial had taken place. The former conviction shall be regarded as no presumption of guilt, nor shall it be alluded to in the argument." If the private prosecutor cannot allude to the former conviction in his argument, by the same reasoning he should not be permitted to allude to it during the progress of the trial. Here he not only alluded to it, but alluded to it in the adducing of testimony in a manner calculated to give weight to that testimony,—that is, he was permitted to prove by a juror who tried appellant at a former trial that not only he, but the entire jury, believed the prosecutrix's tes-

timony on that trial; and such illegal testimony could have no other result than to prove hurtful to appellant, and it evidently was brought out for that purpose. The jury convicted appellant, and gave him 25 years. They may or may not have convicted him without this illegal testimony, or they may, without this testimony, have given him a less term of years in the penitentiary. We cannot tell. We only know that the evidence and the remark of the private prosecutor were improper and illegal, and were of a character calculated to prejudice appellant. *Washington v. State*, 23 App. 336, 5 S. W. 119. The judgment is accordingly reversed, and the cause remanded.

WILLIAMS v. STATE. (No. 1,656.)

(Court of Criminal Appeals of Texas. May 3, 1898.)

HOMICIDE—EVIDENCE—MALICE—LIBEL—JUSTIFICATION—REPUTATION—DYING DECLARATION.

1. In a prosecution of one accused of killing an editor because of a libel to the effect that accused had permitted a negress to horsewhip his wife, testimony was properly admitted that four or five days before the killing, and before the publication, accused told witness that they had been telling it around town that he had stood and let a negro woman beat his wife, and that he would give \$5 to find out who started it, and would give him six shots in exchange with a six-shooter; the language showing general malice, and embracing deceased within its terms.

2. A libel charged that a husband stood by and let a negress horsewhip his wife, and then brought her a butcher knife and told her to use it on the black woman, and that the wife had attempted an assault on the negress. *Held*, in a prosecution of the husband for killing the libellant, accused having contended the article was untrue, the state could introduce evidence of the prior difficulty, under Pen. Code, art. 747, subd. 2, permitting the truth of a libel to be shown in justification, where it charged a crime, and specified the time, place, and nature of the offense.

3. Though the libel also made disparaging and scurrilous observations regarding accused and his wife, calculated to disgrace them among honorable people, the state could not, directly nor indirectly, show the reputation of accused's wife for chastity, this not being impugned in the publication.

4. The state could not show that the wife's reputation was bad, as being a virago, and a quarrelsome, fighting woman.

5. A dying declaration that, when accused and his wife came in, deceased treated them perfectly gentlemanly, and they added insult after insult, was not competent against accused, being a conclusion.

Appeal from district court, Erath county; J. S. Straughn, Judge.

Harry Williams was convicted of murder in the second degree, and he appeals. Reversed.

W. J. & Eli Oxford, Daniel & Keith, and Martin & George, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his

punishment assessed at confinement in the penitentiary for a term of eighteen years; and he prosecutes this appeal.

The theory of the state, which was supported by evidence, was to the effect that the homicide was committed by appellant, Harry Williams, and his wife, on account of malice entertained towards him because of a publication concerning a fight between the wife of appellant and a negro woman. Inasmuch as this publication occasioned the homicide, we would state that deceased, Austin King, and John Hibdon were the editors and publishers of the Appeal, a newspaper published at Stephenville, in Erath county. The publication was made about Saturday, the 8th day of August, 1898, and is as follows: "Negro and White Woman Scrap. On last Saturday there was a lively scrap on aristocratic College Hill between two women of different complexion,—one a beautiful blonde, and the other as black as the king of Hades. The story, as told a reporter of the Appeal, is about as follows: Mrs. Williams, nee Mrs. Skipper, has a little boy some seven or eight years old, who got into a childish difficulty, as children of that age sometimes do, with a little pickaninny belonging to Tish Adams; and, during the fray, young Skipper hit the negro with a rock on the head, hurting him severely. The mother of the coon went to Mrs. Williams, bringing with her her boy, to show cause why Mrs. Williams should not severely chastise her pugilistic offspring for spilling African blood. Mrs. Williams could not see the propriety of belaboring her boy in that light, but went to the house, and came out armed with a buggy whip, which she proposed to wear out on the she coon. By this time Tish had worked up her fighting qualities to a white heat, and dared her to use that whip on her black hide; and on the first demonstration the coon gave Mrs. Williams a tap on the proboscis, and at the same time got possession of the whip, with which she fralied Mrs. Williams' plump person hard and fast until the negro got exhausted and Mrs. Williams fell to the ground in a swoon. It is alleged on good authority that the husband of Mrs. Williams stood there, a silent witness to this dastardly outrage; and, if such is the case, a respectable committee of white women should wait on the woman who bears his name, and request her to sue for an immediate divorce, for no man but a skulking cur would stand by and see a white woman whipped by a negro. It may be the custom in Indiana, but it won't stand muster in Texas. It is further stated by our authority that after the flogging this eunuch monstrosity had the gall to bring his wife a butcher knife, and tell her to use it on the black woman. The negro told him he was a coward, and, if any one had a right to use that knife, it was him." On the day of the publication, Williams and his wife, who lived in the town of Stephenville, made a visit to the country, some nine miles from

town, and spent the day. There they were informed that the publication concerning the previous trouble between his wife and the negro woman had been made in the paper in Stephenville. They returned to their home about night, and Frank Helzer, the son of Mrs. Williams, informed them at the supper table in regard to the publication, and that he had read it. They sent for the paper, and, after perusing it, Williams and his wife got in their buggy and went downtown, to the residence of one Eugene Moore, the editor of another paper, and inquired of him in regard to said publication and their rights in the premises, and was informed by Moore that the parties were not civilly responsible, but might be held criminally responsible. It appears that here some threats were made by appellant or his wife with reference to horsewhipping the editors of the Appeal, who had caused the publication. Moore, however, advised them not to do it. Both parties seem to have been very much excited. They returned to their home, and it does not appear that they left there during the following day, which was Sunday. On Monday morning, Williams (appellant), his wife, and their son, Frank Helzer, got in their buggy and went downtown for the purpose of seeing the editors of the Appeal, and causing them to correct the publication, and, according to the theory of the state, horsewhip the publishers at all hazards. Williams or his wife (from the state's testimony, it cannot be determined which) was armed with a dirk knife, the blade of which was some $4\frac{1}{2}$ inches long. They drove to the court house. Appellant got out of the buggy, and went into the court house for the purpose of procuring a pistol, which he failed to get, while his wife and son, who remained in the buggy, drove to a store near by, and she purchased a buggy whip. They then drove back to the court house. Appellant came out and joined them, and they drove to the office of King & Hibdon, the editors and publishers of the Appeal. The parties immediately got out of the buggy, hitched their horse, and proceeded upstairs to the newspaper office. Frank Helzer followed with the buggy whip. They met a negro boy, who showed them into the office, and at their request went for Austin King, deceased. He came into the office presently, and his attention was immediately directed to the publication contained in the copy of the paper which the parties had brought with them. An altercation occurred as to the matters contained in said publication. According to the theory of the state, appellant and his wife brought this on by stating that they had come for revenge, and that appellant, Williams, would hold deceased while his wife horsewhipped him. None of the state's witnesses, however, were immediately present. Some of them were in the immediate vicinity, outside, in the hall, and this theory is gathered from what they stated they overheard

from the parties during the altercation. It appears to be conceded that all three parties engaged in the fight. Mrs. Williams attempted to use the buggy whip on deceased. She appears to have been shoved or knocked aside early in the fight, and appellant and deceased scuffled and fought around the room for several minutes. About the time the parties rushed in, one of the witnesses testifies to seeing Williams with his right hand in the act of pulling a knife out of the deceased and throwing it on the floor, which was subsequently picked up by Mrs. Williams. The theory of the state is that Williams may have done the stabbing with the knife himself, or his wife may have done it; that if she stabbed deceased, and left the knife sticking in him, appellant is equally guilty with her, as the stabbing was done in pursuance of a conspiracy between them to make him take a horsewhipping or else kill him. At the termination of the difficulty, deceased was found to be stabbed on the right side, two mortal wounds having been inflicted. He was immediately taken downstairs, and lived about 30 hours; dying from the effects of the wounds. Appellant's testimony in regard to the stabbing tends to show that his wife did the stabbing, and that he did not know of it until after the fight was over. In this connection it is further shown by defendant: That in going to the place the only understanding between them was that they were to horsewhip appellant. That they had no agreement as to what they would do if he refused to be horsewhipped. That they went there to horsewhip the man who wrote the article, and they intended to horsewhip him, regardless of whatever opposition they met. That when King came into the room they accosted him, and asked him if he wrote or was responsible for the article (showing it to him), and he said he was, and defendant told him then that it was a lie. That deceased slapped him on the shoulder, and said: "Hold on, Williams. I have damned good authority for that article." That his wife then asked him who was his authority, and he said, "Snapp." That appellant then turned to the page, and commenced reading the article, and asked deceased if he did not know he had slandered his wife. That deceased denied that it was a slander. That appellant asked him if he knew what "proboscis" meant. Deceased said it was the fore part of the face. Appellant told him it was the snout of an elephant. About that time appellant's wife interrupted and said, "Mr. King, did you ever see me before?" Deceased replied, "No, ma'am." She then asked him, "What did you know about my form or my complexion?" And he said, "What in the hell have you got to do with it?" She replied, "I will show you." and picked up the whip, and deceased jumped at her and struck her in the face. That then the fight began. That they first scuffled over the whip, his

wife engaging in the difficulty. That afterwards deceased and defendant fought around the room a short time, and he did not know that deceased was cut until after the fight was over. About the time the parties entered the room, King said: "Take him off, Charley. She has stabbed me." That he did not know when the stabbing was done. The state also proved by several witnesses that Mrs. Williams claimed to have done the stabbing at the time the parties rushed into the room. The theory of appellant was that the homicide, at most, could only be manslaughter, on account of the slanderous publication in regard to appellant and his wife. He further claimed that the evidence showed that deceased was stabbed by his wife without any knowledge or concert on his part, and that, under such circumstances, he could only be guilty of an aggravated assault. We have thus stated the substantial features of the case in order to discuss the assignments of error.

Appellant objected to the testimony of Jeff Owens to the effect that on Wednesday or Thursday of the week before the homicide, which occurred on the following Monday, defendant met witness on the south side of the square in Stephenville, and told witness that he was in a public business, where he was liable to hear a good deal of talk, and that they had been telling it around town that he had stood and let a negro woman beat his wife, and that defendant would give five dollars to find out the man who started it, and that he would give him six shots in exchange with a six-shooter. Defendant objected to said testimony because the same was irrelevant and immaterial and too remote, and the same was not testimony as to any declarations made towards or against the deceased, and the said conversation was had before the publication of the scurrilous article which appeared in the Appeal, and could not have been directed against deceased, and the admission of such testimony was prejudicial to appellant. In *Godwin v. State* (Tex. Cr. App.) 43 S. W. 336, the admissibility of threats or language of a defendant indicating animus was discussed, and the rule was there laid down that language indicating general animus, and not directed towards deceased, would not be admitted unless the language used was of a character showing general malice, and embracing deceased within its terms. And also see *Holley v. State* (Tex. Cr. App.) 46 S. W. 89. Now, applying the above rule to this testimony, we think it clearly embraced deceased within its terms: that is, appellant declared his animus against any one who started or circulated the report. The difficulty about which the homicide occurred grew out of this very report, and the publication thereof in the Appeal; and, in our opinion, the same was admissible.

Tish Adams was introduced by the state, and she was permitted, over appellant's objec-

tion, to testify as to the prior difficulty between herself and Mrs. Williams, about which the publication was subsequently made in the Appeal. Appellant objected to the introduction of the facts concerning said difficulty, on the ground that the same was immaterial, irrelevant, and collateral, in no way related to deceased or the difficulty with him, and was calculated to prejudice the defendant's rights in the minds of the jurors. The court explained this bill of exceptions, by stating: "The defendant had introduced the article in the Appeal on their cross-examination of the witness Eugene Moore, and was contending that the said article was untrue, and this evidence was admitted as tending to show the truth of the article." In the admission of this testimony the holding of the judge below was correct. In our opinion, the article published in the Appeal was of a libelous character, and not only charged Williams and his wife with a penal offense, but alluded to them in a disparaging manner, disgraceful to them as members of society, and the natural consequence of which was to bring them into contempt among honorable persons. And our statute with reference to proving the truth of matter alleged to be libelous, in justification of the charge, authorizes such proof where it is stated in the libel that a person has been guilty of some penal offense, and the time, place, and nature of the offense are specified in the publication. Pen. Code, art. 747, subd. 2. We accordingly hold that it was competent to prove the facts in connection with that previous difficulty.

On the cross-examination of the defendant the state was permitted to prove that, a few weeks before the killing of deceased, defendant came to the justice of the peace of precinct No. 1 in Erath county, and filed a complaint and instituted a prosecution against one Jess Neblett for indecently exposing his person in the presence of his (defendant's) wife, and that shortly thereafter defendant came into the office of W. J. Oxford, an attorney, on some other business, and while there the question of the prosecution of Neblett came up, and said Oxford advised defendant that he was a stranger in the town, but that he (Oxford) had been here a long time, and that he knew the town and the people better than defendant, and that said Neblett had summoned a great many witnesses by whom he expected to impeach the reputation of defendant's wife for chastity, and that, if defendant persisted in the prosecution of Neblett, said Neblett would prove by said witnesses that defendant's wife's reputation for chastity was bad, and that, if such proof was made, it would likely cause defendant serious trouble, as defendant would not stand such imputations against his wife's character, and that said attorney advised defendant to drop said prosecution and dismiss said case against Neblett, and that, acting upon such advice, defendant did agree to drop said case, and did

have said case against Neblett dismissed. Defendant objected to said testimony at the time, because the same was irrelevant and immaterial, and did not in any way show that the article published in the Appeal was true, and the same would prejudice the rights of appellant. We think this contention of appellant is well taken. The charge contained in the published article was not an imputation of a want of chastity on the part of the appellant's wife, but that she had been guilty of a penal offense in making an assault on a negro woman, and likely got the worst of it; and in that connection some disparaging remarks as to her person and as to the character of defendant were published. Nowhere in the publication is there an accusation of a want of chastity on the part of Mrs. Williams, and, if this had been original testimony as to the reputation of Mrs. Williams, it would not have been admissible. The rule is that "the evidence [of character], when admissible, ought to be restricted to the trait of character which is in issue, or, as it is elsewhere expressed, ought to bear some analogy and reference to the nature of the charge; it being obviously irrelevant and absurd, on a charge of stealing, to inquire into the prisoner's loyalty, or, on a trial for treason, to inquire into his honesty in private dealings." 3 Greenl. Ev. § 25; *Leader v. State*, 4 Tex. App. 162. In the case cited the charge was libel, and the court there held the doctrine above enunciated. But the evidence here offered was not admissible as proof of reputation. It was merely an indirect way of getting before the jury illegal testimony of the reputation of the defendant's wife for chastity. In this connection we would further observe that the state was permitted to prove that the reputation of Mrs. Williams for chastity was bad. This was objected to at the time on the ground that it was irrelevant and immaterial, and because the article published in the Appeal did not attack the chastity of defendant's wife, and her reputation for chastity, though bad, could in no way constitute justification for the publication of said article. This was overruled, and a number of witnesses were permitted to testify as to her bad reputation for chastity. This evidence, as stated above, was not in response to any trait of character involved in the case. The charge made in the publication was to the effect that appellant's wife had committed an assault on Tish Adams, and was therefore guilty of a penal offense, and in that connection disparaging and scurrilous observations were made in regard to appellant and his wife; and the further effect of the article was to suggest that they both had been guilty of an act disgraceful to them as members of society, and calculated to bring them into discredit among honorable people. Now, whatever proof of character could be offered on the part of the state, it should have been confined to a rebuttal of the charge made, as in justification of the libelous matter published; and proof admitted that

Mrs. Williams was a woman of unchaste reputation was in no wise responsive to any issue made by defendant. See authorities cited above. It will be observed in this connection that appellant's main defense was manslaughter: that is, that the homicide was committed under the influence of sudden passion engendered on account of the slanderous publication against himself and his wife. No doubt, the object of the prosecution was to cut off this defense, and to furnish the jury a reason to believe that appellant's anger or passion could not have been aroused or excited on account of said publication, because his wife was a woman of unchaste reputation, or, in other words, a lewd woman. While this rule might be invoked if the insult offered was as to the chastity of the wife, yet, as that issue was not involved in the publication, it was not legitimate testimony, but the effect of such illegal testimony was calculated to prove very prejudicial to appellant. The jury were liable to believe that his passion should not have been excited on account of the publication, because his wife was a bawd, and so, to that extent, appellant's defense of manslaughter would be impaired.

The state was also permitted to prove by two witnesses that they knew the defendant's wife, and were acquainted with her general reputation as being a virago, and a quarrelsome, fighting woman, and that such reputation was bad, to which testimony defendant, at the time it was offered, objected, because such evidence was irrelevant and immaterial, and showed no justification for the article written in the paper, and in no way showed the truth of the same, and was calculated to prejudice the jury against defendant. In addition to what has heretofore been said with reference to this character of testimony, we would further state that it is the general rule that the character of a defendant cannot be put in issue unless such defendant takes the initiative in that regard. It is true, in this case proof was not offered of defendant's character, but the state put the character of his wife in issue. She was not a witness in the case, but a co-defendant; and the relation existing between them, and their status in the difficulty itself, was such that, it occurs to us, the evidence of the character offered by the state as original testimony against the wife was, in effect, trenching upon the rule above suggested. But, however that may be, unless such testimony was authorized by some rule of law it was illegal, and we know of no rule of law which authorized it. Its evident purpose was to cut off appellant's right of defense on the issue of manslaughter, and, as we have before remarked, it was eminently calculated to have that effect with the jury.

The state offered the dying declarations of the deceased. Appellant objected to the following portion thereof, to wit: "When they came in, I treated them perfectly gentlemanly. They added insult after insult." This

was objected to on the ground that it was irrelevant and immaterial, and was the opinion and conclusion of the witness making such declarations, and would not have been admissible if the deceased had appeared in court as a witness and given such testimony, and such testimony was calculated to, and, did, prejudice the rights of defendant. Conclusions or opinions or a summary have been in some cases admitted in evidence where the same were of such a character that they could not be so detailed and presented to the minds of the jury as to impart to them the knowledge which the witnesses actually possessed: that is, mere language could not reproduce, and make palpable in the concrete to the jury, the actual fact in such cases. The conclusion of the witness admitted in evidence has been termed a shorthand rendering of the facts. *Powers v. State*, 23 Tex. App. 42, 5 S. W. 153; *Richardson v. State*, 7 Tex. App. 486. Doubtless the same rule would be applicable to a dying declaration, but it does not occur to us that the portion of the dying declaration objected to would come under that head. The acts of the parties, it occurs to us, could have been here expressed: that is, what the deceased did that indicated his acts were gentlemanly, and, on the other hand, what the defendant and his wife may have done that was an insult.

Objection was made by appellant to the court's charge on manslaughter, on the ground that it was too restrictive; that the court should have given the special charge requested by appellant on the subject, predicated on the assault made by deceased on appellant's wife, suggested by appellant's testimony, giving his version as to how the difficulty began. While the court's charge on manslaughter particularized an insult to appellant's wife, involved in the alleged slanderous publication, yet it authorized the jury to take into consideration all of the facts and circumstances both at the time and before; and we take it that it embraced the matter suggested in appellant's requested charge, and that the jury, under the court's charge, were authorized to consider all that happened at the time. However, on another trial of the case, should the facts be the same, it might be proper for the court to give some such charge as that requested by appellant on the subject of manslaughter, in addition to the charge given here.

Appellant also complains that the court refused to give his special requested instructions on aggravated assault. We presume that appellant insists that his own testimony raises the issue of aggravated assault. We have examined the same carefully, and, in our opinion, it does not present that issue.

There are several other assignments of error, but it is not necessary to discuss them here. But, for the admission by the court of the illegal testimony heretofore discussed, the judgment is reversed and the cause remanded.

WILLIAMS v. STATE. (No. 1,665.)

(Court of Criminal Appeals of Texas. May 17, 1899.)

CONTINUANCE — ABSENT WITNESS — HOMICIDE — STATEMENT OF CO-CONSPIRATOR — LIBEL — PUBLICATION — DYING DECLARATION — HUSBAND AND WIFE — CONFIDENTIAL COMMUNICATION — ERROR — CHARGE — MANSLAUGHTER — PRINCIPAL AND ACCESSORY.

1. Where the testimony of an absent witness on a former hearing was such that accused would probably not have introduced him, had he been present, and no suggestion was made that he would testify differently, though, if this were the case, it could have been easily shown, it was not error to refuse a continuance because of his absence.

2. Deceased was stabbed in an altercation with accused and her husband, and within two minutes, and in the presence of deceased, and while accused had hold of his arm, the husband said: "Yes, God d—n him! lay him out. That is what I aimed to do, and there are five or six others in this town that I will do the same way, if I get the chance." Held that, conceding that the stabbing resulted from a conspiracy of the husband and wife, the admission of the statement against accused was prejudicial error; accused not having assented thereto, and not being required to speak.

3. In a prosecution of one accused of killing the publisher of a paper containing a libel against accused, the latter introduced the libel in mitigation. There was no evidence to show that accused knew deceased was not in fact the author, but it did show accused regarded deceased as responsible for it. Held, that it was prejudicial error to admit proof that deceased did not write the article, or his dying declaration to that effect.

4. Under Code Cr. Proc. art. 774, prohibiting a husband or wife from testifying as to communications by the other, it was error to compel a wife, accused with her husband of a homicide, but tried separately, to testify that her husband told her before the killing that he was going to get a pistol.

5. A husband and wife were accused of killing an editor because of a libel against them. On the trial of the wife the court charged that if she sought deceased, not to kill him or inflict serious injury, and in the conflict deceased attacked her so as to cause her to apprehend death or serious injury, and she formed the intent to kill under passion so excited, she would be guilty of manslaughter, but predicated no charge on the libel, or the killing by the husband, though there was evidence to support it notwithstanding the wife testified she did the killing. Held, that the court having predicated a charge on manslaughter growing out of the libel, for the husband, the wife was entitled to a charge presenting the same view of the case.

6. She was entitled to a charge on the doctrine of principals, as applied to a killing by the husband.

Appeal from district court, Erath county; J. S. Straughn, Judge.

Annie S. Williams was convicted of murder in the second degree, and she appeals. Reversed.

Daniel & Keith, W. J. & Eli Oxford, and Martin & George, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and her pun-

ishment assessed at confinement in the penitentiary for a term of 20 years; hence this appeal.

This is a companion case to cause No. 1, 656 (Williams v. State [decided at the present term] 51 S. W. 220), and the statement of facts is substantially the same in both cases. In the former case, however, Harry Williams was a witness, while in this case he did not testify, but his wife, Annie S. Williams, was a witness in her own behalf. She testified in this case. in effect: That she and her husband were informed of the article in the *Erath Appeal* on Saturday, while they were in the country. That when they came home, that night, they saw the article about supper time. After supper she and her husband and son Frank Helzer got in the buggy, and went to the house of one Moore, who was the editor of the *Empire*, another paper in town, and there talked with him in regard to the said publication. That from there they returned home, and remained at home during Sunday. That on Monday morning she and her husband and son Frank got in the buggy and went downtown. That she carried her husband's dirk knife with her. That her husband attempted to get a pistol at the court house. That while he was in the court house she went to a store and bought a buggy whip. That she and her son then returned to the court house, and her husband came out and got in the buggy, and they drove to the office of King & Hibdon. That she had made up her mind, before she went down there, to horsewhip the man who had written the article in the paper. That she carried the dirk knife along for protection. That they went up to the office of King & Hibdon, and no one was there, and they sent for King. When he came in, Mr. Williams asked him if he was the editor of the *Erath Appeal*, and he said he was. Williams then asked him if he was responsible for the article in the paper, and he said he was. Williams then asked him if he knew how that article read, and he said he did. Her husband then told him that the article was a lie from beginning to end. King said: "Hold on, Williams. I have good authority for that article." That she asked King who was his authority, and he said, "Snapp." Williams then said to King, "Don't you know that you have put the negro at the head of this thing, and that you slandered my wife?" and then asked him if he knew what "proboscis" meant, and deceased said he did,—that it was the fore part of the face. Williams then said: "It is no such thing. It was the snout of an elephant." She then asked King if he had ever seen her before, and he said, "No," and then said to King, "What do you know about my face and complexion and my form?" King said, "What in the hell have you got to do with it?" and she then said, "I will show you." "I then reached back and picked up the whip, and King jumped at me, struck me two licks, one on each side of the forehead;

51 S.W.—15

and King said, as he struck me, 'No, God damn it! you won't. I will kill you first.'" That, when he struck her on the head with his fist, he knocked her bonnet down over her face, and grabbed her by the arm above the left elbow. He gave her arm a fearful wrench, and pushed her out of the door. Her bonnet was still down over her face, and he had her by the left arm; and he hurt her so by twisting her arm that she took the knife she had in her left hand with her right hand, and cut at him, but did not know that she hit him, as she could not see what she did. She was so mad, and he hurt her so, that "I cut him for the purpose of getting him loose from me." About this time Williams and King became engaged, and were knocking at each other; and Sam Russell and Charley Wilson came running in, and separated them. She further said that she intended to horsewhip King, if he said he wrote the article in question, and to do whatever was necessary to make him take it, but that she did not intend to kill him. For other testimony, we refer to the opinion in Williams v. State, supra.

The first question presented is as to the action of the court in overruling appellant's motion for continuance. Appellant made an application, setting up that she could prove certain facts by one Russell, who, it was shown, had been properly subpoenaed, but was unable to attend, on account of sickness. In reply to this, the state set up the testimony of said witness Russell in the examining trial, and offered to admit the truth thereof. This examining trial evidence, in addition to the facts stated in appellant's application, contained other facts testified to by said witness more or less damaging to appellant. It was further developed, as shown by the court's explanation, that on a former day of the same term a motion for continuance, predicated on the absence of this same witness, was filed, which contained, as an exhibit, the whole of the examining trial evidence. It is insisted by the state that this was a sufficient answer to the application for continuance. On the other hand, appellant contends that it was no answer; that the authorities all show that, in order to cut off the motion for continuance, the truth of the facts stated in the application must be admitted. This is true, as a general proposition; but, under the peculiar facts of this case, it occurs to us that the application was here made for delay merely, and that, if said witness had been present, it is doubtful if appellant would have introduced him, should the state have failed to bring him forward as a witness. There is no suggestion here made that his testimony would be different from that rendered by him on a former trial of the case. If such was the case, it was entirely feasible for the defendant to have taken his affidavit to that effect, as said witness was accessible, being sick in the town where the trial took place.

In our opinion, the testimony of Mrs. Altman and Tish Adams was admissible. The

difficulty evidently occurred about the alleged libelous publication contained in the Appeal, and it was admissible to show the facts and circumstances connected with said publication, as furnishing the basis thereof, and to show what appellant may have said about it. See the question discussed in *Williams v. State*, supra.

The state introduced John Lockhart, who testified that, shortly after the stabbing of King, and while defendant and Harry Williams were coming downstairs from the office of deceased, and just as he struck the sidewalk, in the presence of the officer who had him in charge, witness Lockhart said to the party who had hold of deceased to lay him down, so the blood would run out of him, and that Harry Williams replied to that, and said: "Yes, God damn him! lay him out. That is what I aimed to do, and there are five or six others in this town that I will do the same way, if I get the chance." This testimony was objected to on the ground that it was irrelevant and immaterial, after the commission of the offense, and not assented to by defendant Annie S. Williams, and was calculated to injure the rights of the defendant. The court, in admitting this testimony, explains "that this statement of Harry Williams was made within about two minutes after the difficulty, that it was made within a few steps and within view of the deceased, and that the defendant was present and had hold of Harry Williams' arm at the time." Under the circumstances of this case, we do not regard this as *res gestæ*, as against appellant. Concede that the testimony shows that she and her husband had entered into a conspiracy to take the life of deceased; the purpose and object of this conspiracy had been accomplished. So it cannot be said that this declaration was made pending the conspiracy, and in furtherance of the common design. It was the act of one of the conspirators made after the accomplishment of the object of the conspiracy. This might be evidence against Williams, the party making it, as a confession or admission, and could only be used against him. What Williams said was not contemporaneous with the act of stabbing deceased, and was not illustrative of that transaction. It was the narration of a past act by one of the co-conspirators, and is not relevant, as forming a part of the *res gestæ* of the homicide itself. See *People v. Davis*, 56 N. Y. 95; *Heine v. Com.*, 91 Pa. St. 145; *State v. Larkin*, 49 N. H. 39. The authorities all teach that the confessions made by one after the conspiracy has ended can only be received as evidence against the one making the confession, and not against his associates. See *Com. v. Ingraham*, 7 Gray, 46; *State v. Arnold*, 48 Iowa, 566; *People v. Arnold*, 46 Mich. 268, 9 N. W. 406; *People v. Aleck*, 61 Cal. 137. If we analyze the language used in the declaration attributed to Williams, the only part of it that referred to the homicide is the statement that

he did it. That, taken by itself, would not damage appellant. But the other expressions, showing his individual animus, if admissible, as affecting her, might prove quite prejudicial. There is no testimony that she in any wise assented to this, and her silence cannot be construed as such indorsement, when she was not required to speak, as to authorize its introduction as evidence against her. This testimony was improperly admitted.

The state was permitted to prove by John Hibdon that Frank Leonard wrote the article in the Appeal about which the difficulty occurred; that King did not know of his writing it, and had nothing to do with it, and, so far as witness knew, he never knew of its contents until after the paper was published. This testimony was objected to on the ground that the proof showed that deceased was one of the publishers of said paper, and the state could not be heard to say that he did not write it and was not responsible for the same, because the law made the same his article, so far as the rights of the defendant were concerned; the article having appeared in his paper as an editorial. The article in question, which was offered in evidence by appellant, was doubtless introduced for the purpose of raising the issue of manslaughter, and was also admissible for the purpose of suggesting murder in the second degree, and in mitigation of the punishment therefor. If said article be libelous, in its terms, of appellant and his wife, then the fact that deceased was either the author or publisher and circulator, it occurs to us, would have the same effect; and we fail to see how its purpose, so far as appellant was concerned, could be lessened or diminished, as to her, by showing that deceased did not in fact write the article. But evidently it was the object of the state by this testimony to depreciate or disparage her defense of manslaughter, by allowing it to be shown that deceased was not in fact the author of the article. There is nothing in the bill, nor, if we refer to the testimony, is there anything in it, to show that she knew he was not the author of the article. On the contrary, the testimony tends to show that she regarded him as responsible for the article. We are of opinion that this testimony should not have been admitted. And the same observations above made are also applicable to that portion of deceased's dying declarations wherein he says, "I did not write the article which gave offense."

Appellant further objected to that portion of the dying declaration of deceased as follows: "When they came into the office, I treated them perfectly gentlemanly. They added insult after insult." Appellant objected to this on the ground that it was not the statement of any fact, but a conclusion of the witness. We concur in this view. See the question discussed in *Williams v. State*, supra. When Mrs. Williams was on the stand, the state was permitted to prove by her that her husband told her on Sunday that

he was going to get a pistol Monday. This was objected to by defendant because the same elicited a private and privileged communication between the husband and wife, and was calculated to prejudice the rights of defendant. It was not shown that this was pertinent or germane to the examination of the witness in chief, so as to authorize the state to bring it out in cross-examination. Standing isolated, it would appear that this was a privileged communication between the husband and wife, and should have been excluded, under article 774, Code Cr. Proc.

Appellant also excepted to the court's charge on manslaughter, and to the refusal of the court to give her requested charge on that subject. We have examined the court's charge carefully on this subject, and find that it only submitted to the jury manslaughter predicated on a killing by appellant herself. Said charge submits an assault on her by deceased as adequate cause, and further submits that if she sought deceased, not for the purpose of killing or inflicting serious bodily injury, and, in the conflict which ensued, deceased attacked her in such manner as to cause her to apprehend death or serious bodily injury, and she formed the intent to kill under passion so excited, in such event she would be guilty of manslaughter. The court gave no charge predicated on the killing by Williams, the husband of appellant, nor did he give any charge predicated on the alleged libelous article. It is true that appellant, by her own testimony, shows that she stabbed deceased, yet the jury may not have believed her statement; and there is testimony in the record on the part of the state indicating that Williams, her husband, did the stabbing. Now, if Williams committed the act which caused deceased's death, and he was instigated thereto on account of the libelous article, or on other accounts suggested in the record as adequate cause to create passion, and the killing by him was under circumstances requiring a charge on manslaughter, certainly his wife should have had the benefit of a charge presenting that view of the case. The court, in its charge, defines who are principals; but it nowhere gave appellant the benefit of the doctrine of principals, as applied to a killing by appellant's husband. Moreover, the effect of the court's charge in singling out certain circumstances as adequate cause to reduce the offense to manslaughter, in omitting to instruct the jury in that connection in regard to the alleged libelous article and its influence on appellant's mind, was calculated to wholly deprive her of the benefit of passion excited in her mind on that account; and, in our view of the case, she should have had the benefit of such an instruction. The charge asked, in our opinion, remedied the defects complained of, and was a proper charge, and should have been given. For the errors pointed out, the judgment is reversed, and the cause remanded.

CARPENTER v. STATE.

(Court of Criminal Appeals of Texas. May 10, 1890.)

CRIMINAL LAW—EVIDENCE—REVIEW—BILL OF EXCEPTIONS—NECESSITY—EVIDENCE ON FORMER TRIAL—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—REVIEW—VERIFICATION OF MOTION.

1. Where defendant and another raised a difficulty with the prosecutor, evidence of such other's acts during the continuance of the difficulty is admissible against defendant, as part of the *res gestæ*.

2. An assignment of error in a criminal case to which no bill of exceptions is reserved cannot be reviewed on appeal.

3. Where a witness for the state in a criminal case could not read, was unwilling, and testified contrary to his testimony on the preliminary examination, which had been reduced to writing, it was not error to permit the state's attorney to read his former testimony to refresh his memory.

4. Refusal to grant a new trial of a criminal case on the ground of newly-discovered evidence cannot be reviewed where that ground of the motion therefor was not verified by appellant.

Appeal from district court, Clay county; A. H. Carrigan, Judge.

Elmo Carpenter was convicted of an assault with intent to murder, and he appeals. Affirmed.

A. K. Swan, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of 2½ years; hence this appeal.

Appellant's first assignment of error is, "The court erred in overruling defendant's objection to the testimony of H. H. Schwend and other witnesses as to the conduct of Chas. Flanigan at and after the time Bob Givens was forced into the waiting room at the depot, as shown by bill of exceptions." It appears from the record that appellant and Charles Flanigan, who were brothers-in-law, raised a difficulty with Bob Givens; and during the progress of the trial he objected to proof of the conduct of Charles Flanigan towards said Givens, in the absence of appellant. The grounds of objection were: "Because it was not shown that there was a conspiracy between appellant and Flanigan, and because the offense, if any, had been completed before said Flanigan entered said waiting room, and because the proof showed that defendant had abandoned the difficulty, if he had entered into it, and was not present at the happening of said conduct." This bill is approved by the court, with the following explanation: "That it appeared that the acts of Chas. Flanigan were done in the waiting room immediately after the shooting, and before the difficulty had ended." Where two parties enter into a difficulty with a third party, the acts, declarations, and conduct of either party are admissible against the other, during

the continuance of the difficulty, as part of the *res gestæ*.

There is no bill of exceptions reserved to support appellant's second assignment of error, which complains of the action of the court in excluding testimony, and hence we cannot review it. Appellant's second assignment of error complains of the action of the court in the following particular: "B. G. Gerling, witness for state, was placed on the stand, and asked by counsel for state if he was present at a difficulty between Bob Givens and appellant and Flanigan, in which Chas. Flanigan shot at Givens; and witness said that he was. State's counsel then asked witness whether or not defendant put anything in his (witness') pocket just after Flanigan fired the shot, to which witness replied that he did not. The testimony of said witness given at the examining trial of defendant, and reduced to writing, was then identified by witness, whereupon state's counsel asked witness to state whether or not he testified to this on the examining trial, and proceeded to read a part of said testimony to said witness, to which appellant objected upon the ground that the same was leading and suggested to witness the answer desired, which objection was by the court overruled. Appellant then objected to the reading of said evidence in the hearing and presence of the jury, which objection, also, the court overruled, and permitted state's counsel to read to said witness, within the hearing of the jury, as follows, from the testimony of said witness, to wit: 'Some one dropped something in my pocket during the difficulty. Eight or ten minutes later, some one came and asked me for that which he had placed in my pocket, and got the thing left in my pocket himself. I don't know what it was in my pocket. Carpenter put whatever it was in my pocket, and Carpenter took it out.' Witness was then asked to tell how it was, to which defendant's counsel objected on the ground that state's counsel had, by reading said testimony to witness, suggested to him the desired answer, which objection was by the court overruled, and said witness was permitted to testify as follows: 'Just after the shot was fired by defendant Flanigan, Carpenter came up to me and put something in my pocket, and in a few minutes he came and got it again. I did not put my hand in my pocket, and don't know what it was he put in there. When he came back he said, "I want to get what I dropped in your pocket."' " The court explains the bill as follows: "That said witness testified that he could not read, and he showed clearly that he was an unwilling witness, and state's counsel stated that he wanted to read the above testimony only to refresh the memory of the witness; and the court ruled, under the circumstances, that the memory of the witness could be so refreshed." The reasons for the admission of this testimony, as stated by the court, make it clearly

admissible. Where a witness cannot read, his statement can certainly be read to him, to know if he had made such statement. This is especially true when, as indicated by the court, the witness is an unwilling one. We have frequently held that, where a witness is not willing to tell what he knows about the transaction, the party introducing him can ask him leading questions, and force from his unwilling lips the truth that is being sought. We do not think the court erred in admitting the testimony in the manner in which he did.

Appellant's third assignment complains of the action of the court in submitting the law of conspiracy and common design on the part of the defendant and Charles Flanigan to murder the prosecuting witness, Bob Givens, for the reason that there was not sufficient evidence to justify such charge. We do not think it necessary to review the facts, but suffice it to say that we think the evidence amply raised this issue, and the court acted properly in submitting the same to the jury.

Appellant's fourth assignment complains of the sixth paragraph of the court's charge because there is not sufficient proof to justify the conclusion that appellant was a principal, acting with Charles Flanigan. And the fifth assignment also refers to this same matter. As above indicated, we do not think there was any error in the court's charge on this phase of the law. Nor did the court err in not charging on self-defense, nor in failing to charge on circumstantial evidence.

Appellant's ninth assignment complains of the court not granting a new trial on the ground of newly-discovered evidence. This ground of the motion is not sworn to by appellant, and hence, even if meritorious, could not be considered by us. The evidence is amply sufficient to support the finding of the jury, and the judgment is in all things affirmed.

DONNELLY v. STATE.

(Court of Criminal Appeals of Texas. May 10, 1899.)

CRIMINAL LAW—APPEAL—RECOGNIZANCE.

1. A recognizance in a criminal cause, which does not state the punishment assessed against the appellant, is not sufficient, under Acts 25th Leg. p. 5.

2. A recognizance, entered into after the expiration of the term of court at which conviction was had, is not sufficient to give the appellate court jurisdiction.

Appeal from district court, Mills county; John M. Furman, Judge.

F. W. Donnelly was convicted of crime, and appeals. Dismissed.

Cox & Meek, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. The assistant attorney general files a motion to dismiss this cause because

this court has no jurisdiction, upon the following grounds: "(1) Because the recognizance entered into by appellant on September 22, 1898, and during the term of court at which appellant was tried, does not comply with the form, either substantially or otherwise, as set forth in article 887, Code Cr. Proc. (Acts 25th Leg. p. 5), and is therefore not such as will sustain the jurisdiction of this court. (2) That appellant was tried at the September term of the district court of Mills county, which adjourned on October 1, 1898, and that at the March term of said court, on, to wit, March 27, 1899, appellant entered into the recognizance disclosed in what is termed the 'Supplemental Transcript' on file herein; that the same was so entered into by appellant after the term at which he was tried, and after the trial court had lost jurisdiction of said cause." We find, from an inspection of what purports to be the first recognizance filed, that the same does not, as indicated, comply with the form prescribed for recognizance by the twenty-fifth legislature, in that the same does not state the punishment assessed against appellant. We have repeatedly held that a recognizance which fails to state this is defective. See Code Cr. Proc. art. 887 (Acts 25th Leg. p. 5); *May v. State* (Tex. Cr. App.) 49 S. W. 402; *Davis v. State*, Id. 403; *Herrington v. State*, Id. 402.

As to the recognizance entered into by appellant after the adjournment of the term of court at which he was convicted, it is only necessary here to state that the same is insufficient, because there is no authority for entering into a recognizance after the expiration of the term of court at which the conviction was had. *Hill v. State*, 4 Tex. App. 562; *Turner v. State*, 16 Tex. App. 318; *Lewis v. State*, 34 Tex. Cr. R. 126, 29 S. W. 384, 774, and 30 S. W. 231; *Quarles v. State*, 37 Tex. Cr. R. 362, 39 S. W. 668, and also on motion for rehearing (Dallas term, 1899) 50 S. W. 457. For the reasons stated, the appeal in this case is dismissed.

PERRY v. STATE.

(Court of Criminal Appeals of Texas. May 10, 1899.)

CRIMINAL LAW—APPEAL—RECOGNIZANCE.

Where a recognizance filed on appeal in a criminal cause, under Acts 25th Leg. p. 5, fails to state the amount of punishment assessed against the appellant, the appeal will be dismissed on motion.

Appeal from Coke county court; L. H. Brightman, Judge.

R. P. Perry was convicted of slander, and appeals. Appeal dismissed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The assistant attorney general moves to dismiss the appeal because the recognizance is not sufficient, in that it

fails to state the amount of punishment assessed against appellant, as prescribed in the form of recognizance provided by Acts 25th Leg. p. 5. We find, upon an inspection of the recognizance, that the point is well taken, and the motion is sustained. The appeal is dismissed.

HOWARD v. STATE.

(Court of Criminal Appeals of Texas. May 10, 1899.)

APPEAL—RECOGNIZANCE—SUFFICIENCY.

A recognizance which does not state the amount of punishment assessed against appellant is insufficient to support an appeal.

Appeal from Comanche county court; J. M. Lambert, Judge.

Monroe Howard was convicted of assault, and appeals. Appeal dismissed.

Graham & Brightman, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of an aggravated assault. Motion is made by the assistant attorney general to dismiss the appeal because the recognizance is not sufficient. The defect is in the following particular: the failure to state the amount of the punishment assessed against appellant. We find the recognizance defective as stated, and the motion is sustained. See *May v. State* (Tex. Cr. App.) 49 S. W. 402. The appeal is dismissed.

PECK v. STATE.

(Court of Criminal Appeals of Texas. May 10, 1899.)

CRIMINAL LAW—SUFFICIENCY OF RECOGNIZANCE—DISMISSAL OF APPEAL.

1. A recognizance which does not state the punishment to which defendant was sentenced is insufficient to support an appeal.

2. If the recognizance filed at the time of taking an appeal is defective, accused cannot prevent a dismissal by filing a valid recognizance.

Appeal from district court, Mills county; John M. Furman, Judge.

J. R. Peck was convicted of larceny, and appeals. Appeal dismissed.

Cox & Meek, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted at the September term, 1898, of the district court of theft of property under the value of \$50, and his punishment assessed at confinement in the county jail for 24 hours. He entered into a recognizance during said term, pending his appeal to this court. The recognizance is defective in not stating the amount of punishment assessed against appellant,—in fact, it is not the form prescribed by the act of the 25th legislature. At the

March term, 1899, appellant sought to enter into another recognizance. This cannot be done. The motion of the assistant attorney general to dismiss the appeal is sustained, and the appeal is dismissed.

FREEMAN v. STATE.

(Court of Criminal Appeals of Texas. May 10, 1899.)

HOMICIDE—DECLARATIONS OF INJURED PARTY— RES GESTÆ.

Deceased, after being wounded, and after the parties had separated, and left the scene of the difficulty, ordered a doctor to be brought, gave his keys to a bystander, with instructions to open his saloon, into which deceased was carried. He then became unconscious, in which state he remained for some time. Upon regaining consciousness, and having his wounds dressed, deceased made a statement relative to the difficulty, in narrative form, using the past tense, and prefacing it by a statement in no way connected with the difficulty. *Held*, that the statement was admissible as part of the res gestæ, though from 30 to 60 minutes had elapsed since the difficulty, and the mind of deceased had, in the meantime, been diverted by other affairs.

Motion for rehearing. Overruled.

For former opinion, see 46 S. W. 641.

Cecil Smith, J. H. Glasgow, and J. M. Morgan, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. This case was affirmed at the last Austin term, 1898, and motion for rehearing was presented and argued at the Tyler term, 1898. The motion and argument of appellant's counsel particularly calls in question the action of this court in holding that the statement of the deceased, made directly after the difficulty which ultimately caused his death, was erroneous. In the original opinion we did not discuss this matter at length, but stated the question in general terms, citing authorities. We now set forth appellant's bill of exceptions on this subject in full: "Be it remembered that upon the trial of the above styled and numbered cause the state showed by the witness Newberry that he was standing 60 or 70 yards from defendant and deceased at the time of the difficulty, and that after the difficulty the deceased left defendant, and came toward his (deceased's) saloon, which saloon was 60 or 70 yards from the place of the difficulty; that the witness ran toward deceased, and met him about half way between the saloon and the place of the difficulty, at which time deceased remarked to witness 'that that damned son of a bitch has killed me over that coon.' The deceased then told witness to go after the doctor for him, and witness then told deceased to give him his keys to the saloon door. Deceased then took the keys to the door out of his left pants pocket, with his right hand, and gave the keys to the witness, and witness went on, and opened the saloon door, and turned back, and met deceased about 10 steps

from the saloon, and assisted deceased to sit down in the saloon door. When deceased sat down in the saloon door, he said, 'I believe I will faint.' Witness then fixed a blanket back in the saloon, and we put deceased upon it, at which time deceased fainted, and remained in a fainting condition for about 10 minutes before he recovered; and about 15 or 20 minutes after he recovered, and after the wounds were dressed, deceased stated to Aunt Nancy Johnson, in my presence, that he was not afraid to die; that 'some people look down on the saloon business, but I have never wronged any person out of a cent, and have tried to live honest'; and then went on to state that 'when the defendant met me he asked me if I had seen anything of his coon, and I told him I had not; and I said, "Why?" and defendant said, "some God damned son of a bitch had turpintined his coon while he had gone to dinner." I said, "I had something to do with that, and I do not want to be called such names." Defendant said, "If you did, you are a damned son of a bitch." I then struck the defendant, and about the same time defendant struck me. I knocked the defendant down, but I did not know I was cut until I tried to reach out my left hand to take hold of defendant, and found that my left arm was paralyzed. After the defendant cut me, I saw the knife in his hand. It was a large knife, with a blade 3 or 4 inches long, with a sharp curved point.' The state offered the evidence of the deceased's remarks as detailed by the witness Newberry as res gestæ, which statements were made between 30 and 60 minutes from the time of the difficulty. To all of which statements of the deceased, as detailed to Mrs. Johnson, in reference to how the difficulty took place, in the presence of the witness Newberry, the defendant objects, for the reason that such statements so made to Mrs. Johnson in presence of the witness Newberry were not admissible as res gestæ in the trial of said cause; which objection on the part of defendant the court overruled, and allowed said witness Newberry to detail to the jury the statements of the deceased made to Mrs. Johnson as to how the difficulty occurred. To which ruling of the court the defendant excepts," etc. It will be seen from the above bill of exceptions that appellant does not object to any particular statement of the deceased, as, to wit, that he said that he was not afraid to die, etc., but the general objection urged is that the detailed statement of the deceased to Mrs. Johnson in reference to how the difficulty occurred was not res gestæ. In the very able and exhaustive brief filed by appellant on motion for rehearing he urges that the length of time that elapsed between the time deceased was cut by appellant and the statement made, being about 60 minutes, is a circumstance tending to show that said statement was not res gestæ; that, in addition to this, appellant went about other things, to wit, that he sent for the doctor; that he asked the witness Newberry to open his sa-

loon door, and got his keys out of his pocket for that purpose; that he then remarked that he was about to faint, and sat down on the gallery; that after this he did faint, and was removed into the saloon; that he remained unconscious for some time; that, after consciousness returned, his wounds were dressed, and in about 15 minutes thereafter he made the statement referred to. And as further indicative of the fact that there was a break or let down in the continuity of his statement to Mrs. Nancy Johnson, he prefaced his statement with the remarks "that he was not afraid to die; that some people look down on the saloon business, but that he had never wronged any person out of a cent, and that he had tried to live honest." It is further insisted that said statement appears to be removed from the domain of *res gestæ* by the fact that it was in a narrative form.

There is no difficulty as to a definition of the term "*res gestæ*." Mr. Wharton defines "*res gestæ*" "as facts speaking for themselves through the instinctive words and acts of participants, and not in the words and acts of participants when narrating the facts. What is done or said by participants under the immediate spur of the transactions becomes thus part of the transaction, because it is thus the transaction which speaks." And at common law the *res gestæ* was strictly confined to the transaction itself. See Whart. Ev. §§ 262-264, inclusive; Underh. Cr. Ev. §§ 95-98, inclusive. The doctrine in some of the American states has been extended beyond the very time of the transaction, and the rule in Texas is very liberal in the admission of testimony as *res gestæ*. On this subject we quote from *Lewis v. State*, 29 Tex. App. 201, 15 S. W. 642, which is the approved doctrine on this subject, as follows: "In order to constitute declarations a part of the *res gestæ*, it is not necessary that they were precisely coincident in point of time with the principal fact, but if they spring out of the principal fact, were voluntary and spontaneous, and made at a time so near as to preclude the idea of deliberate design, they may be regarded as contemporaneous, and are admissible in evidence." And see *Castillo v. State*, 31 Tex. Cr. R. 145, 19 S. W. 892. "The difficulty has been," as was remarked by Judge Hurt in *Lewis v. State*, *supra*, "in the application of the principle." And we confess that, viewing the decisions of our court on this subject, it has been marked with great latitude as to the time testimony has been admitted as *res gestæ*. In *Stagner v. State*, 9 Tex. App. 440, statements made 20 minutes after the transaction were admitted. And so in *Lewis v. State*, 29 Tex. App. 201, 15 S. W. 642, the statement made from a half hour to an hour and a half after the transaction was held admissible. In *Fulcher's Case*, 28 Tex. App. 465, 13 S. W. 750, a declaration was admitted which was made 15 minutes after the shooting. In *Brown's Case*, 44 S. W. 174, a declaration made 15 minutes after the trans-

action was excluded. And so in *Ford's Case* (Dallas Term, 1899) 50 S. W. 350, a declaration made some 15 minutes after the shooting was excluded. Of course, all these cases depend upon their own peculiar facts. In those cases in which the testimony was held admissible the judges appear to have based their decision on the idea that the circumstances indicated a spontaneity, while in the others there were circumstances which indicated deliberation and reflection.

Another test as to what constitutes *res gestæ* is that if it is the event speaking for itself at the time. To illustrate, if, during the difficulty, one cry out, "Spare me!" or "Don't stab me again!" But if it is the narration of a past transaction it ought not to be admitted; as if, after a difficulty between A. and B., A. narrates to C. the circumstances of the difficulty in the past tense. So far as the Texas cases are concerned, we appear to have made a complete departure from this rule, for a large portion of the decided cases on this question are in phraseology narratives of a past occurrence. In *Craig's Case*, 80 Tex. App. 621, 18 S. W. 297, this court recognized the difficulty of reconciling the cases, or of stating the application of the rule to any given case. We quote from Judge Hurt's opinion in said case, as follows: "Just when the fact or statement is or is not a part of the *res gestæ* is one of the most difficult questions to solve known to the writer. The old rule was that, to be a part of the *res gestæ*, the fact or statement should be contemporaneous with the transaction; and this rule is approved by many courts of the first ability. On the other hand, the rule has been construed so as to admit acts and declarations occurring not contemporaneous with the transaction which preceded or followed it; and when they are to be admitted or rejected, if not coincident with the act or transaction in question, is a question of judicial discretion of embarrassing nicety." On this same subject we quote from Underh. Cr. Ev., as follows: "The spontaneous, unpremeditated character of the declarations, and the fact that they seem to be the natural and necessary concomitants of some relevant transaction in which their author was a participant, constitute the basis for their admission as evidence. If a sufficient period has intervened between the act and the statement for consideration, preparation, or taking advice, the statement may be rejected. The mere likelihood or probability that the statement was the result of advice or consideration may exclude it. Actual preparation need not be shown. * * * On the whole, *res gestæ* cannot be arbitrarily confined within any limits of time. The element of time is not always material. If the declarations are narrative and descriptive in their form and character, if they are not the impromptu outpourings of the mind, they should be rejected, though uttered only a few minutes after the main transactions." Underh. Cr. Ev. §§ 1

97. And again, in order to test the spontaneity of the statement, in addition to the lapse of time, the fact that after the main transaction something else intervened, or the party engaged in some other affair prior to making the statement, would be a circumstance to exclude it. This was the rule adopted in *Bradberry v. State*, 22 Tex. App. 273, 2 S. W. 592. In that case the witness Haselfield lived some 200 yards from the place where the difficulty occurred. He heard the firing, and after it ceased went to the place, saw defendant hobbling around, and asked him what was the matter. Defendant told witness to catch his (defendant's) horse, and bring it to him, and he would tell him all about it. He caught defendant's horse, took it to him, which occupied about three minutes, and defendant then made the statement to him about the difficulty. The lower court excluded this statement on the ground that it was not a part of the *res gestæ*. On appeal the ruling of the lower court was affirmed. The holding of the court was predicated on the fact that the party's mind in the interim became employed about another affair, to wit, catching his horse, and that he had time for reflection, and that this constituted a break or let down between the main transaction and the subsequent statement, and that, consequently, the declaration was not spontaneous. Reviewing the authorities, it clearly appears to the writer that, having departed from the old rule on the subject, we really have no rule; but the admission of such testimony is predicated solely on the discretion of the judge trying the case as to what statements are or are not the spontaneous outgrowth of the main transaction; subject, of course, to review by this court. And the holding of this court on the subject seems to be somewhat confused, which usually follows when rules are abandoned. What is spontaneous belongs to the discretion of each particular judge, and is well illustrated by the old story of the chancellor's foot as a measure of the judgment of the court. In the original opinion the rule which appears to be in vogue in this state was adopted, and it was held that the statement appeared to be spontaneous, and was *res gestæ*. In the present motion, however, our attention has been called, by the able brief of counsel for appellant, to the violation of several tests with reference to the admission of testimony as *res gestæ*, and the authorities bearing upon this question have been discussed and reviewed. A majority of the court adhere to the view that the testimony here admitted is within the rule laid down by the authorities in this state. I am constrained to admit that some of the cases go very far towards sustaining the admission of the testimony here complained of, but I do not believe that any case goes as far as we are called upon now to extend the doctrine. The statement here was made about an hour after the main transaction, and after

the parties had separated. So, in point of time, the testimony here complained of is as far removed from the main transaction as that of any reported case. Besides this, the parties had separated. Both had left the scene of the transaction. Defendant had gone to his hotel, and deceased had gone to his saloon. More than this, the mind of the declarant had in the meantime been diverted by other affairs. He had ordered a doctor; he had given his keys to Newberry, to open the saloon for him; he remarked that he was going to faint, and did faint; he was then carried into the saloon, and remained unconscious for some length of time. After this he revived, and his wounds were then dressed. Some 15 minutes after consciousness returned, and when a crowd had gathered around, he made the statement complained of to Mrs. Johnson, prefacing it by a statement as to other matters in no wise connected with the difficulty. The statement itself, as made, was in narrative form, the declarant using the past tense. I believe that a number of tests erected by the law as safeguards against the admission of this character of testimony as *res gestæ* have been violated. My Brethren, however, as stated before, do not agree with me, but believe that the former opinion should be adhered to, and the motion for rehearing overruled. I deem it proper, however, to express my views on this question. In accordance with the views of the majority of the court, the motion for rehearing is overruled.

SCROGGINS v. STATE.

(Court of Criminal Appeals of Texas. May 10, 1899.)

WITNESSES—COMPETENCY—ASSAULT.

1. A child of six, when sworn, stated she did not know what she had done, or understand its meaning, when she held up her hand, but stated she knew it was right to tell the truth, and wrong to tell lies, and that people that told lies were put in jail. *Held*, that she was a competent witness.

2. A child of six testified to facts showing an aggravated assault on her by accused, and was corroborated by her mother, to whom she had voluntarily told enough of the assault to show something was wrong, and when the mother approached, accused he seemed in a hurry to get away, and went off quickly. Accused denied the assault, but was impeached by one witness in rebuttal. *Held*, that the verdict of aggravated assault would not be disturbed.

Appeal from Travis county court; A. S. Walker, Judge.

G. B. Scroggins was convicted of aggravated assault, and he appeals. Affirmed.

Hugh L. Davis, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of \$50, and he appeals.

In the view we take of this case, it is only necessary to pass upon two questions.

Appellant reserved the following bill of exceptions: "Be it remembered that on the 15th day of April, 1897, defendant, G. B. Scroggins, being on trial in said court upon information charging him with an aggravated assault on a child, Margaret Downie, to which charge defendant had pleaded not guilty, the child Margaret Downie was introduced as a witness, whereupon defendant objected to her testimony as incompetent, and requested the court to examine her as to competency as a witness, which the judge proceeded to do, directing her to hold up her hand and be sworn, and, she holding up her hand, the judge administered to her or repeated to her the oath: 'You swear that the testimony you give in this case shall be the truth, the whole truth, and nothing but the truth. So help you God;' whereupon the judge asked the child if she understood what she had just done, to which she replied, 'No, sir.' When he again asked the question, 'Do you understand the meaning of what you did just now, when you held up your hand?' she answering, 'No, sir,' the question was then put, 'Is it right to tell the truth or not?' Answer: 'It is right.' Question: 'Is it wrong to tell a lie?' Answer: 'Yes, sir; it is wrong.' The witness was then passed to the state's attorney to examine. The state asked witness if she knew what was done to people that told lies. She answered, 'Put them in jail.' The county attorney then asked the witness if it was right or wrong to tell the truth, to which witness answered that it was right. The county attorney then asked witness if it was right or wrong to tell a lie, to which witness answered that it was wrong. When the witness was passed to defendant, he asked her if she knew the meaning—if she understood what she did—when the judge made her hold up her hand. She answered that she did not. This was all the evidence as to the qualification of the witness. The evidence being closed, defendant again objected, and excepted to witness Margaret Downie, and to her testimony, on the ground that she had not qualified, and that she did not understand the obligation of an oath, and excepted to the action of the court in allowing her to testify and to her testimony,—all which objections of defendant were by the court overruled," etc. We think that the bill of exceptions shows that the little girl, Margaret Downie, was a competent witness, and knew the nature and quality of the oath administered to her.

Appellant contends that there is no evidence to support the conviction of defendant of the offense charged, to wit, an aggravated assault. The record discloses the following facts, to wit: Margaret Downie, the assaulted party, testified, substantially, as follows: "I do not know what I did when I held up my hand. I don't understand what I did when the judge made me hold up my hand. I am six years old. It is right to tell the truth, and wrong to tell a story. I know it is right to tell the truth, and wrong to tell a story. They put

people who tell stories in jail. I was playing in the yard next to the house where I live. My aunt lives there. The gentleman came to the door. I saw him come to the door, and I ran and opened the door, and asked him in. He told me he wanted to see Miss Mary. He sat down in the parlor, and I went upstairs, and found my aunt was not in, and came downstairs, and went to the parlor door, and told him (meaning defendant) that my aunt was not in. And he called me to him, and took me up on his lap. He put his hands on my legs, patted them, and said they were fat. He put his hands under my clothes. I had on my dress and drawers. He put his hands under my drawers, and on my stomach. He told me not to tell anybody what he had done to me, and said he would give me a nickel. He gave me a quarter of a dollar, and told me to take it and get the change, and bring him twenty cents. I took the money to my mamma, and told her what the man had done. Mamma went to see the man. I did not go back with her." On cross-examination, she stated: "When the man went in, he sat in the parlor. There was a colored woman there, but when she saw me she went away. I went upstairs, and came and told the man the lady was not in,—she was gone to school,—and asked him to leave his name. I did not have on the dress I have on now. I had on a short dress. No one told me to say what I have said. I did not understand what I did when the judge made me hold up my hand. I do not know what it meant. I was going out when the man called me to him, and set me on his lap. I told my mother about what the man did before she asked me. She went to see the man, and when she came back she called me in and questioned me. I was playing in the yard. I had told her before." Mrs. Downie testified: "I am the mother of Margaret Downie, the witness who just testified. She is six years old, and a female child. I do not think I saw defendant when he came to the door of the house. The children were playing in the yard of the house where I was,—the house next to the one defendant went into. The child, Margaret, often opens the door for people who come to the house. After the gentleman went into the house, Margaret brought me a quarter of a dollar, and asked me to change it, and said she was to have five cents out of it. She seemed excited. She made a statement to me about what occurred. I took the money, and went to see the man. He was standing on the gallery. He seemed in a hurry to get away. I gave him the money. He took it, and went out the side gate quickly,—the gate that goes into the alley. All this occurred in Travis county, April 10, 1897." Cross-examined: "The child told me something before I questioned her. She did not tell me all. I remember now the man came in the front gate. I said nothing to defendant when I gave him the money. It is as short a way to go out of the front gate as the side gate to go

to the Millett Mansion." She was questioned by the judge as follows: "Was your daughter hurt? A. No, sir. Was she crying? A. No, judge; she seemed pleased that a nice gentleman, as she thought, should have given her a nickel. Did the child tell you the facts of the occurrence voluntarily? A. No, not all; but told me enough for me to see something was wrong, and caused me to question her further." Defendant, G. B. Scroggins, testified in his own behalf as follows: "I went to the house to see a lady who was staying there. I went on the business I am engaged in, as canvasser for subscriptions. I am very deaf, as you see. When I went to the door, this little girl ran up and opened it. She was playing in the next yard. The children were playing with a rope. When the child opened the door, I went in, and sat in the sitting room. I asked for the lady, and the little girl ran upstairs to see if she was in. She came back, and said the lady was not at home. I had gone in the parlor. There was a colored woman, who came and asked me into the parlor. I called the little girl to me, and took her to me, and kissed her. I am very fond of children. She put her arm around my neck, and sat on my lap. She had on a very short dress. It did not reach her knees. She was barefooted, and had on drawers. I patted her leg, and said, 'What a fat little thing you are!' I talked to her about a monkey that had been on the street, and asked her if she had seen it. I asked her if she had a sweetheart, and she said, 'No.' I asked her if I could not be her big sweetheart, and she said, 'Yes;' and I said, 'Give me a sweet kiss.' I rose to put her down. My hand was on her bare leg, just as I had put it when I had patted her. I was sitting in a high chair, and am tall,—much taller than the child. She was not as tall as I thought her. My arm was around her, and, as I rose to put her down, my hand slipped up against her body, on her stomach, under her dress, but not under her drawers. When my hand pressed the child, she looked up and smiled, as if it tickled her. When I saw this, I pressed her, and sat her on the floor. I told her she must not tell any one she was my sweetheart, and asked her if she wanted a nickel to buy some candy. I felt in my pocket, and did not find a nickel,—only a quarter. I gave the child the quarter, and told her to take it, and get me 20 cents change, and keep the nickel. When the child was gone, I sat in the parlor, got up and went to the piano, and played a piece, and turned, and went to the window, and saw the lady coming with the quarter. I went on the gallery, and met her. She seemed angry. I thought she was like some people are,—did not want strangers to give their children money. I took the money, and went out of the side gate, into the alley. I went this way, as it was the shortest way to my boarding house. I had been at this house some days before, and saw two little girls, and thought this little

girl was one of those little girls. I meant no harm to the child in anything I did. I was not conscious of doing anything wrong, and had no evil purpose in anything I did. I thought of nothing when arrested, and supposed I had been arrested for not having a license." Cross-examined, he stated: "I did not say in the justice court that I went in the side gate. Did you not say in the justice court that you tickled the child, and illustrated it thus (here the county attorney held out his arm, and twirled his finger)? Yes, I said she looked pleased, and I pressed her. You did not take your hand away? No; as I said, I pressed her, and set her on the floor. My hand was not on her naked body or person. Her drawers were between her person and my hand. When I got to the house, I had been carrying a valise. I was tired. I sat down because I was tired. I am a male person, 39 years of age." Cruger testified for the state in rebuttal: "I was present in the justice court. Defendant said he came in the side gate. He also said that, when his hand touched her stomach, he tickled it with his hand." Cross-examined, he stated: "I cannot say if it is nearer to the Millett Mansion through the alley than the front way. It is about the same distance. Yes; I advised the prosecution, and want to see defendant punished." In view of the fact that the case was tried before the court below, and he passed upon the credibility of the witnesses and the weight to be given their testimony, and found appellant guilty of an aggravated assault, we do not think it incumbent on us to disturb the verdict. The judgment is affirmed.

WALKER v. STATE.

(Court of Criminal Appeals of Texas. May 10, 1899.)

CRIMINAL TRIAL—JURY—SEPARATION.

In a prosecution for arson, four of the jurors became sick, and the sheriff locked them in the jury room, retaining the key, and took the others away from the court house to give them a meal, returning them in less than an hour. *Held*, not a separation requiring a reversal of a conviction.

Appeal from district court, Comanche county; T. C. Wilkinson, Special Judge.

Newman Walker was convicted of arson, and he appeals. Affirmed.

R. C. Joiner, McCain & Daniel, and G. H. Goodson, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of arson, and his punishment assessed at confinement in the penitentiary for a term of five years, and he appeals.

There is only one question in this case. Appellant insists that the judgment should be reversed on account of the separation of the jury. The record discloses that the trial lasted several days, and in the meantime the jury were kept together overnight, when they

were not present in court, in a certain room in the third story of the court house. On Sunday, the weather being very cold, and four of the jurors being ill, at mealtime these four were locked in the jury room, and the other eight were taken in custody by the sheriff, and escorted to the hotel, some 400 feet from the court house, and thence to a wagon yard, some 300 or 400 feet further, and thence back to the court house and to their jury room. They were absent from the other portion of the jury in all about 45 minutes. The meals of the other four jurors were sent to them. It is claimed that this was a separation of the jury, in contemplation of our statutes on the subject; and we are referred to the case of *McCampbell v. State*, 37 Tex. Cr. R. 607, 40 S. W. 496, in support of this contention. That was a felony case, in which, after the jury had been impaneled, had heard all the evidence, and retired to consider their verdict, one of the jurors was permitted by the judge to leave the jury, and go in the country, and stay with his sick child some 36 hours, unattended by any officer. In that case we reviewed the authorities, and followed that line of decisions which holds that, where a jury in a felony case separate, unattended by an officer, this will be cause for reversal; and in all such cases the statute was imperative that in the separation of the jury those separated should be attended by an officer. That, as stated before, was a clear case of separation. But we do not regard this as such a case. The whole jury were during all the time in the custody of an officer. The four left in the jury room were under lock and key. The sheriff had that key in his pocket, and there was no mode of ingress or egress into the jury room except through the door, which was locked. In the meantime those separating were in the custody of the sheriff. We cannot regard this as a separation. To do so, it seems to us, would be a travesty on the administration of law. The judgment is affirmed.

MUNDELINO v. STATE.

(Court of Criminal Appeals of Texas. May 10, 1899.)

CRIMINAL LAW—RECOGNIZANCE—DISMISSAL.

A recognizance on appeal from a conviction will not confer jurisdiction on the appellate court, unless it is entered into at the term at which the conviction is had.

Appeal from Travis county court; A. S. Walker, Judge.

C. Mundelino was convicted for libel, and he appeals. Dismissed.

Wm. Von Rosenberg, Jr., for appellant.
Robt. A. John, Asst. Atty Gen., for the State.

DAVIDSON, P. J. During the term of court at which appellant was convicted, he entered into a recognizance, which is fatally de-

fective, because it does not state the punishment. *May v. State* (Tex. Cr. App.) 49 S. W. 402. This occurred at the July term, 1898, of the court. At the April term, 1899, a recognizance in conformity with the law was entered nunc pro tunc. A recognizance must be entered into at the term of court at which the conviction occurs, and unless this is done, no subsequent recognizance will attach the jurisdiction of this court. See *Koritz v. State*, 27 Tex. App. 53, 10 S. W. 757; *Nunn v. State* (decided at the present term) 50 S. W. 712. The motion of the assistant attorney general to dismiss the appeal is well taken, and the appeal is dismissed.

WOOD v. STATE.

(Court of Criminal Appeals of Texas. May 10, 1899.)

INDICTMENT—ALLEGATION OF TIME—ADULTERY—VARIANCE.

1. An allegation in an indictment that the offense was committed in "one thousand eight hundred and nine seven" is sufficient to show its commission in 1897.

2. The variance is fatal where the indictment charges adultery without living together, and the proof establishes the offense by living together.

Appeal from Floyd county court; A. B. Duncan, Judge.

Emily Wood was convicted of an offense, and she appeals. Reversed.

J. W. Pruitt, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of adultery, and her punishment assessed at a fine of \$100, and she appeals.

A motion was made to quash the indictment on the ground that it alleges the date of the commission of the offense as "one thousand eight hundred and nine seven," instead of what was probably intended as "one thousand eight hundred and ninety-seven." We think this is not sufficient. *Somerville v. State*, 6 Tex. App. 438; *Thomas v. State*, 2 Tex. App. 294; *Witten v. State*, 4 Tex. App. 70; *Hutto v. State*, 7 Tex. App. 44; *State v. Harp*, 41 Tex. 487; *State v. Williamson*, 43 Tex. 502.

We notice, however, that the indictment is for adultery by habitual carnal intercourse, "without living together." The evidence shows conclusively carnal intercourse by the parties, living together. The allegation and proof on this question must correspond. It does not do so in this case; hence we are constrained to reverse the judgment. *Powell v. State*, 12 Tex. App. 239; *Randle v. State*, Id. 250; *Burns v. State*, Id. 394; *Ledbetter v. State*, 21 Tex. App. 344, 17 S. W. 427; *Bird v. State*, 27 Tex. App. 636, 11 S. W. 641. Our able assistant attorney general confesses error upon this question. The judgment is reversed, and the cause dismissed.

MONTICUE v. STATE.

(Court of Criminal Appeals of Texas. May 10, 1899.)

ASSAULT WITH INTENT TO COMMIT MURDER—TRIAL—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS—NEW TRIAL.

1. Accused procured a pistol, went to the house of the prosecuting witness, and tried to force an entrance. Witness opened the door as accused was leaving, whereupon accused stated that she "would shoot his heart out," leveled the pistol at witness, and fired; the bullet striking a post in line between accused and witness. *Held* sufficient to support a conviction of assault with intent to commit murder.

2. An offer by the prosecuting attorney to prove that accused was a prostitute, made in the presence of the jury, was not prejudicial error, where the court instructed the jury to disregard the attorney's statement.

3. Error in an instruction defining an assault to be an unlawful violence upon the person of another, coupled with ability to commit an assault, but omitting to define what constitutes ability to commit an assault, is not ground for reversal, if the omission is supplied in another instruction.

4. A new trial on the ground of newly-discovered evidence was properly denied accused, if the witness by whom the new evidence was to be produced was not present when the offense was committed, knew nothing of it, and his testimony was known to accused for a year preceding the trial.

Appeal from district court, Harrison county; W. J. Graham, Judge.

Susie Monticue was convicted of assault with intent to commit murder, and appeals. Affirmed.

W. C. Laue and C. C. Hines, for appellant. John B. Carter, Dist. Atty., and Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of assault with intent to murder, and her punishment assessed at two years' confinement in the penitentiary.

Appellant's first assignment of error is "that the court erred in failing to grant a new trial because the jury found defendant guilty contrary to the charge of the court, in that the jury found defendant guilty of an assault with intent to murder, when the testimony will not support a conviction for more than an aggravated assault." The testimony, in brief, discloses: That appellant became angry at reports supposed to have been circulated by the prosecuting witness, Oliver Smith, reflecting somewhat upon her. That she went to the house where Smith was cooking breakfast, called him out, and asked him why he was interfering with other people's affairs. Smith denied doing so. Thereupon appellant cursed him and threw rocks at him. Smith threw rocks back, and there is some testimony going to show that the rocks struck her skirts. Thereupon appellant hallooed to a party to bring her a pistol, which was refused; and appellant returned to her own home, got a pistol, and came to the house where the prosecuting witness, Smith, was, found the doors all closed, and then tried to force an en-

trance. Failing in this, appellant started away from the house, when witness Smith opened the door. Thereupon appellant stated that she would shoot his heart out, and leveled the pistol at him,—holding the same in both hands,—and fired. The ball struck a post in line between appellant and prosecuting witness, Smith, who was standing in the door. Appellant's testimony is in substance as indicated above, as far as the first part of the row is concerned, but says that she did not fire the pistol at Smith, but that the same went off accidentally; that the pistol was not pointed towards him, nor did the ball hit the post between her and witness Smith. The fact that the ball hit the post, however, is established by several witnesses. It was established by three or four witnesses that she shot directly at Smith. We think the evidence, as briefly stated, shows that the jury were amply warranted in finding the verdict they did.

Appellant's second assignment complains of the action of the district attorney, in this: "The district attorney asked defendant, when she was on the witness stand on her own behalf, on cross-examination, this question: 'What was your occupation at the time the offense was committed?' Defendant objected on the ground that it was immaterial, and the court held that it was immaterial, whereupon the district attorney stated that his object in asking the question was that he expected to prove appellant was a common or public prostitute. All of which occurred in the hearing and the presence of the jury." The court appends to this bill the following: "This bill is approved, with the statement that when the question was propounded, and the objection urged to it, I said, 'I can't see that the testimony is material,' and my manner indicated (as I was) that I was in doubt as to the correctness of my ruling. Whereupon the district attorney rose and said that his object was to prove that witness was a public prostitute. I said, upon exception being taken by defendant, that the statement was unnecessary, so far as the ruling was concerned upon the admissibility of the evidence; that it was an authority, if the district attorney had one, that I wished, to relieve me of my doubt. I then addressed the jury, and told them not to consider the statement of the district attorney, and they nodded their heads in assent to my direction." Even if the statement of the district attorney was improper (which we do not concede), it was the province of defendant's counsel to request the court to instruct the jury to disregard the remarks. *Lancaster v. State*, 36 Tex. Cr. R. 16, 35 S. W. 165; *Carver v. State*, 36 Tex. Cr. R. 552, 38 S. W. 153; *Wright v. State*, 37 Tex. Cr. R. 146, 38 S. W. 1004; *Gilmore v. State*, 37 Tex. Cr. R. 178, 39 S. W. 105. Appellant, having voluntarily taken the witness stand, was subject to the same rules of cross-examination as any other witness. *Quintana v. State*, 29 Tex. App. 401, 16 S. W. 258; *Morales v. State*, 36 Tex. Cr.

R. 234, 36 S. W. 435, 846; McOray v. State (Tex. Cr. App.) 44 S. W. 107; Ingersol v. McWillie (Tex. Civ. App.) 30 S. W. 60; Coal Co. v. Lawson (Tex. Civ. App.) 31 S. W. 849.

Appellant's third assignment is "that the court erred in failing to charge the jury the law of murder and manslaughter." And her fourth assignment complains of the third paragraph of the court's charge, to wit, "The use of any unlawful violence upon the person of another," etc., and ending with the words, 'coupled with the ability to commit an assault, is an assault.' We have examined the court's charge in the particular complained of, and find that it is substantially and almost a literal copy of the statute, except section 8 of article 592 of the Penal Code, defining the term "coupled with an ability to commit"; and this is properly presented in section 9 of the charge, upon the law of simple assault. When the charge is considered as an entirety, we do not think there is any error in the charge as complained of. Jarnigan v. State, 6 Tex. App. 465; Boles v. State, 18 Tex. App. 422.

Appellant's fifth assignment complains of the action of the court "in not granting a new trial for want of the testimony of George Calloway, by whom she expected to prove, and will prove upon another trial of said cause, that he (said witness) told Oliver Smith (the alleged assaulted party), and after said alleged assault was made, that defendant did not intend to shoot him, and that the pistol was discharged accidentally; and he said, 'I know that, but am going to put her in the penitentiary, even though I go too, for perjury, myself.'" Appellant insists that she did not know of the above conversation until after her trial and conviction. We find from an inspection of the motion and counter motion for new trial that the witness George Calloway filed an ex parte affidavit, in which he states that appellant had known for a year what his testimony was. Furthermore, all the witnesses in the case testify that George Calloway was not present at the scene of the shooting, and did not know anything about it. It follows from the above that the testimony of said Calloway was not newly discovered, and not probably true; hence, not ground for new trial. Whitfield v. State (Tex. Cr. App.) 48 S. W. 174; Houston v. State (Tex. Cr. App.) 47 S. W. 468; Sarvis v. State, Id. 463; Willson, Cr. St. art. 817, subd. 6.

Appellant's sixth assignment urges that a new trial should have been granted because of the want of the testimony of George Gordon, who heard the conversation between the witness Calloway and Oliver Smith. For the reasons stated, we do not think this is a ground for granting a new trial.

There is no merit in appellant's seventh assignment. The very issues raised were submitted in the court's general charge, and it is not subject to the criticism urged. No error appearing, the judgment is in all things affirmed.

TAYLOR v. STATE.

(Court of Criminal Appeals of Texas. May 10, 1899.)

REVIEW — EVIDENCE — ABSENCE OF BILL OF EXCEPTIONS.

In the absence of a bill of exceptions, rulings on evidence will not be revised.

Appeal from district court, Harris county; E. D. Cavin, Judge.

Miles Taylor was convicted of receiving and concealing stolen property, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of knowingly receiving and concealing stolen property over the value of \$50, his punishment assessed at 10 years' confinement in the penitentiary, and he appeals.

The indictment is in strict conformity with the form laid down in Willson, Cr. Forms, § 512, which was approved by this court in Brothers v. State, 22 Tex. App. 462, 3 S. W. 737. The record does not contain a bill of exceptions or statement of facts. The motion for new trial does not complain of the court's charge, but the grounds thereof are with reference to evidence admitted. No bill of exceptions being reserved, we cannot pass upon these matters. We have examined the court's charge, and find the same is correct, and the judgment is affirmed.

HOMAN v. STATE.

(Court of Criminal Appeals of Texas. May 10, 1899.)

CRIMINAL LAW—TRIAL—APPEAL AND ERROR.

1. An assignment of error cannot be considered when no exceptions are preserved to the ruling of the court.

2. An instruction, though technically incorrect, if not calculated to injure the rights of appellant, will not be ground for reversal.

Appeal from Karnes county court; F. Theodore Barnes, Judge.

John Homan was convicted of selling whiskey in violation of the Sunday law, and appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of selling whiskey in violation of the Sunday law, and his punishment assessed at a fine of \$20, and he appeals.

Appellant's first assignment of error complains of the action of the court in admitting testimony. There is no bill of exceptions, however, in the record reserved to this ruling of the court, and hence we cannot review the same.

Appellant's third assignment is: 'The court erred in the following charge to the jury: 'A sale is the transfer of the title and possession

of property for a price mutually agreed to between the vendor and vendee. No particular words or acts have been prescribed by the law to be used in a sale, but, in order to constitute any particular transaction a sale, the conditions of the transaction, as above set forth, must obtain. The law presumes a mutual agreement implied, when the transfer takes place without the use of any words or questions, and is understood mutually between the parties thereto, and no objections are raised by either of the parties to the transaction. A sale may take place without the use of any words or signs, at the time of such sale, provided such sale comes within the definition and explanation of a "sale," as herein set forth." Mr. Black, in his work on Intoxicating Liquors (section 403), gives the following definition of a "sale": "A contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay for the thing bought and sold." A contract of sale may be express or implied, and a sale by implication arises from the language or conduct of the contracting parties. 21 Am. & Eng. Enc. Law, p. 449. We think, in view of the fact that there is no dispute as to the fact of sale, that, whatever error is apparent in the charge of the court, it was not calculated to injure the rights of appellant; and under the law as it is now, whether the charge is technically correct or not, if the same was not calculated to injure the rights of appellant, we will not reverse the case. Code Cr. Proc. art. 723 (Acts 1897, p. 17). The evidence clearly establishes appellant's guilt; in fact, it is a stronger case against appellant than the case of Williamson v. State (Tex. Cr. App.) 43 S. W. 983. No error appearing in the record, the judgment is in all things affirmed.

SEGARS v. STATE.¹

(Court of Criminal Appeals of Texas. May 10, 1899.)

LOCAL OPTION—EXISTENCE OF LAW—INSTRUCTIONS—CRIMINAL LAW.

1. In a prosecution for violating the local option law, it is not error to instruct that the law is in force, where there is in evidence the certificate of the county judge that the order declaring the result of the election was properly published, and was duly filed and recorded, and the other orders necessary to carry the law into effect are shown to have been passed and published.

2. A refusal of special charges is not error, where they had been given in the general charge, in so far as they are applicable.

Appeal from Brown county court; Charles Rogan, Judge.

John Segars was convicted of violating the local option law, and he appeals. Affirmed.

Goodwin & Grinnan, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punish-

ment assessed at a fine of \$100, and imprisonment in the county jail for 60 days; and he appeals.

He filed a motion to quash the complaint and information upon the following grounds: "Because the same charged no offense known to the laws of the state; because the act of 1893, on which this prosecution is based, is inoperative and void, being an amendment of repealed law; and because the act of 1893 is uncertain, obscure, indefinite, and contradictory; because there is no penalty prescribed by the written law of the land for the offense with which defendant stands charged; because there are no such articles of the Revised Statutes as those attempted to be amended by the local option act of 1893." The objections urged to the information and to the validity of the local option law have been heretofore passed upon by us, in the case of *Ex parte Segars*, 32 Tex. Cr. R. 553, 25 S. W. 26. And all these questions were decided adversely to appellant's contention, and we do not care to again review those questions. In view of the decision in *Ex parte Segars*, supra, upholding the validity of the local option law, we do not think it necessary to review appellant's assignments of error numbered from 1 to 9, inclusive, because the same all raise issues passed upon by us in said case.

Appellant's tenth assignment is, "The court erred in his general charge to the jury, in that in said charge he assumed the regularity and legality of the local option election." In view of the record before us, there was no error in this. We find from an inspection of the record the certificate of the county judge certifying to the fact that the order declaring the result was properly published, and was duly filed and recorded; and, where this appears, it is not error to tell the jury that the law is in force, where the other orders necessary to carry the law into effect have been passed and published.

Appellant also complains because the court did not give the four special charges requested by him. We have examined said charges, and find that, in so far as the same are applicable, they were given in the court's charge. No error appearing in the record, the judgment is in all things affirmed.

BUSH v. STATE.

(Court of Criminal Appeals of Texas. May 10, 1899.)

CRIMINAL LAW—CONTINUANCE—MURDER—SELF-DEFENSE—INSTRUCTIONS TO JURY—PROCEDURE.

1. A refusal to grant a continuance to defendant in a criminal proceeding, on the ground of the absence of witnesses, is without prejudice, where substantially the same testimony expected to be proved by such witnesses is produced upon the trial, and is not controverted by the state.

2. Alleged error in refusing to give certain instructions to the jury will not be considered

¹ For opinion on motion for rehearing, see 51 S. W. 398.

on appeal, where the evidence does not suggest any issue to which they would apply.

3. An instruction asked in a trial for murder, that "defendant had the right to arm himself with a deadly weapon, and go to the place where the homicide occurred, and at the time he did, and by such acts his right of self-defense will neither be abrogated nor abridged," is too broad, as not stating the circumstances which would authorize defendant to arm himself and seek his adversary.

4. Upon a plea of self-defense in a trial for murder, where it appears that defendant was in no apparent nor real danger of injury from the deceased, an instruction that, to justify the act of defendant on the ground of self-defense, the danger of serious bodily injury must have been "imminent and pressing," is proper.

Appeal from district court, Wichita county; George E. Miller, Judge.

Mike Bush was convicted of murder in the second degree, and appeals. Affirmed.

L. H. Mathis, for appellant. Jas. F. Carter, Dist. Atty., and Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for murder in the second degree, and punishment assessed at confinement in the penitentiary for 25 years.

Appellant applied for a continuance on account of the absence of several witnesses, all of whom attended the trial, except Chambers and Miller. By Chambers it was expected to prove the dangerous and quarrelsome character of deceased, and by Miller the good character of appellant as a law-abiding, peaceable citizen. Appellant on the trial introduced the evidence of several witnesses as to his good character, which the state did not controvert. Several witnesses also testified to the character of deceased as a quarrelsome and dangerous man. The continuance was refused, and appellant reserved a bill of exceptions. It is well settled that, if substantially the same testimony as that which is absent was adduced on the trial, defendant cannot be heard to complain of the refusal of the continuance. *Walker v. State*, 13 Tex. App. 618; *Alhson v. State*, 14 Tex. App. 402; *Beatey v. State*, 16 Tex. App. 421; *Tucker v. State*, 23 Tex. App. 512, 5 S. W. 186; *McAdams v. State*, 24 Tex. App. 86, 5 S. W. 826. Even where the absent testimony is material and probably true, a continuance will not be granted, unless such absent testimony would, if adduced, probably induce a more favorable verdict to the accused than that found by the jury. For collation of authorities, see *Willson*, New Code Cr. St., bottom p. 189. There was no error in refusing the continuance.

It is contended that the court should have charged the law applicable to manslaughter, and erred in refusing to give the requested instructions presenting this phase of the law. We do not propose to enter into a discussion of this question. The evidence before us does not suggest this issue.

Appellant requested the following special instructions, to wit: "You are charged that

defendant had the right to arm himself with a deadly weapon, and go to the place where the homicide occurred, and at the time he did, and by such acts his right of self-defense will neither be abrogated nor abridged." Whether a party has the right to arm himself, and go to the place of the homicide, would depend upon circumstances. Unquestionably he would not have the right to arm himself, and seek the deceased and kill him. The fault in this charge is that it is too broad, and does not state the circumstances, or any circumstance, which would authorize defendant to arm himself and seek his adversary.

Exception was reserved to the court's charge in regard to self-defense, in that it was too restrictive. The following portion of the charge is sufficient to illustrate the point: "The questions are: Was the slayer in present danger of great bodily harm at the time of the killing? Was the homicide committed in a bona fide effort to preserve himself from impending danger? One may stand on his self-defense, not only when his life may be seriously threatened, but he may do so when the infliction of serious bodily injury is threatened, and the danger is imminent and pressing. But a reasonable belief that another intends to inflict on the party some serious bodily injury, and that he is in such a position that he may carry his intention into effect, is not sufficient to justify the killing of him upon that apprehension. Such belief must be formed, in part at least, upon some act of deceased, showing that he has a present intention to inflict the injury; and, even then, the means used to repel the assault, and prevent the impending injury, must be only such as are necessary under the circumstances. An apprehension of future danger does not justify a homicide. The apprehension must be of a present and imminent danger. The right of self-defense is based upon, and limited by, necessity. When the necessity arises, the right instantly accrues, and when the necessity, real or apparent, ceases, the right no longer exists. It is not essential to the right of self-defense that the danger should in fact exist. It may be only apparent, and not real. If it reasonably appears, from the circumstances of the case, that danger existed, the person threatened with such apparent danger has the same right to defend against it, and to the same extent, that he would were the danger real. And, in determining whether there was reason to believe that danger did exist, the appearances must be viewed from the standpoint of the person acting upon them, and from no other standpoint. If, to him, it reasonably appeared that the danger in fact existed, he had the right to defend against it to the same extent, and under the same rules, permitted in case the danger had been real. If, therefore, you find and believe from the evidence that defendant did the acts charged in the indictment herein, but if you further find that, at the time of doing them, J. D. Modgling was in the act of committing

an assault, as hereinbefore defined, upon the person of the defendant, and it reasonably appeared to the defendant, from his standpoint, that from said assault he was in danger of losing his life or of sustaining serious bodily injury, and that such danger was imminent and pressing, and that, under such circumstances, the defendant did the acts charged in the indictment, he was justified in so doing, and you will find him not guilty." The contention here is that the expression, "immediate and pressing," is too restrictive, and is not justified by the law. The evidence shows that deceased was unarmed; that he was standing at the steps leading into the harness room, with a set of harness upon one arm and a hammer in the other hand. He had just emerged from the room for the purpose of mending this harness, when appellant approached from around the corner of the house. A conversation ensued, in which appellant's contention is that deceased used profanity, and gave him the lie. Appellant's testimony in this respect is as follows: "Just as I reached the corner of this little back room, Modgling stepped out of the south door of that little room, where the steps are, going down the steps. He had some harness in one hand, and a hammer, as well as I remember, in the other; and, just as he stepped on the ground at the foot of the steps, he stopped, turned, and looked at me. I never said anything. He eyed me about ten seconds, I reckon, without speaking. I finally spoke, and said: 'Modgling, can you and I get along here without any trouble,—without holding any prejudice against one another?' He said: 'No; you have told a damned lie on me.' I said: 'Well, I'll take that; I don't want any trouble with you.' He had spoken rather loud, and just then his wife stepped out of the door of this little room. I said to Modgling: 'Did you tell Avis that I objected to you and your wife coming to town last Friday?' He replied: 'No; that's another damned lie;' and as he said this he turned and started into the house. I told him to stop, and said: 'I know what you are going after.' He replied: 'Yes, by God; and I will get it;' and kept going. I then drew my pistol, and shot. At the time I shot, he was right close to the door, and starting into it. From my knowledge or the kind of man he was, I believed he was a desperate man, and believed he was going after his gun, and that I had to shoot to protect myself. I had reference to his gun when I said, 'I know what you are going after.' I would not have shot, if I had not believed he was going after his gun." Defendant further states that the gun of deceased was kept in the front south room, on a rack above the bed of deceased, and he saw it there that morning. If in fact deceased was entering his house for the purpose of getting the gun, he would necessarily have to pass through the harness room, the dining room and kitchen, and appellant's room, and out the front door of appellant's

room, and then south to near the middle of deceased's room, enter that room, go to the place where the gun was, take it down, and return. This exact distance we fail to find given, but it was about 50 or 60 feet by this route from where deceased was shot to the gun. Appellant also testified to previous threats on the part of deceased, and there was evidence to the effect that he was a dangerous man, and one likely to execute a threat. The charge as given was a correct enunciation of the law. In order to justify the homicide on the ground of self-defense, either with or without threats, the danger must be apparently or really immediate, and pressing, imminent, and unavoidable. *Hinton v. State*, 24 Tex. 454; *Holt v. State*, 9 Tex. App. 571; *Penland v. State*, 19 Tex. App. 365; *Weaver v. State*, Id. 547. The identical question involved here was thoroughly discussed in *Lynch v. State*, 24 Tex. App. 350, 6 S. W. 190. The charge given was in conformity with the law as stated by the decisions. We do not know that we could add anything to what was said by the court in *Lynch's Case*. The opinion is thorough, exhaustive, and we believe unanswerable. The court, therefore, did not err in this respect.

It is not necessary to discuss the special charge requested by appellant presenting his view of this phase of the law. The court's charge was correct. Nor is there any merit in his contention that the evidence is not sufficient to justify the conviction. The evidence would have justified a conviction for murder in the first degree. The judgment is affirmed.

SHILLING v. STATE.

(Court of Criminal Appeals of Texas. May 10, 1899.)

LOCAL OPTION—INDICTMENT—ELECTION—VALIDITY—
—DELAY IN OFFERING EVIDENCE—INSTRUCTIONS
—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—
IMPEACHING EVIDENCE.

1. An indictment for violating the local option law is sufficient where it alleges that defendant on a certain day anterior to the presentment of an indictment in a certain justice's precinct unlawfully sold intoxicating liquor to a certain person after the qualified voters of the precinct had determined by an election that the selling of intoxicating liquors should be prohibited therein, and the commissioners' court of the county had passed an order to that effect, which order had been duly published.

2. In a prosecution for selling intoxicating liquors in a justice's precinct where the sale is forbidden, evidence as to how many votes were cast at the election is harmless.

3. In a prosecution for violating the local option law it is not error to refuse evidence impeaching a prosecuting witness, offered while the prosecuting attorney is making his closing argument.

4. An application for a continuance in a criminal case on the ground of the absence of a witness is properly refused where the application does not show diligence, and the expected testimony is not probably true.

5. In a prosecution for violating the local option law, the court, in its instructions, may as-

sume the existence of the law, where there is uncontradicted evidence of its existence.

6. Newly-discovered evidence that tends to contradict and impeach a prosecuting witness is no ground for a new trial.

7. Newly-discovered evidence in a criminal case is no ground for a new trial where there are affidavits of witnesses for the prosecution showing that the evidence is not probably true.

Appeal from Coleman county court; B. F. Rose, Judge.

Jim Shilling was convicted of violating the local option law, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail.

Appellant moved to quash the indictment, because the same charged no offense against the law, etc. The charging part of the indictment is as follows: "That Jim Shilling, on or about the 30th day of January, 1897, and anterior to the presentment of this indictment, in justice precinct No. 5 in the county of Coleman and state of Texas, did then and there unlawfully sell to Ed Henderson intoxicating liquor, after the qualified voters of said justice precinct had determined, at an election held in accordance with the laws of said state, that the sale of intoxicating liquor should be prohibited in said justice precinct, and the commissioners' court of said county had passed an order to that effect, which order had been duly published in accordance with law; against the peace and dignity of the state." We hold this indictment is good. *Key v. State*, 37 Tex. Cr. R. 77, 38 S. W. 773; *Willis v. State*, 37 Tex. Cr. R. 82, 38 S. W. 776.

Appellant contends that the court erred in permitting the state to introduce in evidence before the jury, over his objection, the order of the commissioners' court of Coleman county, of date August 16, 1893, ordering a local option election in justice precinct No. 5. We have heretofore passed upon the validity of this particular local option law in Coleman county, and held it valid. *Ex parte Schilling* (Tex. Cr. App.) 42 S. W. 553.

Appellant, in his third assignment of error, complains that the court erred in permitting R. V. Wood to testify as to the number of votes cast in the elections in 1892 and 1894 in the voting precinct in which Washington school house is a voting place. We think it was immaterial as to how many votes were cast at those elections, and hence the court did not make material error in permitting the same to be introduced.

His fourth assignment complains of the court's refusal to permit him to introduce the testimony of Jack Mays and Upton Henderson. We do not think there was any error in this ruling. It appears that while the county attorney was making his closing speech, appellant offered to prove by said witnesses facts that tended to contradict and impeach

the testimony of the prosecuting witness, Ed Henderson. There was no error in this ruling of the court.

Nor do we think the court erred, as claimed in the fifth assignment, in refusing defendant's application for continuance. The same does not show diligence; and it is stated in said application that said Young would testify that defendant did not sell said Henderson said liquor. We think, in view of the facts in this record, that this statement is not probably true.

Appellant's sixth assignment is that the court erred in his main charge to the jury, wherein the jury are instructed that if they believe from the evidence beyond a doubt that defendant sold intoxicating liquor to Ed Henderson on or about the time alleged in the indictment, in justice precinct No. 5 of Coleman county, Tex., they should find defendant guilty, because said charge assumes that local option was in force at that time in said justice precinct; and should convict defendant although the jury might believe from the evidence that the law had not been complied with as a fact in attempting to establish local option in said justice precinct, and that local option was not in force in said precinct at said time. The record discloses the fact that local option was in full force and effect in that precinct at the time the court tried this case; and on the orders, as disclosed herein, we do not think the court erred in so charging. Nor do we think the court erred in refusing to give appellant's requested special charges.

Appellant's seventh assignment complains of the court's failure to grant a new trial on the ground that the testimony of Jack Mays and Upton Henderson, as above indicated, was newly-discovered evidence. We do not think said testimony comes within said rule, and therefore the court did not err in refusing a new trial on that account. And, besides, the *ex parte* affidavits of Jack Mays and Upton Henderson, attached to said motion, are controverted by the affidavit of Ed Henderson, the prosecuting witness, and Walter Harris, showing that the testimony of said Mays and Henderson is not probably true. We think the verdict is amply supported by the evidence, and that local option was in full force and effect in said precinct at the time of the sale. Finding no error in the record, the judgment is affirmed.

Ex parte CLAY.

(Court of Criminal Appeals of Texas. May 17, 1899.)

EXCESSIVE BAIL—HABEAS CORPUS—APPEAL—STATEMENT OF FACTS.

A refusal of an application on habeas corpus to discharge one accused of theft of cattle in three cases, because the bail required was excessive, being \$500 in each case, will be sustained, in the absence of a statement of facts.

Appeal from district court, Harris county; E. D. Cavin, Judge.

Application for habeas corpus by Calvin Clay. From a refusal of the writ, he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant filed an application for writ of habeas corpus before the judge of the criminal district court of Harris county, alleging that he was illegally restrained of his liberty by the sheriff of said county, in default of bail in the sum of \$500 in each of three several cases, wherein appellant is charged with the offense of theft of cattle. He complains that the bail in each of said cases is excessive, and wholly beyond his power to give or procure. We find, from an inspection of the record before us, that there is no statement of facts, if any were adduced upon the trial below; nor is there anything apparent in the record whereby we can see that appellant has been deprived of any statutory or constitutional right. The judgment is affirmed.

MAY v. STATE.

(Court of Criminal Appeals of Texas. May 17, 1899.)

CRIMINAL LAW—APPEAL—CONTINUANCE—BILL OF EXCEPTIONS—THEFT—CUMULATIVE EVIDENCE—REFECTION—POSSESSION—INSTRUCTIONS.

1. A refusal to grant a continuance in a criminal case will not be reviewed, in the absence of a bill of exceptions.

2. In a prosecution for theft, a refusal to admit proof of an explanation of possession given by defendant when he was arrested is not error, where defendant's own testimony respecting the explanation is uncontradicted.

3. An instruction that possession of stolen property is not of itself sufficient to authorize a conviction of theft is incorrect.

4. In a prosecution for theft of cattle, an instruction to acquit defendant if he bought them is sufficient, as bearing on his testimony explaining his possession of the cattle by stating that he traded for them, where no objection is made to the use of the word "bought" instead of "traded."

Appeal from district court, Denton county; D. E. Barrett, Judge.

J. P. May was convicted of theft, and he appeals. Affirmed.

Robt. H. Hopkins, Jr., for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of the theft of cattle, and his punishment assessed at confinement in the penitentiary for a term of two years. The refusal of the court to grant the continuance applied for by appellant will not be reviewed, inasmuch as a bill of exceptions was not reserved.

The first bill of exceptions complains of the action of the court refusing to permit appellant to prove by Bart Howe the explanation given by him, at the time of his arrest, of his

possession of the alleged stolen cattle. There were present, who heard the explanation, besides the witness Howe, the constable who made the arrest and the alleged owner. The alleged owner detailed this explanation, May also testified to the explanation, and it was not controverted by the state that the explanation was made at the time of the arrest. There was no issue on the question, and we see no such error in the ruling of the court as would require a reversal. Had the state controverted the fact that defendant made the explanation, there might have been, perhaps, some merit in this contention.

He requested a special charge in regard to the explanation of possession of property recently after it was stolen, to the effect that the possession is not, of itself, sufficient to authorize a conviction of the party found in possession, etc. We deem it unnecessary to enter into a discussion of the charge requested, so far as the terms employed by appellant in framing the charge are concerned. As we understand the phraseology, it was not a correct charge, and it was such a one as was condemned in *Wheeler v. State*, 34 Tex. Cr. R. 352, 30 S. W. 913. Independent of this, we think the court gave a sufficient charge upon the question, in which he instructed the jury that, if defendant bought the cattle he was charged with stealing, or if they entertained a reasonable doubt as to his having bought them, they would acquit. The only complaint which could have been urged to the charge given was that the court used the word "bought" instead of the word "traded," for defendant's explanation was that he "traded" a mule for the cattle. But no complaint is urged as to this, and perhaps, if any had been urged, it would have been too trivial to be seriously noticed. We think the court's charge sufficiently covered this phase of the case. The evidence is sufficient to support the verdict of the jury, and the judgment is affirmed.

THOMAS v. STATE.

(Court of Criminal Appeals of Texas. May 17, 1899.)

FORGERY—CHARACTER OF INSTRUMENT.

An instrument in the form of an order to pay money, required to be stamped under the internal revenue stamp law (30 Stat. 448), is the subject of forgery, though not stamped.

Appeal from district court, Harrison county; W. J. Graham, Judge.

James Thomas, alias Ed Morse, was convicted of uttering a forged instrument, and appeals. Affirmed.

Scott & Jones, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of uttering a forged instrument, and his punishment assessed at confinement in the penitentiary for a term of two years, and he appeals.

The only question urged by appellant for reversal is that the alleged forged instrument did not have the required internal revenue stamp on it, the instrument being in the form of an order to pay money. The contention of appellant is that said instrument is void on account of the federal statute requiring such an instrument to be stamped, and that, unless it is stamped, it shall be deemed invalid, and of no effect; and that it is further provided that any such instrument, if executed since July 1, 1898, and not stamped with a stamp, shall not be admissible in evidence. We understand the act in question was for the purpose of levying and collecting a tax on all instruments required under the act to be stamped, and no doubt congress would have the right to say that no instrument required under the act to be stamped should be used in evidence in any proceeding in any federal court unless it contained the required stamp. But we do not believe congress would have the power to regulate the introduction of evidence in state courts. Nor do we doubt the power of congress to require stamps to be placed on certain enumerated instruments,—among them the instrument in question,—and to provide a penalty for the failure to stamp such an instrument, and to punish all persons failing to comply with the stamp act under proper proceedings in the federal court. But we do not believe the act in question was intended to invalidate and make absolutely void orders for money, such as the one in question, unless the same should be properly stamped. To hold otherwise would be to interpolate a new provision of law outside of our statutes on the subject of forgery, and authorize the federal statutes on the subject to control the matter. This is not like the case of *Caffey v. State* (Tex. Cr. App.) 86 S. W. 82, referred to by appellant, in which the instrument was a creature of our law; and we held in that case that the instrument was not complete, so as to import an obligation. Here the instrument was complete in form, and under our law and commercial usage does import an obligation. The federal statutes themselves do not seem to treat the instrument without a stamp as absolutely void, but authorize it to be subsequently stamped on certain proof; so that the instrument in question unstamped is apparently of some legal efficiency, and, as far as the same is concerned, the stamp is an extrinsic matter, and, as stated above, is authorized under federal statutes, under certain circumstances, if unstamped, to be stamped. All the authorities, English and American, hold such an unstamped instrument the subject of forgery. 2 Bish. Cr. Law, § 540, and authorities there cited; 2 McClain, Cr. Law, § 758, and authorities there cited. And we particularly refer to the following cases: *Cross v. People*, 47 Ill. 152; *State v. Hill*, 30 Wis. 416, which overrules the former case of *John v. State*, 23 Wis. 504; *Laird v. People*, 61 Md. 309; *State v. Young*, 47 N. H. 402. There being no error in the record, the judgment is affirmed.

TURNERY v. STATE.

(Court of Criminal Appeals of Texas. May 17, 1899.)

LARCENY — SPECIAL PLEA — QUESTION FOR THE COURT — BURDEN OF PROOF.

1. A special plea, alleging an agreement with the state whereby accused was not to be prosecuted if he testified against others, should be tried to the court.

2. Where accused interposes a special plea, alleging an agreement with the state whereby he is not to be prosecuted if he testifies against others, it devolves upon accused to establish the defense.

Appeal from district court, Kaufman county; J. E. Dillard, Judge.

A. D. Turney was convicted of larceny, and appeals. Affirmed.

Jack & Jack, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of the theft of a hog, and his punishment assessed at three years' confinement in the penitentiary; and he appeals.

All of appellant's assignments of error are based upon the charge of the court submitting to the jury the special issue as to whether or not defendant had made a special contract with the state, through Adams, the county attorney, to the effect that, if he would disclose all he knew as to the connection of other persons with the theft of said hog, the state would make a witness of him, and not prosecute him. The contention of appellant is that the court instructed the jury, as to this special plea, that the burden was on the defendant to prove it by a preponderance of the evidence. Appellant also asked some special instructions on this subject, which he claims would have cured the error. It will be observed that appellant's special pleas do not suggest that the burden was on the state to overturn the special plea by evidence beyond a reasonable doubt. We do not understand that any objection was made to the submission of this issue to the jury. In practice, a special plea of this character is not authorized to be submitted to the jury, but should be tried by the court. *Camron v. State*, 32 Tex. Cr. R. 180, 22 S. W. 682. However, it does not occur to us that appellant can complain because the court submitted this issue to the jury, treating the same as a special plea, and instructed the jury that the burden was on appellant to prove the same by a preponderance of the evidence. If the matter had been submitted to the court, which was the proper tribunal for its determination, it would not have been required of the judge, in order to solve the matter, to require the state to overturn by negative proof appellant's plea by evidence establishing it beyond a reasonable doubt. If, after hearing the proof on such matter, the judge satisfied himself that appellant did not establish his alleged contract by a preponderance of the evidence, then it was his duty to overrule the

same. Indeed, this matter appears to be left to the discretion of the trial judge, and we would not reverse a case unless there was clear proof of abuse of such discretion. *Cameron v. State*, 32 Tex. Cr. R. 180, 22 S. W. 682. If we look to the proof offered before the jury, certainly appellant has no just ground of complaint that the jury decided against him. If, on the same evidence, the court had stricken out and overruled the special plea, appellant could not complain. There being no error in the record, the judgment is affirmed.

O'TOOLE v. STATE.

(Court of Criminal Appeals of Texas. May 17, 1899.)

CRIMINAL LAW — CONTINUANCE — ABSENT WITNESSES—PROCEEDINGS IN ACCUSED'S ABSENCE—WAIVER — THEFT FROM PERSON — INSTRUCTIONS.

1. A refusal of a continuance in a criminal case on account of the absence of a witness is proper, where it is doubtful if he can ever be secured.

2. A refusal of a continuance is proper where the testimony expected to be procured is contradictory to the witness' affidavits presented to the grand jury.

3. In a prosecution for theft from the person, an instruction to acquit if defendant took the property with prosecutor's consent, and afterwards formed the intent to appropriate it, is sufficient, as bearing on defendant's claim that he had prosecutor's consent to take the property.

4. An accused, having voluntarily absented himself from the court room, without the court's knowledge, while the jury were impaneled in his counsel's presence, is bound by an express waiver of repanelment of the jury made by him on his return.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Joe O'Toole was convicted of theft from the person, and he appeals. Affirmed.

I. M. Standifer, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of theft from the person, and his punishment assessed at confinement in the penitentiary for a term of two years; and he appeals.

Appellant complains of the action of the court in overruling his motion for continuance. Said motion is predicated on the absence of Nellie Boyd and J. J. McCanliss. As to the latter, we think the diligence used was insufficient. As to Nellie Boyd,—the former, from a statement made as to the cause of her absence,—it is doubtful if she can ever be secured. Defendant says: That he expected to prove by McCanliss that just before the money is alleged to have been taken from the prosecutor, Droak, "said prosecutor was in his saloon, a short distance from where the alleged theft occurred, and that he there exhibited \$7.50 in silver, and said that was all the money he had, and that

he was drunk, and getting drunker fast, and that he told defendant there, if he got too drunk to walk, to take his stuff from his person; that he left there, and went to a house of prostitution near by, where it is said the offense occurred. That he expected to prove by Nellie Boyd that defendant came to the house of prostitution with Droak, prosecutor, and that the said prosecutor soon went to sleep, but, before he went to sleep, told defendant to take care of his effects." Appellant shows that this is his first application for continuance. The court, however, certifies that it is his second application. In our view of the case, that matter does not occur to us to be material. Looking at the statement of facts, we do not believe the alleged testimony is probably true, or that it would be so regarded by an honest jury trying the case. If we look beyond that, to the affidavits as to what the witness McCanliss swore before the grand jury, it appears, were he present, that he would stand self-contradicted.

Appellant says the court committed an error in not giving his requested instruction. Said bill is as follows: "The defendant excepts to the charge of the court, in that part where the court charges 'that if defendant took the money with the consent of Droak, and afterwards formed the intent to appropriate it, he would not be guilty,' for the charge did not go far enough. The charge should have told the jury that if defendant took the property with the consent of Droak, but with the intent to defraud, and afterwards conceived the idea of appropriating it, he should be acquitted." As to this matter, it is sufficient to say that, if the charge requested embodied good law, this issue was not raised by the testimony. Appellant claimed that he had prosecutor's consent to take the money. That was his defense, and the court properly instructed the jury that if he took the money with the consent of Droak, and afterwards formed the intent to appropriate it, he would not be guilty.

Appellant further insists that this case should be reversed because of his absence during the impanelment of the jury. It appears that he purposely absented himself, without the knowledge or consent of the court, during the impanelment. His absence, however, was merely temporary; having gone from the court room into the water-closet, and to the sheriff's office. His counsel were present, and conducted the impanelment. On his return into the court room, the discovery was made for the first time, so far as the court was concerned, that appellant had been absent. The bill of exceptions to overruling the motion for new trial, as presented by appellant, shows, "The court then asked him if he waived the reading of the indictment over again, and he replied that he did." On this distinct waiver of re-reading the indictment, appellant now claims that he did not waive, nor was he asked to waive,

the proceedings in the impanelment of the jury, and the plea of not guilty entered. The court, however, in explaining the bill of exceptions in his overruling the motion for new trial, makes the statement "that defendant was present at the time the court overruled his application for continuance, and the court then and there directed counsel to proceed with the impanelment of the jury. The jury was selected, sworn, and indictment read; and the court called on the defendant to plead, and was then informed that defendant was not present, but was in the sheriff's office, adjoining the court room. Defendant immediately came in from the sheriff's office, and the court informed him that the jury had been sworn, and indictment read, and his counsel had entered a plea of not guilty for him, and asked him whether he waived having these things done in his presence, or whether he wanted these things done over again, and the defendant then and there said he waived these matters, and did not wish to have them done over again; and that this matter was not afterwards brought to the attention of the court until on the motion for new trial." If appellant desired to present this question, he should have refused to waive what transpired during his temporary absence, and then taken a bill of exceptions to the action of the court. See *Bule v. State*, 1 Tex. App. 452; *McMahon v. State*, 17 Tex. App. 321. If he had refused to make the waiver, then, no doubt, the court would immediately have rectified the matter. His absence was by his own volition. Indeed, he can scarcely be said to have been absent. He was in an adjoining room, and, so far as the record discloses, within view and hearing of all that occurred. His counsel was present,—no doubt, with knowledge that he was not in the court room,—conducting the examination and impanelment of the jury. We hold that, under the circumstances, he could waive the proceedings which had occurred during his temporary absence. To hold otherwise, it seems to us, would allow him to take advantage of his own wrong. There being no error in the record, the judgment is affirmed.

ELTON v. STATE.

(Court of Criminal Appeals of Texas. May 17, 1899.)

THEFT AS BAILEE—INDICTMENT—SUFFICIENCY.

An averment, in an indictment under Pen. Code, art. 877, for theft as bailee, that defendant had possession of the property in question, which he acquired by virtue of a contract of hiring and borrowing made with a third person named, sufficiently alleges a contract made by defendant with the third person.

On motion for rehearing. Overruled.

HENDERSON, J. This case was affirmed at the Dallas term, 1899 (50 S. W. 379), and now comes before us on motion for rehearing.

Appellant urgently contends that this case is similar to the case of *Smith v. State* (Tex. Cr. App.) 42 S. W. 302, as far as the indictment is concerned, and that we were in error in the original opinion in holding that the indictments were dissimilar. While there is some difference in the verbiage, yet on the very point insisted on the indictment in the *Smith Case* is similar to the one in this case. We quote that part of the indictment in the *Smith Case*, as follows: That appellant, "Smith, then and there had possession of two certain mules, the property of A. W. Willis, and the possession theretofore acquired by said Smith by virtue of a contract of hiring and borrowing made with the said A. W. Willis." The allegation in the present indictment is as follows: "Said horses then and there being the property of Arthur Cain, and the possession thereof having been theretofore acquired by the said Thomas Elton by virtue of a contract of hiring and borrowing made with one D. W. May, who was thereunto duly authorized by the said Arthur Cain." The contention in the *Smith Case* was that there was no distinct allegation that Smith acquired possession of said property by virtue of a contract of hiring made by him with Willis, and we held in that case that the indictment was defective in that respect. We understand in the present case that it is insisted that the same defect exists in the present indictment, to wit, that there is no distinct averment that Elton acquired the possession of said horse by virtue of a certain contract of hiring made by him with one D. W. May. If we adhere to the rule laid down in the *Smith Case*, unquestionably appellant's contention is correct, and the indictment cannot be sustained. But, on an examination of that question, we believe we were in error in the *Smith Case*. The allegation is "that Thomas Elton came into possession of said two horses by virtue of a contract of hiring and borrowing made with one D. W. May, who was thereunto duly authorized by the said Arthur Cain," etc. Now, by the insertion of the phrase "by said Elton" after the word "made," the allegation would read, "by virtue of a contract of hiring and borrowing made by said Elton with one D. W. May, who was thereunto duly authorized," etc. But we submit that it is not clear that the words here used express that the contract was made by said Elton with said May. Of course, a construction might suggest that, inasmuch as it was not directly averred that Elton made the contract by which he obtained possession of said horses with May, he might have obtained possession by virtue of a contract of hiring made by some one else with May; and such seems to be the reasoning in the *Smith Case*. But we do not believe it sound, for, by every reasonable intendment, the expressions here used aver the acquisition of possession by Thomas Elton by virtue of a contract of hiring and borrowing made by him with D. W. May, and not by some one else. We therefore

overrule the Smith Case, and hold that the indictment in the present case is good.

The other assignments have been previously discussed in the original opinion. The motion for rehearing is overruled.

GRAYSON v. STATE.

(Court of Criminal Appeals of Texas. May 17, 1899.)

CRIMINAL LAW—CONFESSIONS OF MINOR—TRIAL— MISCONDUCT OF JURY

1. It is not necessary, as a predicate to the admission of the confession of a prisoner between 9 and 13 years of age, to show that he has intelligence and discretion enough to understand the criminality of the act charged against him.

2. The court ought not to receive the confession of a person who could not qualify as a witness under the provisions of Code Cr. Proc. art. 768, which provides that children are not competent to testify in court who do not possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath.

3. The jury may, with leave of court, take to the jury room any evidence which has been admitted.

4. Testimony that the jury arrived at their verdict, after discussing the manner in which defendant had been reared, in the belief that the best thing to do would be to place him in a reformatory, does not show such misconduct as will authorize a new trial.

Appeal from district court, Nacogdoches county; Tom C. Davis, Judge.

Criminal prosecution by the state of Texas against Tom Grayson. From a judgment of conviction, defendant appealed. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the reformatory for a term of two years; hence this appeal.

Appellant objected to the introduction of his confessions, testified to by the witness Jos. Reindle; it being claimed by him in that connection that defendant was between 9 and 13 years of age, and the state not having shown that defendant had discretion enough to know the consequences of the crime or of the act. The same character of confession was also adduced on the part of the state by the witness George King. We do not understand that, before the confession of defendant can be used, it must be shown, where he is between 9 and 13 years of age, that he has intelligence and discretion enough to understand the criminality of the act charged against him. The confession of a witness is regulated by another statute; that is, where the party is shown to be under arrest, as in this case (so far as the testimony of George King is concerned), it must be shown that the party was duly cautioned or warned that his confession might be used against him. Article 790, Code Cr. Proc. A witness may

not know the criminality of an act, on account of tender years, and yet be capable of testifying in the courts. Article 768, Code Cr. Proc., provides that children are not competent to testify in courts, who do not possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath. Colter v. State, 37 Tex. Cr. R. 284, 35 S. W. 576; Murphy v. State (Tex. Cr. App.) 35 S. W. 174. We think that, by analogy, the above statute might be applied as a test of the admissibility of confessions; that is, if the party against whom the confessions are introduced is shown not to possess sufficient intelligence to make a statement as to the transaction interrogated about, or has not sufficient intelligence to understand the nature and obligation of an oath, that the statement or confession of such witness ought not to be received in evidence. But no such objection was urged to the confessions in this case. It was simply stated that the confession could not be used, because the state had not previously shown the capacity of the witness to commit the crime. To carry out this proposition would involve the ascertainment by the court, in the first instance, that the witness possessed sufficient intelligence and capacity to commit the crime charged. This rule is not laid down as to the admissibility of confessions, but is a statutory rule set up as a safeguard against the conviction of one of tender years unless a criminal capacity is shown.

There was no error in the action of the court authorizing the introduction of A. J. Spradley. This witness was sheriff of the county, and was excused from the operation of the rule; and it was competent for the state to introduce him, and utilize his testimony in the matter about which he testified.

Appellant objected to the jury, when they retired to consider their verdict, taking with them the school roll of the Independent school district of Nacogdoches county. If this had been objected to when offered as evidence, another question would arise; but it was introduced in evidence without objection, and it was competent for the jury to carry that or any other testimony introduced before them in their retirement, by leave of the court. Besides, no possible prejudice is shown to have resulted to appellant on account of the jury taking with them said school roll.

Nor was there any error, in our opinion, in the action of the court overruling the motion for new trial because of the alleged misconduct of the jury. The bill does not inform us as to any fact considered by the jury which was not offered in evidence. Certain jurors testified that the manner in which defendant had been raised was discussed, and they arrived at their verdict, after discussing the aforesaid matter, in the belief that it was the best thing they could do for the boy, to place him in the reformatory for a term of two years, where he could have the advantage of religious and moral training. Looking at the

record in this case, it is difficult to see how the jury could have done otherwise than convict him. They gave him the lowest term of punishment, and no possible prejudice is shown. The judgment is affirmed.

WEST v. STATE.

(Court of Criminal Appeals of Texas. May 17, 1899.)

INTOXICATING LIQUORS — PHYSICIAN'S PRESCRIPTION.

An information which charges that defendant did then and there unlawfully and willfully, as a regular practicing physician, give one J. B. a prescription, for the purpose of enabling the said J. B. to purchase intoxicating liquors, without personally examining the said J. B., and finding him actually sick, and in need of said intoxicating liquors and stimulant prescribed as a medicine, when in truth and in fact the said J. B. was not sick and in need of said liquor as a medicine, does not allege an offense, under the provisions of Pen. Code, art. 405, which prohibits any person, not a regular practicing physician, from giving a prescription, to be used in obtaining liquor, to any person who is not actually sick and without a personal examination of such person.

Appeal from Brown county court; Charles Rogan, Judge.

Criminal prosecution by the state of Texas against Dr. W. A. West. From a judgment of conviction, defendant appealed. Reversed.

Jenkins & McCartney, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged by information with giving a prescription in violation of the local option law. Omitting prior allegations, the information charges that appellant "did then and there unlawfully and willfully, as a regular practicing physician, give to one John Baugh a prescription for the purpose of enabling the applicant, the said John Baugh, to purchase intoxicating liquors, without personally examining the said John Baugh and finding him actually sick and in need of said intoxicating liquor and stimulant prescribed as a medicine, when in truth and in fact the said John Baugh was not sick and in need of said intoxicating liquor and stimulant as a medicine," etc. Motion was made to quash the information. We believe the motion should have been sustained. By the provision of article 405, Pen. Code, punishment is denounced against any person, not a regular practicing physician, who shall give a prescription to be used in obtaining any intoxicating liquor in any county, etc., where the local option law is in force, and against any practicing physician who is, directly or indirectly, either for himself or as agent, or employé of another, interested in the sale of such intoxicating liquors, who shall give a prescription for the purchase of the same in said local option territory, and against any physician who shall give a prescription, to be used in obtaining any such intoxicating liquors in such territory, to a party who is not actually

sick, and without a personal examination of such person. By the terms of this article, any person who shall pretend to be a physician, and give a prescription as a physician, when in fact he is not a regular practicing physician, is liable to punishment. Punishment is also denounced against any physician who shall give such prescription to a party who is not actually sick, and without a personal examination of such person. So, it would seem the punishment would apply to any one who is not a physician, and who should give the prescription, whether the party be sick or not. In other words, no one, except a physician, shall be authorized to give such prescription in any event. If the legislature has power to denounce this punishment, then the indictment must charge the facts which constitute the offense. It is a familiar rule of pleading that the constituent elements of the offense must be alleged distinctly and affirmatively, and must not be left to be deduced by argument or inference, and must not state mere conclusions. Now, looking upon the face of this information, it will be seen that there is no allegation which alleges that Dr. West was "a regular practicing physician," or a physician at all. It is true that it alleges, "as a regular practicing physician," he gave a prescription to a party who was not sick, and without a personal examination, but this does not charge the fact that he was a physician. The information is framed under that particular portion of the statute which denounces a punishment against a physician for giving a prescription to a party who is not actually sick, without making a personal examination of such person, and not under that which prohibits any but a regular practicing physician from giving same. Every word stated in the information may be true, and yet appellant could not be convicted under such allegation. If he was a physician, and as such gave the prescription to a party who was not actually sick, and without a personal examination, these facts must be stated affirmatively, and not by way of inference or argument. If he was personating a doctor, and was not in fact one, he should be charged under the first phase of this statute, which denounces a punishment against a party giving such prescription when he is not in fact "a regular practicing physician." Because the information does not sufficiently charge the offense, the judgment is reversed, and the prosecution ordered dismissed.

McQUERY v. STATE.

(Court of Criminal Appeals of Texas. May 17, 1899.)

INTOXICATING LIQUORS — PRESCRIPTION BY PHYSICIAN.

1. An indictment charged that defendant did then and there unlawfully, as a practicing physician, give to C. a prescription to enable C. to purchase intoxicating liquor, without personally examining the said C., and finding him

sick and in need of such liquor. C, as a witness for the state, testified that defendant did make a personal examination of him, and to facts indicating that he was sick. *Held*, that the testimony does not support a conviction.

2. An allegation that defendant, "as a regular practicing physician," gave a prescription is not a sufficient allegation that defendant was a physician, so as to support an indictment under Pen. Code, art. 405, which prohibits any physician giving a prescription to one not actually sick, and without making a personal examination.

Appeal from Brown county court; Charles Rogan, Judge.

Criminal prosecution by the state of Texas against Dr. William McQuery. From a judgment of conviction, defendant appealed. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of giving a prescription in a local option precinct, in violation of the statute. Omitting the formal parts, the charging part of the indictment is as follows: "Did then and there unlawfully and willfully, as a regular practicing physician, give to one Walter Caldwell a prescription for the purpose of enabling the applicant, the said Walter Caldwell, to purchase intoxicating liquor, without personally examining the said Walter Caldwell, and finding the said Walter Caldwell sick and in need of such intoxicating liquor and stimulant prescribed as a medicine, when in fact and in truth the said Walter Caldwell was not sick and in need of said intoxicating liquor and stimulant as a medicine at the time he gave said prescription, and did then and there, giving said prescription to the said Walter Caldwell, enable the said Walter Caldwell to purchase intoxicating liquor and stimulant, in the subdivision of said county and state as hereinafter described," etc. It will be observed that this indictment charges that appellant gave the prescription "without personally examining Walter Caldwell," and finding him actually sick, etc. Caldwell testified for the state that appellant did make a personal examination of him, and he further testified to facts indicating that he was sick. It is a familiar rule that the material allegations of an indictment must be proved as alleged. It being alleged that appellant gave the prescription without a personal examination, it was necessary to prove that fact in order to meet the allegation. If this indictment is a valid and sufficient one, then it was necessary to prove that appellant gave the prescription without a personal examination of Caldwell. The testimony does not support the allegation. It is alleged that appellant, "as a regular practicing physician," gave the prescription. This is not a sufficient allegation that appellant was "a regular practicing physician" or was a physician at all. It is indirect and inferential, and if appellant was a physician, and gave the prescription as such,

it should have been so alleged. In the first clause of the statute, any but a regular physician is prohibited from giving a prescription; and the second clause denounces and punishes "any" physician who gives a prescription, being interested in the sale of the intoxicant. The third clause denounces a punishment against "any" physician who gives a prescription to any one who is not actually sick, and without making a personal examination. In the case of *West v. State*, 35 Tex. Cr. R. 48, 30 S. W. 1069, a similar indictment in this respect was held good; but an inspection of that shows that these questions were not discussed, and if that case intended to hold that the expression, "as a regular physician," was sufficient to charge that the party giving the prescription was a physician in fact, we are of opinion that it was error. *West v. State* (just decided) 51 S. W. 247. Because the indictment is insufficient, the judgment is reversed, and the prosecution ordered dismissed.

FIKES v. STATE.

(Court of Criminal Appeals of Texas. May 3, 1899.)

LOCAL OPTION—RECOGNIZANCES—SUFFICIENCY.

1. A recognizance merely reciting that defendant was convicted of "selling liquor in violation of the local option law," without naming the precinct in which the liquor was sold, or that it was sold in a precinct at all, does not recite any offense against the law.

2. A recognizance entered subsequent to the passage of the acts of the 25th legislature, without following the form prescribed by the act, or reciting the amount of punishment, is fatally defective, precluding the attachment of jurisdiction on appeal.

Appeal from Karnes county court; F. Theo Barnes, Judge.

J. H. Fikes was convicted of violating the local option law, and he appeals. Dismissed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for selling intoxicating liquor in violation of the local option law, in justice precinct No. 4, Karnes county.

The recognizance recites as follows: " * * * J. H. Fikes, who stands charged in this court with the offense of selling liquor in violation of the local option law, and who has been convicted of said offense in this court, shall appear before this court from day to day and from term to term of same," etc. This recognizance does not recite any offense against the law. "Selling liquor in violation of the local option law" is not an offense, *eo nomine*. Therefore the constituent elements of the offense must be set out in the recognizance. It does not even name the precinct in which the liquor was sold, or that it was sold in a precinct at all. It was entered into on December 3, 1897, which was several months subsequent to time that the acts of the 25th legislature went into operation. This recognizance does

not attempt to follow the form prescribed by that act, and does not even recite the amount of the punishment. Because the recognition is fatally defective, the jurisdiction of this court has not attached to the appeal, and it is dismissed.

AUSTIN v. STATE.

(Court of Criminal Appeals of Texas. May 3, 1899.)

HOMICIDE — TRIAL — APPOINTMENT OF COUNSEL — NEW TRIAL — NEWLY-DISCOVERED EVIDENCE.

1. Since it is only in capital cases that the court is required to appoint counsel for a defendant too poor to employ his own counsel, a conviction will not be reversed for refusal to appoint counsel for defendant, who was charged with murder in the second degree.

2. A new trial will not be granted for newly-discovered evidence to be given by certain witnesses, where others for whom no process was issued could have attended the trial, and testified to the same facts.

Appeal from district court, Galveston county; E. D. Cavin, Judge.

Jesse Austin was convicted of murder in the second degree, and appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and given 10 years in the penitentiary. There are no bills of exception in the record. The first ground of appellant's motion for new trial states that he was tried without counsel; that he was too poor to employ an attorney. The indictment charges murder in the second degree, and is therefore not a capital case. It is only in capital cases the court is required to appoint counsel for a defendant. Code Cr. Proc. art. 547; Pennington v. State, 13 Tex. App. 44; Brotherton v. State, 30 Tex. App. 369, 17 S. W. 932; Gutierrez v. State (Tex. Cr. App.) 47 S. W. 372.

It is urgently insisted that a new trial should have been granted because of newly-discovered evidence. Appellant, as well as his mother, filed their affidavits to the effect that they had discovered, since the trial, that Gilbert Rivers and Monte Humphrey witnessed the difficulty during which appellant shot deceased. The affidavit of Rivers states that he was standing "on the brick wharf," and saw the entire difficulty which led to the shooting; that the parties were all strangers to him except defendant; that they were gambling; and, when his attention was first attracted to the fight, he saw two men set upon appellant, who drew his pistol, and began retreating and firing; that when the fight was over, deceased, a bystander, was found to be shot. He further stated facts tending to show that De Voe, one of the state's witnesses, did not see the difficulty; and also that Monte Humphrey was on the deck of sloop Mary when the shooting occurred, and

saw it as well as affiant. The affidavit of Monte Humphrey shows that he was standing on the deck of the sloop Undine, and saw the difficulty between the parties. He also states that two parties set upon defendant, armed with cotton hooks; that appellant began retreating, and firing, and that deceased was accidentally shot. He states that the witness De Voe was asleep on the sloop Undine, and did not see the difficulty. The witness De Voe testified on the trial that he saw the difficulty, and at the time of the difficulty was at work on the wharf. The evidence adduced on the trial shows that defendant and witness Stewart, with several other parties, were engaged in a gambling transaction,—throwing dice; that Stewart and appellant became engaged in trouble over the game, and that appellant fired several shots at Stewart, one of which struck the deceased, Railton. These facts were testified to by the witnesses Stewart and Smith. These witnesses make out a clear case of assault by appellant upon Stewart, and exclude the idea that two parties made an assault upon appellant with cotton hooks, or that there was any assault made upon him in any manner, as stated in the affidavits of Humphrey and Rivers. If there was an assault made by the two parties upon appellant with cotton hooks, then it is evident that by the slightest degree of diligence appellant could have had all the parties who were engaged in the game present at his trial. At least he could have had process issued for them. He was engaged in the same game with them. They were not at the trial, and process is not shown to have been issued for them. The record shows that a continuance had been granted appellant at a former term of the court, and perhaps an application for continuance overruled at the term at which the conviction occurred; but they are not before us, and we are not advised as to the contents of either. In addition to those engaged in the game, the evidence tends to show that there were quite a number of people along the wharf about that time. A motion for new trial will not be granted for newly-discovered testimony where the accused could have had an indefinite number of eye-witnesses to the transaction, and failed to use diligence to secure their attendance. All the testimony shows these people were there. Even the affidavits of his newly-discovered witnesses show this fact. It is but reasonable to suppose that appellant was acquainted with all the parties engaged with him in the game, and, if he did not know them personally, he knew they were engaged in the game, and, if the facts existed which he expected to prove by these newly-discovered witnesses, he could have proved same by those who were there. At least the law holds him to sufficient diligence to obtain those whom he knew were and ought to be cognizant of such facts. The motion for new trial was properly overruled. The judgment is affirmed.

MOZEE v. STATE.

(Court of Criminal Appeals of Texas. May 8, 1899.)

ASSAULT WITH INTENT TO MURDER—REDUCTION TO AGGRAVATED ASSAULT—INSTRUCTIONS—ISSUE OF PROVOKING DIFFICULTY—SELF-DEFENSE.

1. Where one charged with assault with intent to murder went to a place where prosecutor was, to ascertain what he had said about him, and committed the assault on hearing his answer, the assault could not be reduced from assault with intent to murder to aggravated assault merely because part of the language used by prosecutor in restating what he had said was vulgar and obscene.

2. Where one accused of assault with intent to murder swore that he shot merely to scare the prosecutor, it was improper to refuse to instruct that if he shot for that purpose, and not to kill, he could not be guilty of such an assault.

3. A charge amply covered by that given is properly refused.

4. The complaining witness testified that defendant came to the place where he was living, confronted him, and asked him to repeat what he had said about defendant to his wife shortly before, and that, before he could do so, defendant stopped him, said he had come to kill him, and, picking up a brickbat, threw it at him with all his power, and in the difficulty which ensued the shooting took place. Defendant's testimony was that he went to talk with him about the matter, and, on beginning the conversation, he got mad, picked up a brickbat, and threw it at defendant, and from this the difficulty started. *Held*, that an issue of provoking the difficulty was presented.

5. Where evidence raises an issue as to provoking a difficulty, it is the duty of the trial court to state the circumstances indicated by the evidence raising such issue.

6. That one seeks a meeting to provoke a difficulty does not deprive him of the right of self-defense, but he must do the acts provoking the difficulty.

Appeal from district court, Falls county; S. R. Scott, Judge.

Wiltz Mozee was convicted of an assault with intent to murder, and he appeals. Reversed.

Z. I. Harlan, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of two years; and he appeals.

In order to understand the various questions raised by appellant, it is necessary to give a statement of the evidence. Chester Allen, the injured party, testified: That on Saturday, before the trouble, a woman whom he was courting, named Adeline Givens, borrowed a horse from him to ride to town, and wanted witness to go with her, but he could not, and asked appellant to let her go with him, to which appellant agreed, and they went to Marlin together on that evening. It was late in the night when they got back, and the next day appellant was telling it around that he kept her out in the woods until that time. Witness was boarding with appellant at the time, and did not like that, and quit

boarding with him, and moved into a house with Dan Sanders, about three or four hundred yards from appellant. The day before the trouble, appellant's wife passed where witness was living, and asked witness why he had quit boarding with them, and witness told her. On June 27, 1897, the day of the assault, witness was at home, and appellant's little girl came down and told witness that her father said for witness to come up there. Witness did not tell her whether he would come or not, and the girl went back home. Witness got up, and went down to water his horse at a well near by; and, before he returned, appellant, his wife, and a woman that was staying with appellant (Betsy Shaw) were standing in front of witness' house. Witness went up, and appellant spoke to witness, and asked him what he had been telling his wife about him and Adeline Givens; and witness started to tell him, and defendant stopped him, and would not permit him to tell it, and said he had come down there to kill witness, and was going to do it, and immediately picked up a brickbat, and threw it at witness with all his power. Witness stooped down and picked up a rod of iron near by, and, when he did so, Dan Sanders spoke to witness, and said, "Put it down;" that defendant had a pistol. And witness looked around and saw his pistol, and he and Dan Sanders were scuffling over it. Witness at once dropped the iron, jumped over the woodpile, and ran in the house. Appellant either got loose from Sanders or was turned loose, and came to the door and repeated several times that witness had as well come out; that he had come to kill him, and was going to do it. Witness got an old gun in the house and came to the door, and presented it at the defendant and snapped it, and it failed to fire. Appellant then fired at witness with his pistol, the ball striking the edge of the door, near where witness was standing. Appellant said to witness that he knew the old gun witness had would not fire. Dan Sanders caught defendant when he fired. Appellant testified: "That on the day of the trouble my wife got after me about what Chester Allen had been telling her about me and Adeline Givens, and said that he told her I kept Adeline Givens out in the woods the night we went to town, and had intercourse with her. I told her I would go to see him about it, and my wife, Betsy Shaw, and myself went down there; and when we got there I told Chester Allen that I had come to talk to him about what he was telling my wife about me and Adeline Givens. He got mad and said: 'Yes; you did do it. You know you did do it. You know you f—d her.' I told him to hush; that I had come down there to talk with him, and not to have trouble. He kept on, and picked up a brickbat and threw it at me. I picked up one and threw it at him. He then picked up a rod of iron, and Dan Sanders got him and made him lay it down. He then ran in the house and got a gun. I then pulled out my

pistol, and he snapped the gun at me, and I shot off my pistol. I did not shoot at him, but shot to scare him. I did not try to shoot him any more. I did not have intercourse with Adeline, and the reason that we were so late was because it rained, and we could not get home sooner. I did not say anything to Allen about coming down there to kill him." The statements of these two witnesses presents, in substance, the testimony offered by the state and the defense.

Appellant's first assignment of error is "that the court erred in not giving to the jury special charges Nos. 1, 2, and 8 requested by him, as shown by bill of exceptions No. 1." The first charge is: "You are further charged that, if you believe that Wiltz Mozee went to the house of Chester Allen for the purpose of pacifying his wife; that, after he got there, Chester Allen used such language in the presence of himself and family as was reasonably calculated and did enrage defendant to such an extent that he was incapable of cool reflection at the time the shot was fired,—you will find the defendant not guilty as charged." We do not think there is any evidence in the record raising the issue contained in appellant's charge. There was no insult to a female relative, or about a female relative, such as would reduce the killing from murder to manslaughter; and, as appellant had gone down there for the purpose of ascertaining what Chester Allen said, he certainly could not say that, because he told him what he had heard him say, the assault should be reduced from assault with intent to murder to aggravated assault by sheer force of the fact that part of the language used by Allen in restating what he had previously stated was vulgar and obscene language.

Appellant's second requested charge is as follows: "You are further charged, if you believe from the evidence that defendant shot at Chester Allen for the purpose of bluffing or scaring the witness, and not with the specific intent to kill, you cannot convict him of the offense charged." We think the court should have given a charge presenting the issue of shooting to scare the injured party. If appellant shot to scare Chester Allen, with no intent to injure him, but simply to scare him, he could not, under our law, be guilty of an assault with intent to murder. It is not for us to say whether the facts proved this or not. Appellant had sworn positively that he did shoot for the purpose of scaring Allen.

Appellant's third requested charge is as follows: "You are further instructed by the court that, before you can convict defendant of the charge as set out in the indictment, you must believe that defendant was actuated by malice, as malice is defined in the main charge, in committing the assault, if any." We think this charge was amply covered in the court's charge.

Appellant's seventh assignment of error is: "The court erred in its charge to the jury upon the subject of 'provoking the difficulty,'

because the issue was not fairly raised upon the trial, and was prejudicial to appellant." Without discussing the evidence in detail, we believe that the issue of provoking the difficulty was presented, arising naturally out of the evidence as contained in the record.

The eighth assignment of error is: "The court erred in its charge to the jury upon the subject of provoking the difficulty, in that the court failed to indicate from the evidence what the act of provocation is, and define its effect and bearing upon the case, and to explain to what extent such act thus indicated would limit or abridge defendant's right of self-defense, but left the jury to speculate and conjecture as to the nature and quality of such act, and the extent of its limitation and abridgment of defendant's right of self-defense as is shown by bill of exceptions." We have frequently held that, where the evidence raises the issue as to provoking the difficulty, it is the duty of the trial court to tell the jury the circumstances indicated by the evidence raising the issue of provoking the difficulty. In *Abram v. State*, 36 Tex. Cr. R. 46, 35 S. W. 390, the court said: "The court should have instructed the jury that if they believed from the evidence, beyond a reasonable doubt, that the defendant and deceased were engaged in a verbal altercation; that the deceased ordered him to dry up or go off, or else he would make him; that they got into a quarrel, each party engaged in cursing the other; and that the defendant with a knife, being a deadly weapon, stabbed deceased and killed him with malice aforethought,—that he would be guilty of murder," etc. Upon referring to the court's charge, we find that the court charged, in substance, as follows: "Unless you further believe from the evidence, beyond a reasonable doubt, that defendant sought the meeting with the said Chester Allen for the purpose of provoking a difficulty with said Chester Allen with intent to take the life of the said Chester Allen, or do him such serious bodily injury that might probably end in the death of the said Chester Allen, and if you so believe from the evidence beyond a reasonable doubt, then you are instructed that, if the defendant sought such meeting for the said purpose and with such intent, the defendant would not be permitted to justify on the ground of self-defense, even though he should thereafter be compelled to act in his own self-defense." We have never held "that the mere fact that a party sought a meeting for the purpose of provoking a difficulty" would deprive him of the right of self-defense, but we have uniformly held that the party must not only seek the meeting, but do some act or acts indicating the desire to bring on the difficulty, and thereby cause death or serious bodily injury to his adversary. The mere seeking of a party for the purpose of bringing on a difficulty, as stated, is not the gist of the offense, but it is doing the acts that produced or provoked the difficulty that deprives him of the right of self-

defense. We think the court's charge is subject to the criticism urged by the able brief of appellant's counsel. *White's Ann. Pen. Code*, par. 1188; *Id.* par. 1281, § 4; *Morgan v. State*, 34 Tex. Cr. R. 222, 29 S. W. 1092; *Abram v. State*, 36 Tex. Cr. R. 44, 35 S. W. 389; *Carter v. State*, 87 Tex. Cr. R. 404, 35 S. W. 378; *Winters v. State*, 87 Tex. Cr. R. 582, 40 S. W. 303. For the error of the court in failing to give the charge above commented upon, and the further error in not properly defining what the court meant by "provoking the difficulty," the judgment is reversed and the cause remanded.

HEDRICK v. STATE.

(Court of Criminal Appeals of Texas. May 10, 1899.)

HOMICIDE—EVIDENCE—ADMISSIBILITY—SUFFICIENT—INSTRUCTIONS—BURGLARY—WITNESSES.

1. In a prosecution for murder, committed while accused was burglarizing a smoke house, evidence was admissible to show that in a conversation a month prior to the offense accused stated to witness that he was going to "rustle" for his living, and knew a smoke house that he could easily get at.

2. Where a witness testified, in a prosecution for murder, that he received from a certain person the shell from which the ball which killed deceased was fired, the court properly refused to allow accused to show that the person from whom the shell was received had committed a robbery, as such testimony was immaterial.

3. Where counsel for accused asked a witness if he did not go to another witness to get him to change his testimony given before the coroner, and the witness testified that he went because he believed that the other witness had not told all he knew, accused cannot complain of the witness' statement that he was satisfied that the other witness had not told all he knew.

4. Since the placing of witnesses under the rule excluding them from the court room when not testifying is within the discretion of the trial court, a conviction will not be reversed merely because a witness was permitted to testify without being placed under the rule.

5. The slightest force, such as the opening of a door or the turning of a lock, is sufficient to constitute a burglarious entry.

6. In a prosecution for murder committed in the perpetration of a nighttime burglary, the court properly instructed on the law of nighttime burglary.

7. Where, in addition to circumstantial evidence showing the guilt of accused, there was direct evidence of his confession, it was not error to refuse to instruct on the law of circumstantial evidence.

8. Where a murder was committed in the perpetration of a burglary, it was not error to refuse to instruct that, before the jury could convict of murder in the first degree, they must first find that the killing took place under circumstances which, if no burglary had been committed, would have made the killing murder in either the first or second degree.

9. Where a murder was committed in the perpetration of a burglary, the court properly refused to instruct on the law of manslaughter.

10. Where murder was committed in the perpetration of a burglary, the court properly refused to instruct on the law of self-defense.

11. Accused broke into a smoke house, took some of the meat outside, and returned for more, when he was discovered by deceased, who was killed by accused while accused was

attempting to escape. *Held* sufficient to show that the murder was committed in the perpetration of a burglary.

12. Evidence that deceased and his father approached a smoke house which accused was engaged in burglarizing; that deceased's father closed the door, which accused pushed open; that accused thrust out his hand, in which he held a pistol; and that deceased's father seized the pistol, which was then discharged by accused, killing deceased,—is sufficient to support a conviction of murder in the first degree.

Appeal from district court, Hill county; J. M. Hall, Judge.

George Hedrick was convicted of murder, and appeals. Affirmed.

Wear & Parr, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted for the murder of J. F. Pauly, by shooting him with a pistol, and his punishment assessed at confinement in the penitentiary for life. The corpus delicti is undisputed, and disclosed that deceased was shot and killed by a burglar in his effort to escape from a smoke house he had entered. The thief and murderer, whoever he was, had helped himself to three hams and about fifty pounds of meat. It is shown by the evidence that two sides and a shoulder of the meat were left by the burglar in a sack when he fled. R. W. Pauly, father of deceased, testified, in substance: "My son died in Hill county, on Sunday, the 9th of May, 1897. On the 8th of May he was at my house, and about ten o'clock that night he was at my smoke house, and was shot by some one from the inside of the smoke house. In the early part of the night deceased went over to see a boy who was sick on my place, and was gone about two hours,—as well as I remember, until about ten o'clock. When he returned he came to the front door, and called me, and said, 'Some one is in the smoke house.' I went out the back door of my residence. The door of the smoke house was open, and I walked to the smoke-house door and pushed it to. As I put my hand on the door some one from the inside said, 'Hold up there.' I pushed the door to, and the party on the inside shoved it back on me, and pointed a pistol out, and I caught it with my left hand, and it fired. Deceased had run up almost against the pistol when it fired. He fell back, and for a second or two I did not know what occurred. I saw the party as he left the place somewhere not far from the smoke house, on the north side of the smoke house. The party had on a white coat. This is all the description I can give of him. After deceased was shot, my wife and I took him in the house, and laid him down on the floor, and I ran about a half a mile, and got a party to go after the doctor. My son died about two o'clock Sunday, May 9th. When I went into the smoke house afterwards, I found a sack in there, with two sides and a shoulder of meat in it. Also found three hams about 65 or 70 yards out from the smoke house, a little northeast from the smoke

house,"—and identified the sack offered in evidence as the sack he saw at the smoke house. On the night of the burglary and homicide, Bert McBride, Mrs. McBride, and Miss Mittie McBride were spending the night at the home of appellant; and they testified to facts showing that defendant came in late that night, and confessed to them, in substance: "That he reckoned he had killed a fellow. Said he had been down to Pauly's. He said he thought he would go, and rustle him some meat, and they caught him. He said they caught him in the smoke house; that he stuck his pistol out, and one of them grabbed it, and he shot." Other witnesses testify to finding a pistol that appellant had on the night of the killing. There is other testimony showing that this particular pistol had been hid away, and found, and identified as the pistol that Bert McBride testified to seeing appellant with on the night of the killing. There are other circumstances in the record going to identify appellant as the party who killed deceased.

Appellant's first assignment of error complains of the action of the court permitting the witness Bill Patterson to detail a conversation had with defendant about the latter part of March, and prior to the time of the alleged homicide, as shown by bill of exceptions. From this bill it appears that the witness testified, over the objection of appellant, that he had a conversation with appellant about the last of April; that he and appellant were talking about times being hard, and appellant said that he was going to make a living by work if he could, and, when he could not, then he was going to rustle for it; that witness stated to appellant the time for rustling had played out in this country. Thereupon defendant stated that he knew where there was a smoke house full of meat, and a trunk with some money in it, that could be got at easily. Appellant's objection to this evidence is that the same is not pertinent or relevant to any issue in this case; that the conversation was not shown to have in any manner referred to deceased or the smoke house alleged to have been burglarized. We think this testimony was germane and pertinent; and while, as indicated in the exception, it does not show directly that it referred to the deceased, it does show that appellant knew where there was a smoke house full of meat; and we think it was pertinent testimony showing that appellant intended to burglarize this meat house. *Briscoe v. State*, 32 Tex. Cr. R. 411, 24 S. W. 95; *Banks v. State*, 13 Tex. App. 182; *Sims v. State*, 10 Tex. App. 132; *Preston v. State*, 8 Tex. App. 30; *Wills, Circ. Ev.* pp. 53, 55; 2 *Best, Ev.* § 458.

Appellant's second assignment of error states that the court erred in sustaining the objection to the following question asked Squire Ham by appellant: "Was not the McCall you testify about, the McCall who was implicated in the post-office robbery in Hillsboro?" Appellant insists that said testimony was admissible to discredit the source of the

state's witness' information, and that the evidence shows that the witness Ham received from said McCall the empty shell out of which it was claimed the ball was fired that killed deceased. We think it is irrelevant and immaterial whether the McCall who gave the witness the shell robbed the post office at Hillsboro or not.

Appellant's third assignment complains of the court's action in overruling his objection to the witness Bob Davis testifying to conversations had with defendant after he was arrested. We find no bill as to this assignment.

Appellant's fourth assignment is the same as his second, except the question was asked Ben Brown instead of Squire Ham, as in that instance. We do not think the court erred in refusing to permit appellant to ask the question.

Appellant's fifth assignment is "that the court erred in permitting the witness Obe Cunningham, over the objections of the defendant, to testify to a conversation he had with Bert McBride some days after the killing, and to the witness stating, among other things, that he was satisfied that Bert McBride knew more than he had told." It appears from the bill that appellant's counsel asked Obe Cunningham if he did go to witness McBride, after he had testified at coroner's inquest, and try to get said witness to change his evidence given at said inquest; and he said he did not go to him for that purpose, but because he believed he knew more than he told. The bill is very vague and indefinite, but a close scrutiny of the same discloses the fact, as we understand it, that appellant objects to the last statement above. If this is not the contention, then the bill has no meaning. It will be seen that appellant asked the witness why he went to see the witness McBride, and intimated that the witness went to get him to change his testimony. Now, certainly, the witness Obe Cunningham would have the right to disclaim this intention, and tell why it was he did go to the witness McBride. If the witness Cunningham believed that McBride knew things he had not testified about, we think that would be a valid reason for going to see him; and we do not think the court erred in admitting this testimony.

We do not think there is any merit in appellant's seventh, eighth, and ninth assignments of error.

The tenth assignment complains because Mrs. Pauly was permitted to testify. She was not placed under the rule, but heard all the other testimony. She testified to seeing the door closed about sundown. We have repeatedly held that the court, in his discretion, may relax the rule. We do not think appellant's rights have been injured in this respect.

His eleventh assignment complains of the court's charge, wherein the jury were instructed that the slightest force is sufficient, such as the opening of a door, or the turning

of a button. We do not think there is any error in this charge. *Sparks v. State*, 34 Tex. Cr. R. 86, 29 S. W. 264.

The twelfth assignment complains of the court charging on nighttime burglary. We have frequently held that under an ordinary indictment for murder in the first degree proof may be offered of murder committed by any felonious act, such as in the perpetration of burglary; and the evidence in this case discloses the fact that burglary was committed at night, and it was not error for the court to charge on nighttime burglary. *White's Ann. Pen. Code*, § 1252.

In his thirteenth assignment appellant complains because the court failed to charge on circumstantial evidence. An inspection of the facts shows that the witnesses Bert McBride, Mrs. M. E. McBride, and Mittie McBride testify to appellant's confession of having committed the crime. His admission of guilt to them was direct, and not circumstantial, evidence; and it is only where evidence is wholly circumstantial that the court is required to so charge. *Glover v. State* (Tex. Cr. App.) 46 S. W. 824.

Appellant's fourteenth assignment is: "The court erred in failing and refusing to charge the jury, in effect, that before they could find defendant guilty of murder in the first degree, they must first find from the testimony that the killing took place under circumstances which, if no burglary had been committed, the killing would have been murder in either the first or second degree." There was no error in the court's failure to give this charge; nor was there any error in the court's failure to charge on manslaughter, nor does the evidence raise the issue of self-defense.

Appellant's eighteenth assignment complains of the action of the court in submitting the question as to whether a burglary was being committed, because the proof shows that the burglary, if any, was committed and completed at the time of the killing, and that defendant was trying to escape. We do not agree to this contention. The record discloses that, if appellant is the party who committed the homicide, he was in the smoke house at the time he fired the shot; that some of the meat was on the outside, and some on the inside, in appellant's sack. The mere fact that he had previously opened the door does not prove that the burglary was completed. He had not left the house, nor had he taken anything away. The evidence shows that he was in the very act of committing burglary at the time the shot was fired.

Appellant's twentieth assignment contends that the court failed to instruct the jury, in effect, that they must believe that the killing occurred under circumstances that would amount to murder either in the first or second degree, before they could find defendant guilty of murder in the first degree on account of the fact that there was a burglary committed.

The twenty-first assignment complains of the court's charge wherein the court tells the

jury that if they believe, from the evidence, beyond a reasonable doubt, that defendant committed the offense of burglary, etc., for the purpose of committing the offense of theft, etc., and that while he was in the act of committing said offense of burglary, with a pistol he shot and killed J. F. Pauly, they will find defendant guilty of murder in the first degree. Appellant's objection to this charge is because the same tells the jury that, if appellant killed Pauly, he would be guilty of murder, irrespective of the question as to whether—First, he had any intention to kill the said Pauly; second, as to whether the killing occurred by accident; third, as to whether the killing occurred under circumstances that would have made out negligent homicide of the second degree; and, fourth, as to whether the killing occurred under such circumstances as would have made it manslaughter or self-defense. We will consider these two assignments together. We have read carefully the able brief of appellant's counsel on this and other questions, and also examined the authorities cited. In the case of *Pharr v. State*, 7 Tex. App. 477, it will be seen that the defect in the charge there complained of was the failure of the court to define malice. Again, in *Tooney v. State*, 5 Tex. App. 188, the court said: "All murder committed by poison is murder in the first degree; not all homicide or killing, because all killing is not murder; nor is all unlawful killing murder. But the offense committed must be murder,—murder in its legal, technical sense,—which is made distinguishable from every other species of homicide by being an unlawful killing, actuated by malice aforethought, either express or implied. This essential ingredient, 'malice aforethought,' is as necessary to constitute the crime of murder by poison as it is to constitute murder committed by other means." It will be seen, as contended by appellant's counsel, that this case, as well as the *Pharr Case*, supra, upholds the general proposition contended for by him. Article 711 of the Penal Code does not attempt to eliminate the element of malice from the definition of murder, nor does it intend to say that all killing by poisoning, starving, or in the perpetration of arson, rape, robbery, or burglary, is murder in the first degree; but the intent of the statute was to say that all murder committed in the perpetration of these acts was murder in the first degree. In other words, the intent of the legislature in this regard was to say that where a party committed murder he should be guilty, and punished for murder in the first degree, if it was done in the perpetration of any of the offenses designated in said article. In *Gonzales v. State*, 19 Tex. App. 394, it was held: "Murder committed in the perpetration of robbery is per se murder in the first degree." Again, in *Sharpe v. State*, 17 Tex. App. 497, the court said: "Counsel for defendant concedes that in *Roach v. State*, 8 Tex. App. 491, the precise question now presented was dis-

tinctly met and decided. In that case the indictment charged that the homicide was committed with express malice aforethought. Evidence tending to disclose a robbery as the motive inducing the homicide was admitted, and the court, as in this case, charged the jury 'that all murder committed in the perpetration, or in the attempted perpetration, of the crime of robbery, is murder in the first degree.' It was held that there was no error in admitting the evidence as to the robbery, nor in giving the charge in relation thereto." Now, reverting to appellant's assignment wherein he complains of the charge of the court, it will be found from an inspection of the charge that the court defines malice, and then defines express malice, and says, "All murder committed with express malice is murder in the first degree, and all murder committed in the perpetration of burglary is murder in the first degree." Then, after defining the offense of burglary by night, the court proceeds as follows: "You are instructed that if you believe, from the evidence, beyond a reasonable doubt, that defendant, in the county of Hill, state of Texas, about the time charged in the indictment, committed the offense of burglary by entering the smoke house of R. W. Pauly for the purpose of committing the offense as hereinbefore explained, and while he was in the act of committing the said offense of burglary did, with a pistol, shoot and kill J. F. Pauly, as charged in the indictment, then you will find the defendant guilty of murder in the first degree," etc. When we recur to the facts of this case, they disclose a condition that precludes any other theory of homicide than murder in the first degree. While it is true, as contended by appellant, that a party could commit a homicide in the perpetration of burglary, and not be guilty of either grade of murder, yet the facts before us do not disclose a state of facts that would authorize the court in charging on any other grade of homicide than murder in the first degree. If the conclusion above stated be correct, that all murder committed in the perpetration of burglary is murder in the first degree, then when the court charges on express malice, and then follows that charge by telling the jury that if a party kills another in the perpetration of burglary, etc., such a charge is correct, if the evidence does not disclose any other theory of homicide. Appellant's defense was that he was not at the place of the homicide, and the court properly charged on alibi.

Appellant's twenty-third, twenty-fourth, and twenty-fifth assignments of error complain of the refusal of the court to give certain special requested charges. We do not think the court erred in this regard.

Appellant's twenty-sixth and twenty-seventh assignments are that the verdict of the jury is contrary to the law and the evidence, and not supported by the same. We cannot agree to this, but must say, without again reviewing the facts, that the evidence

amply supports the verdict. We have examined all of appellant's assignments of error, and find no error in the record. The judgment is in all things affirmed.

HENDERSON, J. (concurring). I agree to the result reached on the ground that under our statute and the evidence the court was only required to charge on murder in the first degree, and there was no error in refusing to give the requested charge.

TEXAS & P. RY. CO. v. MAYNARD.¹

(Court of Civil Appeals of Texas. April 19, 1899.)

ADVERSE POSSESSION—EVIDENCE.

A., several years after he had deeded a strip of land to a railroad company for a right of way, fenced a part of it, claimed it, and had open, continuous, and notorious possession thereof for more than 10 years. The railroad company claimed that it allowed owners abutting on its right of way to occupy and harvest crops on parts of its right of way, and did not consider such occupancy adverse, unless so notified, and that it had never been notified that A. held adversely. *Held*, that A. had acquired title by adverse possession.

Appeal from district court, Kaufman county; J. E. Dillard, Judge.

Trespass to try title brought by J. B. Maynard against the Texas & Pacific Railway Company. From a judgment in favor of the plaintiff, the defendant appealed. Affirmed.

M. H. Gossett, for appellant. J. S. Woods, for appellee.

JAMES, C. J. The case presented to the district judge is shown by the following agreement: "Following is an agreed statement of the pleadings, issues, and evidence on the trial of the above-styled cause, and entered into for purpose of making record on appeal: The suit involved title to about seven acres of land, a part of the Lewis Pearce survey, in Kaufman county, Texas, and consisting of 50 feet on each side of 100-foot strip of land, on which the Texas & Pacific Railway Company is located, through a tract of about 200 acres, in the Longer Pearce survey. Plaintiff sued in trespass to try title, and asserted title by reason of the ten-years statute of limitations, and possession thereunder by his immediate grantor, J. S. Griffith, and himself. It was admitted that J. S. Griffith deeded to the defendant railway company in 1873 a strip of land 200 feet wide for right of way, on which strip defendant's railway was built, and has been since maintained. Defendant answered with plea of not guilty, and 3, 5, and 10 years' statutes of limitations, and further that the possession of Griffith was permissive, and not adverse. It was proven by plaintiff that this grantor, J. S. Griffith (the grantor of both plaintiff and defendant), had for more than ten years prior to the institu-

¹ Writ of error denied by supreme court.

tion of this suit built a fence along each side of the said railway track, 50 feet from the center of the track, leaving only 100 feet, instead of 200 feet, as originally deeded by Griffith, and that under said fence J. S. Griffith had from 1883 to 1894 (the last being the year of Griffith's conveyance to plaintiff) had open, continuous, and notorious possession of all the land under his fence, and claimed it as his property. Defendant proved that it allowed adjoining landowners abutting on its right of way to occupy and harvest crops on parts of its right of way, and did not consider such possession adverse, except when notified that such occupancy was adverse to defendant's rights or under claim of title; that defendant had never been notified by plaintiff or J. S. Griffith that the possession of Griffith was hostile, till the bringing of this suit. It is agreed that the issue is: Does the possession of Griffith, under the above state of facts, operate to pass title from defendant to plaintiff to the strip of land in controversy? It was proven by plaintiff, also, that he and his immediate grantor, Griffith, used and claimed all this land up to within 50 feet of the center of defendant's track, on each side thereof, and had it all fenced, for more than ten consecutive years next before the beginning of this suit. It was agreed that there was no notice to the defendant company of plaintiff's and his grantor's claim of ownership to the 50-foot strip on each side of the said railroad, except such as resulted from the building of the fence, and cultivation and use of the land for the time above specified. J. S. Woods, Att'y for Plff. M. H. Gossett, Att'y for Def. 10/12/98."

The court rendered judgment for the plaintiff. Our conclusion is that the judgment was correct. *Harn v. Smith*, 79 Tex. 310, 15 S. W. 240; *Craig v. Cartwright*, 65 Tex. 413. The conditions that operate to make a title by limitations are not different in this case from those necessary in other cases. Affirmed.

RAGSDALE v. GROOS et al. (ROBINSON, Intervener).¹

(Court of Civil Appeals of Texas. April 19, 1899.)

GARNISHMENT—PLEADING—INTERVENTION—APPEAL—CHECK BY MARRIED WOMAN.

1. When a bank is garnished as a creditor of W. O. S., and answers, denying that it has funds belonging to W. O. S., but alleging that it had had a deposit in the name of Mrs. W. O. S., such answer is not demurrable on the ground that a presumption obtains that the deposit was community property, since the answer does not show that Mrs. W. O. S. is the wife of W. O. S.

2. An allegation by a third person that he had received a check from a judgment debtor for the fund in the hands of a garnishee bank, which check had been accepted by the bank, with proof that the bank has agreed to credit him with the check if a certain other writ of

garnishment was dismissed, entitled him to intervene in the garnishment proceeding.

3. When plaintiff has no right to a fund in the hands of a garnishee, he cannot complain of the judgment disposing of the fund between others.

4. When the evidence in a proceeding for reinstatement of a case is not in the record, the order reinstating the case cannot be reviewed, although the reasons given by the court may not seem sufficient.

5. As to issues not submitted, the statute resolves every fact in favor of the judgment.

6. A check signed by a wife alone, with her husband's consent, is valid.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Garnishment proceedings by Mrs. D. C. Ragsdale against F. Groos & Co., in which C. S. Robinson intervened. Judgment for defendants, and plaintiff appeals. Affirmed.

Ingrum & Davis, for appellant. C. S. Robinson and Goeth & Ihrie, for appellees.

JAMES, C. J. Mrs. D. C. Ragsdale, having a judgment against W. O. Shands, garnished F. Groos & Co., who answered that they were not indebted to W. O. Shands, had no effects of Shands, and did not know of any person having effects of his, or indebted to him; that they were bankers, and had a deposit of \$68.40 credited on their books to one Mrs. W. O. Shands; and by supplemental answer they alleged that on August 14, 1897, prior to the garnishment, Mrs. W. O. Shands drew her check for said sum in favor of C. S. Robinson, and that thereafter neither W. O. Shands nor Mrs. W. O. Shands could have had any interest in the fund, and prayed to be dismissed. C. S. Robinson intervened, and claimed to be the owner of the fund, by reason of the said check; alleging that he presented it to F. Groos & Co., who recognized and received the same, and agreed to pay over to intervenor's credit the said fund. He also alleged that the fund was the separate property of Mrs. Shands. The plaintiff demurred to the garnishee's answer, and controverted it by alleging, in substance, that Mrs. W. O. Shands was the wife of W. O. Shands, and that the deposit in her name was community property, and, in reply to the intervenor's pleading, demurred thereto generally, and alleged that the transfer to Robinson of said fund, if any, was collusive and fraudulent, for the purpose of removing the fund from the reach of plaintiff, etc. The various demurrers were overruled. The court submitted one issue to the jury, viz. whether the money on deposit was the separate or community property of Mrs. Shands. The verdict was that it was her separate property, and there was testimony which warranted the finding.

The answer of the garnishee was not subject to demurrer. If the presumption obtained that the fund was community property, from the fact that Mrs. Shands was the wife of the judgment debtor, still that fact did not appear from the answer.

¹ Rehearing denied May 17, 1899.

Robinson, in our opinion, was properly allowed to intervene. The allegation he made as to the acceptance by F. Groos & Co. of the check, if true, gave him a right in the fund. The testimony was that F. Groos & Co. verbally accepted the check, and agreed to credit Robinson with the fund, if a certain other writ of garnishment was dismissed; and it appears that at that time such other garnishment had, several days before, been quashed, and the judgment was never appealed from. Doubtless, F. Groos & Co. did not pay the check at the time, because the judgment quashing the said writ was still subject to appeal. Upon the above facts, F. Groos & Co. virtually accepted the check. The issue that the fund was the separate property of Mrs. Shands was raised in the pleadings of plaintiff and garnishees, and also by the pleadings of the intervener. The answer of the garnishees was sufficient to discharge them, and it devolved on plaintiff to allege and prove that garnishees did not owe the fund to Mrs. Shands, but to Shands. They accordingly alleged that the fund was community property. Proof that Mrs. Shands was the wife of Shands may possibly have been sufficient to make a prima facie showing of community property. It is a general rule that presumptions do not control in cases of this kind. Evidence was introduced, however, which rebutted such presumption. We conclude that the judgment denying plaintiff any recovery must be sustained, and, she being found to have no claim on the fund, she clearly has no right to complain of the judgment so far as it disposes of the fund between others.

It is necessary to consider another question. It appears that this case, being an appeal from the justice's court, was disposed of at a previous term by an order dismissing the appeal. At the next term the court reinstated the case on the petition of the intervener. The allegations of this petition disclosed good equitable grounds for reinstating the case. *Smith v. Patrick* (Tex. Civ. App.) 36 S. W. 762. The evidence which was before the court upon such hearing has not been preserved, and we are unable to say that the court erred in its decision, although the reasons given by the court might not seem sufficient. As already stated, the adjudication of the fund in favor of Robinson against F. Groos & Co. is a matter which cannot concern plaintiff, the verdict finding against her the only fact which would entitle her to the fund. No other issue was requested to be submitted, and in such case the statute, as it now is, resolves every other fact in issue in favor of the judgment rendered,—as much so as if it had been specifically found by the jury.

The fact that the check was signed by the wife alone can be of no avail to plaintiff, as it appears that it was drawn with her husband's consent, he having made the transaction with Robinson. The judgment is affirmed.

51 S.W.—17

COPELAND et al. v. HOLLOMAN.
(Court of Civil Appeals of Texas. April 26,
1899.)

LIQUIDATED DAMAGES—CONTRACTS.

One agreeing to deliver 150 cattle, on which \$600 had been paid on a certain date, gave a bond to forfeit \$900 if the contract was breached. *Held*, that the damages provided for were liquidated, since they amounted only to a return of the \$600, and \$2 per head of cattle for damages.

Appeal from Hopkins county court; R. B. Keasler, Judge.

Action by O. D. Holloman against W. L. Copeland and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Leach & Crosbey, for appellants. Neyland & Neyland and Eli Van Remkle, for appellee.

FLY, J. This suit was instituted by appellee to recover of W. L. Copeland, as principal, and the other appellants, as sureties, the sum of \$900, liquidated damages for the infraction of a certain bond given for the faithful delivery on a certain date of 150 head of certain grades and kinds of cattle. The court held that the bond evidenced a contract for liquidated damages, and rendered judgment in favor of appellee for the amount of the bond. There was proof to sustain the finding that the contract was breached by appellant W. L. Copeland, and the only question presented is as to whether the parties intended to fix the amount in the bond as a penalty or as liquidated damages. There is no well-defined or entirely satisfactory rule by which it can be determined, in regard to a sum fixed in a contract, as to whether it was intended as liquidated damages, in case of a breach, or merely as a penal sum to meet the damages actually sustained. As said by the supreme court in the case of *Durst v. Swift*, 11 Tex. 273: "It not unfrequently becomes a question of some difficulty to determine whether a sum thus agreed to be paid in case of breach of contract is to be considered in the nature of a penalty, merely to cover the damages which may be actually occasioned by the violation of the agreement, or the full sum really to be paid in that event, as liquidated or settled damages, without reference to the injury sustained." The intention of the parties, drawn from the terms and stipulations of the instrument, is the criterion for the interpretation of contracts in this as in other respects. It is true that the law does not favor forfeitures, and will not enforce them unless it is apparent that a fixed sum was intended to be provided for. Still it is recognized that parties have the right to fix a certain sum as damages in case of a breach of contract, regardless of the damages actually sustained, and when such intent is ascertained the contract must be enforced. "If the supposed stipulation greatly exceed the actual loss,—if there be no approximation be-

tween them, and this be made to appear by the evidence,—then, it seems to us, and then only, should the actual damages be the measure of recovery." *Collier v. Betterton*, 87 Tex. 440, 29 S. W. 467. Six hundred dollars of the \$900 provided for in the bond had been paid by appellee; and the \$300 in excess of that sum was not such a disproportionate sum to the value of the cattle as to indicate that a penalty, and not liquidated damages, was intended. One hundred and fifty cattle were to be delivered, and \$2 damages for failure of delivery of each one would not seem to be an exorbitant sum; and it seems quite reasonable that it was the intention of the parties that, in case of a breach on the part of appellant Copeland, appellee should have his \$600 returned, and be paid, in addition, the sum of \$300 damages. *Eakin v. Scott*, 70 Tex. 442, 7 S. W. 777. The judgment is affirmed.

WESTERN UNION TEL. CO. v. DAVIS.

(Court of Civil Appeals of Texas. May 24, 1899.)

TELEGRAPH COMPANIES — FAILURE TO DELIVER MESSAGE—NOTICE TO SENDER—INSTRUCTION.

In an action against a telegraph company for damages for failure to deliver a telegram, an instruction that if defendant, on the arrival of the message, ascertained that it could not deliver it by the exercise of ordinary care and diligence, it was its duty then to notify the sender of its inability with reasonable diligence and dispatch, and if it failed to do so, and on account of such failure the person to whom it was sent was damaged, it would be liable, is erroneous, as defendant's liability depended upon whether or not it was guilty of negligence in failing to deliver the telegram, and whether or not it was negligence to fail to notify the sender of its inability to find the person to whom it was sent was a question to be decided by the jury.

Appeal from Hamilton county court; C. W. Cotton, Judge.

Action by M. A. Davis against the Western Union Telegraph Company. From a judgment in favor of plaintiff, defendant appealed. Reversed.

Ramsey, Brown & Odell, for appellant. Dewey Langford, for appellee.

KEY, J. This is a damage suit against the telegraph company for failure to deliver a telegram informing the plaintiff that her son was mortally wounded. Verdict and judgment were rendered for the plaintiff, and the defendant has appealed.

Among other things, the court charged the jury as follows: "You are instructed that if you find from the evidence that defendant, on the arrival of the message in question, ascertained that it could not deliver the same by the exercise of ordinary care and diligence, it was the duty then of the defendant to notify the sender of the message of said inability with reasonable diligence and dispatch; and if the defendant failed to do so,

and on account of such failure the plaintiff was not informed of the fact that her son was mortally wounded, and was thereby deprived of being present with her son during his last hours and at his death, and if you further believe that the plaintiff was thereby greatly grieved and distressed, then you will find for the plaintiff." This charge is assigned as error, and we sustain the assignment. The defendant's liability depended upon whether or not it was guilty of negligence in failing to deliver the telegram to the plaintiff; and whether or not it was negligence to fail to notify the sender of the message of its inability to find the plaintiff was a question of fact, to be decided by the jury, and the court had no right to assume that such failure would constitute negligence, and instruct the jury, if defendant failed to so notify the sender of the message, etc., to find for the plaintiff. This charge, in effect, assumes that the failure of the telegraph company, under the circumstances enumerated, to notify the sender of its inability to find the plaintiff, would constitute negligence; and such charges, except where the duty is one prescribed by written law, have uniformly been condemned by the courts of this state.

We also hold that the court erred in refusing special charge No. 13 requested by the defendant. This charge gave the correct definition of the term "negligence," and submitted the defendant's theory of the case pertinently and accurately to the jury. The court's charge did not define nor use the term "negligence," but used the expression "reasonable care, diligence, and dispatch." We are of the opinion that the appellant was entitled to have the court's charge supplemented by the special charge referred to. We overrule the other assignments of error, and reverse and remand the cause. Reversed and remanded.

KNIGHT v. COLEMAN COUNTY.

(Court of Civil Appeals of Texas. May 24, 1899.)

VENDOR AND PURCHASER—FORECLOSURE OF LIEN—DEFENSE—DEFECT OF TITLE.

In an action against the purchaser of land sold by general warranty deed, to foreclose the lien retained by the note, defect of title is unavailable as a defense when fraud, ignorance of the defect, liability to eviction, insolvency of the grantor, or an offer to return possession and the deed for cancellation, are not shown.

Appeal from district court, Coleman county; J. O. Woodward, Judge.

Action by Coleman county against D. B. F. Knight. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Jenkins & McCartney and T. J. White, for appellant. J. K. Baker and Sims & Snodgrass, for appellee.

FISHER, C. J. This is an action by the appellee, Coleman county, against appellant,

Knight, to recover on certain vendor's lien notes executed by Knight and one Gillespie, and to foreclose the lien on the land described in the notes. The appellant, Knight, for answer, pleaded that the land did not belong to Coleman county at the time it was sold to him and Gillespie, but that it was then, and is now, a part of the S. T. Belt survey; also pleaded that the consideration of the notes had failed, in that the land was not a part of the survey sold to them by Coleman county, and was not then owned by Coleman county, but that the land was unappropriated public domain; that, at the time that appellee and Gillespie purchased the land from Coleman county, it was represented that Coleman county was the owner of the land, which representations were relied on by the appellant. The principal issue submitted and tried in the court below was whether the land in controversy was a part of survey No. 90, owned by Coleman county. Appellee contended, and offered evidence tending to show, that it was embraced in survey No. 90, a part of which was sold to appellant; and appellant contended, and offered evidence tending to prove, that it was not embraced in survey No. 90. The only facts which we deem it necessary to find are that the land in controversy was sold by Coleman county to the appellant and one Gillespie, by general warranty deed, and that the notes sued upon were part of the purchase price of said land, and were executed by Knight and Gillespie, and that a vendor's lien was retained thereon to secure the unpaid purchase money. Gillespie afterwards sold to Knight, and Knight assumed the payment of the amount due Coleman county from Gillespie. There is no evidence in the record tending to prove the fraudulent representations alleged by the appellant in his answer, nor is there any evidence going to show that the appellant did not know of the location and situation of the land at the time that he and Gillespie purchased, nor was there any offer to return possession of the premises to Coleman county and the deed for cancellation. We also find that there was no evidence showing that Coleman county was insolvent, and not able to respond in damages on its covenant of warranty. In *Ogburn v. Whitlow*, 15 S. W. 807, 80 Tex. 240, it is held that a contract, such as is evidenced by the deed and the vendor's lien notes in question, was executed, and not executory, and approves the rule laid down in *Cooper v. Singleton*, 19 Tex. 267, to the effect that, where suit is brought by the vendor against his vendee for the purchase money on such a contract, the burden is upon the vendee to establish that the title was a failure, in whole or in part; that there was danger of eviction; and also such circumstances as would prima facie repel the presumption that, at the time of the purchase, he knew and intended to run the risk of the defect in the title; and further states that, as a prerequisite to resisting the payment of the purchase money, he must return the possession

of the premises and the deed for cancellation. Now, in this case, there is no evidence offered by the appellant tending to show that he did not know of the defect in the plaintiff's title, if any; nor is there any evidence tending to show that he is liable to eviction; nor did he offer to return possession of the premises and the deed for cancellation. As further authorities bearing upon these questions, we cite *Haralson v. Langford*, 66 Tex. 113, 18 S. W. 839, and *Elder v. Bank* (Tex. Civ. App.) 42 S. W. 125. The contract in its nature being executed, and Coleman county not being insolvent, according to the rule laid down in *Ogburn v. Whitlow*, under the facts as stated, the appellant's remedy, if any, is confined to an action upon the covenants of warranty contained in his deed. With this view of the case, it is unnecessary for us to pass upon the questions raised in the appellant's brief; for, under the facts as stated, the trial court could have rendered no other judgment. We find no error in the record, and the judgment is affirmed. Affirmed.

WARD v. WESTERN UNION TEL. CO.

(Court of Civil Appeals of Texas. May 6, 1899.)

TELEGRAM—NONDELIVERY—ACTION FOR DAMAGES—PLEADING.

A complaint against a telegraph company for damages for failure to deliver a message alleged that, learning of the dangerous illness of a relative, plaintiff and his wife delivered a message to the telegraph company for transmission to a person in the town where the sick relative was, inquiring as to the latter's condition, and informed the agent of the company that, if the answer to the message was that the relative was still alive, plaintiff's wife intended to go to him at once; otherwise, if he had died; that, though the telegram read that the wife was unable to come, its meaning was fully explained to the agent, and the company was not misled thereby; that the company negligently failed to deliver the message, and that, had it been delivered, it would have been answered that the relative was still alive, in time to permit plaintiff's wife to go to him, and be with him for some time before his death; that the failure to deliver the telegram deprived the wife of the opportunity of being with her relative during his last illness, and caused her and plaintiff mental pain and anguish. *Held* to state a cause of action, since the company, after being informed of the object of the message, had no right to rely on the statement therein that the wife was unable to go.

Appeal from district court, Hunt county; Howard Templeton, Judge.

Action by J. K. Ward against the Western Union Telegraph Company. There was a judgment for defendant, and plaintiff appeals. Reversed.

B. Q. Evans, for appellant. A. H. Field, for appellee.

FINLEY, C. J. This suit was instituted by J. K. Ward against the Western Union Telegraph Company to recover damages on

account of the mental pain and anguish suffered by his wife by reason of being deprived of being with her brother in his last illness, occasioned by the negligence of the telegraph company in failing to promptly deliver a telegram. The court sustained a general demurrer to the plaintiff's petition and trial amendment, holding that no cause of action was therein set out. Plaintiff has appealed.

The following is, in substance, the principal allegation in plaintiff's original petition and trial amendment, leaving off the formal facts: "On the morning of December 2, 1897, plaintiff and his wife, who reside in Greenville, received information, by letter written the day before in Dublin, Tex., that Nat Dryden, residing at Dublin, Tex., the brother of plaintiff's wife, was very sick, and was at the point of death; the letter stating that, in all probability, he would not live through the night of the 1st of December. When this letter was received, on the morning of the 2d, the indications were that he was then probably dead, and, in view of the fact the first train leaving for Dublin thereafter would not leave until 3 a. m., December 2d, and reach Dublin December 3d, 11 a. m., plaintiff's wife, who desired to go to Dublin and attend him in his last hours, would not reach Dublin until after the time when it would be necessary to bury him, if he had died during the night of the 1st, as indicated by the letter. Plaintiff and his wife, not knowing then whether he was still living or dead, concluded to send a message to B. W. Laferty, who was a brother-in-law of Nat Dryden, and who wrote the above letter, for the purpose of ascertaining, during the day of December 2d, and before the first train left for Dublin, whether he (Dryden) was still living; that, if still living, it was the purpose of plaintiff's wife to start to Dublin on the first train, which purpose was then made known to the agent, and if he was dead, owing to her condition, she would not go; and to that end plaintiff, after explaining to the agent of the defendant at Greenville their purposes for sending the message and the intention of plaintiff's wife to start to Dublin to see her brother if she could ascertain before the train left that he was still living, prepared and delivered to the agent of the defendant company, at Greenville, for transmission, the following message: 'Greenville, Texas, Dec. 2, 1897. B. W. Laferty, Dublin, Texas: Sallie not able to come. Wire me how he is. J. K. Ward.' This message was delivered for transmission about 9:30 a. m., December 2d, was paid for, and would have reached Dublin in 30 minutes, and been delivered by 10:30 a. m., December 2d, if there had been no delay; and, if the same had been delivered promptly, Laferty could and would have replied by 12 o'clock, December 2d, that Nat Dryden was still living, and plaintiff's wife could and would have started to Dublin on the first train, and would have reached Dublin, and been with her brother 17 hours be-

fore his death, which occurred on December 4th, 8 a. m.; but the message was not delivered until 3 p. m., December 3, 1897, notwithstanding the agents and servants of defendant, both at Greenville and Dublin, understood the purpose and importance of the message,—understood that plaintiff's wife would go to Dublin on the first train, if such information could be ascertained." The petition alleges that "the messenger boy and agent who was in the employ of the defendant at Dublin at that time, whose business it was to deliver said message, as also the agent who received the message, was well acquainted with Laferty, and had known him intimately for a long time prior thereto, and knew for whom said message was intended, and about whom and which the message referred, and negligently and carelessly failed to deliver the message; that, by reason of the carelessness and negligence of defendant in failing and refusing to deliver said message in due time, plaintiff and his wife were deprived of the knowledge of the condition of the sick brother of plaintiff's wife, as to whether or not he was still living or dead, and that plaintiff's wife was deprived of the right to be present during the last hours of his sickness, in consequence of which plaintiff and his wife were prostrated with grief, and suffering great mental anguish and sorrow, to his damages in the sum of \$975.50." It was alleged in the trial amendment that "while the message contained the statement, 'Sallie not able to come,' it was fully understood by the agents and servants of the defendant at the Greenville office that she would be able by the first train and would go if she received the information that he was still living, and that the defendant was not misled as to the importance, and that part of the message asking information as to Dryden's condition." For the purposes of a demurrer, all of the allegations are assumed to be true, and, if the facts stated in the pleading constitute a cause of action, the demurrer should not have been sustained.

(1) It appears from the pleading that Mrs. Ward received information early in the morning of December 2d, by letter written on December 1st, by Laferty, that her brother was very ill, and not expected to live through the night of December 1st. (2) She was anxious to be with him in his last illness, but did not intend to go to him if she ascertained that he had died, as expected. A telegram was delivered to the company at 9:30 a. m., December 2d, to be transmitted to Laferty, for the purpose of eliciting information as to her brother's condition at that time, whether living or dead. She intended to go to him on the first train, if she ascertained that he was still living, and the company had notice of such intention. (3) The company failed to deliver this telegram until 3 p. m., December 3d. She heard on the morning of the 4th, by letter written on the previous evening after the receipt of the telegram, that her brother was

still alive. He died at 8 a. m., on the 4th, and of his death she was promptly notified by wire, before the departure of any train on which she could have taken passage after she received the letter written on the evening of the 3d, stating that the brother was then alive. (4) Had the telegram to Laferty been delivered on the 2d, she would have gone to her brother on the next train, and been with him for 17 hours before his death. (5) It also appears that the language used in the telegram, "Sallie not able to come," did not mean that she would not go if her brother was still alive, but meant that she would not go if he was dead, and would go if she learned that he was still living; that the matter was fully explained to the company's agent, and thus understood by the company, and it was in no way misled by said statement. (6) It is alleged that she suffered mental pain and anguish, through being deprived of being with her brother during his last hours, and that this was caused by the negligence of the company.

If it did not appear from the pleading that the telegraph company had other notice of the purpose of the telegram than that afforded by the face of the message itself, then we would feel inclined to hold that the statement, "Sallie not able to come," contained in the face of the message, would cut off the right to recover damages for being deprived of the privilege of going to her brother. The company would not have notice of the undisclosed purpose, apparently contrary to the declaration made in the message. *Telegraph Co. v. Henry* (Tex. Sup.) 27 S. W. 63. But when it is alleged that the company was notified of her purpose to go to her brother if still alive, and accepted the message so understanding it, and it is further alleged that the addressee would have promptly replied, giving the information that the brother was still living, we see no reason to determine the rights of the parties solely on such declaration in the telegram. The right to recover damages for mental pain and anguish suffered through negligent failure to deliver a telegram is based upon the proposition that such mental pain and anguish is the natural and proximate consequence of the breach of contract duty, and is deemed to have been within the contemplation of the parties. *Telegraph Co. v. Edmondson* (Tex. Sup.) 42 S. W. 549; 25 Am. & Eng. Enc. Law, 842. When the language of the message is the only notice the telegraph company has, it is a question of law for the court whether the company is liable for the damages claimed. *Crow. Electricity*, § 609. But when information, outside of the message, is given to the operator by the sender, at the time of the sending of the message, the company becomes liable for the damages naturally resulting from the facts communicated. *Id.* 610. Applying these principles to the case in hand, at the time the message was sent the company was informed by the sender that information

was desired as to whether the brother was still living, and that Mrs. Ward would go to him if it should be ascertained that her brother was alive. A failure to promptly deliver the message would, of course, result in a failure to elicit the information sought, and might most naturally result in Mrs. Ward not being present with her brother during his last hours. The question whether she was justified, under the circumstances, in delaying her departure until the desired information could be acquired, is an issue of fact, not of law. *Telegraph Co. v. Lydon*, 82 Tex. 364, 18 S. W. 701. Was she deprived of being with her brother during his last illness, through the negligence of the company? and did the company have notice, outside of the telegram, that it was her desire and purpose, in sending the message, to ascertain whether her brother was living, so that she might go to him if he was alive? These were questions of fact, to be properly submitted to the jury, and not issues of law, to be determined upon demurrer. According to the allegations, the company contracted to deliver the message, it knew the purpose to be as alleged, and therefore must have contemplated such consequences of its failure as are herein claimed. The plaintiff has stated a cause of action, and is entitled to a trial of the case upon the merits. Judgment reversed, and cause remanded.

GULF, C. & S. F. RY. CO. et al. v. SHORT et al.

(Court of Civil Appeals of Texas. May 24, 1899.)

CARRIERS—CONNECTING LINES—THROUGH CONTRACTS—PRESUMPTION OF GOOD FAITH—AGENTS—AUTHORITY.

1. Where a carrier accepts freight from another line, but requires from the shipper a separate shipping contract, exempting it from liability for damages occurring on any other line of road, but respects so much of the through contract originally made with the initial carrier as relates to the through rate, it is not a connecting line, within Rev. St. arts. 331a, 331b, making all carriers connecting lines which recognize, acquiesce in, or act on a contract for through carriage, and is not liable for any damage to the freight not occurring on its own line.

2. Where a petition against connecting lines urged a joint liability against both, and sought to recover against both, it is presumed to have been pleaded in good faith; and hence one carrier, pleading privilege for want of venue and jurisdiction, should expressly negative the joint liability, and state facts showing it was not liable and could not be made a party, and also aver that the allegations of joint liability were fraudulently made to confer jurisdiction.

3. The fact that a carrier accepting freight from another line, which made a through contract, did not acquiesce in it, while it would relieve the former from liability, would not relieve the latter.

4. A station agent is presumed to have authority to contract for shipments over his line.

Appeal from district court, Tom Green county; J. W. Timmins, Judge.

Action by John P. Short and others against the Gulf, Colorado & Santa Fé Railway Com-

pany and another. There was a judgment for plaintiffs, and defendants appeal. Modified.

J. W. Terry and Chas. K. Lee, for appellant Gulf, C. & S. F. Ry. Co. Houston Bros. and T. C. Wynn, for appellant San Antonio & A. P. Ry. Co. D. D. Wallace and Hill & Wright, for appellees.

FISHER, C. J. This is an action by the appellees against the Gulf, Colorado & Santa Fé Railway Company and the San Antonio & Aransas Pass Railway Company to recover damages to a shipment of 669 head of cattle owned by appellees, from Skidmore, Tex., to San Angelo, Tex. Each road answered separately, and set up certain defenses. The San Antonio & Aransas Pass Railway Company, in addition, filed a plea of privilege; alleging that the district court of Tom Green county was without venue and without jurisdiction, as against that road. The trial court rendered judgment in favor of the appellees against both appellants for \$1,553.80, and judgment over in favor of the Gulf, Colorado & Santa Fé Railway Company against the San Antonio & Aransas Pass Railway Company for the same amount.

We find the following facts: That at the time alleged in the petition the appellees made a contract with the agent of the San Antonio & Aransas Pass Railway Company, at Skidmore, Tex., for a special through train to carry their cattle from that point to San Angelo, Tex., on the Gulf, Colorado & Santa Fé Railway, on a through rate of freight, and that also at that time a written contract was entered into, by which the cattle were to be transported from Skidmore, Tex., on the Aransas Pass Railway, to Cameron, Tex., on that road, and there to be delivered to connecting carrier, the Gulf, Colorado & Santa Fé Railway. The facts further show that the cattle were carried to Cameron over the Aransas Pass Railway, and were there delivered to the Gulf, Colorado & Santa Fé Railway; that the Gulf, Colorado & Santa Fé Railway required the appellees to enter into a separate contract for the transportation of the cattle from Cameron, Tex., to San Angelo, Tex.; that this contract was entered into; and that the contract that had been entered into by the Aransas Pass road was not recognized, acquiesced in, or acted upon by the Gulf, Colorado & Santa Fé Railway Company, except that they respected so much of the contract as related to the amount of through rate of freight. We also find that all the damages sustained by plaintiffs to the cattle occurred while in possession of the San Antonio & Aransas Pass Railway Company, and the evidence as to the amount of damages justifies the verdict of the jury.

We will first dispose of the case in so far as it relates to the Santa Fé Railway Company. The contract entered into with the Santa Fé Railway relieves it from liability

for any damages occurring on any other line of road. The damages to the cattle having occurred while in possession of the San Antonio & Aransas Pass, the Santa Fé can only be held liable in the event that the connecting carrier statute (articles 331a and 331b of the Revised Statutes) has application. The facts in the record clearly negative the proposition that the Santa Fé road recognized, acquiesced in, or acted upon the contract that had been previously entered into by the appellees and the San Antonio & Aransas Pass road, unless such acquiescence arose from the fact that the Santa Fé road respected so much of the contract as related to the rate of freight. Agreeing to accept the amount of freight fixed by the Aransas Pass would not amount to an acquiescence in the contract made with that road. This amount of freight may have been fixed by the commission, or may have been the rate that the Santa Fé would have charged or did charge as transportation from Cameron to San Angelo, independent of an amount agreed upon by the appellees and the Aransas Pass road. It is clear that it did not recognize the contract made by the Aransas Pass, nor did it act upon it, because it required of the shipper a new contract for transportation from Cameron to San Angelo. The agreement to accept the proportionate amount of freight does not make it a party to the terms of the contract which the shipper and some other road had seen fit to enter into. Therefore, in our opinion, under no phase of the case can the Santa Fé be held liable.

We do not think there was any error in the trial court's overruling the plea of privilege urged by the San Antonio & Aransas Pass Railway Company. The petition of the plaintiffs urged a joint liability against both roads, and sought to recover against both; and it can be assumed that the liability was pleaded in good faith upon the assumption that both roads were liable under the contract and under the connecting carrier statute. This being true, the plea of privilege should have expressly negated the existence of any such joint liability, and should have stated facts showing that the Santa Fé was not liable, and could not properly be made a party; for, if both roads had been jointly liable, the district court, having jurisdiction over the Santa Fé, would have jurisdiction also over the Aransas Pass, where it was sought to be made liable jointly with the Santa Fé. And, further, the pleading raising the issue of privilege should have also alleged that the averments making both roads jointly liable were fraudulently made for the purpose of giving the district court of Tom Green county jurisdiction. The plea of privilege alleges that the roads were not partners, but it does not deny the joint undertaking (pleaded by the plaintiffs) of both roads to transport the cattle to San Angelo. We do not think there was any error in overruling the plea.

The court having obtained jurisdiction over

the person of the San Antonio & Aransas Pass, there was no error in refusing the charge set out in the proposition under the sixth assignment of error. The fact that the Santa Fé did not recognize, acquiesce in, or act upon the contract made by the plaintiffs with the San Antonio & Aransas Pass Railway would not excuse the latter road, but would excuse the Santa Fé; and there was no error in refusing a charge to the effect that both roads would be excused from liability if the Santa Fé did not recognize, acquiesce in, or act upon the contract made between the plaintiffs and the San Antonio & Aransas Pass road.

There was no error in admitting the evidence complained of in the third assignment of error. Where a contract of shipment is entered into between the shipper and a station agent, it is not necessary for the former to prove that the latter has the authority to make the contract; for, where the shipment is over his road, it can be assumed that he has the power to enter into a contract for the shipment of freight over the lines for which he is agent.

There was no error in admitting the testimony complained of in the fourth assignment of error. The evidence, we think, was admissible as having some tendency to show injuries that the cattle sustained while in possession of the Aransas Pass road. But, however, if it was not admissible, it resulted in no injury, because the court, in charging the jury, did not permit them to take into consideration the cattle that died after reaching San Angelo.

The appellees do not complain of the amount of the verdict, and, from the charge of the court, it is clear that the jury did not consider the value of the cattle that died in the pasture of the plaintiffs, in estimating the amount they were entitled to recover.

The language of counsel, complained of, in his argument to the jury, is not reversible error.

We do not think there was any error in the charges complained of in the seventh assignment of error. The evidence was clear as to what was the market value of the cattle at San Angelo, and we believe the jury were not misled by the charge, but were influenced solely by what the evidence showed to be the market value at San Angelo. This is the only conclusion that could be reached upon this subject, because there is nothing in the evidence to show a different value between San Angelo and Skidmore. What we have said, in effect, disposes of the eighth assignment of error.

We find no error in the record as to the judgment in favor of the appellees against the San Antonio & Aransas Pass Railway Company, and the judgment, to that extent, will be affirmed. But so much of the judgment as is in favor of appellees against the Gulf, Colorado & Santa Fé Railway Company is reversed, and here rendered in favor of the

appellant the Gulf, Colorado & Santa Fé Railway Company, and so much of the judgment as is in favor of the Gulf, Colorado & Santa Fé Railway Company over against the San Antonio & Aransas Pass Railway Company is reversed, and rendered in favor of the San Antonio & Aransas Pass Railway Company. It is further adjudged that the Gulf, Colorado & Santa Fé Railway Company recover of the plaintiffs all the costs incurred by it in the court below, as well as in this court, and the remaining costs are taxed against the San Antonio & Aransas Pass Railway Company. Affirmed in part, and reversed and rendered in part.

COLONIAL & U. S. MORTG. CO., Limited,
et al. v. THEDFORD et al.

(Court of Civil Appeals of Texas. May 6, 1899.)

WITNESSES—OFFICERS OF CORPORATIONS—TRANSACTION WITH PERSON SINCE DECEASED.

A general manager of a corporation is not a "party" to an action wherein such corporation is plaintiff, within the meaning of Sayles' Civ. St. art. 2302, providing that in all actions by or against the legal representatives of a decedent, arising out of any transaction with such decedent, neither party shall be allowed to testify against the other.

Appeal from district court, Denton county; D. E. Barrett, Judge.

Action by Sarah A. Thedford against the Colonial & United States Mortgage Company, Limited, and others to set aside a conveyance of land. On the death of plaintiff, John Thedford and others were substituted. There was a decree for plaintiffs, and defendants appeal. Reversed.

E. C. Smith and Holloway & Holloway, for appellants.

HUNTER, J. This suit was brought by Sarah A. Thedford to set aside a conveyance dated December 27, 1888, purporting to have been made by herself and her deceased husband to Brook Beall, of 80 acres of land in Denton county, and their homestead at the time, upon the ground that her name had been forged to the deed, and also to set aside a mortgage which Brook Beall had executed thereon to the appellant, January 17, 1889, to secure the payment of \$1,000, which had been loaned by appellant to said Beall, Beall having reconveyed the land to Thedford on May 29, 1889. During the pendency of the suit, Mrs. Thedford died, leaving four adult children, two sons and two daughters, the daughters being married. All were made parties plaintiff, and the suit was prosecuted to judgment by these children and only heirs. On the trial of the cause, Mrs. Thedford's evidence was read from a deposition, and she denied executing the deed to Brook Beall or ever having acknowledged it, and evidence was offered to corroborate and sustain her testimony. The notary public testified by

deposition that the certificate of acknowledgment to the deed was made by him, and was correct, and that he explained the deed to her, and took her privy acknowledgment thereof, and that she signed it by making her mark; he writing her name to the deed, at her request. Appellant also offered to prove by J. W. Ridge, its general manager, that "in April, 1893, I went to see Mrs. Sarah A. Thedford, having just learned that some question was made as to the validity of our loan. I had a talk with Mrs. Thedford, and she then told me that she had paid the interest on the loan which was due November 1, 1892. She said that she knew of there being a loan upon the place, and paid the interest on it. She also said, in the same conversation, that she and her husband had made a deed to her son for the purpose of getting a loan, but that she knew that deed did not go through, that it was not accepted, and that the loan was not made. She claimed at the same time that she thought our loan was on the same land deeded to her son." The land deeded to her son was only 40 acres of the survey. This evidence was objected to upon the ground that "it was a transaction with the original plaintiff, who was now dead; that J. W. Ridge was, at the time of said conversation, the manager of the defendant company, and stood in the place of the company, and occupies the position of a party to the suit, and consequently is disqualified, under the statute, from testifying to such a conversation with the deceased." It was admitted that Mr. Ridge was, at the time of the conversation, general manager of the appellant company, which is a corporation, and continued to be down to the time of testifying, and was then. The court sustained this objection, excluded the evidence, and error is assigned on this ruling of the court.

We think the evidence was admissible, and that the court erred in excluding it. Our statute provides: "In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent." Sayles' Civ. St. art. 2302. It will be observed that the statute only excludes parties to the suit, not their officers, agents, or attorneys; and, while corporations can act only through their officers, agents, and attorneys, yet, in the absence of a statute prohibiting them from testifying in such cases, it is error to exclude their testimony. Indeed, we can see no more reason for excluding their evidence than there is for excluding that of an agent or attorney of a private individual who might

have made the contract for his principal with the deceased, or have had the conversation with him sought to be established. Mr. Ridge was not a party to the action, and his evidence should have been admitted. *Lomax v. Marlow* (Tex. Civ. App.) 38 S. W. 228; *Snyder v. Fieder*, 130 U. S. 479, 11 Sup. Ct. 583; *Association v. Owen*, 86 Tenn. 355, 7 S. W. 457, 460; *Cody v. Bank* (Ga.) 30 S. E. 281; *Fidelity Co. v. Goff's Ex'r* (Ky.) 30 S. W. 626. For the error in excluding this evidence the judgment is reversed, and the cause remanded for a new trial.

QUAID v. TIPTON.

(Court of Civil Appeals of Texas. April 22, 1899.)

SLANDER—JUSTIFICATION—CHARGE OF THEFT.

1. In an action of slander, where the gravamen of the charge is that the plaintiff was a thief, it is not necessary to prove the theft to have occurred in connection with the transaction concerning which the theft was charged to have been committed, in order to justify, but defendant may show that it occurred upon another occasion.

2. In an action for slander, a charge that if the jury find from the evidence that plaintiff appropriated to his own use and benefit, without the consent of defendant, any part of the cotton due to defendant by plaintiff, it would justify a statement that plaintiff was a thief, is erroneous, as not requiring a finding that it was appropriated with felonious intent.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

Action for slander brought by C. B. Quaid against L. D. Tipton. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Stuart & Bell and C. R. Pearman, for appellant. Potter & Potter, for appellee.

CONNER, C. J. This was a suit by appellant for damages on account of slanderous charges alleged to have been made by appellee. The trial resulted in a judgment for appellee, and hence this appeal.

There was evidence that appellee on several occasions charged appellant with being a thief, and with having stolen cotton alleged to be due appellee from appellant as rent for the year 1896; appellant being a tenant on appellee's farm. The evidence tended to show that these charges related particularly to a bale of cotton hauled by appellant and another in the direction of Collinsville, by an unusual course, under circumstances tending to indicate a fraudulent purpose to secretly dispose of said bale of cotton, out of which it was charged the rent had not been paid. Appellant and others on the trial testified that this bale of cotton belonged to others, and not appellant, and explained the cause of the direction taken, and the circumstances, consistent with an honest purpose. On the trial appellant admitted having taken some cotton to the city of Gainesville, raised on appellee's farm, during the year in ques-

tion, which he sold, and out of which he had not then paid the rent. He testified that there was but 175 pounds of this cotton, that he had taken and sold it for medicines for a sick child, and that he afterwards paid the rent, and generally explained this transaction in such manner as that a jury might find that this sale was without fraudulent intent on appellant's part to thereby deprive appellee of his rent cotton, if any was due him. There was, however, also evidence tending to show that appellant disposed of this cotton in Gainesville with intent to fraudulently appropriate the rent cotton therein. This evidence, however, was directly contradicted by appellant and his wife. There was also evidence tending to show that appellant raised more cotton on appellee's farm in 1896 than he ever accounted for, though this also was denied or explained in the testimony of appellant.

The assignments of error raise two principal questions. It is first insisted, in effect, that proof that appellant stole rent cotton out of the cotton sold in Gainesville will be no justification for the charge that he stole the rent cotton out of the bale so taken in the direction of Collinsville. We think the gravamen of the charge made by appellee, as shown by the evidence on the trial below, was that appellant was a thief; that he had stolen his rent cotton. This was the substance of the issue, and we are not prepared to hold that, to constitute a justification, the proof must establish the theft of the rent cotton out of the particular bale or the specific number of pounds comprehended within the terms of the charge. Mr. Odgers, in his work on Libel and Slander (*170), says: "But where the gist of the libel consists of one specific charge, which is proved to be true, defendant need not justify every expression which he has used in commenting on the plaintiff's conduct. Nor, if the substantial imputation be proved true, will a slight inaccuracy in one of its details prevent defendant succeeding, provided such inaccuracy in no way alters the complexion of the affair, and would have no different effect on the reader than that which the literal truth would produce. If epithets or terms of general abuse be used, which do not add to the sting of the charge, they need not be justified; but if they insinuate some further charge in addition to the main imputation, or imply some circumstance substantially aggravating such main imputation, then they must be justified as well as the rest. In such a case it will be a question for the jury whether the substance of the libelous statement has been proved true to their satisfaction, or whether the fact not justified amounts to a separate charge or imputation against the plaintiff, substantially distinct from the main charge or gist of the libel, or at least amounts to a material aggravation of such main charge. 'It would be extravagant,' says Lord Denman, 'to say that in cases of libel every comment upon facts requires a justification. But a comment may

introduce independent facts, a justification of which is necessary. A comment may be the mere shadow of the previous imputation, but, if it infers a new fact, the defendant must abide by that inference of fact, and the fairness of the comments must be decided upon by the jury.'" To the same effect is the law given in Mr. Newell's work on the same subject (page 654, § 75). We feel unable to say that the variance or apparent variance here insisted upon in any "way alters the complexion of the affair," or produces a different effect on the mind, or amounts to a substantial aggravation of the main charge. Had the charge been that appellant stole the rent cotton out of the cotton sold in Gainesville, and also out of the bale hauled in the direction of Collinsville, it might well be insisted that one was an aggravation of the other; that the charge of two separate thefts gave additional weight and volume to the opprobrium naturally arising from a simple charge of theft of cotton. But we do not so understand the record in this cause. The charge, in substance and in effect, here shown, was that appellant had stolen rent cotton; and we are unable to appreciate any difference in the moral turpitude involved, whether the proof shows the theft of the rent cotton in one or the other of the two transactions indicated, and we therefore overrule all assignments of error relating to this question.

It is next insisted that the court erred in giving the latter clause of the following charge: "If you find that defendant did charge plaintiff with stealing cotton from defendant, yet, if you also find that said charge was true, this would justify defendant in the use of such language, and you will find for defendant; or if you find from the evidence that plaintiff appropriated to his own use and benefit, without the consent of defendant, any part of said cotton due to defendant by plaintiff, this would justify said language, and you will find for defendant." We think the objection to this charge is unquestionably well taken. The law undoubtedly is that the justification, if any, must be as broad as the charge, and must justify the precise charge. See Odgers, Sland. & L. *169. "To justify for a charge of a crime, the defendant must fasten upon the plaintiff all the elements of the crime, both in act and intent." See note to Warner v. Clark (La.) 21 Lawy. Rep. Ann. 504, (s. c. 13 South. 203), citing McBee v. Fulton, 47 Md. 403. We think this a sound and salutary principle of law, and well supported in authority. See authorities cited in the note supra, and in Newell, Defam. p. 658 et seq., note. The charge complained of omitted the element constituting the very essence of the crime of theft,—a fraudulent intent. It authorized and required the jury to find for defendant if they found appellant "appropriated to his own use and benefit, without the consent of defendant, any part of said cotton." As before stated, appellant admitted selling certain cotton without reserving the rent.

He did not pretend to have obtained appellee's consent, and under this charge the jury could have found no other verdict than they did, if they believed from the evidence that any rent cotton was due appellee. As before stated, appellant's testimony tended to explain this sale in a manner consistent with an innocent intent. Appellant may have in fact then sold cotton, including rent cotton due appellee, and not have been guilty of theft. Unless it was further shown that appellant fraudulently took or disposed of said cotton with the fraudulent intent of thereby depriving the true owner of the value of the same, and of thereby appropriating it to his own use and benefit, there was no justification for the charge of theft of cotton.

The question has not been raised, but we incline to the opinion that fundamental error appears on the face of the record, in that any charge on justification was submitted. We will not discuss this question, but, in view of another trial, suggest that it is very questionable if, besides the general denial, appellee's answer contained anything more than allegations of fact that perhaps were admissible in mitigation of damages. "A plea of justification by its nature is in confession and avoidance, and, when properly made, is a complete bar. But it is not a complete bar unless it confesses and avoids by justifying the entire charge substantially as made." This was evidently the common-law rule. See authorities cited *supra* in Newell, Defam. p. 656 et seq., notes, hereinbefore cited, and in note to Warner v. Clark (La.) 21 Lawy. Rep. Ann. 504 et seq. (s. c. 13 South. 203), cited *supra*. For the error indicated, it is ordered that the judgment below be set aside, and the cause remanded for a new trial.

BANK OF NOCONA v. MARCH.

(Court of Civil Appeals of Texas. April 15, 1896.)

MANDAMUS—PLEADING—SCHOOLS AND SCHOOL DISTRICTS.

A petition for writ of mandamus to compel the treasurer of a city school board to pay certain alleged warrants, issued by the president and secretary of the board to teachers in the public schools, should allege that such warrants were drawn on funds in the hands of the treasurer, and that he has or has had in his possession funds out of which he could legally pay said warrants, and which were duly set apart and apportioned by the school board to pay the same.

Appeal from district court, Montague county; D. E. Barrett, Judge.

Action by Bank of Nocona against J. B. March, as treasurer of a school board, to compel defendant to pay certain warrants. A demurrer to petition was sustained, and plaintiff appeals. Affirmed.

Eldridge & Gardner, for appellant. D. M. Smith and Levi Walker, for appellee.

CONNER, C. J. This is a suit brought by the Bank of Nocona against J. B. March, as treasurer of the board of school trustees of the city of Nocona, Tex., for a writ of mandamus to compel him to pay certain school vouchers issued to teachers for services, and transferred by said teachers to plaintiff. Defendant demurred to said petition, which demurrers were sustained by the court, and, appellant declining to amend, the court thereupon dismissed his suit, and he has duly perfected an appeal from said judgment of dismissal to this court. Appellant's petition, omitting formal parts, was as follows: "Now comes Edward Rines, a resident of Cooke county, Texas, D. C. Jordan, E. F. Rines, residents of Montague county, Texas, partners doing business under the firm name and style of the 'Bank of Nocona,' complaining of J. B. March, respectfully represents that defendant resides in Montague county, Texas; that defendant is treasurer of the board of school trustees of the city of Nocona, Texas, and has control of the public school funds of said city of Nocona, in Montague county, Texas, and it is his duty to keep said fund as such treasurer, and receive all funds of such nature, and pay same out on warrants or school checks issued by the board of school trustees of said city of Nocona; that said city of Nocona is an incorporated city, under the laws of Texas, and has control of its own schools and school funds, and was so incorporated, and had such control of its said schools and school funds, during the years 1896, 1897, and 1898; that during the months of February and March, 1897, W. H. Wilson was president, and L. Black was secretary, of said board of school trustees, and was authorized to draw warrants and checks upon the treasurer of said board of school trustees and of the city of Nocona for teachers' salaries, when ordered or authorized by said board of school trustees; that during said months of February and March, 1897, B. W. Miller was treasurer of said board of school trustees, and was also treasurer of the city of Nocona; that on the — day of February, 1897, said W. H. Wilson, as president, and L. Black, as secretary, of said board of school trustees, drew a check or warrant on said B. W. Miller, as treasurer of said city of Nocona and of said board, in favor of Cornelia S. Coltharp, for forty dollars, payable to her or her order, for services as teacher in the public free schools of said city for the month ending February 28, 1897; that on the 26th day of March, 1897, said W. H. Wilson and L. Black drew a similar check or warrant on said treasurer for forty dollars, in favor of said Cornelia S. Coltharp, for services as teacher for the month ending March 28, 1897; that on the 26th day of February, 1897, said Wilson and Black drew a similar check on said treasurer in favor of Frank Leake for forty dollars, for services as teacher in said public free schools for month ending February 28, 1897; that on the 26th day of March, 1897,

said Wilson and Black drew a similar check or warrant on said treasurer for forty dollars, in favor of said Frank Leake, for services as teacher in said schools for month ending on March 26, 1897; that said W. H. Wilson and L. Black drew each and all of said checks as president and secretary, respectively, of said board of school trustees, and by authority from said board of school trustees then and there first given so to do; that said Cornelia S. Coltharp and said Frank Leake performed the services mentioned as teachers in said public free schools of the city of Nocona, and were entitled to the amounts specified in said checks for their services; that said checks now are the property of plaintiffs, and plaintiffs are the legal and equitable owners and holders of same, and said checks are still due and unpaid, except twenty dollars paid on each of said checks issued and dated February 26, 1897, which sums were paid on August 5, 1897; that said J. B. March succeeded said B. W. Miller as such treasurer of said city of Nocona and of said board of school trustees; that said checks have each and all been presented to said Miller and said J. B. March, as such treasurers, for payment, which was refused; that said J. B. March, as such treasurer, now has money sufficient in his hands belonging to the funds out of which teachers are to be paid, and for the purpose of paying teachers, to pay said checks, and, though often requested to pay said checks when he has had said funds, he has continued to refuse to pay said checks, and still refuses so to do, contrary to his duties as such treasurer; that said checks are lawful claims against the funds in the hands and possession of said J. B. March, as treasurer as aforesaid, and plaintiffs are entitled to have the same paid out of said funds. Wherefore plaintiffs pray that a writ of mandamus issue requiring said J. B. March, treasurer as aforesaid, to pay said checks out of the said funds in his possession, or that may come into his possession, or show cause why he should not do so; and plaintiffs pray for such writ, and for such other relief as they may be entitled to in the premises." The petition was duly verified. To it, however, the defendant demurred generally, and, among others, excepted specially as follows: "It does not allege or show that the pretended warrants were drawn on any funds then in the hands of defendant or of his predecessor, nor that the defendant has now, or has ever had, in his possession, any fund out of which he could legally pay such warrants, duly set apart for such purpose, and apportioned by such school board to pay such vouchers." It was these demurrers that the court below adjudged to have been well taken, and it is here insisted that the action of the court below in so holding was erroneous.

In the case of *Railway Co. v. Randolph*, 24 Tex. 333, our supreme court say: "The rules of pleading, as applicable to the remedy of

mandamus, require the right of the plaintiff to be stated unreservedly, fully, and clearly. In England, the right is shown in the affidavit offered on the motion in support of the rule; and there it is laid down that 'the affidavit should also anticipate and answer every possible objection or argument in fact which it may be expected will be urged against the claim.' * * * The rule, as laid down by the late chief justice, is that 'the circumstances under which the applicant claims the right should be positively and distinctly stated, and objections which might be anticipated should be met and answered.' * * * The object of such strictness is that the court shall be fully satisfied of the propriety of the exercise of this extraordinary remedy, in requiring an officer to do what, notwithstanding his official obligation, he has refused to do,"—citing authority. In the case of *Bledsoe v. Railroad Co.*, 40 Tex. 564, that able jurist, Judge J. W. Ferris, speaking for the court, uses the following language: "To entitle a party to this remedy by mandamus, he must show a clear legal right in himself, and a corresponding obligation on the part of the officer; for, if the right or the obligation be doubtful, the court will not interfere by this process." Both of the above cases are cited with approval by our supreme court as late as the case of *De Poyster v. Baker*, 89 Tex. 159, 34 S. W. 106, and we find no case in which there appears an indication that less strictness in pleading in such cases will be permitted. So that, whatever may be the latitude in pleading allowed by other courts, we think the law in this state undoubtedly is that, in a petition for mandamus, such facts should be alleged as clearly show the right of the applicant thereto and the duty of the officer to perform the desired act.

Tested by these rules, we are unable to say that there was error in the action of the court below. It must be confessed that the rules, regulations, or laws governing schools, and the distribution of the funds of incorporated school districts, do not appear upon our statute books with that degree of certainty, perhaps, to be desired. This arises probably out of the legislative intent to commit the management of such schools almost exclusively to the properly constituted authorities of the incorporated town or village assuming control of its public schools. The law provides that incorporated towns, as the town of Nocona is alleged to be, may, by following the prescribed course, have exclusive control of the public schools within their limits. *Sayles' Civ. St. art. 4004 et seq.* An election of a board of six trustees is also provided for, who are given power to "adopt such rules, regulations and by-laws for their own government as they may deem proper, and to select their chairman, secretary, treasurer and other officers," and the county judge of the county and the mayor of the town are constituted *ex officio* members of said board. *Id. arts. 4007-4009.* The powers of the board

are thus defined: "Said board of trustees shall have and exercise exclusively the same powers, control, management and government of and over such public free schools and institutions of learning in such cities or towns as are now or hereafter may be by law conferred upon the council or board of aldermen of such cities or towns where such council or board of aldermen are invested with the control of such public free schools." *Id.* art. 4010. The powers of the town council and board of aldermen are given as follows: "The council or board of aldermen of such city or town, unless it has vested the exclusive management and control of its public free schools in a board of trustees, are invested with exclusive power to maintain, regulate, control and govern all the public free schools now established, or hereafter to be established, within the limits of said city or town; and they are furthermore authorized to pass such ordinances, rules and regulations not inconsistent with the constitution and laws as may be necessary to establish and maintain free schools, purchase building sites, construct school houses and generally to promote free public education within the limits of their respective cities or towns." *Id.* art. 4022.

Now, what rules, regulations, or ordinances, if any, have been properly passed for the government of the public free schools of Nocona? The petition does not inform us. The school laws referred to provide that the treasurers of such incorporations may receive a part of the public free-school fund annually distributed for the benefit of the children within the scholastic age in this state. It is also provided that a special tax may be levied and collected in the mode and manner pointed out in the law. It is not alleged that the moneys sought to be appropriated so came into the hands of appellee. It is also provided by the law that such schools shall be subject to the general laws, so far as the same are applicable, but by ordinance may provide for the "organization of schools and the appropriation of its school fund in such manner as may be best suited to its population and condition." *Id.* art. 4028. What manner of appropriation of the school fund in the town of Nocona has been adopted? The petition alleges that the warrants or checks sought to be enforced were issued by the president and secretary, by authority of the board of trustees. It may be that this manner of appropriating the school fund therein has been duly adopted, but the facts from which it might so appear are not alleged. The general law provides that the check of the trustees shall be accompanied in all instances by the affidavit of the teacher that he is entitled to the amount specified in the check, as compensation under his contract as teacher. *Sayles' Civ. St. art. 3962.* Whether there be a like or different regulation in the town in question is not made to appear. By the general law, also, it is pro-

vided that trustees, in making contracts with teachers, shall not create a deficiency debt against the district in which they are acting. *Sayles' Civ. St. art. 3959.* What was the contract of the teachers mentioned in the plaintiff's petition? What are the facts showing that this principle was not contravened, if applicable, in the case before us? The general law, in the absence of a valid regulation to the contrary, certainly seems to contemplate that trustees in making contracts shall make no contract for the payment of salaries out of any fund other than the proper fund of the year in which such contract was made. They are given the power to suspend schools, are required to base contracts with teachers on the number of pupils, and forbidden to create a deficiency debt, etc. Now, what was the state of the fund for the year 1897 in the town of Nocona? Was any part of the fund of that year in the hands of appellee? It is true, the petition alleges that the teachers to whom the checks in question were issued "were entitled to the amounts specified in said checks," and "that said checks are lawful claims against the funds in the hands and possession of said J. B. March, as treasurer, * * * and that plaintiffs are entitled to have the same paid out of said fund"; but these are mere legal conclusions, and, in the absence of the facts from which the court can so determine, are not permissible, under any rule of pleading. We conclude, without further discussion, that there was no error in sustaining the exceptions to appellant's petition, and the judgment below is accordingly in all things affirmed.

CAMPBELL et al. v. CATES et ux.

(Court of Civil Appeals of Texas. April 1, 1899.)

APPEAL—REVIEW—VENUE—PLACE OF BRINGING SUIT—ASSIGNEE OF LEASE—LIABILITY TO LANDLORD.

1. A judgment overruling defendant's plea of privilege will not be revised where the evidence on which the ruling was based is not preserved by bill of exceptions.

2. An action for rent on a lease against an assignee thereof, bound by its terms, may be brought in the county where the rent is payable.

3. A subtenant, whose lease is a conveyance of the tenant's entire interest in the premises, is bound to perform the covenants of the original lease, since his lease is, in effect, an assignment thereof.

Appeal from district court, Wise county; J. W. Patterson, Judge.

Action by C. D. Cates and wife against W. L. Campbell and others. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

T. J. McMurray, for appellants. R. E. Carswell, for appellees.

CONNER, C. J. This suit was instituted in the district court of Wise county on December 11, 1897, by appellees against W. L. Camp-

bell and M. F. Thacker, alleged to be partners, and W. B. Worsham and John Wishon, also alleged to be partners, upon a certain rental contract for the lease of pasture lands in Foard county, Tex., and upon two notes for \$500 each, and upon a draft in the sum of \$600; the lease contract being signed by W. L. Campbell for his wife, the notes signed by W. L. Campbell, and the draft signed by Campbell & Thacker, by W. L. Campbell. It was alleged that Campbell and Thacker took possession of the pasture October 1, 1895, and sublet and assigned the same to the defendants Worsham and Wishon. The defendant Campbell denied all the plaintiffs' allegations. The defendant Thacker duly denied partnership with Campbell as alleged. The defendants Worsham and Wishon first pleaded their privilege to be sued in the counties of their residence, and also denied all liability, and alleged that the defendant Worsham had rented some of the land described in the plaintiffs' petition from the defendant Campbell in January, 1896, and the balance of it from other parties, and that he had paid Campbell for it long before he knew of plaintiffs' interest, right, or title to the same. The court found against the defendants' pleas of privilege at the December term, 1897, and afterwards, to wit, in July, 1898, the cause was tried before the court without a jury, and resulted in a finding and judgment for the plaintiffs against the defendants Campbell, Worsham, and Wishon substantially as prayed for, and in favor of the defendant Thacker, dismissing him with his costs, and the case is now before us upon proper appeal.

The evidence supports the finding of the court to the effect that the greater part of the pasture in question was in fact the property of Mrs. Cates, and that Cates and wife had had possession thereof for some six or eight years prior to its lease to Campbell; that on September 12, 1895, appellee Charles D. Cates leased the premises in controversy to the defendant Campbell for two years from the 1st day of October, 1895, for the consideration of \$1,600, payable in Decatur, Wise county, Tex., of which amount \$600 was to be paid in cash, and for which the draft sued upon was then given; that for the deferred payments the defendant Campbell executed two promissory notes of \$500 each, due the 1st of October, 1896, and the 1st of October, 1897, respectively, each payable in Decatur, Wise county, Tex.; that this lease was in writing; that neither the notes nor the draft has ever been paid; that under this lease said Campbell took possession of the pasture in question, and retained possession thereof until about the 1st of January, 1896, when he leased said pasture to the defendants Worsham and Wishon for two years from that date, and that the defendants Worsham and Wishon retained possession of said pasture down to the date of the trial; that in fact Wishon resided in Foard county, Tex.,

and Worsham in Clay county, Tex.; that the defendants Worsham and Wishon in fact paid to the defendant Campbell the entire amount of lease money, as contracted between them; that in legal effect, if not in fact, the defendants Worsham and Wishon had notice of the title and possession of Cates and wife. It further appeared that the defendants Worsham and Wishon at no time made any express promise to pay C. D. Cates the lease money as contracted by Campbell, nor did they at any time sign the lease made by Cates to Campbell, nor said draft nor either of said notes.

The first assignment of error questions the action of the court in overruling the plea of privilege by the defendants Worsham and Wishon. We think it a sufficient answer to this objection to say that, as before stated, the judgment upon this plea appears to have been rendered by the court without the intervention of a jury at the December term of the court, 1897, the judgment reciting that the court heard the law and the evidence, and adjudged in favor of the plaintiffs upon said plea. The evidence submitted upon said plea does not appear in the record by bill of exceptions or otherwise, and we are unable to say that the court erred in overruling this plea on this account, if for no other reason. In addition, the lease from Campbell to Worsham and Wishon conveyed Campbell's entire interest in the pasture as acquired by him from Cates and wife. This operated as an assignment of said lease. *Railway Co. v. Sottogast*, 79 Tex. 256, 15 S. W. 228; *Forrest v. Durnell*, 86 Tex. 649, 26 S. W. 481, and authorities cited. In such case the assignee of the lease became bound to perform the contract of his assignor according to its terms. *Le Gierse v. Green*, 61 Tex. 131; *Forrest v. Durnell*, *supra*. By the terms of the lease contract between Campbell and Cates payment was to be made in Wise county, and Worsham and Wishon thereby became bound by its terms. The court certainly had jurisdiction over the defendant Campbell, and Wishon and Worsham were properly joined, and we think there can be no question that this assignment should be overruled. What we have said in effect also disposes of the other assignments of error, which question the sufficiency of the petition and the sufficiency of the evidence to support the finding of the court below. As before indicated, we think that the facts hereinbefore stated, under the authorities hereinbefore cited, authorized the judgment against Campbell and against Wishon and Worsham. Finding no error in the judgment, it is in all things affirmed.

MITCHELL v. McLAREN et al.

(Court of Civil Appeals of Texas. April 15, 1899.)

PRINCIPAL AND AGENT—TRIAL—EVIDENCE.

1. Power to execute a deed will not be presumed from the fact that it is more than 30

years old, and that title under it has long been asserted, when a power of attorney, recorded at the same time as the deed, is introduced in evidence, to which the execution might have been referred; the sufficiency of the authority being then a question for the jury.

2. A power of attorney reciting, among other things, "and my said attorney is hereby empowered to locate any such certificate in my name, or sell and assign the same," does not authorize the agent to locate a government pension certificate, and also to sell the land after such location.

3. When the evidence tends to contradictory conclusions, though without any conflict among the witnesses, a verdict should not be directed.

Appeal from district court, Archer county; George E. Miller, Judge.

Action for recovery of land, brought by Thomas J. Mitchell against M. C. McLaren and another. Verdict was directed for defendants, and plaintiff appeals. Reversed.

F. E. Dycus, for appellant. C. Von Carlowitz, for appellees.

STEPHENS, J. The land in controversy, situated in Archer county, was patented to Mariana Hutchinson August 12, 1857, by virtue of a certificate issued to her in 1854. She died in the year 1878. Whatever title she then had passed to Thomas J. Mitchell, her sole heir, who brought this suit, as such, to recover the land. M. C. McLaren, the real defendant in the action, claimed under a deed dated May 1, 1863, which purported to be the deed of "Mariana Hutchinson, by her agent and attorney in fact, William B. Jones." It did not, however, recite any power of attorney. In the year 1883 appellee M. C. McLaren redeemed the land from tax sale, and has exercised acts of ownership over it ever since. It seems, also, that she began to make inquiries about the land as far back as 1878, and that the deed under which she claims has been of record since January 1, 1877, when it was recorded in Clay county, and thence transcribed into the deed records of Archer county. Recorded at the same time, and immediately preceding it on the original and transcribed records, was the following power of attorney: "The State of Mississippi, Hinds County. Know all men by these presents, that I, Mariana Hutchinson, of the county and state aforesaid, do hereby constitute and appoint William B. Jones, of the county of Gonzales, state of Texas, to be my lawful and true agent and attorney, with power of substitution, for me and in my name, and for my sole use and benefit, to apply to the proper officer or officers of the state of Texas, at Austin, and to receive for me and in my name all money that may have been due my deceased husband, A. Hutchinson, under special law of the legislature of the state of Texas granting certain pay to prisoners captured by the Mexicans at San Antonio in the fall of 1842, and to receive and receipt for the same in my name. And my said agent and attorney is hereby empowered to receive from the proper officers of the government of the state of Texas all certificates

for land which have been or may hereafter issue either to my said husband, A. Hutchinson, dec'd, or to me as the widow and sole heir of my said husband. And my said attorney is hereby empowered to locate any such certificate in my name, or sell and assign the same, as he, my said attorney, may think proper; and for the purposes aforesaid I do hereby grant to my said attorney full power to execute and deliver all needful instruments and papers whatsoever, whether under seal or otherwise, and generally to do and perform all such acts as he, my said attorney, shall deem necessary or expedient for the complete and effectual execution of the authority hereinbefore granted, as fully as I might and could do if personally present. Hereby ratifying and confirming all the acts of my said attorney or his substitute done by virtue or in pursuance of these presents. In witness whereof I hereto set my hand, and scrawl for seal, this 30th day of March, 1854. Mariana Hutchinson. [Seal.]" The record is silent as to who caused these instruments to be recorded. Upon this evidence the court instructed the jury to return a verdict against appellant, and to that he assigns error.

We are of opinion that the power of attorney did not authorize both a location of the certificate, and a sale of the land after its location, but that it only authorized Jones to either locate the certificate or sell it. He chose to locate it, and so exhausted his power. This is the plain meaning of the words, "And my said attorney is hereby empowered to locate any such certificate in my name, or sell and assign the same, as he, my said attorney, may think proper." He was thus authorized to convert the certificate either into land or money, but not both. *Hennessee v. Johnson* (Tex. Civ. App.) 86 S. W. 775.

But, conceding this construction of the power of attorney, the appellees yet, and mainly, insist, in support of the judgment, that as the deed did not on its face purport to be made under this power of attorney, and was more than 30 years old, with a long-continued assertion of title by M. C. McLaren under it, authority to execute it should be presumed. This would doubtless be correct in the absence of evidence tending to rebut such a presumption. But when a power of attorney was introduced in evidence, to which the execution of the deed might have been referred,—the two instruments being recorded together more than 20 years ago,—it became a question for the jury, and not the judge, to say whether or not, under the circumstances, that presumption was rebutted; it being one of fact. On this point see the last part of the opinion of Chief Justice Stayton in *Stooksberry v. Swan*, 22 S. W. 963, 85 Tex. 563. Where there is no evidence tending to sustain a cause of action or ground of defense, or where all the evidence tends, without conflict, to sustain the one or the other, the court may direct a verdict upon such issue; but where the evidence tends to contrary conclusions, though

without any conflict among the witnesses, it is for the jury, and not the court, to determine in the first instance which conclusion shall prevail. This rule seems now too well established in this state to require the citation of authority. The learned judge who presided at the trial doubtless understood the general rule, but fell into error, we think, in applying it to this case. If, as might have been inferred, M. C. McLaren caused the power of attorney exhibited in evidence to be recorded 20 years ago, in connection with her deed, as a muniment of her title, that circumstance, in the absence of any other known power to execute the deed, tended to rebut the presumption that any other existed. The circumstance itself tended to prove, what was in the nature of an admission by her, that the authority of Jones to make the deed was the power of attorney recorded in connection with it, as a link in her chain of title. Although she testified on the trial, the circumstance of the registration together of the power of attorney and deed was neither denied nor explained, which was itself evidence against her.

We find no merit in the cross assignment of error. On account of the error in giving a peremptory instruction against appellant, the judgment is reversed, and the cause remanded.

LANG v. CROTHERS.¹

(Court of Civil Appeals of Texas. April 8, 1899.)

LANDLORD AND TENANT—ESTOPPEL OF TENANT—PURCHASE OF LANDLORD'S TITLE.

After the title of a purchaser of public land has been forfeited for the nonpayment of interest due the state, a tenant of the purchaser may acquire the title, and hold the land, as against the landlord.

Appeal from district court, Wilbarger county; G. A. Brown, Judge.

Action by J. S. Lang against John Crothers to recover premises leased of plaintiff by defendant. There was judgment for defendant, and plaintiff appeals. Affirmed.

D. R. Britt and F. P. McGhee, for appellant. J. A. Lucky and W. D. Berry, for appellee.

HUNTER, J. This suit was brought by appellant Lang, against the appellee, Crothers, on the 1st day of September, 1897, to recover the north half of section 22, block 2, Houston & Texas Central Railroad Company survey, in Wilbarger county, set apart to the public school fund, and containing 320 acres. The plea was, "Not guilty." The cause was tried by the court without a jury, and judgment rendered for defendant, Crothers. The judge filed conclusions of fact and law, both of which are excepted to, and a statement of facts is brought up in the record, and we are asked to revise one of the conclusions of fact so filed, as well as the court's conclusions of law.

We have examined the evidence, as contained in the record, relating to the rental contract under which Crothers held the land as tenant of Lang, and we find that the court's eighth conclusion of fact is correct, and that the evidence would hardly have warranted any other finding more favorable to appellant. This disposes of the fourth assignment of error.

The record discloses that said section 22 was on the 4th day of September, 1883, public free school land, and on that day, under the act of 1883, it was sold by the commissioner to Coulson, who was an actual settler thereon, and he and vendees of his fully complied with the law requiring residence thereon and payments to the state until June 6, 1889, when appellee, Crothers, and one Davidson bought the section, and divided it; Crothers taking the north half, and Davidson the south. They continued in possession and occupancy of their respective portions, and made all payments to the state required by law, until June 18, 1895, when each, by separate deed, with special warranty, conveyed the same to the appellant, Lang. Davidson, it seems, moved off, and gave full possession to Lang; but Crothers remained on the north half, as tenant of Lang, under a proposition made by Lang to the effect that he might keep and hold the land for a year by either paying the taxes thereon, and interest due on the purchase from the state, or one-third of the crops raised thereon; but, while Crothers failed to accept either proposition, he yet remained on the land and made a crop, but neither paid the interest due to the state, nor any part of the crop, and in 1896 (the record nowhere gives the date), while appellee was still on the land, the commissioner of the general land office declared the sale to Coulson forfeited for nonpayment of the interest due thereon January 1, 1895, and afterwards, during the same year (but the record does not disclose the month), and without having surrendered possession thereof to the appellant, Crothers, learning of the forfeiture, applied to the commissioner to purchase the entire section, and the same was awarded and sold to him under said application; and he has since complied with the law in all respects, and his claim thereto is in good standing in the land office. In the year 1898 (the record does not disclose in what month) appellant, Lang, tendered to the state treasurer \$225,—all the interest due on the Coulson purchase up to January 1, 1898,—and by written application demanded of the commissioner reinstatement thereof; but the money tendered, although sufficient in amount, and the application for reinstatement, were refused, because of the forfeiture aforesaid, and the award and sale to Crothers.

The general rule is that the tenant cannot dispute the title of the landlord under which he entered, or set up an adverse title thereto, without a surrender or eviction, or something equivalent thereto. *Tyler v. Davis*, 61 Tex.

¹ Writ of error denied by supreme court.

674; 2 Tayl. Landl. & Ten. (8th Ed.) §§ 705, 706. But it seems to be as well settled that he can do either, without surrender of possession, where the landlord's title has been legally extinguished or determined, so that it no longer exists, and he has become the purchaser of the paramount title. *Ryder v. Mansell*, 66 Me. 170; *Hardin v. Forsythe*, 99 Ill. 320; *Lancashire v. Mason*, 75 N. C. 458; *Presstman v. Silljacks*, 52 Md. 656; *St. John v. Quitzow*, 72 Ill. 335; *Higgins v. Turner*, 61 Mo. 250; 2 Tayl. Landl. & Ten. (8th Ed.) §§ 629, 708. Here Lang's title had been canceled and forfeited by the commissioner for nonpayment of the annual interest installments due on the purchase, which cancellation or rescission our supreme court has held may lawfully be made by the commissioner, though purchased under the act of 1883. *Fristoe v. Blum* (Tex. Sup.) 45 S. W. 998. This forfeiture or rescission took place in the year 1896, and, when made by the commissioner, terminated and extinguished Lang's title completely; and the land being legally placed upon the market, and Crothers being an actual settler thereon, he had the right to apply for the purchase thereof, the same as if he had never been a tenant of Lang, unless Lang had applied for reinstatement of the Coulson sale within the time required by law, which would have been within 90 days from the date it was again placed upon the market. He did not, by setting up his title in defense of Lang's suit, or by showing that Lang's purchase had been forfeited, dispute the title of Lang under which he entered. The logic of his plea and defense was: "True, Lang had title when I rented from him, but that title then held by Lang had, by the neglect and default of Lang, reverted to the state, and I bought the state's title,—the paramount title; Lang's title having been extinguished, so that when this suit was brought it no longer existed." We find no error in the judgment, and it is affirmed.

TEXAS & P. RY. CO. v. TRUESELLE et al.¹
(Court of Civil Appeals of Texas. April 15, 1899.)

CARRIERS—DAMAGES—PROCESS.

1. When, upon motion to quash the citation, plaintiff amends by leave of court, there is no error in overruling the motion unless defendant was surprised or otherwise injured by the allowance of the amendment.

2. A citation reciting: "The nature of plaintiff's demand is as follows, to wit: That * * * they shipped from O. to F., and from there, over its connecting carrier's line of railway, to K., at which place said cattle were to be promptly sold upon the market thereof; that said cattle were delayed on defendant's road at F. for a period of 5 hours; that said cattle had been upon the cars for about 20 hours when they reached F.; * * * that in consequence of said cattle being negligently left upon the cars at F. they hooked, horned, scarred, bruised, and disfigured each other; that by reason of the premises defendant became bound and promised to pay to plaintiffs their said damages," etc.,—is sufficient to indicate a claim of damages for injuries to cattle.

¹ Writ of error denied by supreme court.

3. In an action for injuries to cattle from an unreasonable delay in shipment, an instruction that the measure of damages would be the difference in the market value of the cattle at the place of delivery at the time they arrived there, in the condition they were in, and their market value in the condition they would have been in had not the delay occurred, and interest added at the rate of 6 per cent. per annum from the date they arrived at the point of delivery, is not erroneous.

4. Evidence that a train load of cattle, after having been 20 hours on the road, were delayed 5 hours on side tracks, without rest, food, or water, when a delay of only 30 minutes or an hour was necessary to transfer to a connecting carrier's line; that while thus delayed they hooked, horned, and bruised each other, and shrunk in weight, and were in bad condition upon reaching their destination, 5 hours later,—is sufficient to sustain a verdict of \$2,000 damages.

Appeal from district court, Midland county; W. R. Smith, Judge.

Action for damages to stock by Truesdell & Gardner against the Texas & Pacific Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Bidwell & Stennis, for appellant. Hawkins & Camp, for appellees.

HUNTER, J. This suit was brought by appellees in the district court of Midland county against appellant on the 15th day of August, 1898, to recover damages to 1,102 head of stock cattle shipped from Odessa, in Ector county, Tex., a station on appellant's line of railroad, to Ft. Worth, Tex., on September 6, 1897, under the usual printed contract for shipment of live stock upon its road, there to be delivered to the Gulf, Colorado & Santa Fe Railway Company, to be thence transported to Kansas City, Mo., for sale on the market of that city. The only negligence alleged was a delay of five hours after arrival at Ft. Worth, before delivery thereof to the connecting carrier aforesaid, to be carried to the Union Stock Yards at Ft. Worth, to be unloaded for rest, food, and water, during which delay, it is alleged, the cattle hooked, horned, scarred, and bruised, and disfigured each other, and shrank in weight, so that upon arrival at Kansas City on the 8th of September, 1897, they were depreciated in value, and plaintiffs were damaged \$1,998.35. The appellant filed a general denial, and also a special answer, which it is not necessary to here notice. The case was tried by a jury, and verdict and judgment went against appellant for \$940, and hence this appeal.

The first error assigned complains of the refusal of the district court to quash the citation because the copy delivered to appellant did not state its name correctly. The original citation ran against the "Texas & Pacific Railway Company," while the copy delivered by the sheriff to the local agent at Midland ran against the "Texas & Pacific Railway," leaving off the word "Company." Upon the hearing of the motion to quash, appellees' counsel prayed the court for leave to amend the copy by inserting the true name, which

the court granted, and the amendment was made, and thereupon the court overruled the motion to quash. If the copy served was legally defective, and the motion had been to quash the service, as it should have been, the amendment made the service good, and it became in legal effect the same as a true copy served from the date of the amendment; and, unless the appellant was surprised or otherwise injured by the allowance of the amendment,—which was not claimed,—we are unable to see any reversible error in the overruling of the motion to quash. *Miszner v. Siter*, 23 Tex. 621; *Cartwright v. Chabert*, 8 Tex. 261; *Holstein v. Gardner*, 16 Tex. 116.

It is also complained in the same motion that the citation did not sufficiently apprise the appellant of the nature of the claim sued on. The citation states it thus: "The nature of plaintiffs' demand is as follows, to wit: That heretofore, to wit, on or about Sept. 5, 1897, they shipped from Odessa, Texas, to Ft. Worth, Texas, and from there over its connecting carrier's line of railway to Kansas City, Missouri, at which place said cattle were to be promptly sold upon the market thereof. That said cattle were delayed on defendant's road at Ft. Worth for a period of 5 hours. That said cattle had been upon the cars for about 20 hours when they reached Ft. Worth, Texas, without food or water, or opportunity to rest. That, in consequence of said cattle being negligently left upon the cars at Ft. Worth as hereinbefore stated, they hooked, horned, scarred, bruised, and disfigured each other. That by reason of the premises defendant became bound and promised to pay to plaintiffs their said damages, amounting to the sum of \$1,998.35, but, though often requested, they have failed and refused so to do, to their great damage \$1,998.35. Wherefore plaintiffs pray that the defendant be cited to answer herein, and that upon final hearing that they have judgment for their said damages and costs of suit, and for both general and special relief." While this is not as terse a statement as could have been made, yet we think that it was sufficient to indicate to the appellant's agents, officers, and attorneys "the nature of the plaintiffs' demand," within the meaning of the statute,—that is, damages for injuries to cattle shipped from Odessa, etc.,—and the specific allegations could be obtained from the petition.

Appellant also complains of the overruling of its special exception to the petition pointing out that the suit was in the firm name, and not in the name of the persons composing the firm. That part of the petition is as follows: "Your petitioners, Truesdell & Gardner, complaining of the Texas & Pacific Railway Company, would with respect show to the court that the plaintiffs are a firm composed of W. E. Truesdell and J. E. Gardner, and reside," etc. All through the petition afterwards they are referred to as "plaintiffs," using the plural number, and we think that, while it is not technically correct to begin the petition in

the firm name, yet it sufficiently appears that the suit was by W. E. Truesdell and J. E. Gardner, who were partners doing business in the firm name of Truesdell & Gardner.

The assignments complaining of the court's charge are all overruled, as we find the instructions given to the jury eminently fair and correct. The court instructed the jury, in substance, that the measure of damages would be the difference in the market value of the cattle at Kansas City at the time they arrived there, in the condition they were in, and their market value in the condition they would have been in had not the delay at Ft. Worth occurred, "and to this difference add interest at the rate of 6 per cent. per annum from the date they arrived at Kansas City"; and to this latter clause of the charge, allowing interest on the difference, the appellant assigns error. We think the charge was correct. Appellees were entitled to this difference in value as occasioned by appellant's negligence on the day the cattle arrived there. In the case of *Watkins v. Junker* (Tex. Sup.) 40 S. W. 12, our Justice Brown discusses the question, and cites numerous authorities, and he comes to the conclusion that "the courts have come to the proposition that in all cases where the measure of recovery is fixed by the conditions existing at the time the injury is inflicted the person entitled to recover has also the right to have compensation for the detention of the money to which he is entitled by reason of the wrong done to him. It being a legal right to receive compensation for the injury inflicted by detaining that to which the party is entitled, it is the duty of the court to instruct the jury under what state of facts they should allow such compensation. * * *

It was not error for the court to charge the jury to find interest for Junker for any sum found to be due him." See, also, *International & G. N. R. Co. v. Dimmitt Co. Pasture Co.* (Tex. Civ. App.) 23 S. W. 756; *Railway Co. v. Jackson*, 62 Tex. 212; *Railway Co. v. Great-house*, 82 Tex. 111, 17 S. W. 834.

The verdict is not excessive. The testimony was sufficient to warrant it. The evidence is conflicting as to the time of delay on the side tracks at Ft. Worth, but it is amply sufficient to sustain the verdict, in that the evidence tends to prove that the cattle stood in the cars on the side tracks of appellant at Ft. Worth for 5 hours, when it was only necessary to so keep them from 30 minutes to an hour; that cattle become restless, and hook and horn each other, and lie down, when the cars are standing still, much worse than when running; that they were in good condition when they arrived at Ft. Worth, but were in bad condition when they were unloaded at the Union Stock Yards at the same place, about 5 hours later. There is no evidence of any delay or injury to the cattle at any other point on the route. The jury found, under a fair and proper charge, that the delay at Ft. Worth in delivering them to the connecting line for carriage to the stock yards was un-

reasonable, and the evidence amply supports that finding, as well as injury caused thereby; and in such cases we have no right to set aside their verdicts, but it is the duty of the courts under such circumstances to sustain them. We find no error in the judgment, and it is affirmed.

DEFEE v. DEFEE.

(Court of Civil Appeals of Texas. May 8, 1899.)

DIVORCE—JUDGMENT—SUPPORT OF CHILD.

Where the court had denied a husband a divorce, and granted the custody of a child to the wife, an order cannot be entered against the husband for a monthly payment for the child's support.

Appeal from district court, Shelby county; Tom C. Davis, Judge.

Action for divorce by Charley Defee against Lula Defee. Judgment for defendant, with an order that plaintiff pay five dollars per month for the support of their child, and plaintiff appeals. Reformed and affirmed.

E. B. Wheeler and Jas. T. Polley, for appellant.

JAMES, C. J. Proceeding by appellant against appellee for divorce and for custody of their two children. More than three years before the institution of the suit the wife went to her father's home, taking with her the two children. Very shortly afterwards, by arrangement between them, the father took the girl, and the mother kept the boy. Shortly before the suit was instituted, the mother, when the girl was at school, went for her, and took her to her father's. By interlocutory order the court restored the girl to the father pending the proceeding. The district court refused the divorce, awarded plaintiff the girl, and defendant the boy, and decreed that plaintiff should pay defendant monthly the sum of five dollars for the maintenance of the boy during its minority, or until the parties should resume their marital relations. We have carefully read the statement of facts in this case, and the conclusions of the judge, and we are unable to say there was any error in the refusal of the divorce. There was ample testimony given, which, taken to be true, would defeat the action.

It is assigned as error that the court had no power, having refused the divorce, to adjudge that plaintiff pay defendant a certain sum each month, during the minority of the boy, for his maintenance. The parties, after this decree, were still man and wife. The legal obligation and liability of the father for the necessary support and maintenance of his minor child remained, and the nature and extent of the obligation was to furnish or pay for such necessities as, from his station in life, it was his duty to furnish the child. Walling v. Hannig, 73 Tex. 582, 11 S.

W. 547. While we think the court had, in this proceeding, and upon the pleadings, the power to render the judgment affecting the custody of the children, and that judgment was properly rendered, in view of the evidence and the welfare of the children (Nels. Div. & Sep. § 979), we are of opinion that it should not have adjudged and fixed liability against plaintiff for the support of the child, nor have made any adjudication on that subject. The judgment will be reformed accordingly, and affirmed.

TARKINGTON et al. v. BRUNETT et al.

(Court of Civil Appeals of Texas. April 26, 1899.)

INTOXICATING LIQUORS—CIVIL DAMAGE LAWS—RIGHT OF ACTION—NOTICE—INSTRUCTIONS.

1. Since the very fact that liquor was sold to a husband makes the wife an aggrieved party, under the civil damage law, it is error to raise an issue by an instruction as to her being an aggrieved party, where no grounds of estoppel were shown.

2. In an action by a wife under the civil damage law, it is error to admit evidence that she had brought suits against other saloon keepers, since she had a right to sue all who had sold liquor to her husband.

3. Where there is no evidence that plaintiff had ever withdrawn notice to defendant not to sell liquor to her husband, it is error to charge the jury on that issue.

4. That a wife either failed to give or withdrew notice to one saloon keeper against selling liquor to her husband does not affect her right of action against other saloon keepers to whom such notice had been given.

5. Since, under the civil damage law, a wife has a right of action against a saloon keeper for selling liquor to her husband, if he is an habitual drunkard, regardless of whether notice not to sell to him has been served, the implied withdrawal of such notice will not defeat her right of action, in the absence of fraud.

Appeal from Grayson county court; J. H. Wood, Judge.

Action by Mrs. M. L. Tarkington and husband against Frank Brunett and others. Judgment for defendants, and plaintiffs appeal. Reversed.

J. H. Randell and Wilkins, Vinson & Batzell, for appellants. Moseley & Smith, for appellees.

FLY, J. Mrs. M. L. Tarkington (joined, pro forma, by her husband, Hugh Tarkington) instituted this suit against Brunett and his bondsmen to recover the penalty of \$500, fixed by law, for two sales of liquor to said husband in violation of the conditions of the terms of a liquor dealer's bond; and the cause, being tried by jury, resulted in a verdict and judgment for appellees.

Appellees, in their answer, set up fraud upon the part of the wife, and claimed that she was estopped from claiming the penalty by conniving at the sale. In the petition it was alleged (and there was proof to sustain the allegation) that the husband of appellant was an habitual drunkard, and that notice

in writing had been given, through a peace officer, by appellant to appellee, not to sell to her husband intoxicating liquors; and proof of either or both of these allegations, in connection with proof of the sale, was sufficient, under the circumstances of this case, to have entitled appellant to a verdict. If the husband was an habitual drunkard, then the sale to him was unlawful, and the right of recovery accrued to the wife, regardless of notice; but if he was not an habitual drunkard, and the notice was given as required by law, then the sale became unlawful, and the right of action accrued to the wife. *Campbell v. Jones*, 2 Tex. Civ. App. 263, 21 S. W. 723.

The very fact that the liquor was sold to the husband made the wife an aggrieved party, under the statute; and it was error for the court to raise an issue by the charge as to her being an aggrieved party, there being nothing shown that would estop her from claiming the penalty.

There was nothing in the testimony to raise the question of fraud or connivance on the part of the wife to whisky being sold to her husband, and it was error to permit testimony to the effect that she had brought suits against other saloon men for selling whisky to her husband. She had the right to sue any and all liquor dealers who had breached their bonds in connection with her husband, and the fact that she did so, standing alone, did not tend to show fraud or connivance on her part. She used the weapon of defense placed in her hands by the law when she made known to saloon men that her husband was an habitual drunkard, and notified them that they must not sell liquor to him; and, if appellee sold liquor to the husband in defiance of the law, he must be held to suffer the consequences.

There was no testimony tending to show that appellant had ever withdrawn or revoked the notice given to appellee not to sell her husband intoxicating liquor, and it was error to charge the jury on an issue not made by the evidence. The fact that, some 18 months before the liquor was sold, appellant had withdrawn the notice as to one Sweeney, another retail liquor dealer, could have no possible connection with the sale of liquor by appellee. There is no pretense that the notice was withdrawn as to him. There is no intimation in the law that the notice will not be effective unless it is given to every liquor dealer in the town or city in which the aggrieved wife may live. The language of the bond applies to the party giving it, and he cannot justify his acts in an infraction of the bond by pleading or proving that some other saloon man had not been given notice by the wife, mother, daughter, or sister. If withdrawal of the notice from Sweeney, for the purpose of getting a position in his saloon for her husband, could be distorted into a withdrawal of notice from all other liquor dealers, still the fact that the husband was

an habitual drunkard would render appellees liable on the bond, in the absence of such fraud on the part of the wife as would estop her from a recovery of the penalty. The judgment is reversed, and the cause remanded.

TEXAS & P. RY. CO. v. GOLDMAN.

(Court of Civil Appeals of Texas. April 26, 1899.)

PERSONAL INJURIES — DAMAGES — LOSS OF TIME — RECALLING WITNESS — RAILROAD — STOPPING AT STATIONS.

1. A petition which alleges that by reason of the injury complained of "plaintiff was confined to his bed for a space of ten days, and suffered the most excruciating pain and mental anguish, and for ten days thereafter was wholly unable to follow his usual occupation, * * * and has been seriously and permanently injured, * * * and that said injuries will shorten his life, * * * and render him wholly unable hereafter to labor and earn money as well as he would if said injuries had not been inflicted," justifies a charge that will allow plaintiff to recover for mental suffering to be borne in the future.

2. It is not error to permit plaintiff to be recalled and testify that he had forgotten about another accident, when it has been shown that at the time of the accident he made a statement inconsistent with his previous testimony as to the number of times he had met with an accident.

3. A railroad company which does not stop its train at a station long enough to permit a passenger to alight therefrom with safety is guilty of negligence, and it is immaterial what the passenger's motive in alighting may be, or whether the conductor had notice of his desire to alight.

4. It is reversible error to charge a jury to take into consideration damages resulting from a loss of time, where there is neither allegation nor proof of the value of such lost time.

Appeal from district court, Kaufman county; J. E. Dillard, Judge.

Action by H. L. Goldman against the Texas & Pacific Railway Company. From a judgment in favor of plaintiff, defendant appealed. Reversed.

M. H. Gossett, for appellant. T. M. Brooks and Wm. H. Allen, for appellee.

FLY, J. This suit was instituted by appellee to recover \$2,000 damages for injuries received while alighting from the train of appellant at Lawrence, Tex., the ground of negligence being that appellant did not stop its train a sufficient time at Lawrence for passengers to safely alight therefrom. The cause was tried by jury, and resulted in a verdict and judgment for appellee for \$540.65.

The question raised by assignment as to improper conduct of the jury need not be considered, as it is not likely to occur on another trial, and comment on the question of sufficiency of the evidence would not be proper.

The first assignment of error complains of the charge which authorized the recovery of damages in the future for mental suffering, the ground of objection being that appellee

did not sue for mental suffering in the future, but limited his cause of action for mental suffering to 10 days immediately following the infliction of the injury. The petition alleged that "plaintiff was forced to and did go to bed, and was confined to his bed for the space of ten days, and suffered the most excruciating pain and mental anguish, and for ten days thereafter was wholly unable to follow his usual occupation, or to do any manual labor whatever, and he has ever since suffered pain therefrom, and now suffers pain, and has been seriously and permanently injured, and has been forced to procure medicines and medical attention to the amount of \$100, and that said injuries aforesaid will shorten his life, and tend to shorten it, and render him wholly unable hereafter to labor and earn money as well as he would if said injuries had not been inflicted." We think the charge was justified by the allegations. *Railway Co. v. Silliphant*, 70 Tex. 623, 8 S. W. 673. There is no reason, however, why the pleadings should not be made so full as to remove such questions on another trial.

Appellee testified, when first placed on the stand, that he had never before been hurt, except by a horse, when a boy; and Mrs. Kirtland, the agent of and witness for appellant, swore that directly after the accident appellee had said that it was the second time he had been hurt by appellant, and that he intended to institute suit. Appellee was recalled, and over the objection of appellant was permitted to testify "that the other accident he had reference to when talking to Mrs. Kirtland was in 1886; the ties spread, and the coach he was on turned over on the T. & P. Ry. Co., at Dallas, and he was pretty badly shaken up; that this was out near the fair grounds, and that he had forgotten about it when he testified that he had not met with any accidents since being thrown from a horse when a young man." We see no error in the admission of this testimony. The testimony above copied is taken from the statement of facts, and differs from that in the bill of exceptions upon which the assignment of error is based; but the statement of facts was agreed to by appellant, and we are not in a position to say which is correct. *McClelland v. Fallon*, 74 Tex. 236, 12 S. W. 60. This matter will not probably arise in the same way on another trial.

In certain charges requested by appellant it was, in effect, stated that if appellee had applied for a ticket to Lawrence, and the agent of appellant by mistake sold him one to Terrell, and appellee failed to read his ticket, and did not tell the conductor that he wished to get off at Lawrence, and he was injured while attempting to get off at Lawrence, that he could not recover. It would not matter whether the conductor knew that appellee wished to leave the train at Lawrence or not. If the railroad company was guilty of negligence in not remaining at Lawrence long enough to enable any passenger

who desired to alight from the train to do so, it was liable for injuries inflicted. It does not matter whether appellee left the train at Lawrence as his ultimate point of destination, or merely as an intermediate station. The injury was received while getting off the train, and, as said by this court in *Railway Co. v. Overfield*, 47 S. W. 684, "where the injury is received in the very act of alighting at a regular station,—not after he had alighted,—the motive of the passenger is wholly immaterial, for the passenger has the undoubted right to alight at such place for the time the train remains there, or to leave the train altogether, if he desires; and while he is in the act of alighting he is clearly a passenger, and entitled to be treated as such." It would seem clear that the right to alight at any regular intermediate station would not be dependent upon notice having been given to the conductor that the passenger desired to alight, but that it is an absolute right enjoyed by the passenger. It follows that the court did not err in refusing the requested instructions. The court instructed the jury that if "plaintiff purchased his ticket at Dallas, to be carried to Terrell, and that plaintiff had failed to inform the conductor on said train that he desired to get off at Lawrence, then the jury should take such fact into consideration, along with all other evidence in the case, in determining whether the agents and servants of defendant in charge of its train were guilty of negligence in failing to stop the train at Lawrence a sufficient length of time for plaintiff to get off by the use of ordinary diligence." The charge was favorable to appellant.

The court charged the jury to take into consideration damages resulting from loss of time, when there was neither allegation nor proof as to the value of such lost time. There was nothing upon which a verdict for lost time could be based, and it was error to give the charge, and for that error the judgment will be reversed, and the cause remanded.

GALVESTON, H. & S. A. RY. CO. v. CLARK.¹

(Court of Civil Appeals of Texas. April 26, 1899.)

RAILROADS—INJURY TO CHILD ON TRACK—CONTRIBUTORY NEGLIGENCE—DAMAGES—PLEADING—EVIDENCE—HARMLESS ERROR.

1. A child 17 months old cannot be charged with contributory negligence.

2. An objection that there is no evidence to sustain a finding cannot be considered, when not assigned as error.

3. An allegation that injuries to a child "are permanent and incurable, and her ability to make a living and earn money after she shall have become 21 years of age is diminished," is sufficient to support a recovery for decreased earning capacity.

4. A girl 11 years old may recover for mental suffering caused by disfigurement resulting

¹ Writ of error denied by supreme court.

from an injury occurring when she was 17 months old.

5. Testimony of an experienced railroad man that, if a fireman was looking out of the engine window on the inside of the curve, he would have a better view of the track ahead than would the engineer on the opposite side, is competent, although the witness was not acquainted with the track at that point; there being evidence that there were no obstructions to the view at that point.

6. The admission of testimony of one not shown to be acquainted with the rules of defendant railroad company, that, under the rules, it was the duty of the fireman to keep a look-out ahead, is harmless, where there is other testimony to the same effect.

7. Where defendant's witness testified that the schedule time for defendant's train was about 35 miles per hour, but that it might have been 30 miles per hour, the admission of evidence on cross-examination that, according to the schedule of the year before, not shown to be the same, it was a little less than 30 miles per hour, is harmless.

8. Error in admitting testimony that the schedule running time of a train was less than 30 miles an hour, based on a schedule of the previous year, not shown to be the one in force at the time, is harmless, where there is other testimony that the schedule time was about 29 miles per hour.

Appeal from district court, Medina county; I. L. Martin, Judge.

Action by W. H. Clark, receiver of an infant, against the Galveston, Harrisburg & San Antonio Railway Company, for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Baker, Botts, Baker & Lovett, for appellant. H. E. Haass and John W. Parker, for appellee.

JAMES, C. J. Action for personal injury to a child from being struck by a train. The questions raised in the appeal are errors alleged in respect to demurrers, admission of testimony, and the instructions to the jury.

The child was 17 months of age, and there was, of course, no contributory negligence in the case, and there was testimony showing negligence of defendant as the cause of its injury.

The demurrers to the petition were properly overruled. *Ewing v. Duncan*, 81 Tex. 236, 16 S. W. 1000; *Floyd v. Patterson*, 72 Tex. 207, 10 S. W. 526.

The court charged that, in estimating plaintiff's damage, they might take into account any impairment of her physical ability, if any, to earn money after she should become 21 years of age. The seventh assignment challenges this charge, because, as stated in the assignment, there was no allegation to support a recovery by decreased earning capacity, and because the petition specifically itemized the different injuries and loss to the child. The petition contains an allegation that "her said injuries and their said effects are permanent and incurable, and her ability to make a living and earn money after she shall have become twenty-one years of age is diminished, and all to her actual damage in the sum of \$20,000." In the statement under the as-

signment, appellant makes the further proposition that there was no evidence that the child would have had an earning capacity, or that the same would have been impaired, but there is nothing in the assignment to warrant us in considering this proposition. The allegation which the assignment states was absent appears in the petition, and this is really all we need say to dispose of the assignment. It is obvious, however, that direct proof of the diminution of the child's earning capacity or its extent would be impossible. Such matter is necessarily committed to the reasonable disposition of the jury, under the circumstances of the case.

The eighth assignment complains of the instruction that, in considering the damages, the jury might consider the mental and physical pain suffered by the child, because the petition and the evidence showed conclusively that the child was, by reason of its tender years, incapable of mental suffering. There was evidence of the most terrible injuries to the child's person and personal appearance. Plaintiff was a girl, and at the time of the trial was over 11 years of age. The injuries appeared to be permanent. We can perceive no fault with the charge, in view of these conditions.

The tenth assignment of error is not well taken. The assignment is very lengthy, but the point made is indicated by the following: W. H. Clark testified, over objection, as to how far an engineer could have seen an object at the place where the child was picked up, and that an engineer or a fireman from an engine could have seen a child a greater distance down the track than could have been seen by a person standing on the track, the objections being that the witness had not made any observation from an engine or any other elevated position at said place; and, further, the court allowed the witness to testify that the engine, boiler, smokestack, and embankment would not have obstructed the view of the engineer and fireman, because witness was not an expert, and such testimony was not based upon the facts in evidence, and because no observation had been made by the witness, and it was his supposition or conclusion, without putting the jury in possession of the facts upon which he based it. Substantially the same objections were made to like testimony of the witness Rieman. It is explained in this assignment that said testimony was allowed to be introduced, and remained before the jury until the testimony was closed, when, on plaintiff's motion, the court instructed the jury to disregard the testimony. The bill of exceptions shows this was done in the following manner: "The evidence having been closed on both sides, plaintiff's attorney announced to the court as follows: 'I wish to withdraw the evidence of the witnesses W. H. Clark and L. Rieman as to the distance the place where the child lay could have been seen by a person elevated on an engine, as the engineer was, east of the section house;

the evidence being that, considering the elevated position of the engineer, the engineer could have seen the child thirty to fifty yards further east of the section house than a person standing on the track opposite the section house could have seen the child." Whereupon the court instructed the jury that the evidence which plaintiff's attorney stated he withdrew could not be considered by them in the case, as it was withdrawn from their consideration altogether, and that they would not consider the evidence at all for any purpose; one of the jurors asking if they must consider the case just as though the evidence had not been introduced at all, and the court answered that they must wholly ignore the evidence in reaching a conclusion. We conclude, in reference to this assignment, that from the charge, the manner in which it was given and received by the jury, and in view of the testimony of the conditions surrounding this accident, there is no reason to believe that the verdict was due to the testimony that was withdrawn. *Church v. Waggoner*, 78 Tex. 200, 14 S. W. 581. We have not considered the question of the admissibility of the testimony.

The complaint made of admitting certain testimony of William Davis (eleventh assignment) cannot be sustained. The witness was shown to be a practical railroad man of long experience, and qualified to answer the questions, and all the hypothetical questions asked this witness were based on facts in evidence. He was also allowed to state that the fireman would have had a better view down the track than the engineer, and this was objected to because the witness was not familiar with the track at that place, or the obstructions, and was not in a position to know, and did not know, and could not state, the facts upon which his conclusion was based. The testimony of the witness was: "If a fireman is looking out of the window on the inside of a curve, he has a better view of the track than the engineer sitting on the outside of the curve." There was evidence that there were no obstructions to the view except the engine itself. The testimony was not objectionable.

The twelfth assignment is to certain testimony of the same witness, who stated "that he, in 1882, as division superintendent of defendant's road, had the power to require of the fireman the duty of keeping a lookout in front of the train; in fact, they were his instructions to use every caution, and that it certainly was the fireman's duty, at the time of this accident [November, 1889], to keep a lookout when not engaged in putting in coal,—because the accident occurred in 1889, and his power, rules, and knowledge in 1882 had no connection with this occurrence, and because it was not attempted to be shown that he had any knowledge of the rules, duties, or conditions existing in 1889." It is pointed out by appellee that there was testimony contradicted of practically the same facts, as of the time of the accident, which rendered this testimony of Davis immaterial and harmless.

Finally, it is contended that "the court erred in permitting plaintiff to show by the witness Murray the schedule time of defendant's road in the year 1888, and which was shown not to be in force at the time of this accident, because the same was intended to, and naturally did, have the effect to prejudice the jury in favor of plaintiff and against defendant." The year to which the said schedule referred was the year preceding the injury. The testimony complained of was elicited upon a cross-examination of the witness by plaintiff's counsel. Upon his direct examination, he had stated that he thought the schedule time when the accident occurred was about 35 miles an hour. Before the schedule of 1888 was mentioned, he testified that he wouldn't say it was 35 miles,—it might have been 30. He did not think it was 28. The schedule of 1888 was not itself offered in evidence, but the witness was allowed to testify that, according to it, the time was a little less than 30 miles an hour. It therefore does not appear that there was any material difference between what the testimony of this witness indicated was the schedule time in 1889 and that indicated by the schedule of the previous year, and hence no injury. The error, if any, appears harmless, for the further reason that the only other testimony of the schedule of 1889—that of the engineer, Griffin—is that it was about 29 miles an hour. The judgment is affirmed.

LINCOLN v. ANDERSON, Sheriff, et al.
(Court of Civil Appeals of Texas. April 13, 1899.)

EXECUTION FROM COUNTY COURT—INJUNCTION—JURISDICTION OF DISTRICT COURT.

A district court has no power to enjoin a sale under a levy of execution under a judgment of a county court.

Appeal from district court, Harris county; John G. Tod, Judge.

Action by A. F. Lincoln against A. R. Anderson, sheriff, and others, for an injunction. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Boyd & Thompson, for appellant.

PLEASANTS, J. The sheriff of Harris county, by his deputy, J. M. Ray, levied an execution on two pianos, the property of appellant, to satisfy a judgment rendered against appellant by the county court of Harris county in favor of appellee L. L. McIlwaine; and on the 2d of June, 1898, appellant obtained a temporary injunction from the Honorable W. H. Wilson, judge for the Fifty-Fifth district of Texas, restraining the sheriff and his deputies from making a sale under said levy, though the judge, in his fiat, expressly declined to enjoin the judgment upon which the said execution issued. The levy was made on the 19th of May, and the injunction applied for on the 31st of said month.

On the 10th of June, 1898, during the term of said district court, the appellees, McIlwaine and Anderson, filed motions to dissolve the injunction, having previously filed their answers to the appellant's petition, in which they except thereto, and deny under oath the allegations of the petition, except so far as same were admitted. On the 21st of June the motion was heard and sustained by the court, and the injunction dissolved; and on the 27th of said month appellant filed a motion to set aside the decree dissolving the injunction, which motion was denied the appellant, and to which he excepted; and on the 8th of July following the cause came on for final hearing, and judgment was rendered refusing the injunction, and giving judgment for costs against appellant, and he appealed to this court, and here assigns several errors, none of which need be discussed, as this court holds that the trial court was without power, under the present constitution, to restrain by injunction the sale of the appellant's property under the levy of an execution issued upon judgment rendered against him in the county court. The district court not having jurisdiction in the premises, its judgment is not revisable by this court, and the appeal might be dismissed at the costs of the appellant; but, as the same purpose is accomplished by an affirmation of the judgment, such is the order of this court. The appellees could not be in contempt of this court, since it was without jurisdiction to revise the proceedings of the lower court; and hence the motion of the appellant to require the appellees to show cause why they should not be fined for contempt was refused on a former day of the term of this court.¹ Affirmed.

DANCY et al. v. SKIDMORE (FIRST NAT. BANK OF MCGREGOR, Garnishee).

(Court of Civil Appeals of Texas. May 24, 1899.)

JUDGMENT AGAINST GARNISHEE — DEFENDANT'S RIGHT TO COMPLAIN.

Defendant cannot complain of a judgment against a garnishee on the ground that the garnishee owes him nothing, but owes a firm of which he is a member, and which is not a party to the action.

Appeal from McLennan county court; F. M. Maxwell, Judge.

Action by T. F. Skidmore against R. R. Dancy & Co. Judgment was rendered against the First National Bank of McGregor, as garnishee, and defendant appeals. Affirmed.

Sanford & Lee, for appellant. L. W. Campbell, for appellee.

KEY, J. According to the statement in appellant's brief, this is a garnishment proceeding against the First National Bank of Mc-

Gregor, growing out of a former case, in the court below, styled "No. 4,057, T. F. Skidmore vs. R. R. Dancy & Co.," a firm composed of R. R. Dancy alone. The bank, as garnishee, answered, admitting that it was indebted to the defendant in the sum of \$360.21, and that it held in trust for said defendant a receipt for two bales of cotton. This answer was filed before the return day of the writ of garnishment, but, after the return day, the garnishee filed an amended answer, stating the same facts, with the addition that the garnishee was still indebted to the defendant in the sum stated, and still held the receipt for the two bales of cotton. The defendant in the original cause filed a verified answer, controverting the answer of the garnishee, alleging that the funds and effects in the garnishee's hands, and covered by its answer, were not the property of R. R. Dancy & Co., defendant in the original cause No. 4,057, but belonged to the firm of R. R. Dancy & Co., a co-partnership composed of R. R. Dancy and T. F. Stubbs. The issues thus presented by the pleadings were submitted by the court to the jury, and the trial resulted in a verdict and judgment for the plaintiff against the First National Bank of McGregor, garnishee. R. R. Dancy & Co., or, more properly speaking, R. R. Dancy, defendant in the original suit, has appealed. The bank has not appealed, and seems to be content with the judgment. Neither T. F. Stubbs, nor the firm composed of R. R. Dancy and T. F. Stubbs, were parties to the proceedings in the court below, nor are they complaining in this court. As a matter of fact, the only complaints in the court below, or in this court, are made by R. R. Dancy (under the name of R. R. Dancy & Co.), the real defendant in the original suit out of which the garnishment suit sprang; and he is making the contention that the garnishee does not owe him anything, and does not hold in its possession any effects belonging to him. He does not deny that he owes the plaintiff, Skidmore, but objects to his debt being paid by the bank, although the bank admits that it owes him the money; the objection being that, as a matter of fact, the bank does not owe the money to him, but owes it to a firm of which he is a member, and which firm is not a party to this proceeding, and the other member of which will not be bound by this judgment. We do not think that Dancy can be heard to object to the bank paying his debt, although the bank may, in fact, owe him nothing. Such action on the part of the bank cannot injure him. Therefore we hold that, although errors may have been committed in the trial of the garnishment proceeding, they have not prejudiced Dancy, and he is not entitled to have the judgment reversed. If the bank was complaining, or if Stubbs or the firm of Dancy & Stubbs were parties to the suit and complaining, the ruling might be otherwise. The judgment is affirmed.

¹ No opinion.

HAYES et al. v. GALLAHER et al.¹
(Court of Civil Appeals of Texas. April 6, 1899.)

TRESPASS TO TRY TITLE—DEFENSES—OUTSTANDING TITLE—EXECUTION—DESCRIPTION—MOTION FOR NEW TRIAL—CONTINUANCE—TRIAL—REOPENING CASE.

1. Proof of an outstanding superior title, not pleaded, cannot defeat plaintiff's recovery in trespass to try title, where defendant specially pleads title in himself.

2. In a levy of an execution, a description of the premises as a certain number of acres on a named river, conveyed by H. to the judgment debtor, H. being a former owner, through whom the debtor claimed, but not his grantor, is void for uncertainty.

3. It is not error to refuse to receive further testimony on an issue not raised by the pleadings after argument had commenced.

4. In trespass to try title it is not error to refuse to postpone the hearing of a motion for new trial to permit the moving parties to acquire an outstanding superior title, relied on by them to defeat a recovery.

5. Where defendants in trespass to try title claim under execution sale against plaintiffs' ancestor, and the amount realized at the sale was applied on the judgment, the court will, as a condition precedent to awarding plaintiffs the premises for irregularities in the levy, require them to pay defendants the amount received at the sale, with interest.

Error from district court, Harris county; John G. Tod, Judge.

Trespass to try title by John T. Gallaher and others against Walter I. Hayes and others. There was a judgment for defendants, and plaintiffs appeal. Modified.

Stewart, Stewart & Lockett, for appellants. Goldthwaite & Moody, for appellees.

WILLIAMS, J. Appellees brought this action of trespass to try title to recover of Walter I. Hayes and Milo Smith 640 acres of land situated on San Jacinto river, in Harris county, patented to Daniel D. Culp, assignee, June 6, 1844. The defendants pleaded general denial, not guilty, and specially setting up title in themselves under a purchase of the land sued for at an execution sale thereof by the United States marshal under judgment against J. B. Gallaher, the ancestor, through inheritance from whom plaintiffs asserted title. The plaintiffs adduced title as follows: (1) Patent to Culp. (2) Deed from Culp to Augustus C. Daws, dated March 28, 1849, recorded same day. (3) Deed from A. C. Daws to James W. Henderson, dated March 1, 1857, recorded November 23, 1857. (4) Deed from J. W. Henderson to A. C. Daws, dated February 1, 1862, recorded March 1, 1862. (5) Deed from A. C. Daws to John B. Gallaher, dated February 1, 1862, recorded March 13, 1862. (6) Proof that plaintiffs are the heirs of J. B. Gallaher, who died intestate December 26, 1871. For the purpose of showing common source of title plaintiffs introduced the following: (7) Judgment for money, of the circuit court of the United States at Galveston, of date May 19, 1870, in favor of A. W. McKee against J. B. Gallaher. (8) Execution on such judgment of

date April 6, 1871. (9) Return of marshal, showing levy upon property in Houston, and, further, upon land thus described: "640 acres of land on the San Jacinto, conveyed by Henderson to Gallaher." The return stated there was not sufficient time to make sale. (10) Venditioni exponas, issued May 12, 1871, ordering sale of above-described land, with return thereon, showing sale thereof, and purchase by W. J. Hutchins for \$76, and the application of such sum to the judgment. (11) Deed from the marshal to Hutchins, dated July 4, 1871, recorded August 16, 1871, reciting the sale just stated, and conveying land described thus: "640 acres of land in the county of Harris, and conveyed by J. W. Henderson to J. B. Gallaher." (12) Deed from Hutchins to James Craig, dated May 2, 1873. (13) Deed from James Craig to appellants Hayes and Smith, dated July 30, 1874.

Appellants, to derail title in themselves from J. B. Gallaher, introduced the above-stated documents Nos. 8 to 13, inclusive. Nos. 12 and 13 describe the land in controversy. They also introduced the deposition of the deputy marshal who made the sale to Hutchins, which tended to show that the land sold was that in controversy. They also showed by their own depositions that since their purchase from Craig they had paid taxes on the land in controversy, caused it to be surveyed and looked after, and its corners frequently established, had negotiated concerning its sale, and had exercised full ownership over it, and had heard of no adverse claim until this suit was brought. They further took the depositions of plaintiffs, which, stated generally, show the absence of any knowledge of the judgment against their ancestor, the sale of the land, or his conduct or claim to the land thereafter. To show an outstanding title superior to that of plaintiffs, appellants, besides the patent to Culp, introduced the following evidence: (1) Deed from Culp to John Shackelford, Jr., for the land in controversy, dated May 1, 1846, recorded February 4, 1854. (2) Deed from Shackelford to Dennis Perkins for same, dated February 1, 1854, recorded February 4, 1854. (3) Deed from Hannah M. Perkins, Henry C. Perkins, Thomas A. Perkins, Elizabeth S. Perkins, and George D. Perkins, reciting themselves to be the children and heirs of Dennis Perkins, to Henry C. Perkins and George D. Perkins, for same land, dated April 29, 1873, recorded January 13, 1874. (4) A stipulation of the parties that the grantors in last-named deed were the heirs of Dennis Perkins, who died prior to its date; that the grantees therein are still living, and have never conveyed the land, and that Daws and Culp have been dead many years. It further appeared that all of the present claimants of the land live in other states.

The case thus presented may be decided by determining the merits of five points raised by appellants, without following the assignments of error in order. The first is that the court below should have given judgment for defend-

¹ Writ of error denied by supreme court.

ants upon the proof of outstanding title. Whether or not the evidence offered was sufficient to rebut the prima facie case made by plaintiffs by their proof of common source, and to show title remaining in Henry C. and George D. Perkins superior to that of plaintiffs, and, if so, whether or not defendants, who claimed under the common source, could have availed themselves of the outstanding title as a defense, under a plea of not guilty, had they not set up their defenses by special pleading, are questions which it is unnecessary to decide. By their answer the defendants not only pleaded not guilty, but set up as their only defense (besides limitations) the title which proceeded from Gallaher, the common source, under the marshal's sale. It is well settled that such a plea limits the plea of not guilty so that it only puts upon plaintiff the burden of showing such title as will enable him to recover, if not defeated by the defense specially pleaded. By such pleading the plaintiff is notified of the title which will be urged against him, and is not required to prepare to meet any other. *Shields v. Hunt*, 45 Tex. 424; *Custard v. Musgrove*, 47 Tex. 217; *White v. Kingsbury*, 77 Tex. 614, 14 S. W. 201; *Railway Co. v. Whitaker*, 68 Tex. 633, 5 S. W. 448. The evidence of outstanding title, having no pleading to support it, could not be made the basis of a judgment in favor of appellants, if otherwise sufficient.

The next contention is that the court should have sustained the title of defendants resting upon the marshal's sale. In this we do not concur. No description of the land was given in the levy, which, by the most liberal interpretation, could be held sufficient. We need not determine whether or not the description contained in the deed was sufficient, for, if it were, it could not cure the levy. Before the officer could be empowered to sell any land, he must have made a valid levy on it. To do that, it was necessary to give such description as would enable intending purchasers, with the aid of the particulars given, to find the land intended by proper inquiry of those familiar with it. That a description which does not give the county or locality where the land is situate, nor the name of the original grantee, nor other particulars than that it is a grant of 640 acres, is on San Jacinto river, and was conveyed by Henderson to Gallaher, is void for uncertainty, we think quite clear. It cannot be even inferred from the levy that the land is in Harris county, as might have been done had the sheriff of that county made it, for the reason that the marshal could have levied on land anywhere in his district. No person intending to purchase, reading this levy, or an advertisement based on it, could have learned from the information given what land was meant. The levy being upon its face void for uncertainty, parol evidence was not admissible to aid it. Proof that a particular tract of land was sold cannot help the matter, because the marshal had not acquired power to sell it by previously levying upon it.

There was no error in the refusal of the court to permit appellants, after argument had commenced, to introduce evidence in support of the defense of outstanding title; if for no other reason, because the pleadings did not properly admit such defense. Nor was there error in the refusal to postpone hearing of motion for new trial to allow appellants time to acquire such title from its owners. We are of opinion, however, that the judgment should have required plaintiffs to pay to defendants the amount paid by Hutchins for the land, before allowing them to recover. The evidence shows that the purchase was made under the belief that the purchaser was getting this tract of land, and that the purchase money was applied to the partial discharge of the judgment with which the property inherited by plaintiffs from their ancestor would otherwise have been charged. The judgment will therefore be reformed so as to allow appellees to recover the land and costs of the lower court upon payment to appellants of the sum of \$76, with 6 per cent. interest thereon from the 4th day of July, 1871. The costs of appeal are adjudged against appellees. *Halsey v. Jones*, 86 Tex. 491, 25 S. W. 696. Reformed and affirmed.

PETERS et al v. CHANDLER.¹

(Court of Civil Appeals of Texas. April 13, 1899.)

NONSUIT—AFFIRMATIVE RELIEF—RECONVENTION—CANCELLATION OF DEEDS.

1. In an action to cancel deeds, to restore the property to plaintiff, and for the rents thereof, and for damages to the property, plaintiff alleged that the foreclosure sale under which defendants claimed title was void because made at a place other than that provided for in the trust deed. The answer admitted that the sale was not made at the place designated in the deed, but alleged that the place was changed at the request of plaintiff; that he was present at the sale, and announced that certain personalty on the premises did not go with the property, urged persons to bid, and announced himself as satisfied with the sale; that the purchaser at the foreclosure sale, in consideration in part of the money derived from that sale, and at the request of the plaintiff, released the balance of the debt which was secured by said deed of trust; that after the sale one of defendants' predecessors in interest, desiring to purchase the premises, so informed plaintiff, and asked him if the title was good, and if he claimed any interest in the land, and that plaintiff informed him that he claimed no interest in the land, and that the title of the purchaser at the sale was good; that plaintiff, as agent, and in his own behalf, had paid rent to the purchaser, and never claimed any title to or interest in the premises. The answer prayed for such relief as the facts showed them entitled to. *Held*, that the matters set out in the answer did not entitle defendants to any affirmative relief, and it was not error to grant plaintiff's motion for a nonsuit.

2. An answer alleged, in reconvention, that the suit was brought by plaintiff for the purpose of compelling defendants to pay him something by way of compromise, and without probable cause, claimed attorney's fees as special dam-

¹ Writ of error denied by supreme court.

ages, and asked judgment therefor. *Held*, that the plea in reconvention was subject to exception, and would not prevent plaintiff from taking a nonsuit.

Pleasants, J., dissenting.

Appeal from district court, Polk county; L. B. Hightower, Judge.

Action by D. S. Chandler against Peters & Willis. From a judgment of nonsuit entered on motion of plaintiff, defendants appeal. Affirmed.

Hill & Hill, for appellants. F. Campbell, for appellee.

PLEASANTS, J. Appellee sued appellants on the 23d day of April, 1896, in the district court of Polk county, to cancel certain deeds to lot 1 and a portion of lot 2, and to lots 7 and 8, in block 21 in the town of Livingston, and for restoration of said property to plaintiff, and for rents of same, and damages for injury alleged to have been done to the property by the defendants. The averments of the petition are as follows:

"On August 30, 1888, and long prior to that time, plaintiff owned and possessed, in fee-simple title, lots Nos. 1, 2, 7, and 8 in block 21 in the town of Livingston, in Polk county, Texas. That on the — day of —, 189—, plaintiff conveyed so much of lot No. 2, as aforesaid, as 26 feet front on Main street by 107 feet eastward, out of N. W. corner of said lot No. 2, so as to include the building thereon. That heretofore, to wit, on August 30, 1888, plaintiff executed and delivered a trust deed of all of said lots to one W. H. Howard, of the city of Galveston, in Galveston county, Texas, except that portion of lot No. 2 heretofore described, together with numerous other pieces of real estate, to secure the payment of certain indebtedness due by plaintiff to sundry parties. That by the terms of said trust deed it was provided that, in event of foreclosure and sale for the satisfaction of said indebtedness, all of said property described in said trust deed, of which the lots aforesaid was a part, should be sold before the court-house door in the county of Galveston, state of Texas. That said trust deed was duly recorded in the Trust-Deed Records of Polk county, Texas, and that the purchaser thereunder, and the defendant herein, had full knowledge, actual and constructive, thereof. That heretofore, to wit, on the 29th day of October, 1891, the said W. H. Howard resigned this trust. That on October 30, 1891, Weis Bros., party of the third part, as named in the trust deed heretofore mentioned, appointed, by an instrument in writing, Henry J. Labatt, substitute trustee, to execute said trust. That on January 5, 1892, said substitute trustee, Henry J. Labatt, in violence of the terms of said trust deed, and without authority from plaintiff, proceeded to make a pretended sale of said lots heretofore described, before the court-house door of Polk county, Texas. That at said pretended sale one Leopold Weis bid said lots in, with numerous tracts and parcels

of land, for the sum of \$1,200. That said pretended bid was purported to be the highest and best bid therefor, and that said bid did not exceed 20 per cent. of the value of said property. That the said price was wholly inadequate, and not near the value of the property. That this property in controversy was about one-tenth in value of the whole property, and sold for \$1,200, and that the same was sold in bulk, and the price of the property, as sold at said pretended sale, was only \$120. That in fact no consideration valid in law passed from the said Weis to the said Henry J. Labatt. That heretofore, to wit, on March 17, 1892, the said Leopold Weis conveyed by special warranty deed all of said lots 1, 2, 7, and 8, as heretofore described, to one J. W. Hammond, for a purported consideration of \$750. That in fact no consideration valid in law passed from the said Hammond to the said Weis. That on February 28, 1894, the said J. W. Hammond conveyed, by special warranty deed, for a purported consideration of \$800, to one W. D. Willis, all of said lots heretofore described. That in fact no consideration valid in law passed from the said Willis to the said Hammond. That on July 2, 1894, the said W. D. Willis conveyed by special warranty deed, for the purported consideration of \$100 cash, and \$700 in notes of \$58.33 $\frac{1}{3}$ each, all of said lots heretofore described, to Peters & Willis. That in fact no consideration valid in law passed from the said defendants, Peters & Willis, to W. D. Willis. Plaintiff alleges and here charges that said pretended sale by Henry J. Labatt, substitute trustee, before the court-house door of Polk county, was in violence to the terms of said trust deed, and conveyed no title; that defendants bought said lots with full knowledge of all the facts herein alleged; that the said lots are improved, and the annual rental therefor is of the value of \$300; that defendants, Peters & Willis, have wantonly torn down and removed a building on said property of the value of \$1,000. Premises considered, plaintiff prays service; that the attempted sale by Henry J. Labatt to Leopold Weis, and the deed from Leopold Weis to J. W. Hammond, and the deed from J. W. Hammond to W. D. Willis, and the deed from W. D. Willis to Peters & Willis, be set aside, canceled, and held for naught, be declared null and void, and discharged from the records, and that the title of plaintiff in and to said lots, and all of them, be confirmed and established as against the said defendants, or any of them, or any person claiming through or under them, and that he have judgment for the land sued for, and writ of restitution; that he have his judgment for the value of the rentals thereon, for the value of the building torn down and destroyed, for all costs of this suit, and for general relief. And plaintiff will, in duty bound, ever pray."

To this petition the defendants filed the following answer December 4, 1896:

"And, answering to the merits, defendants,

Peters & Willis, deny, all and singular, the allegations in plaintiff's petition contained, except as in this answer admitted, and of this they put themselves upon the country. And, by way of further answer, defendants, Peters & Willis, allege the facts to be: That therefore, to wit, on the 30th day of August, 1888, plaintiff was indebted over \$12,000 to Wels Bros., of Galveston, Texas, and sundry other parties, payable at the office of Wels Bros., known as the 'pool creditors.' That, on the day and year last named, to secure the payment of said indebtedness, he made, executed, and delivered to W. H. Howard, trustee, for the use of Wels Bros. and his other named pool creditors, a trust deed conveying the lots and premises described in plaintiff's petition, including, also, other lands. That the said trustee subsequently refused to execute his trust, and H. J. Labatt was duly appointed as substitute trustee by the cestui que trustent, and H. J. Labatt sold said lots and premises described by plaintiff, under said trust deed, on January 5, 1892, before the court-house door of Polk county, to Leopold Wels, together with other premises, for the sum of \$1,885. Said Leopold Wels complied with his bid, and a deed of conveyance was executed by the said trustee on January 6, 1892, to Leopold Wels, and delivered to him, conveying the premises purchased. That said sale was made at the court-house door of Polk county because D. S. Chandler, before the time of the sale, requested H. J. Labatt, the trustee, to sell said property at Livingston, Texas, and not at Galveston, Texas; and the sale would have been made at Galveston, Texas, but for plaintiff's said request. Wherefore defendants say that plaintiff is estopped to deny the validity of said sale made at Livingston. That on March —, 1892, the said Leopold Wels conveyed, by deed, said lots and premises described in plaintiff's petition, for \$750, to J. W. Hammond. That said J. W. Hammond on the — day of February, 1894, for and in consideration of \$800 paid, sold, and by deed conveyed, said lots and premises described in plaintiff's petition, to W. D. Willis. That this purchase was made for and at the request of defendants, and by an agreement between them and W. D. Willis. That on the — day of July, 1894, the said W. D. Willis conveyed, by deed, to these defendants, said lots and premises described in plaintiff's petition, for the sum of \$800, of which these defendants paid cash \$100, and executed and delivered to said W. D. Willis their twelve promissory notes, payable to him or order, of even date with the deed, for \$58.33 $\frac{1}{3}$ each, payable in four, eight, twelve, sixteen, twenty, twenty-four, twenty-eight, thirty-two, thirty-six, forty, forty-four, and forty-eight months. That said notes have been paid as they matured.

"Defendants further allege: That when said lots and premises described by plaintiff in his pleadings were sold by H. J. Labatt, trustee, before the court-house door of Polk

county, and purchased by Leopold Wels, his bid for the property purchased was paid by crediting the totals (about \$1,885) on the said indebtedness of plaintiff to Wels Bros. and the other pool creditors. That the lots and premises described in plaintiff's petition were bid in by Leopold Wels for \$600, which was the reasonable value of said lots and premises. That said Leopold Wels was then the owner of the claim due by plaintiff to the firm of Wels Bros. That said Wels Bros. were the agents of the combined pool creditors of plaintiff, for whose benefit plaintiff executed his trust deed to W. H. Howard. That all of plaintiff's said pool indebtedness was payable at the office of Wels Bros. That Wels Bros. managed the entire collections of the pool indebtedness of plaintiff under the trust deed aforesaid. That, at said sale in Livingston, plaintiff, D. S. Chandler, was present, and assisted H. J. Labatt, the trustee, in selling said lots and premises described in plaintiff's petition, and then and there expressed himself satisfied with the sale of said property, and urged parties present at the sale to bid on the property then sold. That Leopold Wels bid in said property, lots 1, 2, 7, and 8, block 21, in Livingston, less 26x107 feet, N. W. corner of lot 2. That, when said lots and premises were offered for sale, plaintiff then publicly announced that he (D. S. Chandler) claimed the wooden cistern on the lots, and that Capt. T. L. Epperson owned the shop thereon, and that these did not go with the property about to be sold; and the trustee then admitted this to be correct. That this action of plaintiff at the sale, and plaintiff's actions at the said sale in urging persons to bid for the property sold, caused the agent, Leopold Wels, to bid in said property, which he would not have done but for the facts in this answer set up, and plaintiff's action of approval of the sale. Plaintiff then failed to give notice of his now pretended claim, when he should have spoken to have protected it, and he cannot now be heard to assert it. That all the property conveyed by plaintiff by his said deed was sold, and the proceeds of the sale credited on plaintiff's indebtedness, without liquidating it. That then Leopold Wels and the said pool creditors of D. S. Chandler accepted the terms of an assignment made by Chandler & Carr, a firm composed of plaintiff and John F. Carr. That O. E. Oates was the assignee of Chandler & Carr. That said assignee, at plaintiff's request, paid said pool creditors, including Leopold Wels, 20 per cent. of the indebtedness of plaintiff remaining unpaid, after deducting therefrom the proceeds arising from the said sale of plaintiff's lands under said trust deed. That on the — day of —, 1892, plaintiff proposed to Leopold Wels and the pool creditors that in consideration of the amount that the lands of plaintiff had realized under the sale made by the trustee aforesaid, at Livingston, Texas, and in consideration of the 20 per cent. that said O. E. Oates had paid Leopold

Wels on the pool indebtedness, he (Leopold Wels) and said pool creditors should therefore release him (D. S. Chandler) in full. That plaintiff's said proposition for adjustment was accepted by Leopold Wels and the entire pool creditors, * * * and D. S. Chandler was by them therefor receipted in full. Wherefore plaintiff is now estopped to deny the validity of said sale made under said trust deed, as he by his said request caused said sale to be made at Livingston, and by his said action ratified said sale, and ratified the sale of the trustee to Leopold Wels. That on the — day of July, 1892, in consideration of the fact that plaintiff's lands had been sold by the trustee, and the amount realized from said sales under the trust, the trustee, H. J. Labatt, accepted 20 per cent. of the remainder in full payment, and transferred the 80 per cent. remaining unpaid to plaintiff, D. S. Chandler. That this transfer was made to plaintiff in consideration of the amount realized from the sale of said lands under said trust deed, including the amount realized from the sale of the lots and premises described in plaintiff's petition to Leopold Wels, and this settlement was accepted by Leopold Wels and the pool creditors.

"Defendants further allege: That, before J. W. Hammond purchased the lots and premises described in plaintiff's petition from Leopold Wels, he went to D. S. Chandler, plaintiff, and asked him, in person, if he had any claim to said property, and if the title of Leopold Wels to the same was good. That plaintiff then informed said J. W. Hammond that he made no claim at all to said property, save only that a cistern on the ground belonged to him, and that a workshop on it belonged to Capt. T. L. Epperson. Plaintiff said that the title to the said lots and premises was perfect in Leopold Wels, and plaintiff then urged said J. W. Hammond to purchase the said lots and premises. That said J. W. Hammond then bought said lots and premises because of the said statements made by plaintiff, and paid therefor \$750. That J. W. Hammond would not have purchased said property, but for the statements made to him as aforesaid by plaintiff, which was a complete ratification of said sale, and validated it. Wherefore plaintiff is now estopped to deny the truth of said statements to J. W. Hammond.

"Defendants further allege: That, during the time said J. W. Hammond owned said lots and premises, he rented the same about nine months to O. E. Oates, assignee of Chandler & Carr. That during this time plaintiff had charge of the premises as a clerk of the assignee, and saw the rents of the premises paid monthly to J. W. Hammond,—making them himself,—and made no claim to the rents, and did not object to J. W. Hammond's claim to the rents and premises. That, during the time J. W. Hammond owned said premises, he rented the same ostensibly to W. F. Gibson, but really to plaintiff, for four-

teen months. That, though the drugs on the premises were sold by O. E. Oates to W. F. Gibson, the sale was colorable only, and D. S. Chandler was the real owner. That D. S. Chandler had charge of the drugs for fourteen months, and during that time rented said premises from J. W. Hammond, and paid him rent therefor monthly; and during this time the plaintiff made no claim to said premises or said rents, but was the tenant during that time of J. W. Hammond. That, by the acts of plaintiff during the time J. W. Hammond owned said premises under the deed of Leopold Wels, he (plaintiff) acknowledged J. W. Hammond's title to said premises as good, and thereby recognized it to the world; and plaintiff is now estopped to deny the validity of the title of J. W. Hammond, or these defendants who claim through him. That on February 28, 1894, said J. W. Hammond sold and conveyed for \$900 said lots and premises to W. D. Willis. That W. D. Willis purchased said premises for defendants, Peters & Willis, and for their benefit, and for the purpose of conveying it to them. That prior to the sale of J. W. Hammond to W. D. Willis, and in contemplation thereof, defendant W. L. Willis went to plaintiff, and told him that he was contemplating purchasing said lots and premises, and asked him if the title of J. W. Hammond to said property was good, and if he (D. S. Chandler) had any rights in the premises, or any claim to the lots and premises. That then plaintiff informed defendant W. L. Willis that the title of J. W. Hammond in and to said lots and premises was good, and that he (D. S. Chandler) did not claim the same, and had no claim thereto, except that the cistern belonged to him, and was reserved in the sale, and that the shop on the land belonged to Capt. T. L. Epperson, and was reserved in the sale by the trustee. That plaintiff then urged defendant W. L. Willis to buy said premises. That, acting upon these statements to W. L. Willis, which he communicated to W. D. Willis, he (W. D. Willis) purchased said property of J. W. Hammond for these defendants, at the instance and request of these defendants. That, but for said statements of plaintiff to W. L. Willis, said W. D. Willis would not have purchased said lots and premises, and, but for said statements of plaintiff, defendants would not have permitted W. D. Willis to purchase said property for them. That subsequently, on July 12, 1894, said W. D. Willis, by deed, conveyed said lots and premises to these defendants for \$800. That, though the deed from J. W. Hammond was taken in the name of W. D. Willis, the purchase was made at the instance and request of these defendants, and for their benefit, and to be deeded to them by W. D. Willis at the terms agreed on by and between defendants and W. D. Willis before the purchase aforesaid from J. W. Hammond. That, but for the statements of plaintiff to defendant W. L. Willis as afore-

said, defendants would not have purchased said lots and premises, and, but for statements of plaintiff to W. L. Willis, they would not have agreed with W. D. Willis for him to purchase said lots and premises of J. W. Hammond for them, and said W. D. Willis would not have purchased said premises. Therefore defendants say that plaintiff thereby ratified and confirmed the said sale under the trust deed to Leopold Wels, and the sale from Leopold Wels to J. W. Hammond, and the sale of J. W. Hammond to W. D. Willis, and plaintiff is estopped to deny the validity of the title of defendants to said property, or the title of J. W. Hammond, or the title of Leopold Wels, at the time they conveyed as aforesaid. And, by reason of the facts herein pleaded, plaintiff is estopped to deny: (1) The validity of the title of Leopold Wels acquired by him at the said sale, because plaintiff's aforesaid words and acts at and before the sale caused Leopold Wels to believe (he having knowledge thereof) that, if he purchased said lots and premises, he would get a good title thereto, and that plaintiff approved and ratified the sale. If plaintiff had then claimed the premises, Leopold Wels would not have purchased. Having then failed to give notice of his claim, he cannot now assert it. (2) The validity of the title of Leopold Wels when he conveyed to J. W. Hammond, because of plaintiff's admission to J. W. Hammond that Leopold Wels' title was good, and that plaintiff had no interest in the property, and but for this J. W. Hammond would not have purchased it. (3) The validity of J. W. Hammond's title when he conveyed to W. D. Willis, because plaintiff admitted it to W. L. Willis, and but for this W. D. Willis would not have bought. (4) The validity of the sale under the trust deed, because plaintiff requested the trustee to sell at Livingston as aforesaid, and, further, plaintiff, when he settled with H. J. Labatt, admitted it, and received in his settlement the consideration of the trust sale as a credit on his pool indebtedness, and for this consideration in part, H. J. Labatt transferred to plaintiff 80 per cent. of the unpaid pool indebtedness.

"And, by way of further plea in this behalf, defendants say that plaintiff's cause of action, if ever he had any, accrued more than four years next before the filing of this suit, and is therefore barred by the statute of limitation. [Plea of statute of limitation of four years.] And, by way of further plea in this behalf, defendants come and suggest to the court that they, and those under whom they claim, have had adverse possession in good faith of the premises described in plaintiff's petition for more than one year next before the commencement of this suit. And defendants say that on the — of March, 1892, Leopold Wels had said premises, by regular transfers, from the state of Texas to himself; that on this day, for a valuable consideration paid by J. W. Hammond, Leopold Wels con-

veyed, by special warranty deed, said premises to J. W. Hammond; that J. W. Hammond at once took possession of said premises; that on the 28th day of February, 1894, for a valuable consideration paid to J. W. Hammond, he conveyed said premises to W. D. Willis, who at once took possession under his deed; that on the 2d day of July, 1894, for a valuable consideration paid to W. D. Willis by defendants, Peters & Willis, W. D. Willis conveyed, by valid, executed, special warranty deed, to Peters & Willis, defendants, said premises. That defendants at once took possession of said premises. And defendants allege that the said trust deed and the aforesaid deeds were each duly filed and recorded in the proper deed and mortgage records of Polk county at once after said instruments were executed as pleaded, and plaintiff had actual as well as constructive notice thereof from the time of their execution; that these defendants then believed, and had good reason to believe, that they thereby acquired a good and valid title to said premises. And defendants say that they have made permanent and valuable improvements on said lots and premises since they have held possession under said deed, of the value of \$417.95, shown by Exhibit Z, hereto attached, and made a part hereof. And defendants pray for judgment for the value of said improvements, in case judgment herein be rendered for plaintiff for said premises, or any part thereof, on which said improvements are situated.

"Defendants further allege, and here charge the facts to be, that, when Leopold Wels purchased said premises at said sale, he had no knowledge of any defects in plaintiff's title; that, when J. W. Hammond purchased said premises of Leopold Wels, he had no knowledge of any defect in the title to the property he purchased; that, when W. D. Willis purchased said premises of J. W. Hammond, he had no knowledge of any defects in the title to the property he purchased; that when defendants, Peters & Willis, purchased said premises as aforesaid, they had no knowledge of any defects in the title to the property they purchased. And defendants further allege, and here charge the facts to be, that the said trust deed from plaintiff, D. S. Chandler, to W. H. Howard, trustee, for the use of said beneficiaries, gave power of substitution, granting to the substitute trustee the same powers given the original trustee; that said trust deed authorized and empowered the trustee or his substitute, when said property was sold, to convey to the purchaser thereof a deed, with full covenants of warranty of title from plaintiff, binding the said D. S. Chandler, his heirs and assigns, thereby; that plaintiff, by his said trust deed, expressly covenanted thereby with said beneficiaries and said trustee and his substitute that the sale made under said trust deed should forever be a perpetual bar against the said D. S. Chandler, plaintiff, his heirs and assigns, and all

persons claiming under any of them, and that the recitals in the conveyance to the purchaser should be full evidence of the truth of the matters therein stated, and all prerequisites to the sale should be presumed to have been performed. Defendants allege that the deed executed by H. J. Labatt, substitute trustee, under said power, to Leopold Wels, conveyed said premises here in question to Leopold Wels, his heirs and assigns, with full covenants of warranty, as authorized by said trust deed; that by the terms of said trust deed, taken in connection with the facts pleaded by these defendants, plaintiff is now estopped from claiming a prior or subsequently acquired title to said premises by or through any person or parties whomsoever. And defendants here now plead against said plaintiff, in reconvention, his said warranty and covenants in said trust deed, and in the deed of said substitute trustee to Leopold Wels, under and through whom these defendants claim, and pray for judgment as the facts may show defendants entitled to receive. And, by way of further plea, defendants say that they have rendered and paid taxes on the property sued for in this case since they purchased the same, to wit, fifty dollars per year; that, in case plaintiff recovers in this suit, then defendants are entitled to recover, as a part of their judgment in this case, the taxes so paid.

"Considering the premises, defendants pray that, if plaintiff prevails in this action, then that these defendants recover a judgment against plaintiff for \$600, the amount of the bid of Leopold Wels for the property in plaintiff's petition described when he (said Wels) purchased the same, which went as a credit on plaintiff's said indebtedness to Leopold Wels and said pool creditors, together with 10 per cent. interest thereon from the day of sale, and that the same be decreed a lien against said premises, and the same be foreclosed; that defendants stand, in such event, subrogated to all rights of Leopold Wels and said pool creditors under said deed of trust, as to the amount due these defendants as aforesaid, carrying a lien as aforesaid. Defendants pray, in the alternative, that, in case their above prayer be not granted, then that they be decreed joint owners with Leopold Wels and the pool creditors in and to the full amount of the indebtedness of plaintiff to said Leopold Wels and the said pool creditors, without considering any credits by reason of the amounts realized under said trust deed, and annulling the releases made by Leopold Wels and the pool creditors to D. S. Chandler, and subrogating defendants to all the rights to which the evidence show them entitled under said trust deed by reason of their said purchase. Defendants pray for general relief."

"In the above-entitled cause, now come defendants, and, by way of plea in reconvention, allege: That plaintiff, D. S. Chandler, with full knowledge of the facts pleaded and set

out in the foregoing answer, instituted this suit, well knowing that he had no legal or equitable claim or right or title to the lots and premises described in his petition, or any part thereof. That plaintiff instituted this action against these defendants without probable cause, and maliciously intending to injure and damage these defendants, and by process of this court to get up a pretended claim of title to said property, and force these defendants to compromise this suit with him, and to pay him something in a compromise, rather than litigate this matter in a court. That by reason of this suit these defendants have been actually damaged, to wit, defendants have employed counsel to defend them, at defendants' expense and cost, \$250, and defendants allege that said fee is reasonable in this case. Defendants will be further damaged, in necessary expense to be incurred in procuring testimony, and time required to be given in this case by defendants in person, in preparing the defense, to wit, \$250. Defendants pray for their actual damages and for exemplary damages in the sum of, to wit, \$5,000."

On the same day, October 4, 1896, the plaintiff, in replication to defendants' answer, filed the following supplemental petition:

"Plaintiff would further show to the court that the J. S. Brown Hardware Company, under sheriff's sale duly and legally made on a judgment against plaintiff and his partner, John F. Carr, on the — day of —, 18—, became the purchaser of the land in controversy; that the levy and sale made, under which the J. S. Brown Hardware Company became the purchaser and owner of the land in controversy, was in all things regular; that there was no property belonging to the firm of Chandler & Carr subject to execution; that plaintiff was indebted to the said Brown Hardware Company, and on the 20th day of November, 1891, said Brown Hardware Company caused to be issued out of the district court of Galveston county a writ of attachment, directed to the sheriff or any constable of Polk county, Texas, which writ of attachment was duly levied by the sheriff of Polk county, on the 21st day of November, 1891, on the property in controversy; that, upon due proceedings had, said Brown Hardware Company recovered judgment in the district court of Galveston county against plaintiff and his partner, John F. Carr, and foreclosed the attachment lien obtained by levy of said attachment, and obtained from said court an order of sale to sell the land in controversy; that the sheriff of Polk county, under order of sale, duly and legally advertised, as required by law, the land in controversy for sale; that on, to wit, the — day of March, 1892 (it being the first Tuesday in March, 1892), the said sheriff, after said legal advertisement, sold said land, and the Brown Hardware Company became the purchaser thereof; that all of the proceedings aforesaid were in all things regular and legal, and the said Brown Hardware Company became then the owners

of the land in controversy; that, before the institution of this suit, plaintiff entered into negotiations with the said Brown Hardware Company for their title to said land under said sale, and did in fact and in truth make a trade and bargain with the said Brown Hardware Company for their title to the land in controversy, and fully owned said title before the institution of this suit. But plaintiff shows that the deed from the said Brown Hardware Company to plaintiff to the land in controversy was not executed until November 4, 1896. But plaintiff says that he owned and had title of the said Brown Hardware Company before this suit was instituted, but no deed for it. Plaintiff now alleges these facts by supplemental petition, and asks that he be allowed to use the title as above set out, in connection with his title, in the trial of this case, to establish his right to the land in controversy. And plaintiff says further that the discharge of the assignee, O. E. Oakes, as shown, had nothing to do with this litigation; that plaintiff brought suit against said Oakes to force him to make due showing of his said acts as a trustee under a different trust from the one under which defendants claim this title, and plaintiff says that, if there is any act or fact in the Oakes matter that is prejudicial to plaintiff's rights in this matter, the same ought to be considered, and the same was not authorized by such proceeding, and plaintiff had no intention of, and did not believe that he was, ratifying any act or part in the transaction by which defendants claim title to the land in controversy, and the title herein was no way involved in the Oakes matter. And plaintiff says the alleged change in the deed of trust by plaintiff authorizing sale of land in Polk county is not shown to be in writing, and is insufficient to vary the terms thereof. And, for further plea, plaintiff says that all the claims against plaintiff secured by trust deed to W. H. Howard, and to which claims defendants claim subrogation, and of which defendants pray foreclosure, became due and accrued more than two and four years before defendants sought any legal relief in the court, and are therefore barred by the statute of limitation, and plaintiff pleads the two and four years' statute of limitation. And, for further plea in this behalf, plaintiff denies each and every allegation in said answer contained, save such as in this plea admitted. Wherefore plaintiff prays as in original petition."

On the 8th of October, 1896, the defendants filed the following trial amendment:

"That from the day said sale took place under said trust deed by H. J. Labatt, substitute trustee, up to the time of filing this suit, plaintiff studiously concealed from Leopold Wels, from J. W. Hammond, from W. D. Willis, and from these defendants all knowledge of the facts he now pleads,—that he claimed the land in question since said sale, and intended to hold that said trust deed was not legally foreclosed,—but, on the contrary, ever since said

sale, up to the filing of this action, plaintiff has lulled to repose and nonaction Leopold Wels, J. W. Hammond, W. D. Willis, and these defendants, by asserting all during said time that he (plaintiff) approved of said sale, and did not claim any right in or to the premises here sued for, adverse to Leopold Wels, to J. W. Hammond, to W. D. Willis, or these defendants; that, had plaintiff asserted any claim during said time to said premises, then Leopold Wels, J. W. Hammond, W. D. Willis, and these defendants, or those then claiming said premises under said trust sale, would have at once instituted suit against plaintiff. And of this defendants put themselves upon the country."

On the trial of the cause on the 15th of June, 1898, the plaintiff was permitted by the court, over the objection of defendants, to take a nonsuit; and the court rendered judgment that plaintiff take nothing by his suit, and that the defendants go hence without day, and recover of the plaintiff their costs, to all of which the defendants excepted, and gave notice of appeal, and in this court present the following assignments of error: "First Assignment of Error. The trial court erred in permitting plaintiff to take a nonsuit over the objection of defendants' counsel; holding that defendants' pleas were all defensive, and did not entitle defendants to a judgment against plaintiff on the issues pleaded by defendants and joined by plaintiff. Second Assignment of Error. The trial court erred in holding that the defendants' plea in reconvention and for damages against plaintiff was subject to exception, and did not prevent plaintiff from taking a nonsuit, which the court permitted plaintiff to have entered over defendants' objection and exception."

These assignments, in the opinion of a majority of the members of this court, are not well taken, as, in their judgment, the matters pleaded by the defendants are purely defensive, and do not, as pleaded, entitle the appellants to a judgment giving them affirmative relief, and that the judgment of the lower court should be affirmed. In this judgment of the court I cannot concur, and I respectfully dissent therefrom. The appellants deign title to the property in litigation from a sale made under a deed of trust executed by the appellee; and appellee, by his suit, seeks to have the deeds of conveyance constituting appellants' chain of title canceled, because, as he alleges, the sale by the trustee was void, in that the deed of trust authorized and required that the property be sold in Galveston, but that it was sold, in violation of the express terms of the power of attorney, in Livingston. The appellants, by their answer, admit that the deed of trust required the sale to be made in Galveston, but aver that it was made in Livingston at the special request of the appellee, and that appellee was present at the sale, and aided and assisted the trustee in making the sale, and then and there approved the same; and they further aver that

the appellee afterwards affirmed and ratified the sale, and that he declared to each of appellants' vendors, and to appellants themselves, before the property in question was severally purchased by them, that he (appellee) made no claim to the property, and that the sale by his attorney under the deed of trust aforesaid passed the title of the property from appellee to the purchaser at said sale. These matters were pleaded by appellants as constituting an estoppel, and they further pleaded that the deed of trust authorized the trustee to convey the land to the purchaser at the trust sale, with covenant of general warranty, and that the land was so conveyed by the trustee to the purchaser at the trustee's sale. The appellee, by his supplemental petition, asserted a title subsequently acquired to the property, and, in addition, joined issue with the appellants upon the facts pleaded by them in estoppel. Thus, it is apparent that the appellants' title to the property, if title they had, rested in part in parol. The deed of trust, requiring the property to be sold in the city of Galveston, was, it seems, of record in the county in which the property was sold, in disregard of his duty, by the trustee, and without authority, as charged by the appellee; and, since the sale by the trustee, the property had been sold by the sheriff of the latter county, under execution, to satisfy a judgment rendered in favor of a creditor of appellee, and from the purchaser under the execution sale the appellee bought the property, and is asserting title thereto in this suit. If the averments made by appellants in their answer of December 4, 1896, be true, the appellee is estopped from claiming the property in controversy; and it is therefore essential, for the security of their title, and for the removal of the cloud therefrom, that appellants should have a judicial decision upon the issues joined between them and appellee as to the facts pleaded by appellants in estoppel. The fact that the appellants pray for no specific relief is, it seems to me, immaterial. They allege what they aver to be the facts under which the trustee made sale of the property in Livingston, instead of Galveston, and under which they and those under whom appellants claim were induced to buy the property, and pray for such judgment as the facts entitled them to; and such facts, assuming the averments of the answer to be true, clearly show (in the language of the decisions of our supreme court, and in the words of the statute) in the appellants "a cause of action arising out of, or incident to, or connected with the plaintiff's cause of action." The lower court, therefore, in my opinion, erred in entering a judgment of dismissal over the objection of the appellants, and in not retaining the case, and trying and deciding the issues joined between the parties upon the matters alleged by the appellants in estoppel; and for such error the judgment should be reversed, and the cause remanded. *Vide Egery v. Power*, 5 Tex. 501; *Hammonds v. Belcher*, 10 Tex.

271; *Carlin v. Hudson*, 12 Tex. 202; *Scalf v. Tompkins*, 61 Tex. 479; *Cannon v. Hemphill*, 7 Tex. 184. The judgment is affirmed, in accordance with the opinion of the majority of the court. Affirmed.

PLEASANTS, J., dissents.

SOUTHWESTERN TELEGRAPH & TELEPHONE CO. v. JENNINGS et al.

(Court of Civil Appeals of Texas. April 29, 1899.)

JUDGMENT BY DEFAULT—VACATION.

On the appearance day of the first term of the county court, after the filing of a record of an appeal by a defendant from a justice's court, a judgment by default was rendered against defendant. The pleadings were oral except the account sued on; and the justice failed to make a note of defendant's pleadings on his docket. The day before said appearance day, defendant's attorney, who had sole charge of the case, was taken sick, and was unable to attend to the case until a few days after the rendition of judgment, whereupon he moved to set the judgment aside, showing that defendant had a meritorious defense. *Held*, that a refusal to grant the motion was error.

Appeal from Harrison county court; James W. Pope, Judge.

Action in a justice's court by R. L. Jennings and another against the Southwestern Telegraph & Telephone Company. From a judgment for plaintiffs, defendant appealed to the county court, which rendered a judgment by default for plaintiffs. From a refusal to set the judgment aside, defendant appeals. Reversed.

W. S. Bramlitt, for appellant. Marvin Turney, for appellees.

BOOKHOUT, J. This suit was instituted by R. L. and S. B. Jennings in the justice court of precinct No. 3, Harrison county, Tex., on July 27, 1898, against appellant, the Southwestern Telegraph & Telephone Company, on an account for the sum of \$195, wherein plaintiffs claimed that the defendant had damaged certain property of the plaintiffs by cutting therefrom certain trees and timber during the months of June and July, 1898. The defendant entered its appearance in said justice court in due time by a general demurrer and general denial, and thereafter, on the 16th day of September, 1898, the case was tried before the justice of the peace, and judgment rendered for the plaintiff and against the defendant for the sum of \$150. The defendant perfected its appeal from said judgment to the county court of Harrison county, Tex., by filing its appeal bond with said justice of the peace on the 26th day of September, 1898. The transcript of the record and the appeal bond filed with said justice were filed with the clerk of the county court of Harrison county on the 6th day of October, 1898. The case was called in said county court on the appearance day, same

being the 18th day of October, 1898, of the first term of the county court next succeeding the day said transcript and record and appeal bond were filed with the clerk thereof, and judgment entered against the defendant (appellant) by default for the sum of \$150, as appears by the said judgment. The appellant filed its first amended motion for a new trial and rehearing upon the merits, amending its motion filed October 21, 1898,—which last motion was not filed earlier than said date for the reasons hereinafter set out,—upon the 31st day of October, 1898, which said amended motion was by the court overruled, to which action of the court the appellant then and there in open court excepted, and gave notice of appeal to the court of civil appeals for the Fifth supreme judicial district. An agreed statement of facts was approved and filed October 31, 1898, and the appeal bond of appellant as above was filed with and approved by the clerk of the county court on the 17th day of November, 1898. The assignments of error of the appellant were filed with said clerk on the 3d day of December, 1898. The county court adjourned the 5th day of November, 1898. The pleadings of both parties were oral, except the account sued upon, which was in writing. The justice failed to make a note of defendant's pleadings upon his docket. Under appellant's fourth and fifth assignments of error it presents a proposition to the effect that the defendant, the Southwestern Telegraph & Telephone Company, had a meritorious defense to the suit, which it was prevented from presenting in the county court by the unavoidable sickness of defendant's attorney to whom had been given the sole and exclusive management of the case; and a motion to set aside the judgment by default setting up these matters, having been timely made, should have been granted. The uncontradicted evidence introduced upon the hearing of the motion to set aside the judgment shows that the cause was tried in the justice's court on the 16th day of September, 1898, and a judgment rendered against defendant company. From this judgment said company appealed to the county court. The county court met on Monday, the 17th day of October, 1898, and on the next day,—it being appearance day,—upon the call of the appearance docket, plaintiffs, by their attorney, entered their appearance in said cause, and thereafter on the same day the cause was tried. The defendant (appellant here) not appearing in any way, a judgment was rendered for plaintiffs for \$150.

The evidence shows that within three days after the trial of the cause in the justice's court, upon the return of appellant's attorney to his home in Dallas, he was taken sick, and confined to his bed continuously until the 16th day of October, on which day he drove out to the fair grounds at Dallas, to see the general superintendent of the defendant company, to submit a proposition in reference to compro-

missing said cause. Upon his return he was again taken sick, and confined to his bed until October 20th, on which day he got up, and went to Longview, and there telephoned to plaintiffs' (appellees') attorney, asking him when it would suit him to try this case. He was then informed of the rendition of the judgment on the 18th. This was the first information that appellant's attorney had of the rendition of said judgment. He was the sole attorney in the case, and had the sole and exclusive management of the defense of said suit. On the 20th said attorney filed a motion to set aside said judgment, setting up the above facts, as well as others, which were disputed, and hence will not be now considered. The motion also set up that the company had a meritorious defense to said suit, stating specifically in what said defense consisted. This part of the motion was also supported by the uncontroverted evidence. We think, under these facts, defendant was entitled to have the judgment set aside, and an opportunity to present its defense. The proposition announced by appellant under its fourth and fifth assignments of error is supported by the authorities. *Goodhue v. Meyers*, 58 Tex. 408; *Dowell v. Winters*, 20 Tex. 797; *Holliman v. Pearlstone* (Tex. Civ. App.) 29 S. W. 542. For the error pointed out the judgment is reversed, and cause remanded.

KAHLER et al. v. BETTERTON et al.¹
(Court of Civil Appeals of Texas. March 4, 1899.)

MECHANICS' LIENS—SALE—PROCEEDS—DEPOSIT IN COURT—TAXES—PAYMENT—COURTS.

Where property is sold under foreclosure of mechanics' liens, and part of the proceeds belonging to the legal owner is, pursuant to decree, deposited in court to await its further order, the court has power to order taxes, due on the property before sale, paid out of such proceeds.

Appeal from district court, Dallas county; W. J. J. Smith, Judge.

Foreclosure of mechanic's lien by Samuel Caruthers against Mrs. J. B. Cowan and others. There was a decree for plaintiff, and, from an order directing taxes to be paid out of the proceeds of the foreclosure sale, all parties appeal. Affirmed.

Thomas Shearon, for plaintiffs. Morris & Crow, for defendants.

FINLEY, C. J. The record presented in this appeal is quite singular. It contains neither statement of facts, bills of exception, nor pleadings filed by appellants in the trial court. From the different papers embodied in the transcript, we gather the following information: In a certain suit (No. 10,300, Samuel Caruthers against Mrs. J. B. Cowan and others), in the district court of Dallas county, a decree was rendered establishing the me-

¹Writ of error denied by supreme court.

chanic's lien in favor of Caruthers for \$11,968.50, and in favor of Gary & Smith for \$1,922.93, upon the buildings and improvements situated upon a certain lot of land in the city, the legal title to which was decreed to be in W. J. Betterton and the Security Mortgage & Trust Company, of which H. A. Kahler was and is the receiver. It was also decreed that such improvements could not be removed from the land without great expense and loss, and it was adjudged that the improvements were of the value of \$10,800, and the lot of the value of \$7,200. It was ordered that, unless the said owners of the lot paid off said lien debts within 30 days, the lot and improvements thereon should be sold by the sheriff as under execution, and that the proceeds of the sale should be applied—First, to the payment of costs; second, three-fifths of the balance to the payment of said mechanic's lien debts pro rata, and the remaining two-fifths should be paid into the registry of the court, for Betterton, and Kahler, receiver, subject to the further order of the court. It appears that the property was regularly sold; that J. T. Elliott became the purchaser; and that the proceeds were applied in accordance with the decree and order of sale, \$3,458.07 being deposited in the registry of the court as the two-fifths going to Betterton, and Kahler, receiver. Caruthers, the plaintiff in the original suit, joined by Elliott, the purchaser of the property, demanded of the sheriff that he pay certain state, county, and city taxes due upon the property out of the two-fifths of the proceeds going to Betterton, and Kahler, receiver; and, on the sheriff's refusal to do this, they filed in said cause a verified motion, setting forth the taxes due on the property, and praying the court that it direct the payment of such taxes out of the said fund deposited by the sheriff in the registry of the court. Upon this motion no issue seems to have been joined by either Betterton, or Kahler, receiver. The court heard the motion, all the parties appearing, and ordered that two-fifths of such taxes should be paid out of said fund, and to this order all the parties excepted, and gave notice of appeal. No motion for new trial was made, and, as previously stated, no bills of exception and no statement of facts appear in the record. Appellants, though afforded the opportunity to defend against the motion in the trial court, filed no contest whatever, and seem to have reserved their right of contest wholly for this court, and here they attack the action of the court as fundamentally wrong. It is quite doubtful whether they should be heard to question the action of the trial court at all, under these conditions. At any rate, we must give every presumption in favor of the regularity and correctness of the proceedings below, and determine only the question of power of the trial court to make the order complained of. First, we must assume that the taxes were due by the owners, Betterton, and Kahler, receiver, upon the property at

the time of the sale and the entry of the order directing their payment out of the funds in the registry of the court; second, that the taxes were regularly levied and assessed against the property so as to constitute a lien upon it, under our statute. As between the sovereignties and the purchaser of the property at the sheriff's sale, the lien for the taxes continued upon the land, and it could be sold for the taxes. The purchaser did not become personally bound for the payment of the taxes, but his property was bound. Appellants were personally bound, and it was for their obligations to the state, county, and city that the liens attached to the land. The court had taken this property into equitable control. In order to do equity, it had it sold, and the portion of the proceeds belonging to appellants was in the possession of the court, and subject to its order. To do full equity, it was proper for the court to take cognizance of the taxes due on the property. No provision appears to have been made as to the matter prior to the sale, and, as the court had not released its jurisdiction, we can see no reason why it did not have the power to properly settle the equities after the money arising from the sale was placed in the registry of the court. As to whether the court properly meted out equity to the parties, we cannot undertake to determine upon the record before us. We simply determine that the court had the power to adjust the rights of the parties, and we must assume that this power was properly exercised, under the presentation here made. Appellees' contention that the court should have directed all the taxes paid out of the said fund, instead of only two-fifths, cannot be sustained. We have not the facts before us, and cannot know upon what conditions the court based its action. Judgment affirmed.

CARSON v. HOUSSELS.

(Court of Civil Appeals of Texas. April 8, 1899.)

FALSE REPRESENTATIONS—PLEADING—EVIDENCE—DAMAGES—INSTRUCTIONS.

1. A complaint for deceit must allege that the false representations were material, and that plaintiff was ignorant of their falsity, and was actually deceived thereby. An allegation that he relied on them is insufficient.
2. On an issue of the materiality of false representations as to the number of cattle in a herd, made by the seller to the buyer, evidence that the herd, as actually sold, was worth more than the price paid, and that, had the buyer known that it contained only the number which it actually did contain, he would nevertheless have bought it for the same price, is admissible.
3. The measure of damages for false representations by defendant that he had sold no cattle out of a certain herd is the difference between the value of the herd as it actually was and its value had it been as represented.
4. In an action for damages for falsely representing that defendant had sold no cattle out of a certain herd, an instruction that plaintiff is entitled to recover the reasonable market value of the cattle which defendant had sold, and

that in arriving at such market value the value of the cattle on the range as part of the herd should be considered, is erroneous, as authorizing the jury to infer that the measure of damages was the value of the cattle sold.

5. In an action for deceit, an instruction that the burden is on plaintiff to establish his cause of action by a preponderance of evidence, and that the burden is on defendant to show that he did not make the false representations complained of, is erroneous, since a failure of plaintiff to establish his cause of action by a preponderance of the evidence entitles defendant to a verdict.

6. In an action for deceit by the seller of a herd of cattle, in misrepresenting the number of animals he had sold out of the herd, an instruction that the burden is on the seller to show that he represented only that he had not sold any cattle during a stated time is erroneous, where the seller has testified that the representation was that he had sold only a stated number during that time.

Appeal from Wilbarger county court; James R. Talbert, Judge.

Action by J. H. Houssels against T. A. Carson. There was a judgment for plaintiff, and defendant appeals. Reversed.

J. A. Lucky and L. P. Bonner, for appellant. J. M. Basham and R. W. Hall, for appellee.

CONNER, C. J. This was a suit by appellee, in the county court of Wilbarger county, to recover damages alleged to have been done him by reason of the alleged fraud and deceit of appellant in the sale of cattle. It was alleged that appellee on the 3d day of September, 1895, purchased the brand, and all cattle therein, owned by appellant, at the agreed price of \$2,100 in cash paid at the time; that appellant, at and before the sale, represented that he owned all the cattle, save 7 head, in said brand; that he had brought said brand of cattle to Wilbarger county in the year 1888, and that there were then 78 head of cattle in said brand; that since that time but seven head had been sold,—2 cows and 5 steers; and that there were at the time of such sale 300 cattle, more or less, in said brand. Appellee alleged that these representations were falsely and fraudulently made to induce him to make such purchase; that in truth appellant had sold out of said brand 44 head of cattle since the time named, 37 more than as so represented, of the value of \$30 each; that, relying upon said representations, he made the purchase as stated, whereby he had suffered damage to the extent of the value of the 37 head so sold. And he prayed for judgment in the sum of \$995. The trial was by jury, and resulted in a verdict and judgment for appellee in the sum of \$425, from which appellant has duly appealed to this court.

We think the special demurrers to appellee's petition should have been sustained, as insisted upon in the second and third assignments of error. The petition alleges that appellee, "relying upon" the alleged false representations, made the purchase, etc.; but, to sustain his action, it was necessary, not only that appellee should have relied upon the im-

puted representation, but it also must have been a material statement. It must have been a material inducement to the trade. Appellee must have been ignorant of its falsity, and have been actually deceived thereby, and his petition should have so alleged. This is particularly true in this case, in view of the fact that the sale was for a gross sum, the bill of sale executed by appellant conveyed in the designated brand 300 head, "more or less," and appellee himself testified that appellant refused to guaranty any specific number. There was also evidence tending to show that appellee, in person or by agent, made some investigation as to the number of cattle in the brand. It therefore became important to appellant to have the necessary issues clearly and sharply presented. 2 Story, Eq. Jur. § 890; Irvine v. Grady (Tex. Sup.) 19 S. W. 1080; Jackson v. Stockbridge, 29 Tex. 394.

In the fourth, fifth, and sixth assignments of error, complaint is made at the action of the court below in refusing to permit appellant to prove by appellee and others, as he sought to do, that the brand and cattle actually received by appellant were worth more than the \$2,100 paid, and to ask appellant, on cross-examination, while on the witness stand, "that if at the time of the sale * * * he had known, of his own knowledge, that there were 225 head of cattle in said brand, and that he would receive that number, would he have given the sum of \$2,100 for said brand of cattle?" It is asserted in appellant's brief, and not denied in the brief of appellee, that the evidence offered would have shown that appellant in fact received 225 head of cattle in the brand bought, of the value of \$12 each, and that appellant would have answered the above question and testified "that if he had known, of his own knowledge, at the time of his purchase of said brand of cattle, that there were 225 head of cattle in said brand, and that he would receive that number, he would have given the sum of \$2,100 for said brand of cattle on the range, regardless of any representations made by defendant concerning the number he had sold out of said brand of cattle since he brought them in Wilbarger county." We are of opinion that this evidence was admissible on the issue of the materiality of the alleged false representation. As we have seen, one of the vital issues was whether the false representation, if any, was a material inducement to appellant's purchase, and appellant had the right to have the value of the brand and cattle, as actually existing and received by appellee, before the jury, to be considered by them as a circumstance, together with all other evidence, in determining whether in fact the representation, if made as alleged, was material and operated as a material inducement to appellant's purchase. On the same ground, we think the interrogatory put to appellant on cross-examination was a proper question, under the circumstances. The right

of cross-examination is a valuable right, and appellant should have been permitted the privilege of probing the conscience and knowledge of appellant on this issue, and of showing, if he could, that appellant in fact did not rely upon the alleged false representation, and was not induced thereby to make the purchase.

The ninth, tenth, and twelfth assignments complain of the charge of the court. After instructing the jury that if they found the alleged representations to have been made, and to have been false, as alleged, and that appellant relied thereon, and was materially induced thereby to make the purchase, etc., the court further instructed them that they would, in the event they so found, find for plaintiff "against the defendant, Carson, the reasonable market value of all cattle sold out of said brand of cattle to Herring, Fox, Wilson, and McCreary (the purchasers of the 37 head) on the range of said brand of cattle, in Wilbarger county, Texas, on September 3, 1895, the date of the transaction between the parties; and in estimating plaintiff's damages, if any, and in arriving at the market value of the cattle or steers sold to said Herring, etc., you should consider the market value of such steers as though they had never been sold and separated from the main brand, and as though they were supposed to be running on said range as a part and parcel of the main brand of cattle sold to plaintiff by defendant on September 3, 1898." The measure of damage was not the value of those so sold. We are of opinion that the true rule of damage in this case was the difference in value, if any, at the time of the sale, between the brand and the cattle on the range, in the condition in which they actually were at the time, and the value of such brand and cattle under the same circumstances had the facts been as represented. *Farmer v. Randel*, 28 S. W. 384; 2 Sedg. Dam. § 762; *Wheaton v. Olds*, 20 Wend. 174. From the latter portion of the charge quoted, we infer that the court below had in mind the true rule of damage, but we are not at all confident that the jury so understood it. As expressed, the jury may have believed, and most probably did believe, that the true measure of appellee's damage was the value of the cattle sold, or that the difference in the value of the brand and cattle as they were and as represented was necessarily the value of the 37 head sold. Neither proposition would be correct, and we therefore think the charge objectionable, as at least tending to confuse and mislead the jury.

The court also gave the following charge on the burden of proof: "The burden is upon plaintiff to establish his cause of action by a preponderance of legal evidence, and likewise the burden is upon the defendant to establish that he represented only that he had not sold any cattle out of said brand during past two years, as aforesaid, by a preponderance of legal evidence." The writer well knows the difficulty of accurately wording a charge during the heat and hurry of a trial, but we think

this charge clearly erroneous. The plaintiff's cause of action was based on the allegation that appellant had falsely represented that he was the owner of all the cattle in the "W" brand, and that he had brought 87 head to Wilbarger county in 1888, and had not since that time sold out of said brand more than 7 head, whereas he in fact had during said time sold 37 in addition to those he said he had sold. The burden of proof was upon appellee to prove these allegations by a preponderance of evidence, and a failure to do so would have entitled appellant to the verdict, in the absence of all evidence on his part. The error in this part of the charge is emphasized by the fact that it was alleged by appellant in his answer, and so testified to by him on the trial, that the only representation he ever made to appellee concerning said cattle "was that he had not sold out of said brand but seven head within two years next prior to the day of said sale." The charge quoted, among other things, informed the jury that the burden was on appellant to "establish that he represented only that he had not sold any cattle out of said brand during past two years." For the errors indicated, we think the case should be reversed and remanded, and it is so ordered.

SMITH v. ROACH et al.¹

(Court of Civil Appeals of Texas. March 11, 1899.)

SALE—FALSE REPRESENTATIONS—FAILURE OF CONSIDERATION—INNOCENT PURCHASER.

Where purchasers of an interest in a college were induced to execute a note for the price on representation that its debts amounted to a certain sum, while in fact they exceeded it, only a small part of such excess being known to the makers, and they were forced to pay more than the amount of the note to protect their purchase, there could be no recovery on the note in the hands of one not an innocent holder, and who had as yet paid nothing for it.

Appeal from district court, Dallas county; W. J. J. Smith, Judge.

Action by Ben W. Smith against J. W. Roach and others. There was a judgment for some of defendants, and plaintiff appeals. Affirmed.

Harris, Etheridge & Knight and John N. Wharton, for appellant. Morris & Crow, and Porter & Cohron, for appellees.

RAINEY, J. This suit was brought by appellant, Smith, to recover on a negotiable note executed by John W. Roach, W. L. Diamond, and M. Thomas Edgerton to A. S. Laird, who indorsed the note to appellant. Laird answered by general denial and special plea that he was a mere indorser, and prayed for judgment over against his co-defendants. Roach, Diamond, and Edgerton answered generally by general denial, and specially that said note

¹ Writ of error denied by supreme court.

was executed to said Laird as part consideration for his interest in the Oak Cliff College, and that at the time of said sale said Laird represented to them that the total liability of said college was \$2,200.12, which was believed and acted upon by them in making the purchase; that said representation was false, in that said liabilities then existing amounted to the sum of about \$4,000, which was known to said Laird, and fraudulently concealed from them; that the purchase of the interest by them was based upon the liability as represented by said Laird; and that they would not have purchased same had the true facts been known. They further pleaded fraudulent collusion between Laird and plaintiff; that with the knowledge and consent of plaintiff Laird transferred the note for the express purpose of defeating the defense which they had against same; and that Smith paid no consideration therefor. Special issues were submitted to the jury, on which judgment was rendered in favor of plaintiff against Laird for the amount of said note, and in favor of Roach, Diamond, and Edgerton, from which judgment Smith prosecutes this appeal.

Conclusions of Fact.

The note sued on was executed in consideration for the purchase price of Laird's interest in the Oak Cliff College. The college was conducted by Laird and Edgerton, Laird being financial manager, keeping the books, and concealing from Edgerton the true financial condition of the college; and at the time of the purchase Edgerton was not cognizant of the true status of the financial condition. In consummating the purchase, Edgerton was acting for himself, Diamond, and Roach, but Laird did not know that Diamond and Roach were interested with Edgerton in the purchase. In the negotiations for the purchase, Laird represented that the total indebtedness of said college was \$2,200.12, when in fact the total indebtedness amounted to \$3,640. He further represented that \$456 due and owing said college was good and collectible, when only \$304.40 of said amount was good and collectible. These representations were relied on by the purchasers, and induced them to make the purchase; they being ignorant of the excess of the liabilities above \$2,200.12, and also ignorant that a portion of said assets was not good and collectible, except Edgerton, who knew of \$350 of the excess of liabilities and of \$152.20 of the worthlessness of said assets. In order to protect their purchase, the makers of said note paid on the \$1,440 in excess of the \$2,200.12, the amount represented by Laird to be owing said college, the sum of \$1,031.65. On the 16th day of March, 1897, said Laird indorsed the note sued on, and transferred the same to appellant, Smith. In consideration therefor said Smith executed his note for \$900, payable to the order of said Laird, and to become due June 10, 1897, which said note was past due, and owned and possessed by said Laird at the date of the trial

of this cause. Laird transferred the note to Smith for the purpose of defeating the defenses to same claimed by appellees. At the time of the transfer of the note sued on by Laird to Smith, Smith was cognizant of such facts as put him upon notice of the defenses to said note, and he is not an innocent holder thereof.

Conclusions of Law.

The evidence was sufficient to warrant the findings of the jury that the makers of the note were induced to purchase Laird's interest in the college, and execute the note sued on, by the representation of Laird that the total liabilities of the college were much less than they really were; that the existence of said excess was unknown to them, except a small portion, known to Edgerton; and that they had paid more of said excess to protect their interest than the original amount for which said note was executed. This being so, the court did not err in rendering judgment for the makers of the note, unless appellant, Smith, was an innocent holder for value. Under the circumstances surrounding the transfer of the said note by Laird to appellant, the jury were warranted in finding that Smith was not an innocent holder of the note; and as the note for \$900, executed by Smith to Laird in consideration for said transfer, was past due, and still owned and possessed by Laird, Smith would not suffer loss, and he is in no attitude to complain. The various assignments of error complain of issues submitted to the jury, of the refusal to submit special issues requested, and of the findings of the jury. We deem it unnecessary to discuss the assignments in detail. In our opinion, there was no material error committed by the court, or in the findings of the jury. The judgment is affirmed.

HOLLOWAY v. SHUTTLES et al.

(Court of Civil Appeals of Texas. April 8, 1899.)

HUSBAND AND WIFE — PROPERTY OF HUSBAND — CONVEYANCES IN FRAUD OF WIFE — REMEDIES.

1. The owner of a business married, but subsequently abandoned his wife, and sold the stock. After the marriage the business was continued, but underwent no change in value, and no community funds were added. *Held*, that the wife had no such interest as entitled her to recover from the vendee, as the property was the separate property of the husband at the time of sale.

2. A wife, who is a creditor of her husband, cannot, by an equitable proceeding of receivership, sequester his property from a fraudulent vendee, and have it applied to her debt, where she has no community interest in and no lien on it, since she has only the remedial rights of other creditors.

Appeal from district court, Dallas county; W. J. J. Smith, Judge.

Action by Mrs. John G. Holloway against W. E. Shuttles and others to subject certain property to the payment of a debt. There

was a judgment from which plaintiff and defendant Shuttles appeal. Reversed.

This case is appealed upon an agreed statement of the pleadings and proof, under article 1014, Rev. St. The agreed statement is as follows:

"Statement of the Pleadings.

"This suit was brought by Mrs. John G. Holloway, hereinafter styled 'appellant,' in the Fourteenth district court of Dallas county, Texas, against her husband, John G. Holloway, G. R. Holloway, and W. E. Shuttles, hereinafter styled 'appellee.' Mrs. Holloway and the said Shuttles both complain of the judgment, and, the said John G. Holloway and G. R. Holloway not complaining of the judgment, the pleadings and proof, as it pertains to them, will be omitted, except so far as it may have a bearing upon the issues between appellant and appellee. Appellant, in her petition, alleged: The marriage of herself and John G. Holloway on February 27, 1897, in the city and county of Dallas, state of Texas, and the abandonment of her by her husband on April 2, 1897, and the subsequent and continued abandonment and absence in England of her said husband. The delivery by her, to her husband, after their marriage, of two hundred and fifty-five dollars (\$255.00) in money, and jewelry of the value of three hundred and fifty dollars (\$350.00), her separate property, which was used by him in the retail grocery business, in which he was engaged at the time of her marriage, and until his abandonment of her as aforesaid. That the defendant Shuttles, after the abandonment of her by her husband, had obtained possession, and had continued until now in the possession, of said stock of groceries and a lot of horses, harness, and delivery wagons, all of the reasonable value of two thousand dollars (\$2,000), and transferred to him notes and accounts of the reasonable value of fifteen hundred dollars (\$1,500), and all of which was the community property of herself and her husband, John G. Holloway. That the said Shuttles was in possession of the said property as the agent or trustee of her husband. That he had made a pretended purchase of the said property from her said husband, but that the said purchase by the said Shuttles was made for the sole purpose of defrauding appellant. That the sale was colorable, fictitious, and fraudulent, and for a grossly inadequate consideration, and was made for the sole purpose of defrauding appellant out of her money, and out of her community interest in said property. Appellant also alleged that the said appellee and her husband, Holloway, were irresponsible and insolvent; and asked for appointment of a receiver. Appellant prayed that upon final trial all of said property be decreed to her, or that she have judgment for one-half of said property, being her community interest therein, or that she have judgment for her said debt, and that the same be directed to be paid out

of said property. The appellee answered by a general denial, and specially that none of the said property was the separate property of appellant, nor the community property of appellant and appellee, but that all of the said property was the individual and separate property of John G. Holloway, and that the appellee was a bona fide purchaser for value of all of said property."

"Statement of Facts Proven.

"(1) On February 25, 1897, plaintiff and her husband, John G. Holloway, were married in the county of Dallas, state of Texas, and lived together as man and wife until April 2, 1897, when said defendant, Holloway, left and abandoned plaintiff and went to England, with the intention of permanently abandoning her, and has lived there continuously since. (2) Soon after their marriage, and before the abandonment of the plaintiff by the defendant, as aforesaid, the plaintiff loaned the defendant the sum of two hundred and fifty-five dollars (\$255.00) in money, and gave him her jewelry to use, which was of the value of three hundred and twenty dollars (\$320.00), no part of which, said money or jewelry, has ever been repaid to plaintiff by her said husband. That the defendant, John G. Holloway, owned no property of any kind, and had no income, except as herein stated. Plaintiff was then, and now is, insolvent. (3) At the time of the plaintiff's marriage, defendant John G. Holloway owned a stock of groceries, and at said time, as well as for several years prior thereto, was and had been engaged in the business of buying and selling family groceries at retail. After this marriage he continued in that business at the same place until his abandonment of plaintiff, on April 2, 1897. He carried on his business after marriage just as he did before marriage. He purchased goods sometimes on credit, and sometimes paid cash therefor, and sold at retail, both for cash and on credit, and as the stock of goods was depleted by sales he replenished the same by purchases. On April 2, 1897, when defendant Holloway sold said stock of groceries to W. E. Shuttles, hereinafter referred to, the value of said stock of groceries was the same as at the time of the marriage of plaintiff and said defendant, Holloway. On April 2, 1897, said defendant Holloway sold to the said defendant Shuttles the said stock of groceries; also some open accounts for goods that had been sold by said Holloway, partly before and partly after his marriage. Said defendant Holloway also, on said date, sold defendant Shuttles some horses, wagons, fixtures, and furniture which were owned by said defendant Holloway prior to the time of his marriage. The consideration paid by said Shuttles for said stock of groceries, open accounts, horses, wagons, fixtures, and furniture, etc., was \$529.98. This consideration was paid partly in cash, and the balance consisted in the assumption by said Shuttles of

the payment of the sum of \$329.98, which was the community indebtedness of the said Holloway and his wife for goods that had been purchased by him during his marriage. The reasonable market value of said stock of groceries was \$1,200, of the open accounts \$691, and of the horses, wagons, fixtures, etc., \$359; making the total value of said property and accounts \$2,250. John G. Holloway sold appellant's jewelry, receiving the value therefor in cash, the greater part of which, as well as the greater part of the money loaned to the said John G. Holloway by appellant was used by him in his business after his marriage, and prior to the sale to Shuttles. In making said sale to Shuttles it was the intention of the said John G. Holloway, at the time thereof, to defraud his wife, the plaintiff herein; and the defendant Shuttles knew of such intention at the time of his purchase. The value of the accounts of John G. Holloway at the time of his marriage was the same as the value of his accounts at the time of the sale of the said accounts to the said W. E. Shuttles. The indebtedness of John G. Holloway which the defendant Shuttles assumed to pay was paid by the said Shuttles. Said indebtedness assumed by the said Shuttles was the entire indebtedness of every kind of the said John G. Holloway, except his indebtedness to plaintiff. (4) The net profits arising from the business after the marriage until the time of the abandonment of plaintiff by defendant Holloway amounted to \$84. What is meant by net profits, are profits left after the payment of clerk's hire, house rent and all other expenses incurred in said business. (5) As a part of the consideration for the conveyance of the goods and property to him, W. E. Shuttles assumed in his purchase the payment of community indebtedness of Holloway and wife, in the sum of \$329.98, being for unpaid goods purchased by Holloway during his marriage. (6) On July —, 1897, the court heard plaintiff's application for the appointment of a receiver, as contained in her original petition, and on said date the court rendered the following judgment on said application: 'Mrs. John G. Holloway vs. W. E. Shuttles et al. No. 16,418. Be it remembered that on this day came on to be heard the application of the plaintiff, Mrs. John G. Holloway, for the appointment of a receiver; and the evidence and argument for the plaintiff and defendants being fully heard, and by the court understood, it is the opinion of the court that the plaintiff is entitled to the appointment of a receiver to take charge of the property described in the plaintiff's petition, in order to protect plaintiff's community interest therein. It is the opinion of the court that plaintiff in her capacity of creditor is not entitled to the appointment of a receiver, as she has an adequate remedy at law. And the court announced that a receiver would be appointed, unless the defendant W. E. Shuttles deposited in the registry of the court the sum

of \$500, subject to the order of the court, to abide the further orders and judgments in said cause; the said \$500 to be held as though realized from said receivership, and subject to such orders and judgment as if in receivership; and that W. E. Shuttles, at 5 p. m. on this date, deposited in the registry of this court the said sum of \$500, to abide whatever judgment the plaintiff may recover herein, and to escape the appointment of a receiver herein. It is therefore ordered by the court that the injunction herein against the said W. E. Shuttles be dissolved, and said receivership be denied and overruled, and the said \$500 being deposited in the registry of the court to abide any judgment in behalf of the plaintiff and the further order of the court. But it is provided by the decree that, should the judgment in favor of the plaintiff exceed \$500, this decree shall not in any wise affect such recovery. [Signed] W. J. J. Smith, Judge 14th Judicial Civil District.' The defendant Shuttles on the same date deposited in the registry of the said court the sum of \$500 in compliance with said judgment. (7) The defendant Shuttles was not insolvent on the date of his purchase from John G. Holloway, and has never been insolvent at any time since said date. (8) The court rendered judgment for the plaintiff against the defendant Shuttles for the sum of \$42 and all costs of suit, and directed the clerk to pay the same out of the money in his hands in the registry of the court. From said judgment plaintiff appeals, and defendant W. E. Shuttles, being dissatisfied also with said judgment, files cross assignment of errors. (9) Plaintiff contends that judgment should have been rendered in her favor against W. E. Shuttles for the full amount of her claim, with interest and costs, and that the amount of money deposited by Shuttles should be applied to that extent in payment thereof, and that she should have recovered the property, or her community interest, if any, therein, or its value, and five hundred dollars (\$500) paid to her pro tanto thereon.

"The defendant Shuttles contends that judgment should have been rendered in his favor.

"The sole issue submitted to the court by agreement upon this appeal is upon the contention, respectively, of the plaintiff and the defendant Shuttles; and it is agreed that, if neither of them is right, said judgment shall be affirmed. If either of them is right, then the judgment of the lower court shall be reversed, and judgment here rendered in favor of the plaintiff, or defendant, whose contention the appellate court may sustain, with appropriate judgment for costs of courts. No facts or issues shall be considered by the appellate court except those embraced and agreed upon herein."

Kearby, Muse & O'land, for appellant. Frank Reeves and Hudson & Woody, for appellees.

FINLEY, C. J. (after stating the facts). The first question which arises is, was the

stock of goods, accounts, horses and vehicles the separate property of John G. Holloway at the time of the sale to Shuttles, or was it the community property of himself and wife? If it was the separate property of the husband, the wife had no such interest in it as would entitle her to recover it, or any part of it, from the fraudulent vendee of the husband, who had abandoned her. At the time of the marriage the husband owned and conducted the business. The stock of goods and accounts were of the same value five weeks later, when he made the sale, and deserted the wife. The horses and vehicles were owned by the husband when he married. There had been sales and purchases of goods in stock between the dates of the marriage and the sale and desertion, but the business underwent no change in character or value. It was not shown that any community funds went into the business. Under these circumstances, can it be said that the stock of goods, accounts, etc., became transformed from the separate property of the husband to that of the community? This conclusion could only be reached by indulging the presumption that community funds had taken the place of the separate capital invested in the business at the time of the marriage. As stated, there is no evidence that such was the case, unless the fact that \$84, net profits, made during that time, should be considered as furnishing it. It does not even appear that such profits were reinvested in the business. Upon this state of case we would not be warranted in indulging the presumption that community funds went into the business, and we feel constrained to hold that the property was the separate property of the husband at the time of the sale to Shuttles. *Schmidt v. Huppmann*, 73 Tex. 112, 11 S. W. 175; *Cochran v. Sonnen* (Tex. Civ. App.) 26 S. W. 521; *Medlenka v. Downing*, 59 Tex. 32; *McDougal v. Bradford*, 80 Tex. 565, 16 S. W. 619.

2. Could the wife, by resorting to the equitable proceeding of receivership, sequester the property from a fraudulent vendee, and have it applied to the satisfaction of her just claim against the husband? It is quite clear that a simple creditor cannot secure the appointment of a receiver over his debtor's property, and have it applied to the satisfaction of his debt. He must first acquire a specific interest in the property. *Waples-Platter Co. v. Mitchell* (Tex. Civ. App.) 35 S. W. 201. It has been held that the wife who holds a debt against the husband possesses the same remedial rights as other creditors. *Ryan v. Ryan*, 61 Tex. 474. She could have, in this instance, sued the husband on her demands against him, attached the property in the hands of the fraudulent vendee, and had it applied to her debt against the husband. A like result could have been secured by garnishment proceedings. If, then, she has all the remedial rights of other creditors, the principles applying to simple creditors generally should govern in this case. In *Carter v. Hightower*, 70

Tex. 136, 15 S. W. 223, it is held that a simple creditor cannot invoke the equitable proceeding of a receivership, and by that means have the property of the debtor applied to the payment of his debt. The appointment of a receiver does not create any lien upon the property in favor of the creditor, or give him any specific interest therein. On the contrary, the object of such appointment is to preserve pre-existing rights in the property. Mrs. Holloway had no character of lien upon the property, was a simple creditor of the husband, and was in no attitude to question the validity of the sale to Shuttles. Her remedy was plain and complete; but she has mistaken it, and resorted to an equitable proceeding, in which she has no standing. As she had no community interest in the property, and no lien upon it, she was not entitled to have the property subjected to her debt. Shuttles was not shown to be personally liable to her, and she was therefore not entitled to any judgment against him. Judgment reversed, and here rendered for appellees.

JAYNE v. HANNA.

(Court of Civil Appeals of Texas. March 25, 1899.)

ADVERSE POSSESSION.

Adverse possession of land under the mistaken belief that it was covered by defendant's deed does not deprive it of any element necessary to support the plea of limitations.

Appeal from district court, Limestone county; L. B. Cobb, Judge.

Trespass to try title by A. A. Jayne against E. N. Hanna. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Kimble Bros. & Blackman, for appellant. Farrar, Williams & Farrar and Robert Hanna, for appellee.

FINLEY, C. J. A. A. Jayne sued Mrs. E. N. Hanna in trespass to try title for a lot of land, division No. 74 of the town of Groesbeck, in Limestone county, Tex., according to the map of said town drawn by Theodore Kosse. Defendant disclaimed as to part of the land, and pleaded not guilty and the statute of limitations of 10 years as to the other portion. The case was tried by the court without a jury, and resulted in judgment for the plaintiff for the land which was disclaimed by the defendant, and for the defendant for the other portion, upon her plea of 10 years' limitation. The plaintiff has appealed.

Plaintiff showed title to the land, and was entitled to recover, unless the defendant's plea of 10 years' limitation was sustained. The only issue, therefore, upon this appeal, is that of limitations. She had the land inclosed by fence, using and cultivating it for the full period of 10 years prior to the institution of the suit. At the time she took possession and fenced the land, she had no deed

to it. She bought what she supposed to be the land she had inclosed, but the deed covered only division No. 73, and not the land in controversy,—a part of division 74.. She held possession of the land in controversy, under fence and cultivation, for more than 10 years after her purchase, and previous to suit filed, believing it to be her land and embraced in her deed. Shortly before the full expiration or completion of her 10 years' possession from the date of her purchase, the agent of her vendor was informed that she held possession of the land, and that she would soon have title by limitation. This agent went to see her about the matter, and she went with him upon the land, and showed him her fences, and told him that she claimed all the land under fence, except some pasture land not here in question. The fences pointed out inclosed the land in dispute. She at the same time told him that her deed embraced this land, and that she was only claiming land that had been deeded to her. There is some conflict in the evidence here, the agent testifying that he did not go with her on the land and have it pointed out, etc. The court, however, found to the contrary, and we must regard the conflict as settled in favor of appellee. Upon this state of facts there really arises but one question, which is presented for decision. Does the fact that appellee held adverse possession of the land under the belief that it was covered by her deed, and that she had perfect title to it, when in fact it was not embraced within her purchase, deprive her possession of any element necessary to support the plea of limitations? This question we regard as settled in the negative. *Bisso v. Casper* (Tex. Civ. App.) 36 S. W. 345; *Hand v. Swann* (Tex. Civ. App.) 21 S. W. 282; *Bruce v. Washington*, 80 Tex. 368, 15 S. W. 1104; *Bracken v. Jones*, 63 Tex. 184. We find no error in the judgment, and it will be affirmed.

RANDOLPH v. MITCHELL.

(Court of Civil Appeals of Texas. April 15, 1899.)

LEASE—FORFEITURE—NONPAYMENT OF RENT—IMPROVEMENTS—CONSIDERATION FOR EXTENSION OF TIME.

1. To authorize a forfeiture of a lease for nonpayment of rent, under a provision empowering the landlord to declare a forfeiture in such case, it is not necessary that the failure to pay the rent should be willful.

2. Under a lease requiring the tenant to make certain improvements, to be designated by the landlord, in lieu of rent, the tenant is not entitled to credit for improvements made by him without the request of the landlord.

3. An agreement, without consideration, to extend, without interest, an installment of rent due on a lease, is invalid.

Appeal from Bosque county court; W. B. Thompson, Judge.

Action by L. V. F. Randolph against O. S. Mitchell for rent. There was a judgment for defendant, and plaintiff appeals. Reversed.

The lease in question required the tenant, in lieu of rent, to make improvements of a stated value on the premises, to be designated by the landlord or his agent.

P. B. Ward, Gillette & Hall, and Lockett & Kimball, for appellant.

STEPHENS, J. In October, 1894, appellant entered into a written contract with appellee, by the terms of which he leased to him a farm in Bosque county for the term of two years, beginning January 1, 1895, with an option reserved to appellee of continuing the lease for three additional years. The fourth clause of the lease contract provides "that on the failure to pay the rent, or any part thereof, as aforesaid, or to comply with any of the foregoing obligations, or on the violation of any of the foregoing covenants, the lessor may declare this lease forfeited, at his discretion, and he, or his agent or attorney, shall have the power to enter, and hold, occupy, and repossess, the entire premises hereinbefore described, as before the execution of these presents." On account of the failure of appellee to pay the rent due December 1, 1896, appellant, through his general agent, about June of the following year, re-entered and took possession of the farm under this clause of the contract, and also brought this suit to recover for the unpaid rent, including a sum claimed for improvements, which the appellee had failed to make on the farm as stipulated in the contract. In defense of this action, the appellee pleaded an agreement on the part of appellant's agent to extend for one year, without interest, the installment due December 1, 1896; and he further pleaded, in reconvention, this agreement to extend the time of payment, as an excuse for his failure to pay the rent at maturity, claiming damages resulting from the forfeiture and re-entry on the part of appellant. Upon a verdict finding in favor of appellee upon this issue, upon which the evidence was conflicting, and assessing his damages at \$450, judgment was entered therefor, after deducting the sums found in favor of appellant. Hence this appeal.

The fifth assignment of error reads: "The court erred in giving special charge No. 2, requested by defendant, in which the jury is instructed, in effect, that the right of the lessor to forfeit the lease depends, not upon the breach of the contract, but upon a willful breach thereof." The charge complained of reads: "At the request of the defendant, you are instructed that, in order to give a lessor a right to forfeit a lease contract, there must have been a willful breach of such contract by the lessee. You are therefore instructed that if you believe from the evidence that the defendant, in good faith, believed that the payment of the balance of 1896 rent, if any, was extended until the fall of 1897, then you will find for defendant, and against a forfeiture of the lease contract, for such breach, if any."

It is thus seen that the court made the right

of appellant to declare a forfeiture of the lease depend upon whether the act of the appellee in failing to pay the rent was willful, and that this is the feature of the charge that is complained of. The clause of the contract above quoted contains no such qualification, and we are of opinion that the assignment is well taken. True it is that forfeitures are not favored, and that, under proper circumstances, equity will relieve the lessee against the consequences thereof; but we know of no authority for holding that a breach of covenant which works a forfeiture in a lease must be willful to be effectual. The rule upon this subject is correctly stated, we think, in 2 Tayl. Landl. & Ten. § 496, as follows: "But courts of equity are only closed against a tenant where the forfeiture is incurred by his willful and culpable neglect to fulfill the terms of his covenant, and not in cases where the omission has been occasioned by inevitable accident. And the general rule to be applied to all such cases seems to be that courts of equity will relieve where the omission, and consequent forfeiture, are the result of mistake or accident, and the injury and inconvenience arising from it capable of compensation; but where the transgression is willful, or the compensation impracticable, they invariably refuse to interfere." In a note to this section it is said: "But, where the lessor's conduct has misled the lessee into supposing the covenant was not to be insisted upon, equity will relieve."

If, therefore, through accident or mistake, or the misleading conduct of the lessor, the lessee has failed to comply with the covenants of the lease, and adequate compensation can be made for the breach, relief will be afforded, there being no willful and culpable neglect on the part of the lessee. But it does not follow that, because equity will afford relief in a proper case where the breach of the covenant has not been willful, it will do so in all cases where it has not been willful. It will deny it in all cases where it has been willful, and grant it, where it has not been willful, in such cases as come within the domain of equitable relief. Of course, if, in this case, there was an agreement to extend the time of payment for 12 months, upon the faith of which appellee acted in the exercise of his option to renew or extend the lease, that would amount to a waiver of the right to claim a forfeiture, and the court so in effect charged the jury in the main charge, but erroneously required them to find that the failure to pay rent was willful, though no extension of the time for payment was agreed to.

We are of opinion that the fifth special charge requested by appellant should have been given, to the effect that, in estimating the value of improvements made by appellee, he should only have credit for such as he was directed or authorized to make by appellant's agent, as provided in the contract; the ninth error being assigned to the refusal of this charge.

We are also of opinion that the eleventh assignment of error should be sustained, complaining of the judgment in that it did not allow appellant interest on the sum recovered by him. According to appellee's own version, appellant received no consideration for the agreement to extend without interest the time for payment, whatever effect it may have had as a waiver or an estoppel on his right to forfeit the lease.

We find no merit in the other assignments. For the errors indicated, the judgment is reversed, and the cause remanded.

SHIELDS v. ORD et al.

(Court of Civil Appeals of Texas. April 8, 1899.)

DEPOSITIONS—INTERVENTION—FRAUDULENT CONVEYANCES—EVIDENCE—STATUTE OF FRAUDS.

1. A deposition taken in a case before intervention, subsequently admitted, but limited in its purpose to the original parties, cannot then be read in evidence by the intervener.

2. One who has conveyed his property to another, to hinder and delay his creditors, cannot afterwards set up the statute of frauds in avoidance of the conveyance, in a suit by his grantee.

3. Nor can his wife, who has intervened in the action, making a claim of her separate property, set up the statute of frauds. Such claim can only be made by creditors of the grantor.

4. Evidence that, upon a failure in business of a merchant, he made a deed of trust, and then, to reinstate the business, sold the homestead, taking notes payable to himself and wife, which were deposited in bank, with their joint indorsement; that the wife consented to sell on condition that the proceeds should become her separate property, which claim, however, was not interposed until two years after possession was taken by a purchaser under a purported sale by the merchant and the grantee of the trustee, more than one year after suit was brought by such purchaser to secure the property,—is sufficient to submit to the jury the question of the bona fides of the wife's claim to the property on intervention in the suit against her husband.

Appeal from district court, Dallas county; W. J. Smith, Judge.

Intervention by Mrs. Nettie Ord in an action by Kane Shields against T. G. Ord, to recover possession of real property and fixtures. Judgment rendered in favor of Shields against T. G. Ord, and in favor of Mrs. Ord against Shields, from which latter judgment Shields appeals. Reversed.

Dickson & Moroney, for appellant. Kearby, Muse & Oeland, for appellees.

STEPHENS, J. Mrs. Nettie Ord, the wife of T. G. Ord, on the 11th day of January, 1898, filed in the district court of Dallas county a plea of intervention in a sequestration suit then pending between Kane Shields and her husband, which had been instituted by Shields, January 4, 1897, to recover from T. G. Ord the possession of a certain saloon, including fixtures, on Murphy street, in the city of Dallas. To this suit T. G. Ord had answered by plea in reconvention, claiming dam

ages for the value of the saloon so taken from him and replevied by Shields, and also for the value of another saloon, on Lamar street, taken into possession by Shields without process. In Mrs. Ord's plea of intervention claim was made to the property of both saloons as her separate property; her contention on the trial being that in the year 1893 the homestead of Ord and wife had been invested in the saloon property, she consenting to a sale of the homestead with the understanding that the proceeds should become her separate property and be so invested, and that in furtherance of this understanding the bill of sale had been taken and the business conducted in the name of one Meisterhans, and that Shields, in seizing and converting the property in controversy, had rendered himself liable to her for its value. The main contention of Shields was that in October, 1895, he had purchased from T. G. Ord, and taken possession of, the property, under bills of sale from both Ord and Meisterhans, in whom was the apparent and legal title, paying therefor a valuable consideration, by canceling a debt due him from Ord, and assuming and paying other debts of Ord, without any notice of the claim of Mrs. Ord, and that thereafter the saloon business was conducted by T. G. Ord as the agent for Shields, up to the institution of the sequestration suit. T. G. Ord denied that the sale to Shields was real and absolute, but pleaded that it was simulated and fraudulent, and only a mortgage, etc. Upon these contentions, thus briefly stated, the case was tried, and a jury verdict returned in response to special issues submitted, resulting in a judgment in favor of Shields against T. G. Ord, and in favor of Mrs. Ord against Shields for \$2,500, the value of the saloon fixtures, from which latter judgment this appeal is prosecuted.

The jury found that the conveyance of the property in controversy from T. G. Ord to appellant, made in October, 1895, was not, as it purported to be, an absolute sale of the property, but that it was only a security for the debt owing by Ord to Shields, and the debts assumed by Shields in the alleged purchase, which Ord owed to other parties, and that these debts had all been paid. They further found that it was the purpose of Ord and Shields, in the transfer of the property from the one to the other, to cover or protect the same from the creditors of Ord, "and to hinder, delay, or defraud the creditors of Ord in the collection of their debts," and that the sale was a pretended one. They further found that the fixtures were the separate property of Mrs. Ord, and of the value of \$2,500.

Numerous errors are assigned to the court's rulings in the admission and exclusion of testimony, the most of which, we think, should be sustained, and substantially for the reasons given in appellant's brief, to wit, the sixteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-

seventh assignments. Of these, we will discuss only the sixteenth,—the others being of minor importance,—which complains of the admission in evidence in behalf of intervener of the ex parte deposition of T. G. Ord, taken before Mrs. Ord intervened, upon interrogatories propounded to him by Shields, which tended to show, among other things damaging to appellant, that the sale under which appellant claimed, together with the running of the saloons in his name, were but the means of deceiving the creditors of T. G. Ord, while the real title and management of the business remained with T. G. Ord. This version of the transaction between appellant and Ord was at variance with that given by appellant and the attorney who negotiated the sale and prepared the bills of sale. The position of one who intervenes in a pending controversy is somewhat peculiar, in that depositions already taken may be read in evidence by the original parties, but not by the intervener. 1 Sayles, Tex. Civ. Prac. p. 233, § 206, par. 2; Rainbolt v. March, 52 Tex. 246; 6 Enc. Pl. & Prac. p. 584; 11 Enc. Pl. & Prac. p. 589, and notes; Doane v. Glenn, 1 Colo. 495. The last case cited, as digested in the Encyclopædia of Pleading and Practice, seems directly in point on the proposition that intervener cannot read a deposition previously taken, though the case itself is not accessible. The very opposite of the foregoing seems to have been observed as the rule on the trial of this case; for when plaintiff below offered in evidence the answer of T. G. Ord to the thirty-fifth interrogatory, to the effect that from October 26, 1895, to January 4, 1897, the two saloons were run in the name of T. G. Ord as agent for Kane Shields, and that T. G. Ord so represented the matter to the mercantile agencies and others, which was the only part of the deposition offered by plaintiff, upon objection by intervener the court admitted the answer as against defendant T. G. Ord, but not against intervener. On the other hand, when intervener offered the deposition, it was admitted, over pertinent objections of plaintiff below, "without qualification as to its admissibility against or for any party." If any part of the deposition had been admitted in evidence against the intervener, she might then, perhaps, have read the rest, but such was not the case. It is contended in support of the ruling that the deposition was admissible against T. G. Ord, whose answer set up a claim to the property in his own right, and that appellant should have requested a charge limiting the scope of the evidence. True, Mr. Ord made no objection to the evidence, and he and his wife were adverse parties on the face of the record, but evidently they were in sweet accord in making a common fight against Shields. There was no occasion to request a charge limiting the testimony, since it was admitted expressly without qualification, and was evidently offered against plaintiff, Shields, and him only.

Under the eighth, ninth, and tenth assign-

ments of error, complaint is made of the court's charge. In so far as the charge may be construed as submitting to the jury the effect of the statute of frauds upon the validity of the conveyance from T. G. Ord to Shields, we think it was inapplicable and misleading. If the jury had concluded from the evidence that the saloon property really belonged to T. G. Ord, and not to his wife, and that he had made a real conveyance of it to Shields in fraud of his creditors, he could not be heard to set up such fraud in avoidance of his own act, and consequently there was no occasion for the jury to have been given the statute of frauds in charge upon the controversy between the original parties to the suit. No creditor of T. G. Ord was complaining of the transaction. Indeed, notwithstanding the verdict the court seems to have taken this view, in effect, in rendering judgment against T. G. Ord and in favor of Shields. Nor could the intervener avail herself of such a ground of recovery since she was not a creditor of T. G. Ord, and founded her right to recover alone upon the ground that the property was her separate property. If it was her separate property, it was, of course, not liable for the debts of the husband, and ordinarily no conveyance thereof by him could have affected her rights or those of his creditors. There was a phase of the case, however,—though whether covered by the pleadings we doubt,—in which, assuming that she owned the property in her own right, it was nevertheless subject to the payment of the debts created by T. G. Ord in running the business for her in the name of Meisterhans; and if in the settlement of these debts, which may be treated as hers, a real sale was made by T. G. Ord, who seems to have had plenary authority from his wife in the premises, it passed the title, no separate acknowledgment of the wife being required in such cases. *Ballard v. Carmichael*, 83 Tex. 355, 18 S. W. 734. But upon that phase of the case it was misleading to charge the jury, as was, in effect, done in one or more paragraphs complained of, that a transfer made for the purpose of hindering, delaying, and defrauding the creditors of T. G. Ord would not pass the title. If the sale was not real, but merely colorable (that is, to cover up the property without passing the title), the title did not pass, no matter who owned the property, and that issue was, as it doubtless should have been, submitted to the jury; but the charge submitting it was too much burdened with the legal effect of a conveyance by T. G. Ord for the purpose of hindering, delaying, and defrauding his creditors.

We are also of opinion that the thirteenth assignment of error should be sustained, reading: "The court erred in refusing to submit to the jury the fifth special issue requested by plaintiff, as follows: 'Was it the intention of Mr. and Mrs. Ord, or either of them, that the property included in the bill of sale from Payne and Slacke, trustees, to

Meisterhans, should in fact be the separate property of Mrs. Ord, or was this a mere pretense to protect the property from Ord's creditors?' " The answer of appellee to this assignment is that it was undisputed that the property in controversy was the separate property of Mrs. Ord. But we do not so read the record. The history of the property contains suggestions to the contrary. In the year 1893 T. G. Ord failed in business, and made a deed of trust. Very soon thereafter, in order to reinstate the business, the homestead, presumptively community property, was sold, and the notes taken for the deferred payments were used for that purpose. These notes seem to have been made payable to Ord and wife, and went into the bank with their joint indorsement. The conveyance of the saloon property was made by the trustees in the deed of trust to Meisterhans in order to conceal the real ownership, lest the claim of separate property in Mrs. Ord should invite an attack by the creditors of T. G. Ord. Thus, the business was resumed by T. G. Ord and conducted by him for about two years substantially as before, but ostensibly as the agent of Meisterhans. But for the alleged understanding at the time of the sale of the homestead, of which there was evidence, to the effect that she consented to the sale on condition that the proceeds should become her separate property, the claim of separate property interposed by her for the first time more than two years after appellant had taken possession under the purported sale from both T. G. Ord and Meisterhans, and more than one year after this suit was brought,—T. G. Ord then claiming the property as his own,—would seem to have been an afterthought. At all events, whether or not that understanding was feigned (that is, whether or not the Meisterhans arrangement was a mere pretense to protect the property from T. G. Ord's creditors) was an issue distinctly raised by the evidence; and, as appellant's requested instruction would have pertinently submitted it to the jury, it should have been granted. Without discussing other assignments, we order the judgment to be reversed, and the cause remanded for a new trial between appellant and appellee Mrs. Nettie Ord, and between them only. The judgment against T. G. Ord, not being complained of, will not be disturbed.

INTERSTATE BUILDING & LOAN ASS'N v. TABOR et ux.¹

(Court of Civil Appeals of Texas. April 1, 1899.)

MORTGAGE ON HOMESTEAD — VALIDITY — RELEASE OF OTHER SECURITY — FORFEITURE — PLEADING — FRAUD ON WIFE.

1. The answer to an action to foreclose a vendor's mortgage on a homestead alleged that the note had been secured by shares in a building association, which plaintiff, at the time of purchasing the mortgage, had released, that suffi-

¹ Writ of error denied by supreme court.

cient could have been realized from the stock to pay the mortgage, which plaintiff purchased after maturity, with full knowledge that it had been paid off; that the note accompanying the mortgage recited that it was secured by the stock in question. *Held* to sufficiently show that plaintiff had notice of the existence of the lien on the stock, as against a general objection that the answer failed to allege that fact.

2. Plaintiff purchased a vendor's mortgage on the homestead of a husband and wife from a building and loan association, which held shares of its stock of sufficient value to extinguish the loan, as collateral security therefor, and released the stock to the husband. The husband and wife then gave plaintiff a bond and trust deed on the homestead as security for the former mortgage, which was to remain as a subsisting obligation in case the trust deed should be held invalid. The release of the stock was by recital in the transfer of the lien. The husband testified that, as he and plaintiff's agent were on the way to procure his wife's signature to the bond and trust deed, he told the agent not to talk to his wife too much about it; that neither he nor the agent told her anything about it, but that before then he had told her it was merely a transfer of the mortgage to another company. The wife testified that she signed the papers without reading them, on the representation of plaintiff's agent that it was merely a transfer of the debt, which would remain in the same condition as before, and that she did not know of the release of the collateral. *Held* to warrant a finding that plaintiff purchased the mortgage knowing that it could be extinguished by applying the proceeds of the stock on it.

3. Where the purchaser of a vendor's mortgage on a homestead, secured by collateral sufficient to extinguish it, induced the wife of the owner of the premises to execute a new mortgage, and a release of the collateral, by representing to her that she was merely signing a transfer of the debt, which would remain in the same condition as before, the vendor's mortgage was released as against the wife and her homestead, because a fraud had been perpetrated on her.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

Action by Interstate Building & Loan Association against E. L. Tabor and wife. There was a judgment for defendant Kate Tabor; and plaintiff appeals. Affirmed.

W. R. Edrington and Robt. G. Johnson, for appellant. Martin & Smith and Harris & Harris, for appellees.

CONNER, O. J. Appellant, a nonresident corporation, sued appellees, in the district court of Tarrant county, on a bond for \$1,000, executed by appellees, and to foreclose a deed of trust, also executed by appellees, securing said bond by a lien on lots 13 and 14, block 2, Elizabeth Gouhenant's addition to the city of Ft. Worth, Tex., and on 10 shares of the capital stock of plaintiff corporation, owned by appellees. It was averred that said debt was due and unpaid; and also that the sum of \$1,000, owing by defendants, was, at their request, used by plaintiff in the purchase of a vendor's lien loan obligation of \$1,000, given for a part of the purchase money of the above-described lots, and was dated December 18, 1887, and executed by P. D. Wyatt, payable to the Ft. Worth Building Association, and that the same had been assumed by defend-

ants in their purchase of said property from Isla W. Rely and husband, and that plaintiff is the owner and holder of the same; and that it was agreed, by and between plaintiff and defendants, that if said bond and deed of trust should, in any action or proceeding, be held void or unenforceable, in whole or in part, plaintiff should hold the said vendor's lien until the advance made by it should be fully paid. Plaintiff prayed for judgment for its debt, and a foreclosure of its lien. Defendants entered a general denial, and specially pleaded that said property is their homestead, and was such when the bond and deed of trust were executed by them; that said instruments are void, so far as they purport to fix a lien on said homestead; that the vendor's lien obligation, purchased by plaintiff, was purchased after maturity, with knowledge that the same had been fully paid prior to the purchase; that the Ft. Worth Building Association, to whom said loan obligation was payable, held 10 shares of its capital stock as collateral security for said obligation, and that dividends amounting to \$850 had been declared on said stock, and said association had sufficient earnings to declare another dividend of \$1,000, and that such facts, under the by-laws of said association, canceled said debt; that said stock was of the value of \$1,850, and plaintiff, by its contract of purchase, released to said Ft. Worth Building Association all claim to, or lien on, said stock, and thereby impaired the security for said debt, and created an additional burden on the homestead of defendants, and attempted to create a lien on said homestead, contrary to the constitution, and thereby released any lien they might have had on said homestead. Defendant Kate Tabor separately pleaded that, to induce her to enter into the contract sued on, plaintiff, through its agent, A. A. Henderson, represented to her that there was \$1,000 due and owing the Ft. Worth Building Association, which was a valid vendor's lien on her homestead, and that the loan to be procured from plaintiff was to take up and extend the time of payment of said \$1,000, and that plaintiff was to take the place of said Ft. Worth Building Association, and make no change in the securities held by said association; that defendant Kate Tabor relied on said representations, and believed the same, and, on account of the falsity of said representations, she has lost the security of said 10 shares of stock, for which she received no benefit, and that such loss was occasioned by the violation of plaintiff's said agreement, and that plaintiff is, in consequence, estopped from setting up any claim against her. There was a jury trial, resulting in a judgment for appellant for \$1,298.55 against appellee E. L. Tabor, with foreclosure of lien on 10 shares of stock in appellant association, and for appellee Kate Tabor on the issues raised by her as to the lien on the homestead claimed by appellant.

In the third and fourth assignments of error, complaint is made of the action of the

court in overruling appellant's exceptions to defendants' answer, in that it is not alleged therein that appellant had notice of the existence of the alleged lien upon the 10 shares of stock in the Ft. Worth Building Association, the surrender of which is urged as a defense by appellees. We have examined said answer, and do not think it subject to the objection thus made. Among other things, it was alleged that "plaintiff had purchased the Wyatt note, if at all, after maturity, with full knowledge that it had been paid off and satisfied; * * * that there was paid on said note, at the time of plaintiff's alleged purchase, the sum of \$1,414.50, and said note was more than paid off, and plaintiff had knowledge of said fact at said time, and had sufficient notice by the recitals in said Wyatt note to put it upon inquiry as to all the particulars of said transactions, as said note recites that said shares of stock (viz. the 10 shares in the Ft. Worth Building Association) were hypothecated to secure said note, and that the same was to be satisfied according to the terms and conditions as set out in the by-laws," etc. It was also alleged that the Wyatt note was secured by a lien on 10 shares in the Ft. Worth Building Association, of the value of \$1,350, and that "if the said shares had not matured, so as to cancel and satisfy said note, said stock had by its terms, and under the rules and by-laws of the association, matured, so that the same could be cashed for more than sufficient to pay off said debt, and that plaintiff, by its contract of purchase of said note, released to said Ft. Worth Building Association all claims or lien on said stock," etc. Other allegations of the answer may also be looked to, but we think, in the absence of an objection other than the general one that "it is not alleged that plaintiff had notice of said lien," the allegations quoted are sufficient. It is expressly alleged, in effect, that by the recitals of the note plaintiff had notice of the lien. We therefore overrule the third and fourth assignments of error.

There are 12 other assignments of error, with 13 propositions in all thereunder. We have carefully examined each, and the record relating thereto. We will not attempt to treat them separately. So far as properly presented for our consideration, they, in various forms, present the contentions: (1) That appellant had no notice of the lien on the stock in the Ft. Worth Building Association; (2) but, if there was such lien, and appellant had notice, that the husband had the right to abrogate it, and to appropriate the stock to community purposes; (3) that there was no evidence showing that the Wyatt note had been paid off or discharged at the time of appellant's purchase.

The jury in their verdict, after finding for appellant against E. L. Tabor for \$1,298.55, with foreclosure of lien on 10 shares of stock in the appellant association, say: "And we further find for the defendant Kate Tabor; that is, we find that plaintiff is not entitled to

a foreclosure of lien on the lot of land described in the petition." This finding was approved by the court below, and it is our duty to sustain such verdict and judgment, unless it appears that some error to appellant's prejudice was committed upon the trial so resulting. In our opinion, the judgment below is maintainable on either one of two propositions. That is, if, in fact, as alleged, the Wyatt note was, in effect, paid off and discharged at the time appellant purchased it, and appellant had notice thereof, then it is clear that appellant would have no legal right to foreclose a lien that was but an incident thereto; or, second, if said note was not paid, and appellant fraudulently, as in effect alleged, so destroyed securities given for its payment as to increase the burden upon the homestead of Kate Tabor against her right and consent, then, to the extent of the value of security so destroyed, appellant would be estopped from insisting on the lien upon the homestead.

The following are, in substance, the facts pertinent to these questions: In 1887, one Wyatt executed a note for \$1,000, under circumstances constituting a lien therefor on the lots described in plaintiff's petition, and claimed by appellee Kate Tabor as her homestead. To secure its payment, there was also a valid lien on 10 shares of stock in the Ft. Worth Building Association, of the par value of \$100 each. This obligation being owned and held by said Ft. Worth Association, said lots and stock were afterwards purchased by various parties, among others appellee E. L. Tabor, such purchasers assuming the Wyatt note. Appellee E. L. Tabor's purchase and assumption was made in 1889, and both of the appellees immediately went into possession, and established their homestead thereon, and said lots have been their homestead ever since. The stock obligation in the Ft. Worth Building Association had the usual provisions for the payment of interest, dues, stock payments, etc., and provided for the liquidation of the Wyatt or loan obligation in accordance with its by-laws. Among others, it had the following by-law: "When the shares of stock upon which any loan has been made shall reach the matured value of \$100 each, the amount of the value of stock shall be credited to the account of the borrower owning the same, when the loan shall be declared fully satisfied and paid, and the stock shall be canceled, and revert to this corporation." Wyatt and his vendees, including E. L. Tabor, made the required interest and stock payments to the Ft. Worth Building Association until some time before the execution of the bond and trust deed executed to the appellant association, on May 21, 1893, when E. L. Tabor ceased to make any such payments. Such "stock payments" then aggregated \$710. Some time before this latter date it appears that the Ft. Worth Building Association ceased to do business, and was then solvent and in process of liquidation. It also appears that

at this time, to wit, May 21, 1895, the Wyatt stock on the books of the company had been credited with stock payments and dividends declared to the extent of 85 per cent. of its face value. Such dividend had, in fact, been declared as to all stock of the association, such 85 per cent. having been paid to nonborrowing stockholders. At this time all debts of the Ft. Worth Building Association had been paid, and its only liabilities were to its stockholders, such liability then amounting to \$7,000 or \$8,000. Its assets, mostly, if not altogether, real estate, then amounted to \$23,000, and were sufficient to have more than paid all stockholders the remaining 15 per cent. In this condition, appellant, on May 21, 1895, made the loan of \$1,000 to appellee E. L. Tabor, it being arranged, in substance, by and between E. L. Tabor and appellant's agent, one Henderson, that said \$1,000 should be paid by appellant to the Ft. Worth Building Association, thereby taking up the Wyatt note; that the Ft. Worth Association should transfer said note to appellant, and appellant release the lien therefor on the 10 shares of Ft. Worth Building Association stock, thereby leaving it subject to the control and disposition of E. L. Tabor; that appellees should give bond and trust deed on the lots in question, as security for such advance; and that appellant should also retain the Wyatt note, with its vendor's lien, and also have lien on 10 shares of stock, of \$100 each, in its own association, to be taken by E. L. Tabor. This arrangement was perfected, and the bond and trust deed sued upon in this case was the result. The bond, among other things, recited that E. L. and Kate Tabor had received an advance of \$1,000, which had been used by the association in the purchase of a certain vendor's lien outstanding and unpaid against the real estate described in plaintiff's petition, describing the lien herein described as the Wyatt vendor's lien. The trust deed also recited that the advance and deed of trust was made pursuant to the request of the said E. L. and Kate Tabor, and at their request used by the Interstate Building & Loan Association for said vendor's lien, and that said association, at the request of the said E. L. and Kate Tabor, has changed the form and manner, and extended the time of payment, of the original indebtedness represented by said vendor's lien, in the way indicated in this deed of trust and the bond which it is given to secure. Said deed of trust further provided that it and the bond should be given and held as an extension of the original vendor's lien purchased at the request of E. L. and Kate Tabor by appellant, "and that, in every action or proceeding on said bond or deed of trust, the holder thereof shall be entitled and subrogated to all the rights, equities, and securities of the original owner and holder of said vendor's lien, and evidences thereof, so purchased and extended by the plaintiff." This bond and trust deed were duly signed and acknowledged by the appellees. The transfer of the Wyatt

obligation to appellant recited that the Ft. Worth Building Association "assigns to plaintiff [appellant] said deed of trust [referring to the Wyatt deed of trust], except so far as said deed of trust applies to the said 10 shares of stock of the Ft. Worth Building Association, and the said 10 shares of stock are hereby fully released unto the owner thereof, free from the operation of said deed of trust." Kate Tabor, in substance, alleged and testified that she had no knowledge that the lien upon the 10 shares in the Ft. Worth Association had been released; that she did not know the condition of the Wyatt obligation; that Henderson, appellant's agent, did not read the papers to her; that he represented to her that the transaction was to be, in effect, but an extension of the debt of \$1,000, that he represented was then due, upon their homestead; that Henderson represented to her that the transaction amounted, in substance, but to a transfer of the former vendor's lien to his company, and that the debt, as to his company, would in all respects remain as it existed in the Ft. Worth Company, except that the time of payment was to be extended. E. L. Tabor testified that he talked with Henderson several times about the matter; that he refused to procure the loan in question unless the stock in the Ft. Worth Association was released, but, finally, after the agreement had been perfected, and while on the way to his house for the purpose of having Mrs. Kate Tabor sign the bond and trust deed, he said to Henderson: "You don't want to talk too much about this transaction." Told him he didn't want to make too much remarks to his wife about the transaction that was going on. Didn't tell him in particular why I didn't want him to. I just simply told him I didn't want him to make any remarks,—say anything to my wife about what was going on about the papers." He further testified that when they got there he does not know that he told his wife anything; that Henderson before him didn't tell her anything. He further testified, on cross-examination, that "he didn't know that he could explain his purpose more explicitly than he had for directing Henderson not to tell his wife." "If he said too much to her, probably she wouldn't sign the paper. My purpose was I wanted the papers fixed up." It was further shown that, after the bond and trust deed sued upon by appellant had been executed, the Ft. Worth Association paid to E. L. Tabor \$670 in dividends on said stock therein, deducting some for fines, etc.; that he afterwards sold the stock for \$120; that he paid this money out "in debts and one thing another," no necessity therefor, however, appearing in evidence. E. L. Tabor further testified: "At the time I got this loan from the plaintiff in this case, I didn't think or claim that I owed the Ft. Worth Building Association anything;" that before the papers were executed he had talked a little to his wife about signing them; "I told her that I wanted to transfer it into an-

other company; that this company was claiming that I owed them a thousand dollars on this property, and I wanted to transfer it to another company." Mrs. Tabor also testified that, when Henderson came with the papers for her signature, he didn't read the papers to her, and said: "I can explain it just as well, and it will stand just as it stands now, but it was just only simply transferring the place;" and that she refused to sign any papers to the place, until he said it was "just simply transferring the place, and that 'it will stand just like it stands now, transferring it into the Interstate Building & Loan Association from the Ft. Worth Building Association'"; that Henderson came twice; that the first time she refused to sign the papers, and he said to her: "Mrs. Tabor, it is just simply transferring the place, and it will stand just like it stands now." She further testified that she "didn't read the papers, but simply signed her name, and that she understood the transaction as explained to her by Henderson"; that "she didn't then understand that there was anything due on the place"; she thought that, "if anything, her husband had overpaid the place"; that she thought "the place was clear, but that it had to stay in the building and loan association for a limited number of years, and that it was just only transferring it"; thought that was perhaps a rule of the company. She further testified that she got no part of the money received by her husband on the Ft. Worth stock, and in fact did not know that he received any money; that she did not agree to the release of the Ft. Worth stock. It was admitted that, at the time of the execution of the bond and trust deed sued on, E. L. and Kate Tabor were husband and wife, and that at the date thereof the lots in controversy were their homestead.

We think the evidence sufficient to support the contention of appellees that appellant's agent had notice, as defined by the court in his charge, of the existence of the lien on the stock in the Ft. Worth Association to secure the Wyatt note. We are also of opinion that such notice extended to knowledge of the condition of said stock and Wyatt note, as hereinbefore presented. We are also of opinion that, in equity, at least, under the facts, the Wyatt obligation, as against Mrs. Kate Tabor and as against the lien on her homestead, was paid off and discharged, and that, therefore, as against her, no cause of action on the Wyatt note existed in appellant's favor, or was acquired by appellant in its said transfer. But, if mistaken in this, the writer thinks the evidence is such as to support the finding of the court and jury below, in effect, that, as to Mrs. Kate Tabor, a legal fraud was perpetrated. Without effort to now elaborate or justify the proposition by the citation of authorities, in my judgment, under the circumstances of this case, Mrs. Kate Tabor was vitally interested in the homestead. She had, by the universal and long-continued

trend of legislation and judicial decision in this state, an affirmative, substantive right of property therein. She had the right to insist upon the application of all securities for the payment of the Wyatt note, before resort should be had to the homestead. Without her knowledge, and against her consent, neither appellant nor her husband could release such securities, and thereby increase the burden upon the homestead. Our law provides that, before the homestead can be transferred, the express consent of the wife must be obtained. She has the right to refuse to execute any paper that takes her homestead away from her, and I am unable to perceive why she should not be accorded the right of refusing to impose a burden upon the homestead that might result in an indirect conveyance thereof, and in an absolute destruction of her homestead privileges. It was admitted that, at the time of the execution of the trust deed and bond upon which appellant sued, the lots in question were the homestead, and that the lien thereby created was invalid. It therefore follows, from what has been said, that the verdict and judgment of the court below must be upheld. It is accordingly ordered that the judgment below be in all things affirmed, on the ground that the evidence, as we interpret it, shows beyond question that the Wyatt obligation was, in effect, paid off or discharged at the time of its acquisition by appellant.

TAYLOR v. ST. LOUIS TYPE FOUNDRY.¹
(Court of Civil Appeals of Texas. March 18, 1899.)

DISTRESS FOR RENT—ACTION ON CLAIMANT'S BOND—ABANDONMENT—VALUE—EVIDENCE.

1. A claimant of property held under a distress warrant, who has twice filed a claimant's bond in the county court, which had jurisdiction of the claim, and has each time, upon his own motion, dismissed the proceedings, where he does not have such judgments of dismissal set aside when for the third time he seeks to have his claim adjudicated, is deemed to have abandoned his claim to the property.

2. Where a complaint in an action on a claimant's bond alleged facts which, upon proof thereof, would entitle plaintiff to judgment, the court of civil appeals cannot, upon a reversal of a judgment entered on a general verdict for defendant, enter a judgment for plaintiff, in the absence of a finding as to the value of the property described in the bond.

3. The valuation placed upon property by the sheriff in proceedings by a person to gain possession by means of a claimant's bond is not sufficient evidence of the value of the property described in the bond to authorize an appellate court to enter judgment thereon, on reversal of a judgment in favor of defendant in an action brought on the bond.

Error from Bowie county court; H. W. Vaughan, Special Judge.

On rehearing. Reversed.

Henry & Henry, for plaintiff in error. P. A. Turner, for defendant in error.

BOOKHOUT, J. Upon a former day we reversed the judgment of the trial court, and

¹ Writ of error denied by supreme court.

dismissed this cause. 35 S. W. 691. The plaintiff in error has filed a motion for rehearing, in which, for the first time, it is insisted that judgment should be here rendered in her favor upon the claimant's bond. This is a suit upon a claimant's bond filed in the county court of Bowie county on April 19, 1894, by the St. Louis Type Foundry, as the claimant of certain property levied upon by the sheriff of said county by virtue of a distress warrant sued out in the case of Mrs. N. C. Taylor against Charles E. Beard. From a judgment in favor of the claimant an appeal has been taken to this court by the plaintiff in the distress proceedings. The plaintiff in error filed a plea in abatement, in which she insisted that the claimant had abandoned its claim to the property by its failure to prosecute its claim in the proper court within the time contemplated by law, and having, after filing the affidavit and bond in the proper court on two different occasions, voluntarily dismissed each case, which orders of dismissal are still in force. This plea and the evidence thereon were submitted to the court, and the court found against the plea. The following facts are shown in support of said plea: Plaintiff in error sued out a distress warrant against Charles E. Beard on the 2d day of October, 1889, and caused it to be levied upon certain property in a storehouse in the city of Texarkana, owned by her and which she had rented to Beard. On October 4, 1889, the plaintiff in error presented its affidavit and claimant's bond for the property so levied upon, alleging it was the owner of the same. The sheriff fixed the value of the property levied upon at \$500. The said affidavit and bond were filed in the county court on October 10, 1889, and duly docketed in that court as cause No. 870. Thereafter, during the October term of said court, the claimant (defendant in error) appeared in open court, and dismissed said cause from the docket of said court, and on the 22d day of February, 1890, filed said oath and bond in the district court for said county, and the same was docketed as a cause in said court. On April 1, 1891, the said cause, upon motion of plaintiff (plaintiff in error), was by said court dismissed on the ground that the district court had no jurisdiction of the cause. On the 19th day of October, 1891, the claimant again filed the oath and bond in the county court, and it was docketed as a new cause upon the docket of said court, and numbered 1,105. On November 5, 1891, the claimant appeared in open court and dismissed this cause. The order of dismissal is fully set out in the record. After this (the exact date is not shown by the record; possibly in November or December, 1891) the said claimant sued out a writ of error from the judgment of the district court of April 1, 1891, dismissing the cause in said court. This writ of error was prosecuted to this court, and the judgment was here affirmed on March 14, 1894. On April 19,

51 S.W.—20

1894, the claimant filed its oath and bond for a third time in the county court, and the same was docketed in said court as cause No. 1,373, and is the present case. The court overruled the plea in abatement.

Plaintiff in error contends that these facts show that the claimant abandoned its claim to the property, and that the trial court should have sustained the plea in abatement. It will be noted that the officer fixed the value of the property levied upon by the distress warrant at \$500, and returned it to the county court, where it was filed and docketed as a suit. In this the officer performed his full duty. Rev. St. 1895, art. 5290. While the cause was thus pending in the proper court the claimant appeared in open court, and voluntarily dismissed the same, and filed the affidavit and bond in the district court for Bowie county. This order of dismissal, having been made by a court having jurisdiction of the claim, would, in law, be an abandonment of the claim, unless set aside. It is contended by defendant in error that at the time this action was taken the law in reference to the jurisdiction of the courts where the property was levied upon by virtue of a distress warrant, and the officer valued it at exactly \$500, was in such an uncertain condition, by reason of a conflict between section 8, art. 5, and section 16, art. 5, of the constitution, that, the defendant in error having acted in good faith in dismissing the case in the county court and filing the papers in the district court, it ought not to suffer for a mistake made under such conditions. It may be that the dismissing of a case in a court having jurisdiction, and the filing of it in another which did not have jurisdiction, under such circumstances, would not necessarily operate as an abandonment of the prosecution of the claim. But it devolved upon the claimant to use diligence in the prosecution of his cause in the district court, and, upon that court holding it had not jurisdiction, to return to the county court, and move to reinstate the cause dismissed in that court, upon proper allegations, stating the facts, and showing that the cause had been dismissed by mistake. This the claimant did not do, but, after the district court decided it did not have jurisdiction of the matter, claimant waited over 6½ months before taking any action in the matter whatever. Then, instead of moving to set aside the judgment, and reinstating the original cause in the county court, claimant went into the district court and filed the affidavit and bond therein as a new cause, and numbered 1,105, and permitted the judgment of the original cause (No. 870) to remain in full force. This last cause (No. 1,105) so filed was on November 5, 1891, dismissed by the claimant in open court, and said judgment is still in force. The excuse for this action is here stated,—that the claimant concluded to further test the jurisdiction of the district court by prosecuting a writ of error from the judgment of that court to this

court. A writ of error was sued to this court, and the judgment of the district court affirmed by this court on March 14, 1894. 6 Tex. Civ. App. 732, 26 S. W. 226. Thus, the minutes of the county court showed two judgments of dismissal of this very claim,—one entered in cause No. 870, on October 10, 1889, and one in cause No. 1,105, entered November 5, 1891. Neither of these judgments had been set aside at the time the present case was filed therein, in April, 1894. Had the claimant, in law, abandoned its claim to the property by reason of the facts before set out? Our statutes in reference to the trial of the right of property have made ample provision for, and contemplate, a speedy trial thereof. Rev. St. 1895, arts. 5296-5300. We have held that where the claimant's affidavit and bond are filed in a court which has not jurisdiction thereof, and the same is dismissed by said court because it has not jurisdiction of the matter, and the claimant fails, for two successive terms of the court having jurisdiction of the claim, to cause the affidavit and bond to be filed in said court, such delay will be considered an abandonment of the claim. *Deware v. Elevator Co.* (Tex. Civ. App.) 43 S. W. 1047. In the case before us, after the district court had adjudicated it had no jurisdiction, the claimant waited 6½ months before taking action, and we take knowledge that during that time two terms of the county court of that county intervened. But, if two terms had not passed, yet the claimant deliberately, after filing the affidavit and bond in the county court, appeared in open court, and caused the order of dismissal of the case in that court to be entered. Mr. Justice Stayton, speaking for the court as to the effect of an order of dismissal, in *Zurcher v. Krohne*, 63 Tex. 122, uses the following language: "If, however, the court had jurisdiction, the motion to dismiss the cause, on whatever ground made, would, if sustained, operate as an abandonment of the claim, and the property should have then been returned to the officer."

The undisputed facts show that the claimant has abandoned his claim to the property, and the court erred in not so holding. The judgment of the trial court is reversed, and judgment is here rendered dismissing the claim of the St. Louis Type Foundry to the property described in its affidavit and bond.

The plaintiff, in her pleadings, set out the bond and her debt, and made the necessary allegations to entitle her, upon proof of the same, to recover judgment against the makers of the bond. It was shown that one of the sureties was dead, and as to him the suit abated. The appellant now asks that we render judgment in her favor for the amount of her debt against the principal and remaining surety. This, in view of the condition of the record, we cannot do. The case was tried by a jury in the court below, and a general verdict returned in favor of the claimant. There was no finding as to the value of the

property described in the bond. This is a material issue, which the parties were entitled to have determined in the trial court. This court cannot determine this fact in the first instance, but it must be framed by the trial court. *Patrick v. Smith*, 90 Tex. 267, 38 S. W. 17. Besides, the evidence in the record as to the value of the property is not of such a conclusive character as would authorize this court to find its value. The only evidence of the value of the property is the sheriff's valuation of the same. It has been held that this evidence is not sufficient to authorize an appellate court to render judgment on the bond. *Dixon v. Zadek*, 59 Tex. 532. The judgment of the trial court is reversed, and judgment will be here rendered dismissing the claim of the appellee to the property. The suit of plaintiff upon the claimant's bond is remanded for another trial.

KENTON INS. CO. v. OSBORNE et al.¹

(Court of Appeals of Kentucky. June 1, 1899.)
PROCESS—SERVICE ON FIRM AS AGENT—MIS-
JOINDER OF CAUSES OF ACTION—ELECTION—
TRIAL ON HOLIDAY—BURDEN OF PROOF.

1. Where a firm was agent for a corporation, service of process on one member of the firm was a service on the agent.

2. In an action on an insurance policy, service of process on the agent who issued the policy, and with whom the contract was made, was prima facie sufficient, as the burden was on defendant to show that there was a higher officer in the county.

3. Where some of the property embraced in a fire insurance policy belonged to a firm, and other property embraced therein belonged to a single member of the firm, the entire cause of action having been vested by assignment in one plaintiff, he may, in a single action, recover the full amount of the policy.

4. A motion to require plaintiff to elect which of two causes of action he will prosecute must be made before issue is joined on the merits.

5. Defendant cannot complain that one of the plaintiffs was not allowed to remain in the court room during the trial.

6. It was in the discretion of the court to continue on a holiday the trial of a case which had already been begun, and, if defendant was prejudiced by the absence of its witnesses on that day, it should have shown the fact on motion for new trial.

7. The burden of proof was on the plaintiff, every fact entitling him to recover being denied.

Appeal from circuit court, Davless county.
"Not to be officially reported."

Action by F. E. Osborne and others against the Kenton Insurance Company on a policy of fire insurance. Judgment for plaintiffs, and defendant appeals. Affirmed.

Sweeney, Ellis & Sweeney, for appellant.
J. D. Atchison and Wilfred Carico, for appellees.

HOBSON, J. On August 19, 1890, appellant issued F. E. Osborne and P. L. Steel a policy of insurance insuring for one year, at \$1,100, a storehouse and contents at Curds-ville, Ky. The storehouse belonged to Os-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

borne, and so did a barroom and fixtures kept in it. There was also in the storehouse a general stock of merchandise belonging to Osborne & Steel. By an indorsement on the policy, this fact was noted September 8, 1890. The storehouse burned on the night of September 25, 1890, with part of its contents, and this action was instituted by appellee Wilfred Carrico, on the 19th of March following, as the assignee of Osborne & Steel; the policy having, after the fire, been assigned to him as trustee for their creditors. There was a trial and judgment for the full amount of the policy in the court below. Several grounds of reversal are relied on.

The summons was returned: "Executed on the Kenton Insurance Company by delivering to W. M. Rudd, a member of the firm of J. C. Rudd & Son, who are agents for said company, a true copy of the within." Appellee moved to quash the process, and the court overruled the motion. The firm of J. C. Rudd & Son being the agent of appellant, it is insisted that the service on one of them is not sufficient. This is a misconception of the purpose of the statute. The copy of the summons is delivered to the agent as the representative of the corporation and for it. If it had several agents of equal authority, it need not be served on all of them. The object of the service was to bring the corporation before the court, not the firm of J. C. Rudd & Son. Each of the partners equally represented the corporation, and a service on any one of them was a service on its agent.

It is also objected that it does not appear that the Kenton Insurance Company did not have its president or some higher officer in the county. It does appear from the return that Rudd & Son were agents for the company. It also appears from the policy that they issued it, and it is alleged in the petition that the contract was made with them. This prima facie constituted them the proper persons to serve the summons on. If there was any higher officer in the county, appellant should have shown it. It is a salutary rule that all pleas in abatement must give the plaintiff a better writ, and, appellant not disclosing any other person upon whom the process might be properly served, the court did not err in refusing to quash it. Civ. Code Prac. § 51, subsec. 3.

Appellant also complains that there was a misjoinder of causes of action in the petition; that the right of action for the loss of the house and liquors was in Osborne alone, and the right of action for the loss of the stock of general merchandise was in the firm of Osborne & Steel, and not in Osborne individually, and so that the two could not be joined in one action. Both, however, arose out of the same contract, and, by the assignment to Wilfred Carrico, both had vested in him. We do not think that he would have been allowed to bring two actions on this contract; and, after the entire cause of action had vested in one plaintiff, we see no necessity for two

actions or two trials under one contract, where the facts would have been precisely the same in both. Besides, motions of this character must be made before issue is joined on the merits. The motion here was not made when the original answer was filed, nor until after the issues in the case had been made up. It was therefore properly overruled by the court. The defect in the petition, if any, was cured by the verdict. Appellant cannot complain that Steel was not allowed to remain in the court room nor do we see how it was prejudiced by this. It was discretionary with the court to continue the trial on the 22d day of February, and, if appellant was prejudiced by the absence of its witnesses on that day, it should have manifested this on motion for a new trial. Steel testified on the trial, and his affidavit was not competent evidence.

The rule is that the burden of proof is on him who would be defeated if no evidence at all was offered. As the pleadings stood on the trial of the case, we do not see that any judgment could have been rendered against appellant if no evidence had been offered on either side; for every fact entitling Carrico to recover was denied. The instructions fairly submitted the issues made to the jury, and, while the evidence is conflicting, it cannot be said that it does not support the verdict. Judgment affirmed.

McFERRAN et al. v. McFERRAN.¹

(Court of Appeals of Kentucky. May 23, 1899.)

CUSTODY OF CHILDREN—MODIFICATION OF JUDGMENT OF DIVORCE.

Where a judgment of divorce awarding to the mother the custody of the children of the marriage gave the father the right to visit the children at reasonable times, without any provision as to the details of the visits, it was in the sound discretion of the chancellor to subsequently make such further provision for the father seeing his children as changing circumstances might seem to require; but it was an unreasonable interference with their attendance at school, and with the mother's supervision, to require that they should at various times during the year visit the father in a distant county for 10 days at a time, no reason appearing for disturbing the original judgment.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by Warren V. McFerran and James C. McFerran, Jr., against James C. McFerran and the Fidelity Trust & Safety Vault Company, as trustee, to obtain a share of the income of a trust fund. Judgment fixing the allowance to plaintiffs out of the trust fund, and requiring plaintiffs to visit the defendant, James C. McFerran, their father, at stated times, and plaintiffs appeal. Reversed.

Fairleigh & Straus, for appellants. Harris & Barr, for appellee.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

DU RELLE, J. By judgment of the Louisville chancery court appellee's wife was granted a divorce, restored to her maiden name, and adjudged to be entitled to have the care and custody of her children, Warren V. McFerran and James O. McFerran, Jr., it being further provided that appellee "shall have the right at all reasonable times to visit and see his said children." After the judgment, the two children, by next friend, brought suit in the law and equity court against their father, the appellee, and the Fidelity Trust & Safety Vault Company, as trustee under the will of their paternal grandfather, to obtain a share of the income of a fund held in trust under that will for the benefit of their father and his family. A judgment was rendered directing the payment for their support of a fixed sum out of that income. On appeal to this court that judgment was affirmed (21 S. W. 870), the court, through Judge Pryor, saying: "There is, in fact, nothing before us except the question as to the annual allowance to be made these children under the circumstances now surrounding all the parties. These circumstances may change. The father may have other burdens upon him that would lessen the allowance to the children, and, on the other hand, the income of the trust fund may increase so as to require another application to the chancellor either to reduce or increase the allowance. The trust is of that character as brings the case within the power of the chancellor from time to time, that the trust fund may be applied as directed by the devisor." When the case was returned to the law and equity division, appellee filed what is called a "supplemental petition," alleging that he had married, and his expenses had been thereby increased, and that a considerable diminution had taken place in the income arising from the trust fund, and praying "that, unless said children desire to come and live with him, that under the changed conditions the trustee be authorized to make an allowance to each of plaintiffs of \$400 per annum until further order of the court." The trial court rendered judgment fixing the allowance to the children at two-sevenths of the whole income from the trust fund, and as to this there seems to be no complaint on either side. The judgment further provided that the children "shall visit their father, James O. McFerran, at the following times of each year: In the month of June, for ten days, beginning June 5th; in October, for ten days, beginning October 5th; in the month of December, from the time their vacation from school begins until such vacation ends in January; for ten days beginning February 5th; for ten days beginning April 5th; for ten days beginning June 5th. The cost of transportation for these children shall be borne by their father when they visit him, and the cost of return shall be borne by their mother." This appeal is from this part of the judgment.

While considerable testimony was taken as to the state of health of the two boys, and the

necessity existing for the constant attention and care of their mother, as well as the services of physicians, it is evident that this testimony was taken as bearing upon the amount of the allowance to be made, for this record discloses no application or suggestion of a desire for a change in the status fixed by the judgment of the chancellor under which the father was authorized to visit and see his children at all reasonable times. On behalf of appellants it is earnestly insisted that this part of the judgment is void, because conflicting with the judgment of the chancellor giving the custody of the children to the mother. With this contention we do not concur. The chancellor's judgment gave the father the right to visit and see the children at reasonable times, without any provision as to the details of the visits. The matter would seem to be left in the sound discretion of the chancellor to make such provision for the father seeing his children as changing circumstances might seem to require; and it may be that a showing might be made which would render it proper to require the boys to come, in charge of their mother, or some one representing her, from Versailles to Louisville, to visit their father, at his expense. This is a matter upon which the parties ought to be able to agree without litigation. But the record before us shows no such condition, nor even a request for such order. On the contrary, it shows a state of fact, both as to the health and education of the boys, which would require their mother's supervision and their attendance at school to be interfered with as little as possible. The judgment seems to us to unduly interfere with both. Under the judgment of the chancellor the father's right to proper access to his children was unrestricted, and, in our opinion, no reason appears in this record for disturbing it. The judgment is therefore reversed, and cause remanded, with directions to set aside so much of the judgment as alters the disposition made by the chancellor in the divorce suit with respect to visiting the children by their father.

EAST TENNESSEE TEL. CO. et al. v. CITY OF RUSSELLVILLE.¹

(Court of Appeals of Kentucky. May 24, 1899.)
MUNICIPAL CORPORATIONS—POWER TO GRANT USE OF STREETS FOR TELEPHONE LINE.

1. Previous to the adoption of the present constitution, a city council could not, without legislative authority, grant to any person or corporation the right to occupy the streets of the city with telephone poles and wires; that being an additional servitude.

2. Under Const. § 163, providing that no telephone company shall be permitted to erect its poles along the streets of a city without the consent of the proper legislative body of the city being first obtained, "but when charters have been heretofore granted conferring such

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply," where a city council had, without legislative authority, prior to the adoption of the present constitution, attempted to grant the right to erect telephone poles and wires along and over the streets of the city, the city has the right to compel the removal of such poles and wires erected without the consent of the city council after the adoption of the constitution.

3. Ky. St. § 3650, providing that all ordinances "now in force," shall remain in force until altered or repealed by ordinance, does not give validity to a void ordinance.

Appeal from circuit court, Logan county.

"To be officially reported."

Action by the city of Russellville against the East Tennessee Telephone Company and others to enjoin defendants from maintaining telephone poles and wires along the streets of the city. Judgment for plaintiff, and defendants appeal. Affirmed.

Selden Y. Trimble, S. R. Crewdson, Wilbur F. Browder, and James H. Bowden, for appellants. H. S. McOutchen, E. G. Vick, W. P. Sandedge, Cradock & Sandedge, and John S. Rhea, for appellee.

PAYNTER, J. Previous to the adoption of the present constitution, the council of a municipal corporation, without legislative authority, could not grant to any person or corporation the right to use the streets and alleys of a city or town for any purpose other than for which they were dedicated. The streets and alleys of a city or town are intended for public travel, and, when an additional servitude is placed upon them, it is in derogation of common right. *Ruttles v. City of Covington (Ky.)* 10 S. W. 644; *Com. v. City of Frankfort*, 92 Ky. 149, 17 S. W. 287. In *City of Newport v. Newport Light Co.*, 84 Ky. 166, the court, in considering the question of the right of a gas company to use the streets to enable it to lay down its pipes, said: "It may be regarded, however, as well settled that the right to use the street of a city by a gas company to enable it to lay down its pipes is a franchise that can be granted only by the legislature, or some local or municipal authority authorized to confer it." 2 Dill. Mun. Co. p. § 691. "However it may be as respects the power of the legislature to make the grant exclusive, no such power, it is clear, can be exercised by a municipal council, unless it be plainly conferred by express words, or by necessary or at least reasonable implication." *Id.* § 695. Section 163 of the constitution, to which we will hereafter refer, recognizes that to occupy the streets and alleys of a city or town with telephone poles and wires is an additional servitude, by refusing telephone companies the right to enter upon the streets and alleys of a city or town without the consent of the proper legislative bodies or boards of such city or town being first obtained. It is the imposition of a new and additional servitude on streets and alleys of a city or town to erect telephone poles and string wires thereon. *Telegraph Co. v. Bar-*

nett, 47 Am. Rep. 453; *Broome v. Telephone Co.*, 42 N. J. Eq. 141, 7 Atl. 851; *Telegraph Co. v. Williams*, 86 Va. 696, 11 S. E. 106; *Stowers v. Cable Co. (Miss.)* 9 South. 356; *Cable Co. v. Irvine*, 49 Fed. 113.

On November 18, 1890, the board of councilmen of the city of Russellville granted to J. W. Clark, "for ten years, exclusive franchise for the purpose of erecting a system of telephone lines in that city." At that time the councilmen of that city had no legislative authority, express or implied, which authorized them to grant such a privilege to him. He enjoyed no charter privilege which conferred upon him the right to occupy the streets and alleys of that city for the purposes stated. The date of the grant of the privilege shows that it was before the adoption of the present constitution. Previous to February 8, 1893, a motion was entered before the board of councilmen to the effect that Clark be given 60 days in which to commence operations on his telephone system; and, after considering the motion, they, on February 8, 1893, rejected the proposition, for the reason, as given by them, that upon investigation they found that under the present constitution he did not enjoy the right to erect a telephone line in the city. Afterwards Clark proceeded to erect his telephone line, placed poles on the streets and alleys of the city, strung wires upon them, and seems to have been operating it when, in 1896, the East Tennessee Telephone Company purchased the telephone line from him, claiming that it had been granted the privilege by the board of councilmen in 1884 to erect a telephone line over the streets and alleys of the city. The right to have erected this telephone line, and to maintain the same, is claimed to exist by virtue of the action of the board of councilmen in granting the privilege to Clark in 1890; and, further, as the telephone company had been granted the privilege in 1884 to erect a telephone line in the city, it had the right to acquire his interest in the telephone line, and therefore the city has no right to compel the removal of the present poles from the streets and alleys of the city, or to prevent it from planting additional ones. It may be added here that the board of councilmen of the city had no legislative authority to grant the privilege to the telephone company to erect a telephone line in the city. Section 163 of the constitution reads as follows: "No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply." It will be seen from this

section of the constitution that no authority is vested anywhere to authorize any telephone company to construct its line on or across the streets and alleys or the public grounds of a city or town, except with the consent of the proper legislative bodies or boards of such city or town. No such authority was obtained by Clark or the telephone company, and it necessarily follows that they had no right to enter upon the streets and alleys of the city for the purposes stated. To hold otherwise would be to utterly ignore and disregard the organic law of the state. When a telephone company takes possession of the streets and alleys of a city or town without the consent of the legislative bodies or boards of the city or town, it has no more right to occupy the streets and alleys than any wrongdoer has who takes possession of the land of another without his consent. The last paragraph of section 163 is to the effect that when charters had been theretofore granted conferring such rights, and work had in good faith been begun thereunder, the section does not apply. There is no pretense in this case that Clark had any charter which authorized him to build a telephone line over the streets and alleys of the city of Russellville; neither is it pretended that the charter of the telephone company conferred any such right. So neither of them had charters which conferred such rights. Nor had they commenced work, in good faith or otherwise, for the purposes of erecting the telephone line, when the present constitution was adopted. As the action of the board of councilmen previous to the adoption of the present constitution was invalid, no rights accrued to Clark or the telephone company thereunder. They had no rights to be recognized by the provisions of the constitution. It was not the purpose of the constitution to render valid a resolution of a board of councilmen, which, under the law at the time of its adoption, was invalid. The fact that the provisions of the constitution only relate to rights which accrued by virtue of charters, and that these charters were not to operate to give consent to the use of streets and alleys of a city or town, except work had commenced in good faith, shows that no effect was intended to be given to any unauthorized action of city authorities which had been taken before the adoption of the constitution.

It is suggested that section 3650, Ky. St., which reads as follows, "All laws, ordinances, by-laws and resolutions now in force in said cities, and not inconsistent with this chapter, shall remain in full force until altered or repealed by ordinance," validates the ordinance granting the appellant's franchise. By the express terms of this section, it only keeps in force ordinances, by-laws, and resolutions which were in force at the time the act for the government of cities of the fifth class became a law. The franchise which the common council attempted to give Clark and the telephone company was not even in force at the time of the adoption of the constitution;

and, had the franchise been granted by a charter then, it would have been invalid, unless work in good faith had been begun under it before the adoption of the constitution. The judgment is affirmed.

CITY OF LOUISVILLE v. SEIBERT.¹

(Court of Appeals of Kentucky. May 31, 1899.)
VALIDITY OF SPECIAL STATUTE — LIMITATION OF ACTIONS — LIABILITY OF CITY FOR INJURY TO PROPERTY.

1. The provision of the charter of cities of the first class fixing a special limitation of six months as to actions against such cities for injuries to person and property is unconstitutional.

2. The 12-months statute of limitations has no application to an action against a city for injury to property.

3. A city is liable for injury to abutting property caused by making an excavation in a street, and leaving the street in that condition for an unreasonable time, whereby water is caused to accumulate so as to deprive the owner of access to his premises.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by Margaret Seibert against the city of Louisville to recover damages for injury to property. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry L. Stone and Alex. G. Barrett, for appellant. Gardner & Moxley, for appellee.

GUFFY, J. The appellee instituted this action March 28, 1896, in the Jefferson circuit court, against the appellant, the city of Louisville. It is substantially alleged in the petition that on or about the 11th of April, 1895, appellant undertook to, and did, by and through its agents, grade Twentieth street from the north line of Colgan to Maple street, and that said grade was completed on the 11th of April, 1895; that in said grade a deep excavation was made in said street, three or four feet below the natural surface at that point, and, when it rained, water drained into same, and could not escape therefrom, and, since the same was completed, water, to the depth of two or three feet, stood in said excavation from Colgan to Maple street, rendering said street wholly unfit for travel, and same has since been a cesspool of stagnant water, mud, and filth, and same entirely surrounds plaintiff's premises on Twentieth street, extending from the north side of Colgan street to and beyond the rear of her stable, and by reason of same she has been cut off from the use of Twentieth street, and her stable rendered inaccessible from Twentieth street; that at the time said excavation was made she resided in a flat above the storeroom on her premises, and the storeroom on the first floor was rented to a tenant, who conducted a successful business therein, but because the stable was rendered inaccessible

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

from Twentieth street, and Twentieth street was in such condition that it could not be crossed with convenience or safety, she lost said tenant. The plaintiff further sets out specifically various items of damage and injury to the amount of \$5,000. On October 16, 1896, a supplemental petition was filed, showing that the wrongs theretofore set out still continued, and set up additional damages, but did not increase the amount of her demand. The answer may be treated as a denial of the manner of grading, and the results therefrom, and a denial of the damages, as set up by the plaintiff. In an amended answer the defendant pleaded the 6-months statute of limitations in regard to suits against the city of Louisville, and also pleaded the 12-months statute of limitations. The court sustained a demurrer to the pleas of the statute of limitations, which constituted the second and third paragraphs of the amended answer. After the issues were made up, a jury trial resulted in a verdict and judgment in favor of plaintiff for the sum of \$500; and, appellant's motion for a new trial having been overruled, it has appealed to this court.

Appellant complains of the admission of incompetent evidence and the rejection of competent evidence. We are, however, of the opinion that no error occurred in respect thereto; nor did the court err in overruling appellant's motion for a peremptory instruction to the jury to find for defendant.

It is insisted for appellant that the court erred in sustaining a demurrer to the second and third paragraphs of the amended answer, in which the statute of limitations was pleaded and relied on. It is insisted for appellee that the 6-months statute relied on by appellant is unconstitutional. We need not discuss that question, as it was fully discussed in *City of Louisville v. Kuntz*, 47 S. W. 592, wherein it was decided by this court that the 6-months statute was unconstitutional. The 12-months statute of limitations has no application to an action of this kind.

It is evident that a city has no right to excavate a street, and leave it an unreasonable length of time in such condition as to inflict upon an owner of abutting property such injuries or damages as are alleged to have been done in this case; and we think the evidence introduced fully sustains the verdict of the jury. The instructions given correctly presented the law applicable to the case on trial. Perceiving no error in this record prejudicial to the substantial rights of the appellant, the judgment is affirmed.

CHEEK et al. v. GRAHN et al.¹

(Court of Appeals of Kentucky. May 27, 1899.)

ASSIGNMENTS FOR CREDITORS—PREFERENCE BY PARTNERS—PRESUMPTION.

1. Payments by insolvent partners, out of partnership assets, to their individual creditors,

with intention to prefer them to the exclusion of others, will operate as an assignment for the benefit of creditors.

2. It will be presumed that insolvent debtors knew of their insolvency at the time of making payments to creditors.

3. The fact that insolvent partners paid their local creditors to the exclusion of foreign creditors tends to show that they intended to give the local creditors a preference.

4. The fact that insolvent partners, after their stock of goods was destroyed by fire, did not again engage in business in their own names, tends to show that payments made by them to certain creditors, to the exclusion of others, out of the proceeds of insurance on the property, were made in contemplation of insolvency.

Appeal from circuit court, Warren county.
"Not to be officially reported."

Action by Cheek, Webb & Co. against Grahn & Dickerson and other to have certain payments made by defendants Grahn & Dickerson declared to operate as an assignment for the benefit of creditors. Judgment for defendants, and plaintiffs appeal. Reversed.

John B. Rodes, for appellants. Mitchell & DuBose, for appellees.

GUFFY, J. The appellants instituted this action in the Warren circuit court against appellees. One of the objects sought was to have certain payments made by appellees Grahn & Dickerson adjudged to be a preference, and to operate as an assignment of all their property for the benefit of their creditors, and to require those persons to whom such payments were made to account for the same, and for a pro rata distribution of the assets or property of the said firm of Grahn & Dickerson. No answer was filed by any of the defendants, except Potter, Matlock & Co. After the issues were made up and proof taken, the court rendered a judgment in effect that the petition and amended petition of appellants be dismissed in so far as they or either of them charged that the alleged payments made to the defendants Potter, Matlock & Co. are or were a preference under the statute known as the "Act of 1856," and judgment was also given Potter, Matlock & Co. against the plaintiffs for their cost; and from that judgment this appeal is prosecuted. The proof conduces to show that Grahn & Dickerson were grocery merchants in Bowling Green, and that in December, 1895, their stock of goods was destroyed by fire, and that soon afterwards they collected something over \$500 of insurance, and proceeded to pay the sums set out in the pleadings to the various creditors in or about Bowling Green, most of the payments being small, except about \$400, paid to appellees Potter, Matlock & Co. The proof further conduces to show that Grahn & Dickerson had not, at the time of taking their depositions, engaged in any other business in their own names. It is the contention of appellees that the payments were not made with the knowledge of the insolvency of Grahn & Dickerson, or with the view of preferring the creditors so paid to other creditors; and that at the time of such payments—especially the pay-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ments to appellees Potter, Matlock & Co.—the late firm of Grahn & Dickerson were not aware of the fact that they were insolvent. There is also some contention that part, if not all, of the debts due said Potter, Matlock & Co. were individual debts of the members of the firm; but we do not think that a matter of any consequence, whether they were firm debts or individual debts. But the fact seems to be that the firm was insolvent at the time of the payments made to Potter, Matlock & Co., and under various decisions of this court the presumption must be indulged in that they were aware of it, or ought to have known it; and, if they paid their local creditors to the exclusion of foreign creditors, that is a circumstance at least tending to show that they intended to give the local creditors a preference; and the further fact that they did not thereafter engage in any business in their own names is some evidence that they had insolvency in contemplation, whether they were aware that they were insolvent or not; and, in either event, the payments would probably bring them within the provisions of the statute. Without attempting to recite in detail the testimony, we are of the opinion that under the decisions of this court the payment must be adjudged to be preferential, and therefore within the statute of 1856, and operated as an assignment of all the property of the said firm and its members for the benefit of all their creditors. *Thompson v. Heffner's Ex'rs*, 11 Bush, 353; *Grimes v. Grimes* (Ky.) 6 S. W. 333; *King v. Moody*, 79 Ky. 63; *Oliver v. Sutton* (Ky.) 43 S. W. 475; and also superior court decision in the case of *Ringold v. Smith*, 9 Ky. Law Rep. 441. For the reasons indicated, the judgment appealed from is reversed, and cause remanded, with directions to adjudge the payments set up in the pleadings to operate as an assignment of all the property of the said Grahn & Dickerson for the benefit of all their creditors, and for proceedings consistent herewith.

SCHLAMP et al. v. BERNER'S ADM'R.¹

(Court of Appeals of Kentucky. May 31, 1899.)
INSURANCE—ASSIGNMENT OF POLICY—INSURABLE INTEREST.

The assignment of a policy of life insurance to one who has no insurable interest in the life insured is void, as against public policy.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Action by the administrator of Mary H. Berner against John Schlamp and others to settle the estate of plaintiff's intestate. Judgment dismissing cross petition, filed by defendants, and they appeal. Affirmed.

Dudley & Fitts, for appellants.

WHITE, J. In 1892, and again in 1894, the Prudential Life Insurance Company is—

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

sued policies of insurance on the life of Josie Davis, whose real name was Mary Berner. These policies were payable to the administrator, executor, or assignee of the insured. After the issue of these policies, the insured, by a writing, assigned the policies to appellant Barbara Schlamp, who is designated as a cousin of the insured. Josie Davis (otherwise Mary Berner) died in 1896, leaving a will. Administration was had on her estate after the executor failed to qualify, and an action was instituted to settle the estate. Appellants filed a cross petition, claiming the proceeds of the two life policies, less the expenses of burial. It is pleaded in answer to this cross petition that there existed no relation of blood between Mary Berner and appellant Schlamp, nor was there any relation of debtor and creditor, except as to the burial expenses,—not in contest, for this expense was paid out of the proceeds of the policies. This is admitted, as is also the fact that no part of the premium was ever paid by appellant Schlamp. The court, on trial, adjudged that appellants were not entitled to any part of the proceeds of the two policies, and dismissed the cross petition; and from that judgment this appeal is prosecuted.

It is not contended that appellant ever had any insurable interest in the life of deceased, either as kinswoman or creditor, except that appellant was requested to attend to the burial of deceased; and all this expense has been paid without question. The question presented here is, is the assignment of these policies by the insured, who paid all the premiums, to one who had no insurable interest,—neither of kin nor creditor,—valid, so as to give the assignee the proceeds? The authorities throughout the several states are not uniform; but in this state the doctrine is well settled that one who had no insurable interest, either as of kin or as creditor, can derive no benefit from life insurance by an assignment of the policy, and that, as to creditors, his interest could never exceed his debt. *Bayse v. Adams*, 81 Ky. 368. It is clear that appellant has no insurable interest in the life of deceased, and the assignments of the two policies are void, as against public policy. The proceeds belong to the estate of deceased, Mary Berner. Judgment affirmed.

RULO v. MURPHY et al.¹

SAME v. BEADLES et al.

(Court of Appeals of Kentucky. May 26, 1899.)
HOMESTEAD—PURCHASE OF HOMESTEAD WITH PROCEEDS OF INSURANCE ON FORMER HOMESTEAD—SALE UNDER SUPERSEDED JUDGMENT—NECESSITY OF PROCESS.

1. A debtor is entitled to the homestead exemption as against a debt created after he acquired and occupied the property.

2. A homestead purchased with the proceeds of insurance on another homestead is exempt, as against all debts against which the former homestead was exempt.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

3. It was error to confirm a sale of land made under a judgment which had been superseded.

4. A judgment enforcing a lien asserted by cross petition, which was rendered before service of process thereon, was premature.

Appeal from circuit court, Fulton county.
"Not to be officially reported."

Action by H. D. Murphy & Co. against Sally Rulo and others to set aside a conveyance as fraudulent. Judgment for plaintiffs for a sale of the land, and judgment confirming the sale made thereunder, and defendant Sally Rulo appeals. Reversed.

J. W. Ray, for appellant. Robbins & Thomas, for appellees.

BURNAM, J. As the questions involved in these two cases grow out of the same transaction, they are heard together. They involve the validity of a judgment subjecting the homestead of appellant to the claim of appellees, and also the judgment confirming a sale of the homestead made by the master commissioner pursuant to the judgment. The facts out of which this litigation grew are these: N. Rulo was indebted to H. D. Murphy & Co. for a balance of \$83.60 for groceries sold to him during the year 1890, and also for a balance of \$149.20 for goods sold to him by the same firm during the latter part of 1893 and in the month of January, 1894. He purchased no goods from them during the year 1891, but started a new account with them in the latter part of 1892, which was continued during the year 1893, and up to the 1st of February, 1894. The cash payments made by him on the last account were sufficient to extinguish his indebtedness for goods furnished previous to the 1st day of April, 1894, but the balance of \$83.60 for the year 1890 remained unpaid. On the 5th day of December, 1895, he executed and delivered to Murphy & Co. his note for the aggregate amount of both balances, and soon thereafter they instituted this action to subject to the payment of their debt a house and lot occupied by appellant as a homestead, which had been purchased from one Hazzard on the 30th day of May, 1895, and had the title thereto taken to the defendant Sally Rulo; making Hazzard, who held a lien on the property, and the Fulton Building & Loan Association, who was also alleged to be interested, parties defendant. Plaintiffs charged that the consideration for the house and lot was paid by N. Rulo, and the title taken to his wife, with the intention of defrauding his creditors, and that the property was acquired after the creation of his indebtedness to them. Appellant resisted the sale on the ground that the property was exempt as a homestead, and that it was acquired previous to the creation of the debt sued for. Hazzard filed an answer, which he made a cross petition, setting up the unpaid balance due him, and asking judgment and for the enforcement of his lien. The building and loan

association also filed an answer, which was made a cross petition, alleging that there was due to them an unpaid balance of \$48, for which they held a lien on the property. No process was sued out or served on the cross petition of the building and loan association, and the case was submitted the same day, and judgment rendered subjecting the house and lot to the claims of Murphy & Co., Hazzard, and the building and loan association. Appellant superseded that judgment of Murphy & Co. on the 8th day of November, 1897, and asks on this appeal that it be reversed. Notwithstanding the supersedeas and appeal the master commissioner sold the property on the 15th day of November, 1897, and appellee Lena S. Beadles became the purchaser. Exceptions were filed to the confirmation of the report of sale on the ground that the judgment under which the sale was made, in so far as it adjudged the property liable for the debt of Murphy & Co., had been superseded, and also upon the ground that no summons had ever been issued or served upon appellant upon the cross petition of the building and loan association. A number of other objections were also made, but the court overruled the exceptions and confirmed the sale, and directed a writ of possession to issue; and from the judgment of confirmation an appeal is also prosecuted.

The proof in the record shows that appellant in the fall of 1892 purchased a lot from one Carr, on which she immediately erected a dwelling house, which she moved into and occupied in March, 1893, and continued to so occupy it until its destruction by fire in 1895; that this house and the furniture therein were insured for \$700; and that \$400 of the insurance money was used to pay for the property purchased from Hazzard, which was sold under the judgment in this action. We think it is very clear that the only part of plaintiffs' debt which antedated the acquisition of the first homestead, in March, 1893, was the balance of \$83.60 remaining unpaid on the account of 1890. The residue of their debt was for goods purchased subsequent to the time when appellant acquired and occupied the property as a homestead, and it was therefore exempt from liability for the payment thereof. See *Nichols v. Sennitt*, 78 Ky. 630; *Darnell v. Smith's Ex'r*, 98 Ky. 238, 32 S. W. 745.

The property was of less value than \$1,000, and, having been burned, the insurance money, not exceeding \$1,000, is also exempt from the claims of creditors, just as the homestead was exempt. Appellant had the right to rebuild and use the money for that purpose, or to use it in the purchase of another home, free from the claims of creditors. See *Thomp. Homest. Exemp.* 749, 750, 784; *Houghton v. Lee*, 50 Cal. 101; *Bernhelm v. Davitt* (Ky.) 5 S. W. 193. In our opinion, the property was only liable for the balance of \$83.60 remaining unpaid on the account of 1890.

We are also of the opinion that the court erred in confirming the sale made pursuant to the judgment, as the execution of the supersedeas bond suspended the judgment in favor of Murphy & Co., and no steps looking to its enforcement taken thereafter were valid.

Appellant was also entitled to be brought before the court by service of process on the cross petition of the building and loan association, and the judgment subjecting the homestead to the alleged balance due that association was prematurely rendered. For the reasons indicated, the judgment decreeing a sale of the property and the judgment confirming the report of sale are both reversed and remanded for proceedings consistent herewith.

LAWSON et al. v. S. T. BARLOW CO.¹

(Court of Appeals of Kentucky. May 27, 1899.)

EXECUTION—EXEMPTIONS—PLEADING.

1. Improvements erected by a debtor on the land of his wife are not personal property, within the meaning of the statute providing that "other personal property" may be set apart to a debtor as exempt, in lieu of provisions and provender not on hand.

2. To entitle a debtor to have other property set apart to him as exempt, in lieu of provisions and provender not on hand, it is not sufficient to allege that he has not the requisite quantity of provisions and provender, but he must show the extent of the deficit.

Appeal from circuit court, Nicholas county.
"Not to be officially reported."

Action by the S. T. Barlow Company against Jerome Lawson and Berthena Lawson to enforce a judgment. Judgment for plaintiff, and defendants appeal. Affirmed.

Norvell & Robinson, for appellants. Hanson Kennedy, for appellee.

GUFFY, J. The appellee instituted this action in the Nicholas circuit court seeking to enforce the collection of a judgment against the appellant Jerome Lawson, which had been theretofore rendered, and upon which execution had been returned, "No property found." It was sought to subject about one acre of ground, together with the improvements thereon, to the payment of the judgment. It is substantially alleged in the petition that the appellant Jerome Lawson had obtained from his co-defendant, Berthena Lawson, one acre of ground, and, with her knowledge and consent, he had built a house upon it worth at least \$200; all of which had occurred after he had incurred the indebtedness to the plaintiff the collection of which was sought in this action. The defendants, Jerome Lawson and Berthena Lawson, answered, and denied that Jerome Lawson had any interest in the land, but did not deny the erection of the improvements. It was also alleged that the improvements were not worth more than \$150, and that Jerome Lawson was a housekeeper, with

a family consisting of a wife and three children. A further allegation is made as follows: That he is the owner of no personal property, except one horse and cow; that he has not sufficient provision, including bread-stuff and animal food, to sustain his family one year, nor a sufficiency of provender to keep his said live stock for 12 months; and, if it is determined that said small frame house is his property, it is only personal property, and is exempt by law from seizure and sale. Wherefore defendants pray that plaintiff's petition be dismissed. To this answer plaintiff filed a demurrer, but the same was overruled. The reply may be treated as a traverse of the answer, so far as the answer claiming that Berthena Lawson was the owner of the land is concerned, and also a traverse as to the value thereof, as alleged by defendants; and also set out that Jerome Lawson was the equitable owner of the house and outbuildings erected upon said lot, and that same were built upon said lot, with the consent of Berthena Lawson. The affirmative matter in the reply was controverted of record. The cause was finally submitted upon the pleadings and the depositions of two witnesses, neither of whom are parties to the action. The court, in effect, decided that the one acre of land was not the property of the defendant in the execution, but adjudged that the improvements were the property of the said Jerome Lawson, and that he had the right to use and control them. The court further adjudged and directed the master commissioner of the circuit court to rent out the entire property until the portion of rent to which the defendant in the execution would otherwise be entitled was sufficient to pay plaintiff's debt, interest, and cost; and he was directed to take and hear proof on the subject, with the view of determining what portion of the rent should be paid to Berthena Lawson and what portion to the plaintiff, and from the aforesaid judgment appellants have appealed.

As to the claim of appellant that he should be allowed the improvements in lieu of provision and provender not on hand, it may be said, first, that the improvements partake so much of the nature of realty that we do not think the same can be assigned to him under the law providing for a substitution of personal property in lieu of provision, etc. But, whether this be so or not, the answer of the appellant is defective, in not showing what provision and what provender he had on hand. It will be seen that the averment is that he has not 12 months' provision or provender on hand. That averment might be true, and yet he might have more than 11 months' of both on hand. Nor does the answer sufficiently negative the idea that he might have considerable amount of money or choses in action due him. Taking the pleadings and testimony together in this case, we think the judgment appealed from is in accordance with the law and the facts. Judgment affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

WINCHESTER BANK v. CLARK COUNTY NAT. BANK.¹

(Court of Appeals of Kentucky. May 27, 1890.)

BANK CHECK—PRIORITY OVER ATTACHMENT—LIABILITY OF BANK AS GARNISHEE.

1. A check drawn before, though not presented until after, an attachment lien was created on the deposit, has priority over the attachment.

2. Where a deposit was not sufficient to pay an outstanding check of which the bank had notice, and also a debt of the depositor to secure which the bank had been served as garnishee, the bank, though it has paid out a part of the deposit on checks subsequently drawn, is liable as garnishee for the difference between the amount of the deposit and the amount of the check outstanding at the time it was served as garnishee.

Appeal from circuit court, Clark county.

"Not to be officially reported."

Action by the Winchester Bank against I. C. Skinner and the Clark County National Bank. Judgment for defendant Clark County National Bank, and plaintiff appeals. Reversed.

J. W. Benton, for appellant. Beckner & Jonett, for appellee.

WHITE, J. On February 10, 1897, the appellant, Winchester Bank, sued out an attachment against I. C. Skinner, claiming \$315.37, and had appellee served as garnishee. At that time appellee had on deposit the sum of \$671.39 to the credit of I. C. Skinner. On the same day the attachment was served, but afterwards, a check for \$393.95, drawn February 8th, by I. C. Skinner, in favor of O. C. Skinner, was presented by appellant as the agent of C. C. Skinner; but, there being but \$356.02 on deposit, after keeping back the \$315.37 under the attachment, the O. C. Skinner check was refused payment. After the execution of the order of attachment, the appellee paid out on checks of I. C. Skinner the balance above the amount of the attachment. The O. C. Skinner check was returned as uncollectible and protested. In May, 1897, the appellee filed its answer as garnishee, admitting that at the date of the attachment it had to the credit of I. C. Skinner the sum of \$671.39, and then held subject to the order of the court \$315.37. C. C. Skinner filed a petition, asked to be made a party, and claimed the fund attached, alleging that the appellant sued out its order of attachment after it received his check for collection, and before it presented it for payment, and that his check was drawn February 8, 1897,—two days before the attachment was sued out. Without answering or denying the allegations of the petition of C. C. Skinner, appellant filed an amended petition, seeking to hold appellee liable for the difference between the deposit, \$671.39, and the O. C. Skinner check of \$393.95, by reason of the facts, as alleged, that this sum was paid out with knowledge of the existence of the O. C. Skinner check,

and after the service of the attachment. To this amended petition the court sustained a demurrer, and directed appellee to pay to C. C. Skinner the sum of \$315.37 attached. Appellant failing to plead further, its action as to appellee garnishee was dismissed, and from that order it appeals.

It appears from the amended petition that on the 10th day of February appellee had on deposit \$671.39, and received notice by the check to C. C. Skinner of an appropriation of \$393.95, and by the attachment of a lien for \$315.37. There were not enough of funds to pay these two liens, yet after that day appellee paid on other checks drawn by I. C. Skinner subsequent in date to the one for \$393.95, as well as the date of the attachment, the sum of \$356.02. Taking this statement to be true, as it must on demurrer, we are of opinion that the appellee garnishee is liable for the balance on deposit, after paying the check for \$393.95 in full. It is clear that this check drawn on the 8th was an appropriation of any funds on hand at its presentation that remained to the credit of I. C. Skinner, and this regardless of the attachment lien of appellant. Appellee could have paid the \$393.95 check in full on presentation on the 10th, or, if it deemed this course unsafe, it could have refused to pay to any person the \$671.39 till the equitable liens were settled. In utter disregard of the \$393.95 check, which appellee refused to pay because of the attachment, it paid out the balance on deposit, saving only the amount fixed by the attachment. The demurrer to the amended petition should have been overruled. For this error the judgment is reversed, and cause remanded for proceedings consistent herewith.

McCORMICK HARVESTING MACH. CO. v. MARTIN et al.¹(Court of Appeals of Kentucky. May 27, 1890.)²
APPEAL AND ERROR—NECESSITY OF MOTION FOR NEW TRIAL.

A judgment in an action in equity, though upon legal issues, may be reviewed on appeal without a motion for new trial.

Appeal from circuit court, Harrison county.
"Not to be officially reported."

Action by the McCormick Harvesting Machine Company against J. T. Martin and others upon a promissory note. Judgment for defendants, and plaintiff appeals. Reversed.

D. L. Evans and W. S. Cason, for appellant. Blanton & Berry, for appellees.

DU RELLE, J. Appellant brought suit against appellees upon their note for \$630, upon which were credits amounting to nearly \$200. In their answer and counterclaim, appellees pleaded: First. A special plea of non est factum, alleging that the words, "This note is secured by book-acc't notes transferred and assigned this day as collateral security,"

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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² For modification of opinion, see 51 S. W. 1021.

were not in the note when it was executed and delivered, and were inserted in the face thereof after its execution and delivery, without the knowledge or consent of either of them. Second. That the note was given as evidence of a full settlement as of its date, and that at the same time, in full accord and satisfaction thereof, they assigned and transferred notes and accounts aggregating in face value \$1,002.63, of which at least \$850 were at that time good and collectible; that appellant agreed to collect them and apply the proceeds in discharge of the indebtedness of \$630, and to return whatever notes and accounts remained uncollected after the discharge of such indebtedness, but that appellant did not collect, or use any diligence to collect, the greater part of such notes and accounts; and that by reason of such failure appellees had been damaged in the sum of \$200. A demurrer to the first paragraph was sustained. Appellant replied to the second paragraph of the answer and counterclaim; denying the accord and satisfaction, or that it had received the notes or accounts in satisfaction of the note, or any part thereof. It further pleaded that the assignment indorsed upon the notes and accounts was, through mistake, made as in part payment, but that they were only assigned as collateral security, denied that \$850 of them were collectible, denied that it had not used diligence in collecting the notes and accounts, and averred that it had used diligence, had given credit for all the sums collected, and that none of the uncollected ones "are collectible by law." In their rejoinder, appellees denied the affirmative averments of the reply, and again pleaded the alteration averred in the answer. The surrejoinder put in issue the alleged alteration. After a jury had been sworn the appellant moved to set aside the swearing and transfer the cause to equity. The motion was sustained, the cause submitted, and judgment rendered against appellant on appellees' counterclaim for \$200.

Appellant cannot complain that the court determined the issues of fact, for it was upon its motion that the transfer was made.

It is unnecessary to consider the plea as to the alteration of the note, for there is no evidence to sustain the plea that the assignment indorsed upon the individual notes and accounts assigned by appellees was made to read in part payment of the note sued on through mistake. On the contrary, it appears from the evidence of the agent who made the settlement that the form of the assignment was prepared for him by an attorney, and he nowhere states that it was done by mistake. The evidence, giving due weight to the finding of the chancellor, seems to us to sustain the plea that the notes and accounts were received in payment of the indebtedness.

But there is not, in our judgment, any sufficient evidence to sustain the judgment for damages upon the counterclaim. No damage is shown to have occurred, and the judgment over was error. It is claimed for appellees

that the judgment of the chancellor upon this question is conclusive, for the reason that no motion for new trial was made; and the cases of *Helm v. Coffey*, 80 Ky. 176, and *Henderson v. Dupree*, 82 Ky. 678, are relied upon. In those cases it was held that in a common-law action, where the law and facts were submitted to the court, and in an equity cause, where an issue out of chancery, triable by a jury, was tried by the court on agreement of the parties, motion and grounds for new trial were necessary to obtain a review of the judgment by this court. In the case of *Simms v. Lanehart*, 38 S. W. 490, we felt bound to follow the doctrine laid down in those cases; but it is certainly not our purpose to carry the doctrine further, and apply it to an action in equity. As there was no testimony showing damage, the transfer of the whole cause to equity did not prejudice appellees. For the reasons stated, the judgment is reversed, with directions to dismiss the counterclaim.

COOKE v. CLARK'S COMMITTEE.¹

(Court of Appeals of Kentucky. May 27, 1890.)
INTEREST—DEMAND—MANDATE ON REVERSAL.
OF JUDGMENT.

1. Where no demand is alleged, a note payable on demand bears interest only from the date of the filing of the petition.

2. An error in allowing interest on a note may be corrected without awarding a new trial.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by William Clark's committee against J. Esten Cooke on a promissory note. Judgment for plaintiff, and defendant appeals. Reversed.

Humphrey & Davie and Lane & Burnett, for appellant. Simrall, Bodley & Doolan, for appellee.

WHITE, J. This action was brought upon two promises to pay money,—the first, a negotiable note for \$300; the second, as follows: "\$700.00. Louisville, Ky., June 23, 1880. On demand after date I promise to pay to the order of William Clark seven hundred dollars. J. Esten Cooke." The defense presented was payment. On this issue, trial was had before a jury, which resulted in a verdict and judgment for appellee for the sum of both notes; the judgment giving interest on the \$700 note from its date. After reasons and motion for new trial were overruled, this appeal was prosecuted.

The reasons assigned for new trial that are insisted on in this court are that the verdict of the jury is contrary to the evidence, and is not supported by the evidence, and that the judgment awarding interest on the \$700 note from its date is error; there being no allegation or proof of a demand ever having been made. The burden of proving pay-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ment of the notes was on appellant, and, in the opinion of the jury, this was not done. We are not prepared to say that their verdict was flagrantly against the evidence. There was some proof of a payment, but it was not clear or satisfactory that it was made, or, if made at all, that it was in satisfaction of these notes. This was a question for the jury, and we do not feel authorized to disturb their finding.

The note or duebill for \$700 was payable on demand. For what it was given, does not appear. No demand is alleged to have ever been made. It has long been the rule in this state that such paper bears interest only from demand. *Gore v. Buck*, 1 T. B. Mon. 209; *Bartlett v. Marshall*, 2 Bibb, 469; *Patrick v. Clay*, 4 Bibb, 246; *Dillon v. Dudley*, 1 A. K. Marsh, 67; *Nelson v. Cartmel's Adm'r*, 6 Dana, 7. Demand is not a condition precedent, that must be made before an action may be instituted, but is necessary before the note will draw interest. We are of opinion that the judgment allowing interest on the \$700 note was error. However, it will not be necessary to award a new trial on reversal. This error can be corrected by the court. This procedure is recognized by this court in *Reynolds v. Powers*, 29 S. W. 299, and *City of Dayton v. Gardner*, 40 S. W. 779. Wherefore, for the reasons indicated, the judgment of the lower court is reversed, and the cause remanded, with directions to enter judgment on the verdict for the sum of \$300, with interest from December 16, 1878, and for \$700, with interest from January 5, 1894, the date of the filing of the petition, and for proceedings consistent herewith.

McCLURE v. RENAHER et al.¹

(Court of Appeals of Kentucky. June 1, 1899.)
ATTACHMENT—RECOVERY ON ATTACHMENT BOND—ATTORNEY'S FEES.

Attorney's fees may be recovered as part of the damages in an action on an attachment bond, to the extent that they were for services rendered in defending the attachment alone, as distinguished from the action itself.

Appeal from circuit court, Grant county.

"Not to be officially reported."

Action by Moses McClure against J. B. Renaker and others on an attachment bond. Judgment for defendants, and plaintiff appeals. Reversed.

A. G. De Jarnette, for appellant. W. W. Dickerson, for appellees.

HOBSON, J. Appellant instituted this action against appellees on an attachment bond executed by them. The attachment having been discharged, he sought to recover the damages sustained by him by reason of the attachment, including his reasonable attorney's fee in defending it, which he alleged was \$100. The court below refused to al-

low him anything for his attorney's fee, on the ground, apparently, that the attorney was employed to defend the action on the merits, and having defended the whole case, including the attachment, no part of his fee could be recovered on the bond. We are referred to *Smith v. Bell*, 91 Ky. 655, 25 S. W. 752, and *Worthington v. Morris' Ex'r*, 32 S. W. 269, to sustain the ruling of the court below. *Smith v. Bell* was not an action upon an attachment bond. The attorney's fee there sought to be recovered was expended in a suit to determine the title to the land; and so the court said that "for mere resistance to the recovery in an action of ejectment, or an action of that character, we are of the opinion no attorney's fees, except those allowed by the statute, can be recovered." There was nothing in the case involving the question made here. In *Worthington v. Morris' Ex'r*, 98 Ky. 54, 32 S. W. 269, the purpose of the action was to set aside a fraudulent transfer of property; and the attachment of the property so transferred was taken out to get jurisdiction to set aside the transfer, and was therefore at the basis of the action. It was merely decided that to allow an attorney's fee for defending the attachment, under such a state of facts, would be, in effect, to make the defeated party pay his adversary's attorney's fee in the case. The case is analogous to those where it is held that an attorney's fee cannot be recovered upon an injunction bond, where the injunction is the relief sought in the action. *Turnpike Co. v. Dulaney*, 86 Ky. 516, 6 S. W. 590. Neither of these decisions was intended to change the rule which had been often declared in previous cases. In *Drake*, *Attachm.* § 176, it is said that "fees paid to counsel for services in the attachment suit" are allowed as part of the damages to be recovered on the bond. He then adds: "Where it is sought to recover for counsel fees in defending the attachment, it is held in Kentucky that no recovery can be had unless the fees were paid, or contracted to be paid, and are proved to be reasonable. As to costs, the court of appeals of that state held that, if the whole costs turn upon the defense of the cause of action, they are not recoverable upon the attachment bond; if incurred in defending the cause of attachment alone, they are recoverable; if incurred partly in defending the cause of action, and partly in defending the cause of attachment, they are recoverable only so far as incurred in defense of the attachment." This statement of the law is fully sustained by *Trapnall v. McAfee*, 3 Metc. (Ky.) 34; *Shultz v. Morrison*, Id. 98; *Johnson v. Bank*, 4 Bush, 283; *Marchand v. York*, 10 Ky. Law Rep. 777; *Wilson v. Smith* (Ky.) 38 S. W. 870. It may be that the greater part of the attorney's services in contest were rendered in defense of the action, but it is manifest that a part of them were rendered in defending the attachment. The reasonable value of the services rendered upon the attachment alone may be determined

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independently of the other services, and, under the rule above quoted, may be recovered in this action on the bond. In the action in which the attachment was obtained, appellee Renaker sought indemnity of appellant from loss by reason of a certain mortgage. The attachment was taken out to secure the judgment that might be recovered, and, having been improperly issued, appellees became liable on the bond for all appellant's costs, including his counsel fees incurred by reason of it.

On the cross appeal, we see no reason for reversing the judgment recovered for \$22.45. It is true, there was a judgment in the attachment suit for the costs in that action, amounting to \$12.45, on the attachment issued, and this amount is included in the judgment on the bond. Renaker signed the bond, as well as the other appellees, and thereby undertook that he would pay this cost. In suing on this bond, appellant was not required to split his cause of action, but might recover on it as a whole against all the obligors in the bond. His election so to do would merge the first judgment in the second, and he would be estopped thereafter to take steps to collect it. On the original appeal the judgment is reversed, and the cause remanded for a new trial and further proceedings not inconsistent with this opinion.

RALLS v. PRATHER.¹

(Court of Appeals of Kentucky. May 31, 1899.)

HOMESTEAD—MARSHALING SECURITIES.

Though a debtor was not entitled to a homestead as against a vendor's lien, yet as the vendor permitted the proceeds, which were sufficient, after setting apart a homestead, to satisfy his lien, to be applied to the payment of inferior liens, as against which the debtor was entitled to a homestead, he cannot subject the homestead to pay the balance of his claim.

Appeal from circuit court, Nicholas county.
"Not to be officially reported."

Action by the assignee of D. B. Ralls for a settlement of the assigned estate. Judgment in favor of Pauline Prather subjecting the homestead of the assignor, and he appeals. Reversed.

Norvell & Robinson, for appellant. Thomas Owens, for appellee.

WHITE, J. In 1886 the appellant bought of appellee a tract of land in Nicholas county containing 98 acres. There were some deferred payments. In 1894 appellant became indebted to one Mann in the sum of \$339, and executed a mortgage to secure same on 15 acres out of the 98 bought of appellee. In 1893 appellant became indebted by reason of surety to J. W. & S. S. Ralls in the sum of \$513, and, to secure them against loss, executed a mortgage to them on 10 acres of the 98 acres bought of appellee. In neither of these mortgages is the right of homestead

waived or relinquished, nor does the mortgage cover the land on which the dwelling house is situated. In 1894, after the execution of the mortgage to Mann, the appellant made a deed of general assignment for the benefit of all his creditors, reserving to himself all exemptions allowed by law to a housekeeper with a family. In an action brought by the assignee for a settlement of the insolvent estate, the commissioner was directed to lay off to the appellant a homestead, and to lay off the 10 and 15 acres separately, and to subdivide the remainder if he deemed it advisable, and directed a sale of the several parcels of land except that allotted as a homestead. At a sale of these parcels, which was confirmed, the 15-acre tract sold for \$345, the 10-acre tract for \$255, and the remainder, outside the homestead, for \$990.25. The appellee's purchase-money debt on the day of sale amounted to \$1,116.12. At the May term, 1896, the commissioner reported that out of the proceeds of the sale of the several parcels he had paid costs and attorney's fees in the settlement suit of \$316.75, and that there was a balance due appellee, Prather, of \$195.27, with interest from May 16, 1896, after all the proceeds of sale had been exhausted. At the May term, 1897, judgment was entered directing the commissioner to sell the parcel allotted to appellant as a homestead to pay this balance of the purchase money due her. From this latter judgment, this appeal is prosecuted.

It is clear and well settled that, as against appellee, Prather, there is no homestead exemption. It is equally clear that, as against the two mortgages, the deed of assignment, and all general creditors, appellant has a homestead. It is equally clear that the debt of appellee is superior to that of any creditor. By the sales of the parcels of land by the commissioner there was realized \$374.13 more than sufficient to pay appellee's debt in full. The priority of right was appellee's debt first, then the homestead of appellant, then the mortgage debts. The legitimate costs of foreclosure of each claim follow the claim.

We are of opinion that, when the land sufficient to pay appellee's claim was sold, the right of the homestead was perfect, and no subsequent diversion of the fund from the payment of appellee's debt could affect the right of appellant, once perfected. If appellee has suffered the proceeds of the sales, on which she had first claim, to be appropriated to other uses, she alone must bear the burden. She cannot shift it on appellant, and thus subject his homestead. For these reasons, the judgment appealed from is reversed, and cause remanded for proceedings consistent herewith. The motion of appellee to require appellant to pay for parts of the record unnecessarily copied is sustained, and the clerk of this court, in taxing the costs of this appeal, will tax against appellant the cost of copying 120 pages, which is unnecessary for this appeal.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

KANSAS CITY, FT. S. & M. RY. CO. v. KING.

(Supreme Court of Arkansas. May 6, 1899.)

RAILROADS—INJURY TO ANIMALS.

A verdict for plaintiff for damages for the killing of a horse by an engine is not sustained when the uncontradicted evidence of the engineer is that he used all diligence in trying to prevent the accident, and there is no other evidence as to the killing.

Appeal from circuit court, Lawrence county; Richard H. Powle, Judge.

Action by R. A. King against the Kansas City, Ft. Scott & Memphis Railway Company for damages for killing a horse. From a judgment for plaintiff, defendant appeals. Reversed.

W. J. Orr, for appellant. R. A. King, pro se.

BUNN, C. J. This is a suit for damages for the negligent killing of a horse by one of the trains of the defendant company. Judgment for plaintiff in the sum of \$65, and defendant appealed. This action was commenced before a justice of the peace, based on an account for said damages. The defendant was duly summoned, but failed to appear on the day set for trial; and, after waiting three hours, the justice of the peace took the testimony, and found for the plaintiff in the amount claimed, to wit, the sum of \$65, and rendered judgment accordingly. Thereafter, in due time and in due form, the defendant filed its affidavit, and took an appeal to the circuit court, where also judgment was rendered for plaintiff in the said amount of \$65, and the defendant, saving all proper exceptions, appealed to this court. After verdict, defendant filed its motion in arrest of judgment as follows: "The defendant moves the court to arrest the judgment herein for the reason that the statement filed with the justice and relied on by the plaintiff does not state a cause of action, or facts sufficient to constitute a cause of action."

The contention of the defendant, as more particularly stated in its brief and argument, is that the venue was not laid in the account filed, and there was no proof of the county in which the killing is alleged to have occurred, and no motion made to amend or amendment made; therefore there was nothing upon which to find a judgment. Without disposing of this question, which will not probably arise in a new trial, we proceed with the further statement of the case. The motion in arrest was overruled, and defendant excepted. The defendant filed motion for new trial on four several grounds,—the first being substantially the same as for the motion in arrest; the second, because the court read to the jury as an instruction section 6207, Sand. & H. Dig. (known as the "Lookout Statute"); the third, because the verdict is not supported by sufficient evidence; and the fourth, because the verdict is contrary to the evidence.

The question of the sufficiency of the evi-

dence to sustain the verdict is the only one we need to discuss or consider. There is no contention that the horse was not killed by the engine at the time and place alleged in the complaint. The plaintiff's uncontradicted evidence shows his ownership of the animal, and the value thereof, and the testimony of the engineer is the only testimony as to the circumstances attending the killing of the animal. He stated, in brief, that it was a cloudy, if not a dark, night, and that he could see the animal only about the distance of 100 yards ahead; that his headlight was an oil light; that the animal was standing on the track when he first saw it; that he was keeping a lookout, and at once he gave the stock alarm, which consisted of a succession of short whistles, and put on the brakes and the air, and did all he could to stop the train, which consisted of 23 or 24 heavily loaded freight cars besides the caboose; that he was running at a speed of 25 miles an hour, and could not have stopped his train within less than 400 yards; that the horse did not run more than 100 yards after he saw him; that he did not succeed in slowing up much, but he knew of nothing else he could have done to stop the train than he did do; and that his stock alarm aforesaid frightened the animal.

We think the statement of the engineer is altogether reasonable, and not contradictory, and fairly removes the statutory presumption of negligence when the animal is injured by the running of a train, and that therefore there is not sufficient evidence to sustain the verdict, since the evidence of the engineer is unimpeached, and cannot be arbitrarily discarded. Reversed and remanded.

ACRUMAN v. BARNES.

(Supreme Court of Arkansas. May 6, 1899.)

HOMESTEAD—EXEMPTION OF INSURANCE—PURCHASE MONEY.

The money becoming due, after loss, on an insurance policy insuring a homestead for the benefit of the owner, is not exempt from garnishment in an action on a note secured by a mortgage on the homestead, where the money for which the note was given was loaned to the mortgagor for the purpose of, and was used in, buying the homestead, under Const. 1894, art. 9, § 3, which provides that the homestead of any resident who is the head of a family shall be exempt from the lien of any judgment or sale on execution, except such as may be rendered for the purchase money or for specific lien.

Appeal from circuit court, Dallas county; John B. McCaleb, Judge.

Action by E. A. Acruman against H. A. Barnes. From a judgment in favor of defendant, plaintiff appealed. Reversed.

Appellee, Barnes, owned a homestead of less value than \$2,500, which ordinarily was exempt from sale under execution. He sold his homestead to one Pulliam, and afterwards bought it again from Pulliam, and paid him \$1,000 therefor, which \$1,000 was loaned to

him, for the purpose of repurchasing the homestead, by the appellant, Acruman. As a part of the transaction, the appellee, Barnes, executed to appellant, Acruman, at the time, a mortgage on the homestead to secure the payment of the \$1,000. Barnes, of his own motion, and with his own means, insured the building, constituting, with the land on which it was situate, the homestead. The building was afterwards consumed by fire, of which Barnes made proof, and established the liability of the insurance company for the loss. Before payment for the loss by the insurance company, Acruman sued Barnes on the debt for the money loaned, and garnished the insurance company. A trial was had, and resulted in a judgment against Barnes for the debt. The insurance company answered, and admitted its liability for \$1,000 on the insurance policy held by Barnes. Barnes was made a party to the garnishment proceedings, and filed an intervention, claiming that the property was not insured for the benefit of creditors, but to protect his homestead; that he expected with the insurance money to purchase another residence; and that he claimed the money exempt from the payment of his debts, under the law exempting the homestead. He filed his schedule as required by the statute. The circuit court held that Acruman had no interest in the insurance policy, and acquired none in the insurance money by the garnishment proceedings, and that the \$1,000 insurance money was exempt, from which Acruman appealed.

R. O. Fuller and Thornton & Thornton, for appellant. W. S. Ams, for appellee.

HUGHES, J. (after stating the facts). Where money is loaned with which to purchase a homestead, upon the understanding that it will be so used, and it is so used, and a mortgage is given to the lender to secure the payment of the money loaned for that purpose, if the building constituting a part of the homestead is insured for the benefit of the owner of the homestead, and afterwards is consumed by fire, is the money due on the policy of insurance exempt from seizure on process of garnishment or execution for the debt due the lender? Article 9, § 3, of the constitution of 1894, provides that "the homestead of any resident of this state, who is married or the head of a family, shall not be subject to the lien of any judgment or decree of any court or to sale under execution or other process thereon, except such as may be rendered for the purchase money or for specific lien." Acruman's testimony shows that he loaned the money to Barnes to be used for the purchase of the homestead property, and Barnes swears he used it for that purpose. Barnes executed a mortgage to Acruman upon the same property to secure the payment of the money loaned with which to purchase it. In some courts it is held that money loaned to purchase property cannot be considered

purchase money as between the lender and borrower, but only between the vendor and purchaser of the property. *Heuissler v. Nickum*, 38 Md. 270. But, in our opinion, the weight of authority and the better reason is that money borrowed of a third person, with which to purchase a homestead, when it is understood between the lender and the borrower that it is to be used for that purpose, and it is so used, is purchase money. *Allen v. Hawley*, 66 Ill. 164; *Hamrick v. Bank*, 54 Ga. 502; *Carr v. Caldwell*, 10 Cal. 385; *Nichols v. Overacker*, 16 Kan. 54. "Things bought with borrowed money, borrowed with the avowed purpose of buying them, are not exempt as against the lender." *Waples, Homest.* 911; *Houlehan v. Rassler*, 73 Wis. 557, 41 N. W. 720. "The homestead is liable for money borrowed to pay a balance due on the purchase price." *White v. Wheelan*, 71 Ga. 533; *Middlebrooks v. Warren*, 59 Ga. 232. "One who loans money to enable another to purchase a homestead cannot be defeated in collecting it by the claim of homestead immunity upon the part of the borrower." *Warhmund v. Merritt*, 60 Tex. 24; *Eyler v. Eyler*, Id. 315. The insurance money due the appellee in this case was not exempt from the debt due the appellant for the \$1,000 loaned him by the appellant, with which to purchase the homestead, for the loss of which the insurance money was due the appellee. The money loaned, under the circumstances, was purchase money, according to the authorities; wherefore the decree of the chancellor holding that the money is exempt is erroneous. The judgment is reversed, with directions to enter a judgment for the appellant.

WEST-WINFREE TOBACCO CO. v. WALLER et al.

(Supreme Court of Arkansas. May 6, 1899.)

GUARANTY—CONSTRUCTION—PAROL EVIDENCE—ADMISSIBILITY—CONTRACTING WRITINGS.

1. A guaranty that on demand, after 30 days after date, the guarantors will pay to the employers of a salesman any moneys advanced by them to the salesman for expenses in excess of the amount he is entitled to under his contract of employment, which is for one year, is a continuing guaranty for the entire term of the salesman's employment.

2. The guaranty being unambiguous, in an action thereon against the sureties, parol evidence that they signed it for 30 days only was inadmissible.

Appeal from circuit court, Columbia county; Charles W. Smith, Judge.

Action by the West-Winfree Tobacco Company against J. M. Waller and others. There was a judgment for defendants, and plaintiff appeals. Reversed.

This case was commenced in a justice of the peace court, and comes here by appeal from the circuit court. The appellant company employed one L. Harper, about December 20, 1894, to travel and sell tobacco for it, and

was to advance him money to defray his expenses, to give him a salary, and a per cent. on all he sold over \$3,000 worth. Harper agreed to work for it during the year 1895, and gave the appellant a guaranty, with appellees as securities, that he would pay it (appellant) back all moneys advanced to him by appellant, to the amount of \$100 more than he was entitled to receive under their contract, as expense money, wages, or otherwise. Harper worked for appellant four or five months, and quit owing the appellant \$100 advanced to him more than he was entitled to receive for wages, expense money, or otherwise. The appellant company sued Harper, and recovered a judgment against him for said \$100, with 6 per cent. per annum interest from the 26th day of January, 1895. Execution was issued upon said judgment, and returned *nulla bona*. The appellant company then sued the sureties, Waller and Couey, on their guaranty, which is as follows: "\$100.00. Magnolia, Ark., Jan. 10, 1895. On demand, after thirty days after date, for value received, I promise to pay West-Winfree Tobacco Co., or order, without offset, negotiable and payable at Columbia County Bank, Magnolia, Ark. This is to cover advances in excess of my dues, as per your offer of Dec. 20th, 1894, which I accept to amount of cost of collection, one hundred dollars. Homestead and all other exemptions waived by the maker and each indorser. L. Harper." Indorsement on note or bond: "Homestead and all other exemptions waived. We guaranty within. Protest waived. J. M. Waller. J. E. Couey." Upon this note or bond a trial was had in the circuit court, on an appeal from the justice of the peace, at the August term thereof, 1897, and judgment was rendered against the plaintiff; whereupon the plaintiff filed its motion for a new trial, which was overruled, to which appellant excepted, and brought the case here by appeal. On the trial of the case, J. M. Waller was allowed, over the objection of the appellant, to testify that on or about January, 1895, L. Harper came to him, and asked him to sign a bond to the West-Winfree Tobacco Company, in order to secure him a position as traveling salesman for it. "I told him I could not do so. He came back two or three days afterwards, and told me that, if I would go on the bond, that Mr. J. E. Couey would go on it too, and I went down to Mr. Couey's place of business, and Mr. Harper presented the instrument herein sued on, and Mr. Couey and I signed the indorsement written on the back of the instrument. The bond or note is for one hundred dollars, and I signed the instrument or guaranty for 30 days, and for no longer. I signed the guaranty for one hundred dollars to be advanced within thirty days from the date of the instrument, and for no advancement made after thirty days after the date thereof." The other surety, Couey, was also allowed to give testimony to the same effect, over appellant's objection, to which it excepted. The court refused to instruct the

jury, at the instance of the plaintiff, "that the paper sued on in this case is a continuing guaranty, and is made to secure money advanced by them to Harper at any time during the year he was working, provided they advanced him more than he was entitled to be paid under his contract." The plaintiff excepted to the court's refusal to give this instruction.

J. M. Kelso, for appellant. A. S. Kilgore and J. Y. Stevens, for appellee.

HUGHES, J. (after stating the facts). There is no ambiguity in the meaning of the note guarantied by the appellees, and its proper construction was that asked to be placed upon it in the fourth instruction asked for by the plaintiff, which the court refused to give, and in so doing committed error, in our opinion.

The testimony of Waller and of Couey was incompetent, and the court erred in admitting it. It tended to contradict or vary the terms of an unambiguous written contract.

For the errors indicated the judgment is reversed, and judgment is ordered to be rendered below for plaintiff, for which purpose let the case be remanded.

BUNN, C. J., and BATTLE, J., not sitting.

RICHARDSON v. BALES.

(Supreme Court of Arkansas. May 6, 1899.)
MONEY PAID BY MISTAKE—LIMITATION OF ACTIONS.

Defendant, to induce his wife, the plaintiff, to institute proceedings for divorce, said he would pay her attorney's fee. He had considerable notes and mortgages, and threw them down on the table, and told her to take what she wanted, which she did, and the amount was credited on his note. After divorce he continued to borrow money of her, and when she sought to recover it he alleged mistake and overpayment in the former settlement. *Held*, that there was no such mistake or concealment of facts as would take the case out of the statute of limitations, barring actions for money paid by mistake in three years.

Appeal from circuit court, Saline county; Alexander M. Duffie, Judge.

Action by Mrs. N. C. Richardson against Henry Bales for money loaned. From a judgment for plaintiff for amount of her demand less set-off claimed by defendant, plaintiff appeals. Reversed.

Mrs. N. C. Richardson, on the 31st day of October, 1896, brought suit against Henry Bales to recover \$733.61, due her for money loaned, and evidenced by four promissory notes of defendant. On the 2d day of November, 1896, Bales filed an answer, admitting the execution of the notes sued on, but alleged by way of set-off that from Mrs. Richardson was due him the sum of \$471.10 paid to her through mistake in a certain settlement had between them about other matters on 19th of July, 1893, and also that he was entitled

to an additional credit of \$6 for money had and received by Mrs. Richardson. Mrs. Richardson filed a reply, denying that Bales had paid her money by mistake, and controverting the other allegations of the answer. She also pleaded the statute of limitations of three years against the set-off claimed by Bales. On the trial in the circuit court Mrs. Richardson asked the judge to instruct the jury that the claim of defendant to recover money paid by mistake was barred by statute of limitations in three years from date of such payment, which he refused to do. There was a verdict and judgment for plaintiff for amount of her demand less the amount of the set-off claimed by defendant, from which judgment she appealed.

E. H. Vance, for appellant. J. S. Williams, for appellee.

RIDDICK, J. (after stating the facts). The only question presented by this appeal is whether the claim of defendant to recover money paid by mistake was barred by the statute of limitations. It is admitted that the alleged overpayment was made in a settlement having no connection with the notes sued on, and over three years before the filing of the answer claiming the same as a set-off, and we are of the opinion that the claim was barred. Under our statute an action to recover money paid under a mistake of fact, when there is no fraudulent concealment, is barred in three years from the date of payment. The right of action arose upon such overpayment, and the statute commenced to run immediately, even though the mistake was not discovered until a year or two afterwards. *Sand. & H. Dig. § 4822; Leather Manufacturers' Bank v. Merchants' Bank*, 128 U. S. 26, 9 Sup. Ct. 3; *Sturgis v. Preston*, 134 Mass. 372; *Ware v. State*, 74 Ind. 181; *Jones v. School Dist. No. 19*, 28 Kan. 490; *Busw. Lim. § 171*. There is nothing in the pleadings or proof to show any concealment of facts on part of plaintiff. The note upon which defendant claims to have made the overpayment was at once handed to him, and, if he did not look at it, he alone was to blame. The record shows that at the time this settlement was made in which he says the mistake occurred defendant and plaintiff were husband and wife. He wanted a divorce, and, in order to induce her to bring suit for a divorce, he agreed to pay her attorney's fee. As the settlement was made by defendant with that object in view, and for the purpose of smoothing the road to a divorce, he doubtless felt disposed to be liberal with his wife. His testimony displays the state of mind in which he made the settlement. "I had," he said, "considerable notes and mortgages, and I threw them down upon the table, and told her to take what she wanted." This very liberal proposition was made before the divorce. Afterwards, when the divorce had been granted, he continued to borrow money from his di-

vorced wife, but when she sought to recover it he alleged as a set-off a mistake and overpayment in the former settlement. We have read the evidence carefully, and think there is reason to doubt whether any such overpayment was made. If there was an overpayment, we are still in doubt whether it was due to the alleged mistake or to the fine liberality of a man desirous of a divorce, and who, to quote the language of one of his witnesses, "was paying attention to another woman." In any event, his action to recover for the overpayment was clearly barred by the statute of limitations before this suit commenced. This disposes of the whole case of defendant except an item of six dollars, for which he claims credit, and which, we think, should be allowed. As defendant does not dispute the notes sued on, and as his claim of an overpayment, if there was ever any merit in it, is now barred by limitation, we think plaintiff should have judgment. The judgment of the circuit court will therefore be reversed, and a judgment entered here in favor of plaintiff for the amount of notes sued on less the credit of six dollars.

PARKS v. LUBBOCK et al.

(Supreme Court of Texas. May 22, 1899.)

"INTEREST"—DEFINITION—USURY.

Under Rev. St. art. 3097, which defines "interest" as the compensation allowed by law or fixed by parties to a contract for the use or forbearance "or detention" of money, a stipulation that, on failure to repay a loan at maturity, the debtor shall pay for its detention a rate in excess of the legal rate of interest, is void.

Error to court of civil appeals of First supreme judicial district.

Suit by John B. Lubbock and others against Mary Fields, executrix. She died pending suit, and the cause was revived against R. C. Parks, administrator de bonis non. A judgment for plaintiffs was affirmed in the court of civil appeals (50 S. W. 466), and defendant brings error. Reversed.

Thos. B. Greenwood & Son, for plaintiff in error. A. W. Gregg and B. H. Gardner, for defendants in error.

GAINES, C. J. This suit was brought to recover judgment upon a promissory note executed by Henry Fields and Mary Fields, of which the following is a copy:

"Five years after date, for value received, we promise to pay to the order of the Jarvis-Conklin Mortgage Trust Co., at its office in Kansas City, Mo., eight hundred and twenty-five dollars, lawful money of the United States, with interest thereon at the rate of six per cent. per annum, payable semiannually on the first days of May and November in each year, according to the tenor and effect of the interest notes of even date herewith, and hereto attached. This note is to draw interest from date at the rate of twelve per cent.

per annum, if either principal or interest remain unpaid ten days after due. At the option of the legal holder, after any of said interest notes remain due and unpaid ten days the whole of the principal and interest may be declared immediately due and payable. This note is given for an actual loan of the above amount, and is secured by a trust deed of even date herewith, which is a first lien on the property herein described. Dated at Kansas City, Mo., November first, 1889. Henry Fields. Mary Fields."

Attached to the note are 10 interest coupons, for \$24.75 each. The note is indorsed on its back, in blank, and without date, to John B. Lubbock and William B. Lubbock, by the Jarvis-Conklin Mortgage Trust Company.

At the time the note was made the makers executed a deed in trust upon a certain tract of land to secure its payment. The deed in trust provided that in case of suit 10 per cent. should be recoverable by the trustee for the use of the attorney. The note was indorsed by the payee to John B. Lubbock and W. B. Lubbock. They, together with S. M. Jarvis, the trustee in the deed in trust, brought suit upon the note, and to enforce the lien of the mortgage. Henry Fields having died, the suit was brought against Mary Fields, his executrix. She died while the action was pending, and it was revived against R. C. Parks, as administrator de bonis non of Henry Fields' estate. The defendant pleaded that the contract was usurious, and sought to defeat a recovery for the interest. The trial court held that there was no usury in the contract, and gave judgment for the full amount claimed. The court of civil appeals took the same view of the transaction, and affirmed the judgment.

We incline to think that, treating the question as one to be decided by the common law, the court of civil appeals, in holding that the contract was not usurious, reached a correct conclusion. Interest, as known to the common law, is defined as "a compensation usually reckoned by a percentage for the loan, use, or forbearance of money." Abb. Law Dict.; 11 Am. & Eng. Enc. Law, 379. This does not embrace the compensation for the detention of money beyond the time at which it was agreed to be paid; that is to say, after the maturity of the debt. Therefore the parties to a contract for the payment of money might lawfully stipulate that, upon the failure of the debtor to pay at maturity, he should pay for its detention a rate in excess of what the law would allow as interest. The sum so agreed to be paid for the detention of the money is treated, not as interest, but as a penalty for failing to pay at maturity. The authorities seem to be practically unanimous in upholding the legality of such a stipulation. But we think our statute has made a different rule. It defines "interest" as follows (Rev. St. art. 3097): "'Interest' is the compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention

of money." According to this article, as we analyze it, the use of money referred to is that which is contracted for when a loan is made. The forbearance occurs when there is a debt due or to become due, and the parties agree to extend the time of its payment. The detention of money arises in a case when a debt has become due, and the debtor withholds its payment, without a new contract giving him a right to do so. It follows, therefore, that what would have been deemed a penalty under the rule of the common law is made interest under our statute; and, if the rate agreed upon for the detention of the money after the maturity of the debt exceed the 10 per cent. per annum, the contract is usurious, and is void as to the interest. Id. art. 3104. The definition above quoted was not contained in our first statute upon the subject of interest. It first appeared in the Revised Statutes of 1879, as article 2972. It was probably borrowed from the Civil Code of California, section 1915 of which defines "interest" in precisely the same words. Section 4061 of the Revised Codes of North Dakota gives the following definition of the word: "Interest is the compensation allowed for the use, or forbearance, or detention of money, or its equivalent." According to Stimson, the Civil Code of Louisiana contained the same definition (1 Stim. Am. St. Law, art. 4810); but we have found it in neither of the Codes of that state to which we have access. We have not found, however, any decision by the courts of either of the states mentioned in which the definition has ever been construed. Nevertheless the conclusion is not to be resisted that there was a purpose in adding the word "detention" to the accepted definition of "interest," and that this purpose was to meet the case when the debtor should detain the money owed beyond the stipulated period of forbearance, and so to provide that a promise to pay an additional sum for such detention should be deemed interest, and not merely damages by way of a penalty to secure a prompt performance of the contract. The attention of the court of civil appeals was not called to the definition of the word "interest" as contained in our statute, and they seem to have overlooked it in deciding the case.

The other questions presented by the appeal and the application for the writ of error were, as we think, correctly disposed of by the opinion of that court.

The judgment of the district court and that of the court of civil appeals are reversed, and judgment is here rendered for the sum lent, without interest, less the admitted credits, and for 10 per cent. attorney's fees, and costs of the district court, and for the foreclosure of the mortgage. The defendants in error will pay the costs of the appeal and of the writ of error. It is further ordered that this judgment be certified to the county court for observance.

WILLIAMS, J., not sitting.

HOUSTON, E. & W. T. RY. CO. v. SUMMERS.

(Supreme Court of Texas. May 18, 1899.)

DEFECTIVE TRACK—INJURY TO PASSENGER—PLEADING AND PROOF.

Where a complaint alleges that a track and switch at the place of an accident were in bad condition, that the straps holding the rails together were not properly bolted, that the ties were old, and that the stationary rail meeting the rail at the switch was about $1\frac{1}{2}$ inches higher than the rail that it met, it authorizes admission of evidence that the slide rail was three-eighths of an inch out of line with the rail of the main line, causing a lateral projection of one rail beyond the other.

Error to court of civil appeals of Fourth supreme judicial district.

Action by J. F. Summers against the Houston, East & West Texas Railway Company. Judgment for plaintiff was affirmed (49 S. W. 1106), and defendant sued out a writ of error. Affirmed.

Baker, Botts, Baker & Lovett, J. C. Feagin, and O. S. Parker, for plaintiff in error. Branch, Garrison & Blount, and E. W. Smith, for defendant in error.

WILLIAMS, J. The writ of error was granted under the impression that there was error in the admission of testimony for which the court of civil appeals should have reversed the judgment. The witness Richardson was allowed to state at the trial that the slide rail of the switch where the train was derailed was about three-eighths of an inch out of line with the rail of the main line, causing a "lip," or lateral projection of one rail beyond the other. Objection to this evidence was urged on the ground that it varied from the petition, in that the allegation of the particular defect was "that the rail which meets the rail to make the switch was bent up at the end, and was about $1\frac{1}{2}$ inches higher than the rail that it met." It is unnecessary now to decide whether or not, if this were the only averment descriptive of the condition of the switch, the difference between it and the evidence stated would constitute a fatal variance. It might be conceded that the evidence was not admissible under this allegation, and still we think that other averments in the petition were amply sufficient to let in the proof. Concerning the condition of the switch, the petition contained the following: "Plaintiff charges that the track and switch at said station of Sterne was in bad condition, repair, and in a dilapidated condition, and that the rails used at said station of Sterne weighed only 35 lbs. to the yard, and were old and badly worn; that the straps holding said rails together were loose, and were not properly bolted; that said rails were not properly bolted down, and the ties under said rails were old and in a dilapidated condition; that the switch used at said point was of an old pattern, and in a dilapidated condition, and that the stationary rail which meets the rail that

* * * to make the switch was bent up at the end, and was about one and one-half inches higher than the rail that it met." Other evidence in the case indicated that the effect of the loosening of the straps or rods holding the switch rails together, and of the other fastenings, would be to give "play" to the rails, and allow them to get out of line; and it was therefore proper to show that they were out of line at the time in question, for the purpose, if for no other, of showing that they were not properly confined, and of thus establishing the fact charged in the petition. The other assignments of error were properly disposed of by the court of civil appeals.

DAVIS et al. v. SAN ANTONIO & G. S. RY. CO.

(Supreme Court of Texas. May 29, 1899.)

RAILROADS—RIGHTS OF STOCKHOLDERS—RECEIVERS' SALES—RAILROAD COMMISSION—COLLATERAL ATTACK.

1. Rev. St. art. 4584d, provides that when the sale of a railroad discharges the property from liability in the hands of the purchaser for junior mortgages, unsecured debts, etc., it shall cancel the claim of every stockholder to any share of stock. *Held*, that a receiver's sale of a railroad on condition that the court would resume possession and control of the property if the purchaser should fail to pay the price did not cancel the rights of defendant holders of a certain issue of stock, so as to disentitle them to a review of a judgment subsequently rendered enjoining them from voting the stock on the ground that it was illegal.

2. Rev. St. art. 4584g, in relation to the issuance of stock by railroad companies, provides that the directors shall make a list of subscribers, showing the number of shares subscribed by each, the amount of stock represented by each share, and the amount paid on each subscription; that the president of the board or presiding officer of the meeting at which the issuance of stock is authorized shall certify that such statement is correct; that it shall thereupon be entered on the minutes, and, after having the corporate seal attached, shall be attested by the secretary of the company, "and deposited with the railroad commission and by it filed and preserved"; that "the secretary of the company shall then be authorized to make out and deliver to each stockholder in said list a certificate corresponding with the said statement in number, name," etc., "which certificate shall be signed by the president of the said railroad company, attested by the secretary, with the seal of the said company affixed"; that the stock shall not exceed the value of the railroad property; and that "the correct aggregate amount of stock so issued by each railway company shall be certified to and registered in the office of the secretary of state by or at the instance of the railroad commission." *Held*, that the commission cannot authorize or prohibit the issuance of stock certificates, nor annul shares once issued and delivered.

3. An attempted exercise of such power by the commission is subject to collateral attack.

Error to court of civil appeals of Fourth supreme judicial district.

Petition by the San Antonio & Gulf Shore Railway Company against William Davis and others. A judgment for plaintiff was affirmed by the court of civil appeals (44 S. W. 1012), and defendants bring error. Reversed.

Clark, Ball & Guinn, Peter Shields, H. L. Dignowity, and John W. Parker, for plaintiffs in error. Upson, Bergstrom & Newton, Franklin & Cobbs, John R. Shook, and W. W. King, for defendant in error.

BROWN, J. On the 10th day of January, 1895, the railway company filed in the district court of the Forty-Fifth judicial district, Bexar county, its petition against William Davis, J. C. Davis, M. T. Davis, M. Davis, J. G. Fry, J. S. Fry, J. R. Tendick, James R. Davis, John Harrington, William Fry, A. J. Fry, George Dally, S. Massey, and William A. Harrington. The petition alleged, in substance, that the defendants were in the possession of certain properties of the corporation, including its stock subscription and \$360,000 of its first mortgage bonds, and prayed for a writ of injunction against the defendants to prevent interference with the plaintiff's possession of the said property, and also to prohibit the defendants, their servants, agents, and employes, to dispose of, damage, injure, or incumber the said bonds, stock certificates, or other property, etc.; also, for a writ of mandamus requiring the defendants to deliver to the plaintiffs the bonds, stock certificates, books, papers, accounts, money, and all other property belonging to the corporation. The petition was sworn to, and on the 10th day of January, 1895, the judge directed the clerk to issue the writ of mandamus, and a notice to the defendants to show cause why the injunction should not be granted. On the 16th day of January, 1895, the defendants filed their original answer, the contents of which need not be here stated, and on that day the district judge ordered the clerk to issue a writ of injunction, enjoining the defendants from interfering with R. E. Sadler, the secretary of the plaintiff corporation, in the possession of any of the books and property named, and from interfering with J. Brown King, the treasurer of the corporation, in the possession and control of any money, financial account books, etc. On January 25, 1895, the plaintiff filed an amended petition, naming the same defendants, and added thereto as defendants John Scott, H. O. Engelke, George Dullnig, and J. S. McNeill. In addition to the averments of the original petition, it was alleged that Clifford was the president of the corporation, Sadler the secretary, and King the treasurer, and, as such officers, they were entitled to the possession of the property of the company; that the defendants were in possession of the property, except that which had been delivered under the court's order, without authority of law, and without authority from the company; that they had \$360,000 in mortgage bonds of the company in their possession; that the board of directors had removed William Davis from the presidency of the company on the 9th day of January, 1895, for misconduct, and had appointed Clifford general manager of the road,—and prayed for a mandatory writ of injunction, en-

joining defendants from disposing of or incumbering the bonds, etc. Upon this petition, the court ordered the writ to be issued, with certain limitations embraced in the order of January 24, 1895. The plaintiff filed its second amended original petition on February 20, 1895, reiterating the allegations of the original and amended petitions. In addition, it charged that the defendants William Davis, J. G. Fry, J. S. Fry, James R. Davis, William D. Davis, J. E. Davis, Henry Brashear, James M. Dolan, and M. T. Davis are in possession of certain shares, purporting to be the capital stock of the plaintiff corporation, in amounts stated in the petition, and represented that the shares were illegal, fraudulent, and void, issued in violation of law, without the corporation having received value therefor in cash or services, and that the said shares were issued without the authority or consent of the board of directors, but that the said board of directors had ordered the same to be canceled. It was alleged that the shares of stock claimed by the defendants had never been authorized by the railroad commission of Texas or the secretary of state of Texas, and that the issue of stock greatly exceeds the value of the property of said company. It was alleged that the illegal stockholders had called a meeting for the purpose of voting said illegal stock, and thereby to elect themselves directors, and get control of the business of the company. A mandatory injunction was prayed for to protect the plaintiff in the possession of the property, and for an ancillary writ of injunction, enjoining the defendants (naming them and their assigns) from voting said stock at said special meeting, and from calling or holding any meeting of stockholders of the said company under and by virtue of the said stock. The judge ordered the writ of injunction to issue as prayed for. The defendants in this suit (the plaintiffs in error here) applied to the district court for the Thirty-Seventh judicial district of the state of Texas to appoint a receiver for the said railroad company, which was done, and the property of the said company was placed in the possession of the receiver. On April 8, 1897, more than two years after the last order had been entered in the case, the defendants moved to dissolve the injunction granted on the 22d day of February, 1895. In the motion to dissolve the injunction the appointment of the receiver and sale of the property are alleged, and it is averred that the injunctions are thereby rendered unnecessary. After this motion was filed the district court for the Forty-Fifth district made an order transferring the case to the district court of the Thirty-Seventh judicial district, in which the receivership was pending. On the 9th day of June, 1897, the plaintiffs in error filed in the district court of the Thirty-Seventh judicial district an original amended answer, containing substantially the allegations embraced in the original answer, with averments to meet the additional charges made in the plaintiff's

amended petition. The amended answer denied that William Davis had ever been legally removed from the office of president of the plaintiff corporation, and denied that Clifford had ever been legally elected president of the corporation, charging that he had no right to the possession of the property. They denied that they had possession of the \$360,000 in bonds of the corporation, as charged in plaintiff's petition, but admitted that they had turned over to the contractors who constructed the railroad \$230,000 of the said bonds in payment for the work done. The answer denied that the board of directors of the corporation had been lawfully in session since the 8th day of January, 1895, but averred that the directors had met as conspirators for the purpose of getting possession and control of the property of the corporation. The answer admitted that William Davis and others had possession of the shares of stock charged by the plaintiff's petition, but alleged that the certificates of stock were regularly issued, by order of the board of directors of the railroad company, for money paid and services rendered to the corporation, as required by the constitution and laws of the state of Texas. The answer avers that after the corporation was duly organized the board of directors met in regular meeting, at the office of the company in Texas, and, by a lawful proceeding authorized certificates of stock to issue to the different persons named for the amounts specified, and that the said board of directors authorized and empowered the president and other officers of the company to issue and deliver the shares of stock which the defendants hold and claim, and that the officers of the railroad company made up a statement, as required by the statute, showing all of the facts with reference to the issuance of the said stock, and deposited the same with the railroad commission of Texas. It is denied that the railroad commission had any authority to annul the said stock, and it is insisted that the said stock had never been lawfully canceled or in any wise annulled. The answer alleges that the railroad property had been sold under order of the district court by the receiver, and delivered to the purchaser, upon condition that the court would resume possession of the property in case the purchaser failed to pay the purchase money as prescribed by the order of the court. It was denied that the sale was legal and binding upon the defendants, but no facts are alleged showing such illegality. On the 5th of August, 1897, the plaintiff filed an amended original petition, denying the allegations of the defendants' answer, and averring that the stock claimed by the defendants was issued in violation of law, and was void; that the plaintiff was never paid for the same in money or services, and that the amount of the stock was in excess of the value of the company's property when issued, and was not authorized by the railroad commission; that the authority to issue the stock claimed by defend-

ants was revoked by the railroad commission January 29, 1895, and other shares of stock authorized, which are alleged and set out in detail in the supplemental petition; that the stock authorized by the railroad commission had been regularly issued, and was registered with the secretary of state. The supplemental petition then sets up the facts with regard to the placing of the property in the hands of a receiver, the order of sale by the receiver, the purchase of the property by Bergstrom, trustee, and the confirmation of the sale by the court. It is alleged that a deed to the property was ordered by the court to be made to Oscar Bergstrom, trustee, and possession of the property delivered to him, with a right in the court to retake possession, should the trustee fail to pay the balance of the purchase-money when due. The supplemental petition contained, in proper order, the following exceptions to defendants' answer: (1) Said answer nowhere states that defendants' alleged shares of stock were authorized by the railroad commission of Texas, and registered by the secretary of state; (2) said answer seeks to attack collaterally the orders of the railroad commission. On the 4th day of October, 1897, the defendants presented to the district court for the Thirty-Seventh judicial district a motion to dissolve the injunctions theretofore issued, whereupon the plaintiff insisted upon being permitted first to present the exceptions above quoted; and, over objections of defendants, the court took up the exceptions to the defendants' answer, and sustained a general demurrer and the two exceptions to the defendants' answer. The defendants declined to amend their answer, whereupon the court entered its judgment, holding "that the defendants are not entitled to have a hearing upon the merits of the case on their motion or answer, for the reasons expressed in said exceptions, without amending in the particular mentioned in said first and third exceptions." The court then proceeded to enter judgment perpetuating the injunctions theretofore granted in the cause, whereby the defendants were enjoined perpetually from voting any of the shares of stock set out in the said writ of injunction, which are the shares in controversy in this suit. The court of civil appeals affirmed that judgment. 44 S. W. 1012.

It is claimed that all the property belonging to the corporation has been sold and delivered to the purchaser, that the corporation is insolvent, and that the stock of the defendants was canceled by the sale, whereby the subject-matter of litigation has ceased to exist, wherefore this court should not entertain jurisdiction for the purpose of determining an abstract question of law, or adjusting the costs of litigation between the parties. *Lacoste v. Duffy*, 49 Tex. 767; *Gordon v. State*, 47 Tex. 208; *Robinson v. State*, 87 Tex. 562, 29 S. W. 649.

Article 4584d, Rev. St., reads as follows: "Every judicial or other sale of any railroad in this state hereafter made, which shall have

the effect to discharge the property so sold from liability in the hands of purchasers for claims for damages, unsecured debts, or junior mortgages against such railroad company so sold out, shall have the effect to annul and cancel all claims of every stockholder therein to any share in the stock of such railroad." The question arises, did the sale of the property of the corporation terminate the rights of the defendants in the shares of stock claimed by them, so that there no longer exists a subject-matter of litigation between the parties in this case? If the sale were absolute and completed, the effect of the statute above quoted would be to annul the stock claimed by the defendants, as well as all stock in the corporation, and there would be no subject for judicial determination; but, from the allegations of both the plaintiff and the defendants, it appears that the confirmation of the sale was upon the expressed condition that the court would resume possession and control of the property in case the purchaser failed or refused to pay the purchase money. It is not alleged that the purchase money has been paid, or that the sale has been completed, or that the court has relinquished its right to resume control of the property. Under these conditions, it might become important to the corporation, and therefore to all the lawful stockholders in it, that the court should assert the right to resume and exercise control over the property, in which event, if the defendants' stock be lawful, they would be entitled to participate equally with other stockholders in determining the action to be taken by the corporation. If the stock claimed by the defendants was canceled by the sale of the property, then all of the stock of the corporation shared the same fate. In that state of case, the corporation was left without any interest to be protected,—the subject of litigation no longer existed; and the court could not have entered judgment for plaintiff, but should have dismissed the case. Likewise, if the conditions were such that a contingency might arise in which it should be important to the corporation that illegal stock should not be used to its disadvantage, then it would be equally true that under such conditions it would be important to the defendants, if their stock be lawful, that they should be permitted to vote it. If plaintiff was entitled to be protected against the stock if illegal, the shareholders were equally entitled to vote it if valid. The plaintiff insisted upon a perpetuation of the injunction in order to protect its rights, thereby asserting that a state of facts might arise in which the stockholders would have interests to be protected. The court which had jurisdiction over the receivership, with the power to resume control of the property, determined that it was necessary for the protection of the plaintiff that the injunction should be perpetuated. These are significant facts, for we will not presume that the court entered a useless judgment, or undertook to adjudicate

dead issues. The zeal with which the plaintiff pressed the suit, and the vigor with which the court applied the remedy of injunction, indicate that at the trial the shares of defendants were regarded as dangerous to plaintiff; and, if so, the subject of litigation had not expired. If it clearly appeared that the stock of the corporation was canceled, this court would proceed no further, but it does not so appear; and we cannot deny to the defendants the right to have a revision of errors committed in the application of the extraordinary remedy of a perpetual injunction, which virtually annulled their shares of stock without the semblance of a trial.

The judgment in this case is based upon the proposition that the answer of defendants presented no defense to plaintiff's action, because it did not aver that the shares of stock claimed by them were issued by authority of, or were approved by, the railroad commission. Article 4584k of the Revised Statutes is in the following language: "Every certificate of stock in any railroad company and every bond and other evidence of debt operating as a lien upon the property of such railroad company which shall be made, issued or sold without a compliance with this chapter, shall be void." Article 4584g, prescribes with great particularity what the board of directors and officers of a railroad corporation must do, to authorize its secretary to issue certificates of stock to the subscribers. The board of directors must meet in person, in the state of Texas, at the principal office of the corporation, and make a list of the subscribers to its stock, showing the number of shares subscribed for by each, the amount of stock represented by each share, and the amount actually paid, labor done, or property received on each share of stock, giving to each name on the list a number; and "the president of the board, or presiding officer of the meeting at which the issuing of such certificates of stock is authorized, shall make a certificate to said statement to the effect that the same is correct, and that the amount of money paid, labor done and property received, as stated, is correct, and shall sign the same in person. Such statement shall thereupon be entered at large upon the minutes, and, after having the seal of the company affixed thereto, shall be attested by the secretary of the company and deposited with the railroad commission, and by it filed and preserved in the office. The secretary of the company shall then be authorized to make out and deliver to each stockholder in said list a certificate corresponding with the said statement in number, name, number of shares, amount of stock represented by each share, and the amount of money or its equivalent paid upon each share, which certificate shall be signed by the president of the said railroad company, attested by the secretary, with the seal of the said company affixed. * * * In no event shall the stock exceed the value of the railway property, and the correct aggregate

amount of stock so issued by each railway company shall be certified to and registered in the office of the secretary of state by or at the instance of the railroad commission." The answer alleged a compliance in every particular with the requirements of this article, and denied that the amount of stock issued exceeded the value of the property. The foregoing article plainly imposes upon the railroad commission the performance of two ministerial duties with reference to the stock of railroad companies: (1) To receive and preserve the statement of the stock required to be made out by the directors, certified and presented to it by the president of the corporation; (2) to cause the aggregate amount of the stock issued by the company to be registered in the office of the secretary of state. The performance of these ministerial duties does not involve the exercise of the power to authorize or prohibit the issuing of the certificates of stock, nor does it involve the authority to annul such shares when once issued and delivered. The secretary of the company does not derive his power to issue and deliver the shares of stock from the acceptance by the railroad commission of the statement required by law, but the authority to make the issue is conferred upon the secretary of the corporation by the law upon compliance with its terms. No possible construction of the language of the article can so expand it as to embrace within its terms authority for the railroad commission to interfere with or control the corporation in issuing certificates representing the stock subscribed for. If, without the consent of the shareholders, the railroad commission undertook to authorize or prohibit the issuing of the stock in this company, or to annul such shares of stock when once issued, it usurped authority not conferred upon it by the laws of the state; and its acts were null and void, and may be attacked in any proceeding wherein their validity is in question.

The district court erred in sustaining the demurrer and exceptions to the defendants' answer, and in entering judgment perpetuating the injunctions without trial upon the merits of the case, and the court of civil appeals erred in affirming that judgment. It is therefore ordered that the judgments of the district court and of the court of civil appeals be reversed, and that this cause be remanded to the district court of the Thirty-Seventh judicial district for further trial, and that the plaintiffs in error recover of the defendant in error all costs in the court of civil appeals and in this court.

POLK COUNTY v. PHILLIPS.

(Supreme Court of Texas. May 18, 1899.)

COUNTIES—AUTOPSY—EXPENSES.

Under Code Cr. Proc. art. 1024a, authorizing a justice of the peace, if he deem it necessary, when impracticable to secure county phy-

sician, to call in regular physician to make autopsy, at expense of the county, and consider whether death was occasioned by violence, and, if so, the nature and character of the violence used, where deceased came to his death by a gunshot wound it was proper to call on a physician to determine whether deceased was lying down, as testified to by his companion, or was on his feet, resisting arrest with a deadly weapon, as testified to by other witnesses.

Certified question from court of civil appeals of First supreme judicial district.

Action by A. M. Phillips against Polk county. Judgment for plaintiff. Defendant appeals. Case certified from court of civil appeals.

C. L. Carter and A. C. Bullitt, for appellant. F. Campbell, for appellee.

GAINES, C. J. The court of civil appeals for the First supreme judicial district have certified the following question for our decision, viz.: "In the above case the question stated below has arisen, and is deemed material and essential to a proper decision of the case, and it is therefore certified for decision. On the 16th of February, 1897, an inquest was held in Polk county, by a justice of the peace of said county, upon the body of one W. W. Gatling, who was killed in said county by a constable and his posse; and at said inquest the appellee, in obedience to an order of said justice, attended said inquest, and made an autopsy of the deceased, and he presented a bill of \$25 for such services to the county commissioners' court, and said bill was rejected in toto by said court, whereupon he instituted suit in the justice's court, and recovered judgment against the county for ten (\$10) dollars, and upon appeal to the district court, the county court of that county not having jurisdiction of such suits, the judgment was affirmed, and from the judgment of the district court the county of Polk appealed to this court. There was no question at the time of the inquest that the deceased came to his death at the hands of the constable and his posse from gunshot wound, and that the constable at the time of the homicide held a warrant of arrest for the deceased, and that it was known to both the justice of the peace and to the appellee, before the autopsy was made, that the deceased came to his death from violence inflicted as above stated; and the justice caused the autopsy to be made for the purpose of determining whether the deceased was, at the time of the assault upon him, lying down, as testified to by his companion, or whether he was on his feet, resisting his arrest with deadly weapons, as testified to by other witnesses. The appellee is a regular practicing physician, and made the autopsy after he had been duly summoned for the purpose by the justice of the peace, and testified as an expert that the deceased, at the time he was shot, was on his feet, with his arms raised. There was at the time a county physician for Polk county, but, it being impracticable to secure his services, the appellee was engaged by the justice of the

peace holding the inquest. Upon the foregoing statement, we respectfully submit the following question: Was the county liable to the appellee for the services rendered in making the autopsy under the law authorizing the employment of a regular practicing physician for certain purposes by a justice of the peace when holding an inquest?"

Article 1024a of the Code of Criminal Procedure provides that: "Whenever an inquest is held to ascertain the cause of a death, the justice of the peace is hereby authorized, if he deems it necessary, to call in the county physician, or if there be no county physician, or if it be impracticable to secure his services, then some regular practicing physician, to make an autopsy in order to determine whether the death was occasioned by violence; and if so, the nature and character of the violence used; and the county in which such inquest and autopsy is held shall pay to the physician making such autopsy a fee of not less than ten nor more than fifty dollars, the excess over ten dollars to be determined by the county commissioners' court after ascertaining the amount and nature of the work performed in making such autopsy." The question may be solved by determining the meaning which is to be given to the words, "the nature and character of the violence used"; that is to say, by determining whether they are to be restricted to the ascertainment of the physical nature of the violence, or whether the meaning is to be so extended as to include other circumstances attending the act, which may disclose its moral quality. The object of the statute which provides for an inquest upon a dead body is to aid the enforcement of the law by the detection of crime, in case an offense has been committed. This is its sole purpose. It might be to the interest of science in most cases to ascertain whether a death had resulted from poison or from natural causes, or whether it was produced by a gunshot wound or other physical injuries. But in many cases, the inquiry, if stopped at that point, would fall far short of accomplishing the purpose of the law. The fact that death had resulted from violence, and the further fact, for example, that the violence consisted of a blow upon the head, are but steps in ascertaining whether or not a crime has been committed. The blow may have characteristics other than those of a physical nature. It may have been accidental or it may have been intentional. It may have been willful, and without justification, or it may have been justifiable. In accomplishing the purpose of the inquest, it is as important to determine these latter characteristics of an act of violence which has led to a death as it is to determine the fact that there was violence, and that death was its result. We think the purpose for which the physician was brought in to make the examination of the dead body was a purpose contemplated by the statute under consideration, and we therefore answer the question certified in the affirmative.

GALVESTON, H. & S. A. RY. CO. v. CODY
et al.

(Supreme Court of Texas. May 18, 1899.)

APPEAL—RECORD—REVIEW—TRIAL—SPECIAL
ISSUES.

1. The refusal to submit a jury case on special issues cannot be reviewed, in the absence of a bill of exceptions.

2. A request that a jury case be submitted on special issues comes too late after the main charge has been given.

Application for writ of error to court of civil appeals of Fourth supreme judicial district.

Suit by Clara M. Cody and others against the Galveston, Harrisburg & San Antonio Railway Company. A judgment for plaintiff was affirmed by the court of civil appeals (50 S. W. 135), and defendant applied for a writ of error. The application was denied without opinion, but the present rehearing was granted. Application denied.

Upson, Bergstrom & Newton, for applicant.

GAINES, C. J. Having held in the case of Railway Co. v. Jackson (recently decided) 50 S. W. 1012, that under our present law the trial judge, in a case tried with a jury, is bound to submit it upon special issues, when requested to do so by a party to the suit, we granted a motion for a rehearing of the application in the present case upon the ground that in the trial of the cause the court had refused, upon request of the defendant, so to submit the issues. The transcript having been returned to us, we find, upon inspection, that there appears therein a written request by counsel for defendant to submit the case upon special issues, accompanied with a special request to submit certain issues. These are marked "Refused" by the judge. That is all that the record shows with reference to the matter. We are of opinion that a party who desires to review the action of the court in refusing a submission upon special issues should except to the ruling of the court, and take a bill of exceptions thereto. Such a request is neither a charge given nor a requested charge refused, and it stands upon a very different footing. The propriety of a bill of exceptions in such a case is shown by the very record before us. We are clearly of the opinion that a request for a submission upon special issues should be made before the main charge is given to the jury. If the proceedings are inserted in the transcript in the order of time, then the request in this case was made after the charge was given to the jury. This was too late. A proper bill of exceptions would have shown at what point in the progress of the trial the request was made. Being of the opinion that the action of the court in the particular we have had under consideration cannot be reviewed in the absence of a bill of exceptions, the application is again refused.

WAGGONER v. FLACK.

(Supreme Court of Texas. May 22, 1899.)

STATE LANDS—SALE—FORFEITURE—DEFAULT IN INTEREST.

1. Act March 25, 1897, authorizing commissioner of land office to forfeit land sold by the state for failure to pay interest thereon, authorizes the commissioner to forfeit for a failure to pay interest which had accrued before the passage of the act, as well as for that which might accrue thereafter.

2. Act March 25, 1897, relating to forfeiture of land sold by the state for nonpayment of interest, does not repeal Laws 1895, p. 67, § 11, so as to prevent a forfeiture as provided in that section for interest remaining unpaid for the years 1894, 1895, and 1896.

Certified questions from court of civil appeals of Second supreme judicial district.

Action between W. T. Waggoner and J. M. Flack. From the judgment, Waggoner appealed to the court of appeals, which certifies certain questions.

F. P. McGhee, A. A. Hughes, and W. W. Flood, for appellant.

BROWN, J. The court of civil appeals for the Second supreme judicial district has certified to this court the following statement and questions:

"The section of school land in controversy was first sold in November, 1885, at \$2 per acre, and on thirty years' time, to D. B. Phillips, who transferred his right to appellant. The law was complied with in this purchase, and all interest paid to January 1, 1893. On August 20, 1897, no further payments having been made, the commissioner of the general land office entered a forfeiture for nonpayment of interest, and, after reclassification and appraisal at \$1 per acre, in September, 1897, again put the land upon the market. In November following, appellee made application to purchase it as an actual settler upon another piece of school land within the prescribed radius, complying in all things with the law. Consequently, in March, 1898, the land was awarded to him. In the judgment appealed from, the action of the commissioner in declaring the forfeiture and in awarding the land to appellee was approved, and the recovery of the land sought by appellant was denied.

"We therefore deem it advisable to certify to your honors for decision the question whether or not, under any law in force on August 20, 1897, the commissioner of the general land office at any time before November, 1897, was authorized to declare a forfeiture for the nonpayment of interest due since the year 1894. That is to say, whether or not the forfeiture act of 1897 (Acts 1897, p. 39), which went into effect August 20, 1897, authorized any forfeitures until after the 1st of November of that year; and, if it did not, then whether its enactment had the effect to repeal section 11 of the law of 1895, so as to prevent a forfeiture as provided in that section for interest falling due and remaining

unpaid during the years 1894, 1895, or 1896."

The act of the legislature entitled "An act to authorize the commissioner of the general land office to forfeit all lands heretofore sold by the state under any of the various acts of the legislature for failure to pay any portion of the interest thereon," approved March 25, 1897 (Gen. Laws 1897, p. 39), empowered the commissioner of the general land office to declare forfeiture of any sales of the public school lands made before the passage of the act, if any portion of the interest theretofore due upon the 1st day of November of any year remained unpaid, and also to declare such forfeiture in case any portion of the interest on such sales which might become due on the 1st day of any succeeding November should remain unpaid. In other words, this law applies only to lands sold prior to its enactment, but embraces payments of interest already due, as well as those to become due on such sales.

It is declared in the act that it is cumulative. Hence it does not conflict with any other law upon this subject, but was intended to supply an authority, claimed not to exist as to some of the sales, by covering the whole field from the beginning of such sales down to the date of the law. The emergency clause reads as follows: "The fact that the authority of the land commissioner to make forfeitures of land without judicial ascertainment has been questioned, and the fact that there are now more than ten thousand purchases which can be forfeited under the law, for nonpayment of the interest due thereon, and the further fact that it is almost impossible and certainly impracticable to institute so many different suits against so many different purchasers, creates an imperative public necessity requiring the suspension of the rule providing that bills be read on three several days, and the same is hereby suspended." The declared necessity for the law shows that its purpose was to dispel any doubt of the power of the commissioner to enforce the state's right to forfeit all sales theretofore made and by explicit terms to authorize the commissioner to enforce the existing rights of forfeiture for a failure to pay interest which had accrued anterior to the passage of the law, as well as for that which might accrue at a date subsequent to its enactment. This law does not repeal the eleventh section of the general law of 1895 upon the same subject.

GALVESTON, H. & S. A. RY. CO. v. JACKSON.

(Supreme Court of Texas. May 25, 1899.)

APPEAL—JURISDICTION—CERTIFIED QUESTIONS—STATUTES—AMENDMENT.

After the filing of an opinion in answer to a certified question of the court of civil appeals, determining that Rev. St. art. 1333, requires a trial court to submit special issues to the jury when requested to do so, the article was amended May 12, 1899, so as to make such a sub-

mission not mandatory. *Held*, on a motion for rehearing, that the court had no jurisdiction to determine whether the question ought to be decided according to the amendment rather than the law existing at the time of the trial, there being no such question certified by the court of civil appeals.

On motion for rehearing. Overruled.
For prior report, see 50 S. W. 1012.

GAINES, C. J. To our minds, the argument on the motion for a rehearing of the question certified suggests no sufficient reason why we should change the opinion heretofore filed. 50 S. W. 1012. But it is urged by counsel in support of the motion that, because the legislature has amended the article construed by us so as no longer to make it mandatory upon the trial court to submit a case upon special issues, when requested to do so by a party to the suit, the question ought to be decided by the law now existing, and not by that in force at the time of the trial, and at the time of the appeal. That presents a novel and difficult question; but it is a question not certified by the court of civil appeals; and is one which, in our opinion, we have no jurisdiction to determine in this proceeding. The amendment referred to became a law May 12, 1890, which was not only after the question was certified by the court of civil appeals, but was after our opinion in answer thereto was filed. The motion for a rehearing is overruled.

CHICAGO, R. I. & T. RY. CO. v.
LANGSTON.

(Supreme Court of Texas. May 25, 1899.)

DAMAGES—PERSONAL EXAMINATION.

Where plaintiff in an action for personal injuries has exhibited them to the jury, and physicians have testified in relation to them, defendant is entitled to have an examination by experts of its own selection.

On motion for rehearing. Sustained in part.
For prior report, see 50 S. W. 574.

GAINES, C. J. When we disposed of the questions submitted upon certificate of dissent in this case, we were of opinion that the majority of the court correctly held that the language of counsel of the appellee upon the argument before the jury was a ground for a reversal of the judgment, and we are still of that opinion. We thought, however, that a ruling upon the other question was not necessary to a decision of the case, and therefore declined to answer it. Counsel for the appellee in their motion for a rehearing urgently insist upon an answer to the other question, and we have reached the conclusion that, in view of another trial, the question ought to be determined. When we answered the second question, we were inclined to think that the majority of the court were right upon both, and we are now of that opinion. Our conclusion is that both questions should be answered in the affirmative, and our opinion will be

so certified. Except for the purpose of answering the first question certified, the motion for a rehearing is overruled.

WISE COUNTY COAL CO. v. PHILLIPS
et al.

(Court of Civil Appeals of Texas. April 1, 1899.)

PUBLIC LANDS—PATENTS—ABANDONMENT.

One who, after the required settlement of a homestead by him and his ancestor, causes a survey to be made, files field notes in the general land office, and applies for a patent thereon, which is refused because of a conflicting patent as to part of the land, files new field notes and survey excluding the disputed tract and including a tract not contained in the original application and settlement of the ancestor, and obtains a patent under such corrected field notes and survey, thereby abandons his right to the disputed tract.

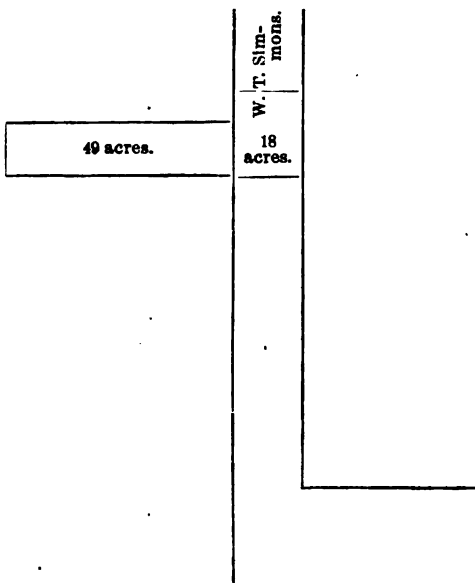
Appeal from district court, Wise county; J. W. Patterson, Judge.

Action by Jay Phillips and others, heirs of J. L. Phillips, deceased, against the Wise County Coal Company, to recover land. From a judgment for plaintiffs, defendant appeals. Reversed.

R. E. Carswell, for appellant. J. E. Grigsby, for appellees.

CONNER, C. J. This suit was instituted in the district court of Wise county by the appellees, as the only heirs of J. L. Phillips, deceased, to recover a tract of about 18 acres of land claimed by appellant as the vendee of one W. T. Simmons. Briefly stated, the facts are that on the 4th day of December, 1893, J. L. Phillips, through whom appellees claim, was an actual settler upon unappropriated public domain, and applied to the surveyor of Wise county for a survey, not to exceed 160 acres, as a homestead donation. By virtue of this application said surveyor on December 20, 1893, made a survey. Both the application and survey evidence an intention to include the 18 acres of land in controversy, and it is so found as a fact by the court below. This application and survey were duly filed in the general land office in June, 1894. The survey, however, evidences some uncertainty in its calls. The survey, as apparently applied for and made, was of a strip of land in the shape of an L, of which the base extended east and west about 1,184 varas, and was 108 varas wide, and the upright extended north and south about 3,400 varas, being about 85 varas wide, said strip of land being surrounded on all sides by older surveys. The uncertainty in survey, if any, related to the upper or most northerly part of the survey, upon which are located the 18 acres in controversy in this suit. At the time of his application and survey, J. L. Phillips was an actual settler upon the base or most southerly portion of the survey. A few days after said J. L. Phillips' application and survey,—about December 10, 1894,—W. T. Simmons applied

to purchase, and caused to be surveyed, together with other lands, the 18 acres in controversy, which afterwards, to wit, on December 22, 1894, was patented to him by the commissioner of the general land office. J. L. Phillips continued to occupy and live upon the land applied for and surveyed by him until his death in June, 1896, during his lifetime having built some houses upon the 18 acres in controversy, and leased them to tenants, and made contracts of sale to some, agreeing to convey when patent was procured. After the death of J. L. Phillips, appellees G. W. Bullock and wife, Ellen Bullock, who was a daughter of J. L. Phillips, and Jay Phillips, continued to live on the land. In September, 1896, appellees caused a resurvey of the land originally applied for and corrected field notes thereof to be made, which corrected field notes included the land in controversy. This corrected survey also included a strip of land 260 varas wide and 1,072 varas long, projecting west from the 18 acres of land in controversy, containing about 49 acres. The south boundary line of this projected strip is an extension of the south boundary line of the W. T. Simmons survey; so that if the 18 acres in controversy, patented to Simmons, be excluded therefrom, the survey would be somewhat in the form of a Z, thus:



The field notes, as so corrected, were forwarded to and filed in the general land office on October 1, 1896. The commissioner of the general land office refused to patent the land in accordance with such corrected survey, because of the conflict with the W. T. Simmons survey. Appellees thereupon again corrected the field notes of their survey so as to exclude the conflict with the Simmons, to wit, the land in controversy, but again included the 49-acre strip above referred to. As so again corrected, the field notes were filed in the gen-

eral land office on November 16, 1896, and appellees secured patent thereon, and thereafter instituted this suit to recover said 18 acres of land. The court below concluded as a matter of fact and as matter of law that appellees did not waive their right to the 18 acres of land in controversy by the resurvey in 1896 omitting the land in controversy, and by procuring patent on such recorrected survey. In the second and third assignments of error it is insisted that the court erred in so holding, and we think these assignments are well taken. Section 6, art. 14, of the constitution of 1876, provides that: "To every head of a family without a homestead there shall be donated 100 acres of public lands, upon condition that he will select and locate said land and occupy the same three years, and pay the office fees due thereon." It will be noted that, to avail himself of the benefit of this clause of the constitution, among other things, it is necessary that the homesteader shall not only select the land desired by him, but that he shall live thereon for the full period of three years. It has been held that by selection and settlement he acquires a right that may be assigned. *Johnson v. Townsend*, 77 Tex. 640, 14 S. W. 233; *Palmer v. Bennett*, 81 Tex. 451, 19 S. W. 304. Article 3944, Sayles' Civ. St. 1888, in effect provided that, in case a transfer had been made before he had completed his three years' residence, his assignee would have the right to complete the period of residence, and acquire patent therefor. There, however, appears to be no corresponding right conferred by statute upon the heirs in the event the original occupant should die before the term of his residence is completed. Article 3946 provides that when the original occupant or his assignee is dead the patent shall issue to his heirs on application of the surviving widow, one of the heirs, or his legal representatives; and it may be that, the statute having conferred the right to procure patent, the right to do all things necessary under the law in order to perfect title to the land would be implied, or that the term "assignee," as used in the statute, is sufficiently comprehensive to include the widow and heirs of a deceased homesteader. Under our law of descent and distribution, and the history of the settlement of this state, we incline to this view of it. However, we do not find it necessary to decide the question, and we do not decide it. At most, however, after the decease of J. L. Phillips prior to the three years' occupancy required by the law, his heirs had but an equitable title,—the right to perfect their title by continuing such occupancy, and performing other and necessary requisites thereto. It has often been held, and expressly held, in this state, that one having an incipient right to land, as a location or survey or other merely equitable title, not perfected into a grant or vested by a deed, may abandon such inchoate right. *Dikes v. Miller*, 24 Tex. 418; *Hollingsworth v. Holshausen*, 17 Tex. 43; 3 Washb. Real Prop. (5th Ed.) p. 67. See,

also, *Sideck v. Duran*, 67 Tex. 257, 8 S. W. 204. So that, while the heirs of J. L. Phillips, after his death, might have remained thereon, and insisted upon the acquisition of the land as selected and surveyed by their ancestor, yet the statute evidently contemplates the right of selection. He is not required to select any particular part of the public domain, where in quantity it exceeds 160 acres, or even to take the full amount. He may select any number of acres, not to exceed 160, and we are of opinion that appellees, having recorrected the survey made by their ancestor in such manner as to include land not originally appropriated, and having deliberately destroyed the integrity of the original survey, and omitted the particular land in controversy, and having procured patent upon the field notes as so corrected, expressly recognizing and calling for the Simmons survey, under the circumstances of this case it must be held to operate, as against a survey and patent on their face apparently valid, as an abandonment or forfeiture of the land in controversy; and that appellees, not offering to surrender their patent, or cancel the same, so that patent might issue for the land originally located, cannot go behind the field notes and patent upon which they have chosen to rely, and show a right to the 18 acres thus in effect abandoned by them. To hold that appellees in this suit can now recover, it seems to us, would be to hold, in effect, that the commissioner of the general land office could and should, upon proper application, issue to appellees a patent to the 18 acres of land in controversy, while yet there is not on file in the land office any field notes that can be properly said to legally apply thereto. Rev. St. art. 4171. If correct in this conclusion, it follows that the appellees showed no right of recovery on the trial below. This conclusion renders a decision of other questions raised unnecessary, and necessitates a reversal and rendition of the judgment in appellant's favor, and it is so ordered.

HOLMES et al. v. SANDERS.

(Court of Civil Appeals of Texas. May 6, 1899.)

WILLS—POWER OF EXECUTOR TO SELL ESTATE—LIFE ESTATE.

A will directed the executor to pay testator's debts, gave his widow certain property and a specific legacy, and provided that she was to have the use of the dwelling house during life, and also the income from the remainder of the property, and after her death the property was to be divided among testator's children. A subsequent clause authorized the executor to sell the estate to pay debts and legacies, except that part specifically devised. Held that, to pay debts and the legacy, the executor had power to sell the entire estate not specifically devised, during the life of the widow.

Appeal from district court, Collin county; J. E. Dillard, Judge.

Trespass to try title by Lucy S. Holmes and another against Catherine Sanders. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

E. F. Brown, for appellants. Abernathy & Beverly, for appellee.

FINLEY, C. J. This is a suit of trespass to try title to land situated in Collin county, brought by Lucy S. Holmes, joined by her husband, William H. Holmes, against Catherine Sanders. Defendant pleaded not guilty, limitations of three, five, and ten years, and improvements made in good faith. The case was tried by the court without a jury, and judgment was rendered for the defendant, from which plaintiffs have appealed.

There is no statement of facts in the record, but the trial judge filed findings of fact and law, in which these facts appear: "(1) John Huffman was the owner, at the date of his death,—which was in 1880,—and in his separate right, of the land in controversy, holding regular chain of title from the state of Texas. (2) At the date of the death of John Huffman he left surviving him his wife, Helen N. Huffman, who afterwards married G. L. Douthett, and afterwards J. M. Douthett, and also the following children, Amanda Collier, P. A. Huffman, J. S. Huffman, E. L. Huffman, W. J. Huffman, Mary E. Harrington, Louisa Dougherty, Elvira Holmes, Rebecca Holmes, and Lucy Holmes and Martha Harrington, and these were the only children. (3) John Huffman left a will, which was regularly probated by the county court of Collin county, and Joseph W. Baines was appointed executor of said will, and duly qualified as such executor. (4) The will of John Huffman is as follows: 'First. I direct that all my just debts and funeral charges shall be by my executor hereinafter named paid out of my estate as soon after my decease as shall be found convenient. Second. I give and bequeath unto my faithful and beloved wife, Helen N. Huffman, all my household and kitchen furniture, silver plate and ware, books, pictures, my pair of horses and buggy, and all property exempt from forced sale by the laws of this state, and the sum of four thousand dollars to be paid to her by my executor within twelve months after my decease, to have and to hold the same unto the said Helen N. Huffman, her heirs and legal representatives, forever. I also give to her the use of my dwelling house, lots, gardens, orchards, and all appurtenances to the same belonging, the same being the place where I now reside, situated in Collin county; to have and hold the same unto the said Helen N. Huffman during her natural life. I also desire that the net proceeds arising from the rent of all lands and tenements belonging to my estate be paid unto my said wife, the said H. N. Huffman, annually, by my executor (to do with as she may deem proper), so long as she may live. Third. I have heretofore advanced and given to my children the fol-

lowing amounts, which I desire and direct to be charged against them in the final distribution of my estate among my heirs: To Amanda Collier, one thousand eight hundred and fourteen dollars (\$1,814.00); P. A. Huffman, one thousand four hundred dollars (\$1,400.00); J. S. Huffman, one thousand and fifteen dollars (\$1,015.00); E. L. Huffman, two thousand three hundred and seventy-five dollars (\$2,375.00); W. J. Huffman, one thousand five hundred dollars (\$1,500.00); Mary E. Harrington, nine hundred and seventy dollars (\$970.00); Louisa Dougherty, six hundred dollars (\$600.00); Elvira Holmes, one thousand nine hundred dollars (\$1,900.00); Rebecca Holmes, two thousand and seventy-five dollars (\$2,075.00); Lucy S. Holmes, one thousand six hundred and eighty-nine dollars (\$1,689.00); Martha Harrington, nine hundred and fifty dollars (\$950.00). I desire and direct that all the residue of my estate remaining after the death of my said wife shall be equally divided among my said children or their heirs, share and share alike, taking into account the said advancements above specified: provided, that if any heir or heirs deny or controvert having received said amounts, they shall not be entitled to anything more from my estate, and I direct that my said estate be divided equally as aforesaid among the other heirs which shall not deny and controvert the amount to them charged. Fourth. I nominate and appoint Joseph W. Baines to be executor of this will, and direct that no security be required of him as executor. Fifth. It is my will that no other action be had in the county court, in the administration of my estate, than to prove and record this will and to return an inventory and appraisal of my estate. I authorize and empower my said executor to sell and dispose of any portion of my said estate at public or private sale in a manner that may be best for the purpose of paying my just debts and legacies herein bequeathed, saving and excepting from such sale and disposition that portion of my estate specially devised; and also authorize and empower and direct my executor to sell on a credit of twelve months (12) all property remaining on hand at the decease of my said wife, and upon the payment of the purchase money of the same to divide the net proceeds as directed heretofore in the 3rd division of this will. [Signed] John Huffman. The above is a correct copy of the will, leaving out the preamble and names of witnesses, etc., which was regularly probated as agreed to by attorneys for both parties. (5) That Joseph W. Baines, as executor of said will of John Huffman, by a deed sufficient on its face, and regular, and for a valuable consideration, sold the land in controversy to Silas Harrington, who went into possession of the same and paid valuable consideration for said land, to wit, the sum of ——— dollars and to whom deed was executed. (6) That Silas Harrington sold the land in controversy to T. D. and W. J. Johnson, who paid valuable con-

sideration for said land. These deeds are warranty deeds. (7) That Lucy Holmes has quitclaim deeds from P. A. Huffman, Amanda Collier, and Elvira Holmes, which are gifts, and without warranty, to all their right, title, and interest as the heirs at law and legatees under the will of John Huffman, deceased, in and to all the land situated in Denton and Collin counties, in the state of Texas, belonging to the estate of John Huffman, deceased, and of which he died seised and possessed. (8) It is agreed that Lucy Holmes and Elvira Holmes are each married women, and were married at the date of the death of John Huffman, and have so continued under the disabilities of coverture. (9) The land in controversy was not occupied by John Huffman at the date of his death as his homestead, but he was living on other land. (10) The sale of the land was made by J. W. Baines as executor to pay the debts and legacies provided for in the will, and were used for this purpose. (11) Helen N. Douthett was the only constituent member of the family of John Huffman at his death. (12) T. D. and W. J. Johnson, by warranty deed, conveyed the land in controversy to Catherine Sanders, who bought the same, and paid the purchase price, without actual notice of any defect in the title. The deed from Baines to Harrington was dated July 25, 1881, and duly recorded in Collin county record of deeds. The deed from Harrington to T. D. and W. J. Johnson was dated March 11, 1883, and recorded in Collin county record of deeds. The deed from T. D. and W. J. Johnson to Catherine Sanders was dated October 1, 1894, and recorded October 19, 1894, in Collin county record of deeds. (13) The land was unimproved at the time of defendant's purchase, and is worth twelve dollars per acre as unimproved land, and there are 167 acres. (14) Defendant has put improvements on said land since her purchase, and prior to the institution of this suit, as alleged in her answer, and of the value alleged."

Upon these facts the judge pronounced these legal conclusions: "Conclusions of law: As matter of law, based on the facts as above set forth, I find the sale by the executor under the will of John Huffman, deceased, passed, and vested the title in the purchaser, and divested same out of the estate. I further construe the will, and find that it gives to said executor full power and authority to sell the land and other property to pay debts and the legacy. I conclude that plaintiffs are not entitled to recover anything in the suit, and render judgment for the defendants."

Appellants present this single assignment of error: "First. The court erred in construing the will to give to the executor full power and authority to sell the land and property of the estate to pay debts and legacy: (a) Because by the terms of the will H. N. Douthett, the surviving wife of John Huffman, deceased, testator, was given all the rents and revenues of all the land of the estate, which

was to be paid to her annually by the executor so long as she should live, to dispose of as she might deem proper; (b) because by this clause of the will she took a life estate in all the lands by special devise; (c) because by the terms of the said will all property specially devised was reserved and excepted out of the power of sale, and the sale made by the executor under the will is null and void, and did not pass the title to the land, nor divest same out of the estate." We are of the opinion that the trial court rendered the proper judgment. *Terrell v. McCown*, 91 Tex. 252, 43 S. W. 2; *Cooper v. Horner*, 62 Tex. 362; *Holmes v. Johns*, 56 Tex. 41; *Brown v. McConnell*, Id. 230. Judgment affirmed.

WILLOUGHBY v. TOWNSEND.

(Court of Civil Appeals of Texas. May 24, 1896.)

SCHOOL LANDS—BONA FIDE SETTLER—AFFIDAVIT MADE ON SUNDAY—TENDER.

1. In an action of trespass to try title, and to determine which of two rival claimants should have precedence, plaintiff testified that prior to his application he moved a little house, with neither floor nor windows, on the land; that he put in a bed and heating stove, and moved into it, with the intention of making it his home; that he owned another tract of land, about a mile distant therefrom, on which his family lived; that when he was away from the land his hired man and son slept there; that he was absent therefrom only for the purpose of cultivating his other land, and earning money with which to pay for this land; that his family intended to move on the land as soon as the school year was ended; that, during the time he slept on the land, he ate his dinners and suppers at the house on the other tract, where his wife and children were; that he took victuals to the house, and got his own breakfasts; that he fenced the land, and subsequently put up other buildings. *Held*, that plaintiff was a bona fide actual settler on the land, with the intention of purchasing it for a home.

2. An affidavit, accompanying an application to purchase land, which stated that applicant's home was upon the land, and that he was a bona fide settler on it, and head of a family, sufficiently complies with a statute which requires that a person desiring to purchase school lands shall accompany his application with his affidavit, stating, in effect, that he desires to purchase the land for a home.

3. The fact that an affidavit accompanying an application to purchase school lands was made on Sunday does not invalidate the title acquired pursuant to such application.

4. In an action to determine title to school lands purchased from the state, it is not necessary for one claiming a right thereto by reason of priority of application to show that he has tendered the installments due thereon subsequent to the first, when it is shown that the commissioner of the land office refused the first installment tendered, and rejected his application, in favor of that of a rival applicant.

Appeal from district court, McCulloch county; J. O. Woodward, Judge.

Trespass to try title brought by W. A. Townsend against D. B. Willoughby. From a judgment in favor of plaintiff, defendant appealed. Affirmed.

F. M. Newman, for appellant. Goodwin, Grinnan & Shropshire, for appellee.

KEY, J. This is the second appeal in this case (45 S. W. 861), which is an action of trespass to try title, and involves a contest between two claimants of a section of school land in McCulloch county. The appellee was plaintiff, and appellant defendant, in the court below. Verdict and judgment were rendered for the plaintiff, and the defendant has appealed.

Both parties made application to purchase the land from the state under the act of the 24th legislature providing for the sale of such lands. Appellant's application was presented to the commissioner of the general land office on the 12th day of January, 1897; and appellee's application was presented to the same officer the day following. Appellant's application was in substantial compliance with the requirements of the statute, and, if he was a bona fide settler upon the land prior to and at the time of making his application, he had the superior title, and should have prevailed in the court below. Whether or not he was such settler was submitted to the jury, and they having decided against him, and there being testimony in the record to support their decision, we find as a fact that he was not a bona fide actual settler upon the land, within the meaning of sections 8 and 9 of the statute referred to (Laws 1895, p. 63). The court also submitted the same issue in reference to the plaintiff, and the jury having decided in his favor, and there being testimony in the record to support the decision, we find as a fact that the plaintiff was a bona fide actual settler on the land prior to and at the time of the filing of his application with the commissioner of the land office, and was desirous of purchasing the land for a home, and that the other facts stated in his application were true.

Notwithstanding the failure of the defendant's title, the plaintiff was not entitled to recover the land unless he showed title in himself; and it is contended by counsel that this was not done, (1) because he failed to show that he was an actual settler upon the land, (2) because the affidavit accompanying his application failed to state that he desired to purchase the land for a home, and (3) because the application was sworn to on a Sunday. In reference to the first question, the plaintiff testified: "On December 16, 1896, I moved my house on the land. The house was 9 by 10 feet; no floor, no windows, and covered with plank,—looked like weatherboards. I put in a bed, bedding, and bedstead, and a small heating stove. I went on it with the intention of making it my home, and continued to live there from December 16, 1896, to this time. I slept in said house on said land all the time I was at home. I own another tract of land in McCulloch county, Texas,—160 acres of old patented land, about one mile from the school land in controversy.

I lived with my family on this land about six years. I am a farmer, and my only means of support has been by cultivating this 160-acre tract of land. I have a house on the 160-acre tract, and about 73 acres in cultivation. I have a wife and family of eight children, and this place was not large enough for the crops to support my family and feed my milk stock and work stock. I had to pay a high rate of pasturage on my stock, or to sell off my calves as they came, and I have not made a living on this small tract of land, one year with another. The reason I wanted to move was because I wanted more land for a home. When I was away from this school section, it was for the purpose of cultivating my farm and the land that I rented from Mr. Crew, and for the purpose of freighting, which were my only means of making a support for my family, and making money to pay for said land with; and I was away for these purposes only. When I was away, my hired hand and son slept in the house on this school section in controversy. When I was there, either my son or a hired hand slept with me on this school section in the house. My wife never lived on the land until the middle of January, 1898, but all the time continued to live on said 160-acre tract of land. I intended to move my wife and children on the land in controversy as soon as school was out, which was in April or May, 1897. She remained on the 160-acre tract, because it was one mile nearer school, and we were then sending our children to school. If the land had been awarded to me, I would have moved my wife and children on it as soon as school was out, in April or May, 1897. I never intended to move my wife and children on the land in controversy until school was out. From August, 1897, to about January 8, 1898, I slept about one-third of the time on said land. All the time that I was away from this school land, it was for the purpose of making money to pay for it with, or for the purpose of sending my children to school. All of the time while I was so sleeping on said land, I would eat dinner and supper with my family. A majority of the time, I would take bread with me cooked, and in the morning would cook meat and coffee on the heater, and would eat my breakfast on the land in controversy. Nearly always, I would go on the land after night, and leave early in the morning. Sometimes I would stay on it until late in the day. The house on the land was over a mile from my little place where my wife resided. I never did any work on said land, or put up any improvements on it, except building the little house, and putting a three-wire fence around it, until January, 1898, when I built another house, with two rooms, 12 by 14 feet, and another 10 by 16 feet, a small smoke house and crib, when I moved my family on this place, since which time have lived there with my family. After the jury decided in my favor at November term of the district court in 1897, I moved my family on the

land as soon as I could get lumber on the ground and build. All of the time that I was away from the land, it was for the purpose of sending my children to school, and making money to pay for the land with. There was a tent put up on said land by Paul Willoughby, son of Tal Willoughby, out of two wagon sheets, before I went on the land. I never saw defendant on the land until the latter part of February, 1897. In the tent I saw a bedstead and three comforts, and an old heating stove, with no pipe, sitting on outside of tent. Between the 3d and 17th of January, 1897, I went to said tent five or six different times late at night, and three or four different times by daylight, to see if any one was staying at the tent, and found no one there. During the time from December 16, 1896, till the last of February, 1897, I frequently saw the tent, and never saw Willoughby there. I was watching to see if any one lived there. The tent here spoken of was made as follows: A pole with one end in the fork of a mesquite tree, and the other end resting on a fork, with two old wagon sheets thrown across the pole, with end of the pole towards the north and south, and neither end closed." We are of the opinion that this testimony supports the finding of the jury that the plaintiff was a bona fide actual settler upon the land, and that he desired to purchase it for a home. *Thomas v. Porter*, 57 Tex. 61. Section 11 of the statute referred to expressly declares that necessary absence from the land by such a purchaser for a time not exceeding six months in any one year, for the purpose of earning money with which to pay for the land, or for the purpose of schooling his children, shall not work a forfeiture of his title.

The affidavit accompanying the plaintiff's application to purchase the land reads as follows:

"I, W. A. Townsend, do solemnly swear that my home is upon aforesaid section No. 228, certificate 32-246, issued to G., H. & H. R. R. Co., in McCulloch county, purchased under act of 1895, and that I am a bona fide settler on the same, and head of a family, and am now neither assignee, original purchaser, nor owner of any other land purchased from the state. I further swear that I am not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in this purchase, save myself, and that my post-office address is Brady, in McCulloch county, state of Texas. [Signed] W. A. Townsend, Applicant.

"Subscribed and sworn to before me this 10th day of January, 1897. J. W. Matthews, Notary Public, McCulloch Co., Tex."

The statute requires that any person desiring to purchase such lands shall accompany his application with his affidavit stating, in effect, among other things, that he desires to purchase the land for a home. The statute does not require the affidavit, in terms, to

state that the applicant desires to purchase the land for a home, but does require that such shall be its effect. The very fact that the plaintiff was making application to purchase the land is conclusive of the fact that he desired to purchase it, and he states in his affidavit that he is the head of a family, a bona fide settler on the land, and that it is his home. We think this equivalent to stating that he desired to purchase it for a home.

On the former appeal, this court held, and still holds, that the fact of the affidavit being made on a Sunday will not invalidate appellee's title.

It is also contended that the plaintiff should have shown a tender to the state of the several annual installments of the purchase money for the land. The testimony shows that the commissioner of the land office rejected the plaintiff's application, and awarded the land to the defendant. It was also shown that the plaintiff tendered the first payment required by the law in order to entitle him to purchase. In view of the fact that his application to purchase was rejected by the commissioner of the land office, we do not think that it devolved upon him to prove that he tendered to the state the other annual payments, which, of course, the state would not have accepted, as it had rejected his application to purchase, and awarded the land to his adversary. We have considered all the questions presented in appellant's brief, and, finding no reversible error, the judgment will be affirmed. Affirmed.

CLARK et al. v. CLARK.

(Court of Civil Appeals of Texas. April 29, 1899.)

HUSBAND AND WIFE — COMMUNITY PROPERTY — ACTIONS AGAINST EXECUTORS — EVIDENCE — ADMISSIBILITY — INSTRUCTIONS — JUDGMENT — TRIAL.

1. Rev. St. art. 2302, making testimony of transactions with a decedent inadmissible in an action against his executors, in which judgment may be rendered against them as such, does not apply to an action against executors, who are trustees for legatees in the will of such decedent.

2. An instruction which assumes a fact not supported by the evidence is erroneous.

3. In an action by plaintiff to recover land as heir of his father, it is not error to refuse an instruction that his mother having acquired the property under a conveyance executed after the father's death, and reciting that the consideration was paid by her, a presumption arises that it was purchased with her separate means, since there is no statute which makes such facts presumptive evidence that the property was purchased with the wife's separate means.

4. A judgment which is not authorized by the verdict or pleadings is erroneous.

5. In an action by plaintiff to recover land as heir of his father against legatees under the will of his deceased mother, it is not error to permit defendants to testify to conversations with such mother prior to her death, in reference to the ownership of the land, when they were called to testify by plaintiff.

51 S.W.—22

6. In an action by plaintiff to recover land inherited from his father, parol evidence that he did not include such land as part of his assets in filing a petition in bankruptcy is competent, as showing that he did not then claim the land, although the schedule itself is not accounted for.

7. In an action by plaintiff to recover realty in the town of C., as heir of his father, it is not error to admit a recital in a bond for title by his mother, after the father's death, that she was "the sole proprietor of the town of C." with an instruction not to consider it as evidence that the land was her separate property, but only in so far as it showed that she held adversely to plaintiff.

Appeal from district court, Red River county; E. D. McClellan, Judge.

Action by James Clark against Pat B. Clark and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

Hale & Hale and Lenox & Lenox, for appellants. Dudley & Moore, for appellee.

BOOKHOUT, J. Appellee, James Clark, brought this suit against appellants, Pat B. Clark and Mrs. Isabella Morrison, to recover certain real estate in Red River county, and in the town of Clarksville, part of the Henry Stout H. R. survey, alleged to be community property between his father, James Clark, and his mother, Isabella H. Gordon, née Clark. He asked for partition, and for an accounting by his brother Pat Clark, for what he had received from the community estate of their father and mother, and to be charged with what he himself had received therefrom; alleging that his mother had received and appropriated to her use largely more than her community interest in the property, and that his brother Pat had also received much more than his share of said property, and that he (plaintiff) was the true owner of the larger share of all the property of which his mother, Mrs. Gordon, died possessed, and his brother Pat Clark was entitled to the balance. He asked for partition, etc., alleging, *allunde*, that his father, James Clark, died on the 2d day of May, 1838, leaving surviving him four children, to wit, plaintiff, Pat B. Clark, Frank Clark, and Sarah D. Clark; that Sarah D. Clark died in 1846, without issue; that Frank Clark died in 1856, leaving a widow and one child; that it died afterwards, without issue; that, at the death of James Clark, he owned, among other property, in community with his wife, I. H. Gordon, née Clark, plaintiff's mother, about 3,700 acres of the Henry Stout survey, where the town of Clarksville is now situated, worth about \$14,000, besides some \$6,000 worth of slaves; that his homestead was at his death on the Stout land, and that his widow and children continued to occupy it after his death, and his mother resided there until her death, about August, 1895, and that no partition of said community estate had ever been made; that Dr. Gordon died in 1872, leaving, surviving him, his widow (appellee's mother), and one child, the defendant Isabella H. Morrison. Plaintiff alleges, after

the death of his father, his mother married Dr. George Gordon, and she still held and occupied the homestead until her death, in 1896, and that during all this time she held this land as tenant in common with her children by said James Clark, and in trust for them, to the extent of one-half, and had the use of it, and that she conveyed and used the proceeds of some land in Hopkins county, sold \$6,000 worth of slaves, and that she had conveyed and sold off all of the Stout land at Clarksville, except about \$14,000 worth of it, by selling lots in the town, which is shown, on exhibit to the petition, pages from 1 to 31, inclusive, and that the property so sold and conveyed by her was worth largely more than her one-half community interest in the estate, and that plaintiff and Pat Clark are entitled to all of it remaining unsold, but, Pat having received much more from the community than he, plaintiff was entitled to the larger share of the remainder. Alleges that Mrs. Gordon left a will, in which she bequeathed all of her property to the children of plaintiff, the children of Pat B. Clark, and the children of Mrs. I. H. Morrison (her grandchildren); that she left no debts, and there was no necessity for administration. Says Pat has received \$6,000 and he \$1,200 out of the community; that Pat B. Clark and Mrs. I. H. Morrison are claiming the property for themselves, and as executors of I. H. Gordon, for the benefit of the grandchildren as the legatees under the will, but that she had nothing to will, but that Pat and plaintiff are entitled to all of it as heirs of their father, subject to the advancements made to each out of it, heretofore made to each, respectively. Prayed that Pat B. Clark be charged with what he had received from the community, and the legatees under the will be charged with the community of James and Isabella H. Clark, and that they be adjudged to have no interest in the Stout survey by virtue of the will of Mrs. Gordon, and for partition. Plaintiff filed first supplemental petition, in which the interest of Lula Barry derived through Frank Clark was set up, and making her and her husband parties, and adopting, as against them, all the allegations made against the other defendants, and for partition. Then files a supplemental petition, making all the children of James Clark, plaintiff, and of Pat B. Clark and of Isabella H. Morrison, who are the legatees under the will, parties, and asking for partition. Then filed second supplemental petition, consisting of general demurrer, general denial, and that the property was all community between James and Isabella H. Clark, and that the widow and heirs of James Clark were tenants in common. All of said heirs and legatees appeared and answered, claiming under the will as legatees. Defendants Pat Clark and Mrs. I. H. Morrison, executors of the will, answered: (1) By exceptions on the ground of two and four years' statute of limitation. (2) General denial. (3) Set up the will

and their qualification as executors. (4) That the real estate of Henry Stout, H. R., was the separate property of Mrs. I. H. Gordon, née Clark, and that she did not hold it in trust for any one, and that she bought and paid for the Stout certificate, by virtue of which it was located, with her own separate means, after the death of her husband, James Clark; that the land was surveyed for, and patented to, her after her husband's death; that she publicly and notoriously occupied and claimed the Stout land, and paid all taxes on it, up to the time of her death; that she sold it off in town lots, and otherwise, from time to time, and appropriated the money to her own use, and exercised various acts of ownership over it, from the time of its location, in 1838, to her death, and accepted a patent from the state for it, and had it duly recorded many years ago, during all which time plaintiff knew all about her claim and her acts, and that he lived in Red River county all the time from childhood up to this time, and that, with his knowledge, she had thus held and claimed the land for the 50 or 60 years, and the whole community knew of her so claiming the land, yet plaintiff set up no claim until after her death, nor had ever asked to be let into joint possession, or any possession, of the land, or any part thereof, nor contributed to its improvement. They pleaded the statute of limitations of 3, 5, and 10 years on plaintiff's claim to the land, and 2 and 4 years' limitation against his claim to the personal property; that the negroes were freed by action of the government; and the cattle that were used in building house on the homestead were the community property of Dr. Clark and his wife, Isabella. Pleaded stale demand against the recovery of the land, and that, if plaintiff ever had any interest in, or claim to, any part of the land, it was but an equity, and that his mother held under full legal title by virtue of a patent from the state, and location made by and for her, in her name. Pleaded that she and husband, Dr. Gordon, reared and educated plaintiff and Dr. Pat B. Clark, and used much of the personal property for their benefit, each getting his full share of it; that she administered on the estate of James Clark, deceased, paid the debts, and had but little left of proceeds of personal property; and that she had conveyed to James and Dr. Pat Clark a number of valuable tracts of land, which was community of herself and their father, and in the conveyance had given them her community half of each tract. Pleaded that plaintiff bought one of the lots from her in 1872, and she alone conveyed it to him, the deed reciting \$800 consideration. In 1867 or 1868, plaintiff, James Clark, went into voluntary bankruptcy, and got a discharge from his debts, and he failed to put any interest in the Henry Stout survey on his schedule, and made the proper oath under law, and is estopped now to claim the land, or any part thereof. By way of cross bill, defendants set

up that plaintiff's claim casts a cloud on the title of the legatees, and ask its removal; claims rent of homestead against plaintiff since he has been in possession; and prays judgment for the land for legatees under the will of their grandmother Mrs. I. H. Gordon; asks a writ of possession, and that there be made no partition, for costs, and for general relief. The legatees under the will adopt the answers of Pat B. Clark and Mrs. Morrison, executors of I. H. Gordon, deceased. The cause was tried and verdict rendered for plaintiff, and judgment rendered thereon, a motion for new trial overruled, and notice of appeal given by defendants. From this judgment Pat B. Clark (in his own right and as executor) and his children, Isabella Morrison (in her own right and as executrix) and her children, who claim under the will of Isabella Gordon, née Clark, appealed. F. H. Clark, Pat B. Clark, Jr., M. B. Young and her husband, T. H. Young, Lula Berry and her husband, Willis Berry, Lula M. Steel and her husband, Robert Steel, M. M. Clark and Jim Clark, minors, do not appeal.

Appellants' first assignment of error complains of the action of the court in admitting the testimony of plaintiff, in his own behalf, that he did not schedule or inventory his interest in the Henry Stout survey when he went into bankruptcy, in 1869, for the reason that his mother was in possession and exercising acts of ownership over it at the time, and he had told her prior thereto that she could sell any portion of the same, and that he would never disturb the title to the property so sold. The objection to this testimony was that it was the statement of a contract with, or agreement between, plaintiff and his mother, Mrs. Gordon, now deceased, and that she admitted that he had an interest in the property. The objection was overruled, and the evidence admitted. Upon the trial the plaintiff was called by the defendants as a witness, and asked, "Did you schedule any interest in the Henry Stout survey when you filed your petition in bankruptcy?" to which witness answered, "I have no recollection whether I did or not." Thereupon he was asked by his own counsel, on cross-examination, "If you did not schedule it, please state your reasons for not doing so;" to which the witness replied, "My mother, Isabella H. Gordon, was in possession of it, and was exercising acts of ownership over it, at the time, and I had told her prior thereto that she could sell any portion of said survey, and that I would never disturb the title to any portion of the property so sold by her." This suit was originally instituted by the plaintiff, James Clark, against Pat B. Clark and Isabella H. Morrison, to recover his interest in the land in dispute inherited by him from his father. It was alleged that the property was the community property of his father, James Clark, and his mother, Isabella Gordon, née Clark, and that his mother had received and appropriated largely more than her commu-

nity interest in the property, and that his brother Pat had also received much more than his share of said property, and that he (plaintiff) was the true owner of the larger share of all the property of which his mother, Mrs. Gordon, died possessed, and that Pat Clark was entitled to the balance. He prayed for a partition of the land. Pat B. Clark and Isabella H. Morrison answered, denying that the property was the community property of James Clark and Isabella Gordon, née Clark, but they charged that the same was the separate estate of Mrs. Isabella Gordon, and that she, by will, devised it to the children of plaintiff, the children of defendant Pat B. Clark, and the children of defendant Isabella Morrison, and that by said will the said defendants were appointed executors thereof. They alleged the death of Mrs. Gordon, and the probate of her will, and their qualification as executors. They prayed that the partition be denied, and that the legatees be adjudged to be the owners of the property, and that all cloud on their title be removed, and for a writ of possession. They did not assert or claim any interest in the land, except as executors of said will. By the order of the court, and by supplemental petition, all the devisees in the will were made parties. They answered, adopting the answer of the executors. The legatees were the grandchildren of Mrs. Gordon, and would not have inherited under her as heirs. The record does not show that there are any debts against the estate of Mrs. Gordon, or that there is any necessity for administration thereon. In this condition of the record, it would seem that this is a suit against the legatees in the will of Mrs. Gordon. It is not a suit where judgment will be rendered against the executors as such. They, under the facts as they now appear, occupy the position of trustees for the legatees in the will. It is well established that the statute cannot be invoked by a defendant who derails title as a legatee in the will of the deceased. *Newton v. Newton*, 77 Tex. 508, 14 S. W. 157; *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705; *Wootters v. Hale*, 88 Tex. 564, 19 S. W. 134. This court has held, upon a state of facts similar, as we think, to those shown by the record in this case, that the executors occupied the position of trustees for the legatees in the will, and hence the suit was really against the legatees in the will, and that, as the statute does not embrace legatees, the evidence was admissible. *Caffey's Ex'rs v. Caffey* (Tex. Civ. App.) 35 S. W. 740. This holding was approved by this court on a second appeal of that case. 47 S. W. 65. See, also, *Wagner v. Isensee* (Tex. Civ. App.) 33 S. W. 155. We conclude that the testimony was admissible, and that there is no merit in appellants' first assignment of error.

Appellants' third assignment of error complains of that part of the court's charge in which the jury were told that "the uncontroverted evidence showed that Mrs. Gordon had

sold off largely more than her half interest in the Henry Stout survey, and, if they found for plaintiff, then the plaintiff and Pat B. Clark should recover all the land sued for," etc. This charge assumed that the evidence showed that Mrs. Gordon only owned a one-half interest in the land, if it was the community property of herself and James Clark, Sr., and that the plaintiff and defendant Pat B. Clark owned the other half. This was not true. At the time of the death of James Clark, Sr., he left surviving him his wife, who subsequently married Dr. Gordon, and their four children, to-wit, plaintiff, James Clark, and defendant Pat B. Clark, Sarah D. Clark, and Frank H. Clark. Sarah D. Clark died without issue, and one-half of her interest in the property went to Mrs. Gordon. Frank H. Clark afterwards died, leaving one child. This child subsequently died without issue. The mother married again, and died, leaving decedents, who are parties to the suit, and who suffered judgment by default to go against them. This did not give plaintiff the right to recover more than he sued for. He sued as an heir of his father, and to recover, as such, the interest inherited by him in his father's estate. He did not seek to recover any interest alleged to have been inherited by him from his sister Sarah D. Clark, or his brother Frank H. Clark. It was error for the court to assume that Mrs. Gordon only owned a one-half interest in the community estate of herself and James Clark, Sr. Appellee contends that the uncontroverted evidence shows that Mrs. Gordon conveyed more than her interest in the community estate of herself and James Clark, Sr., and hence the above charge, in view of the evidence, if error, is harmless. The record does not show the amount of land sued for, nor the amount of land sold by Mrs. Gordon. We cannot say from the evidence that she had sold off more than her interest. We conclude that the charge was erroneous, and that the third assignment of error is well taken.

Appellants' fourth assignment of error complains of the action of the court in refusing the following special charge requested by defendants: "Gentlemen, you are instructed, at the request of defendants, that the uncontroverted evidence shows that the Henry Stout certificate was transferred to Isabella H. Clark after the death of James Clark, reciting therein, among other things, that the consideration for said transfer was received from her, and the law, therefore, presumes that the said certificate was purchased with the separate means of the said Isabella H. Clark. You are therefore instructed that the burden of proof is upon the plaintiff to show, by the preponderance of the evidence, to your satisfaction, that the said certificate was purchased with the community funds of the said James and Isabella Clark, and, unless you so find from the preponderance of the evidence that said certificate was purchased with community means, you will return a verdict

for the defendants." The appellants insist that they were entitled to have the jury charged, as a matter of law, that the presumption arises, where the wife acquires property by virtue of a conveyance executed after the death of the husband, and purporting to be made upon an onerous consideration paid by her, that it was purchased with her separate means. We have no statute which makes such facts presumptive evidence that the property was purchased with her separate means. The court in its charge instructed the jury as to what constituted community property and what constituted separate property. The charge requested was upon the weight of evidence, and was properly refused. A charge placing the burden of proof upon the plaintiff, under the facts, would have been proper.

The court instructed the jury, as to the form of their verdict, that, "if you find a verdict for plaintiff, your verdict should be in this form, to-wit: 'We, the jury, find for the plaintiff;' and, if you find a verdict for the plaintiff, you will then make a separate verdict, stating the amounts of money and value of property, if any, received by plaintiff and Pat B. Clark, respectively, on account of their interest in the community estate inherited from their father, James Clark. You will not, however, include in such finding any money or property received by either of them from Mrs. Gordon, except such as belonged to the common estate of her and James Clark, such as was intended by her as an advancement on account of their interest therein." The jury returned the following verdict: "We, the jury, find for plaintiff." Upon this verdict the court entered a judgment that plaintiff, James Clark, and defendant Pat B. Clark, recover all the land, and awarding and decreeing to plaintiff an undivided half interest therein, and decreeing to defendant Pat B. Clark the other undivided half interest therein. It further appoints commissioners to partition the land between said parties. The costs are taxed against all the defendants in said judgment. This verdict does not dispose of the issues in the case. The question of advancements made to plaintiff and Pat B. Clark, out of the community estate of their father and mother, was submitted to the jury as a distinct issue, upon which they were instructed to find. There was evidence showing advancements made to each of said parties. The jury failed to find on this issue. Again, the judgment was not authorized by the verdict or pleadings. The defendant Pat B. Clark did not, in his pleadings, set up any claim or title to the property, except as one of the executors of the will of Mrs. Gordon. In the face of this pleading and verdict, the court adjudged and decreed to defendant Pat B. Clark an undivided one-half interest in the property. This was error. Neither the pleadings nor the verdict authorized the judgment in favor of Pat B. Clark.

Appellants' eleventh assignment of error complains of the action of the court in ad-

mitting the testimony of Frank Clark and Pat B. Clark, Jr., sons of plaintiff, over defendants' objections, as to conversations with Mrs. Gordon in reference to the ownership of the Stout survey. These witnesses were parties defendant, made so by the action of the court, and were legatees under the will of Mrs. Gordon. They were called to testify by plaintiff. The court did not err in admitting their testimony. Rev. St. art. 2302.

We do not think the objections made to the charge of the court presented in appellants' thirteenth and fourteenth assignments of error are well taken. For the errors pointed out the judgment of the trial court will have to be reversed.

The appellee filed cross assignments of error, which he asks be considered, in the event this court reversed the judgment of the trial court. The first cross assignment complains of the action of the court in admitting in evidence the testimony of Douglas Reeves as to what property plaintiff put in his schedule in bankruptcy, the objection being that the same was not the best evidence, and the predicate for the nonproduction of the best evidence was not sufficient to admit secondary evidence, and because the same constituted no defense, and could not affect the rights of plaintiff to this action. There is no contention made in this court that this evidence was not secondary evidence. If it is to be so treated, then we think the evidence of the destruction of the records was not sufficiently shown to admit secondary evidence. But we think the evidence was admissible as primary evidence. The fact to be proved was that James Clark did not include his interests in the lands sued for as a part of his assets when he filed his petition in bankruptcy, in 1869. It was this fact that was to be proved, and the schedule itself was but an incident to the proof of such fact. 1 Jones, Ev. § 202; Bulger v. Ross, 98 Ala. 267, 12 S. W. 803. If parol evidence is as near the fact to be proved as the written evidence, then each is primary. Whart. Ev. § 77; Hewitt v. State, 121 Ind. 245, 23 N. E. 83; Starkie, Ev. pp. *716, *717. The evidence was competent, as a circumstance tending to show that at that time plaintiff did not claim any interest in the land. The trial court did not err in admitting the recitations in the bond for title from Isabella H. Gordon to W. M. Harrison, in which it is recited that she is the "sole proprietor of the town of Clarksville." This was admitted to show that Mrs. Gordon claimed the land in hostility to the claim set up by plaintiff, and the jury were explicitly instructed that they must not consider such declaration as any evidence that the land in controversy was her separate property, but they could only consider the same in so far as it might tend to show that she held such property adversely to plaintiff. There was no error in admitting the testimony, as restricted by the court. We therefore overrule the second and third cross assignments of error. The

fourth cross assignment of error complains of the action of the court in refusing to permit the plaintiff, while a witness in his own behalf, to testify, in effect, that his mother, Isabella H. Gordon, prior to her death, recognized his interest in the land sought to be partitioned, down as late as the year before she died (1894). The sole objection to this evidence was that it came within article 2302 of the Revised Statutes, prohibiting a party testifying in a suit against executors, as to any statement by, or transaction with, the deceased. We think that this evidence was admissible, for the reasons above set forth, in overruling appellants' first assignment of error. We therefore sustain the appellee's fourth assignment of error. Reversed and remanded.

ZIMPLEMAN v. STAMPS.

(Court of Civil Appeals of Texas. April 15, 1899.)

EVIDENCE—DEEDS—DESCRIPTION—ACKNOWLEDGMENT BY CORPORATION.

1. Where a deed described a lot as shown by a town map, which at the time the deed was made had been executed, but was not recorded until some days thereafter, parol evidence was properly admitted to show that no other map of such town, except the one referred to, had ever been recorded in that county.

2. A deed of a town lot described it as lot 14, block 31, in the town of C., E. county, "as represented on a map thereof drawn by —, recorded in Book —, p. —, of Records for Deeds," etc. At the time the deed was made the map had been executed, but was not recorded, and it was proved that there was but one such map ever recorded. *Held*, that the description was sufficient.

3. Under Sayles' Civ. St. art. 4617, providing that the acknowledgment of a deed shall specify that the person making it is the individual who executed and is described in the instrument, an acknowledgment by a corporation, by the vice president and secretary, stating that J., vice president, and R., secretary, were well known as such to the officer taking the acknowledgment, and that each acknowledged that he executed the deed, was a substantial compliance with the statute, and therefore sufficient.

Appeal from district court, Eastland county; T. H. Conner, Judge.

Trespass to try title by Alexander Stamps against George B. Zimpleman. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. J. Butts, for appellant. Jas. B. Goff, for appellee.

HUNTER, J. This suit of trespass to try title was filed in the district court of Eastland county on November 19, 1896, by appellee, to recover from appellant lot 14, in block 31, of the town of Cisco, in said county. The defense was not guilty. The case was tried by the court without a jury, who gave judgment for the appellee, and this appeal is taken on a statement of facts. There is no controversy about the facts. Appellant did not introduce any evidence, while appellee

showed a chain of about nine transfers, beginning with patent from the state and coming down to himself, which showed title in appellee, if the objections made thereto on the trial and here are not good in law. A map of the town of Cisco and dedication of streets was put in evidence by appellee, executed by the Texas Central Railway Company, then owner of section 85, block 4, of Houston & Texas Central Railroad Company lands in Eastland county, upon which the town of Cisco was laid out and is situated, dated May 12, 1881, and recorded in the deed records of Eastland county May 30, 1881; and the first error assigned is to the admission of the deed of the Texas Central Railway Company to S. O. Berry, of date May 17, 1881, conveying lot 14, block 31, town of Cisco, upon the grounds (1) that said deed does not purport to convey any part of section 85, nor tend in any manner to connect plaintiff with the same, and (2) that the certificate of acknowledgment is defective, in that it fails to show that the parties who appeared before the notary public were known to him to be the persons who signed the deed.

The first objection is based upon the fact that the deed simply describes the lot as "lot No. 14, in block No. 31, of the town of Cisco, Eastland county, as represented on the map thereof drawn by —, recorded in Book —, page —, of Records for Deeds, etc., for Eastland County." It will be noticed that at the date of this deed (May 17, 1881) the map of the town of Cisco put in evidence by appellee had been executed (May 12, 1881), but it was not recorded until May 30, 1881. Oral evidence was admitted to show that no other map of Cisco, except the one put in evidence, was ever placed upon the deed records of Eastland county prior to the year 1897; but this oral evidence was also objected to, because the deed records themselves were the best evidence of what they contained and of what they did not contain. But we think there was no error in admitting the oral evidence to prove that no other map of Cisco was on the deed records. One of the witnesses was the deputy clerk of the county court, and another was an abstracter of land titles, and the latter had gone through the deed records page by page. They both stated, as did Mr. Calhoun, also, who showed that he was familiar with the records, that no other map of Cisco was ever recorded in the deed records of Eastland county prior to the year 1897. By other evidence it was shown that the lot in question, as described in the map, was on section 85. This oral evidence, we think, was competent to prove the negative for which it was offered, and it thereupon devolved upon appellant to show affirmatively to the contrary, by producing the record of any other map, if it existed. Returning to the question of the sufficiency of the description, we think that reference to the map as "the map of the town of Cisco" was sufficient, there being but one, and the

blanks in the deed not being filled would make no difference, but would rather indicate that it had not at that time been recorded, as, in fact, it seems it had not.

The second objection has given us more trouble, but we think the certificate of acknowledgment is sufficient. It reads as follows: "The State of Texas, County of Harris. Before me, J. C. Kidd, a notary public for Harris county, duly commissioned and sworn, personally appeared G. Jordan, vice president, and A. S. Richardson, secretary, of the Texas Central Railway Company, who are to me well known as such, and each acknowledged that he executed and delivered the foregoing instrument of writing, bearing date of the 17th day of May, 1881, for the purposes and consideration therein specified, and as the act of said corporation. To certify which I hereto sign my name and affix my official seal, at Houston, this 17th day of May, 1881. [Signed] J. D. Kidd, Notary Public, Harris County, Texas. [L. S.]" Our statutes provide that the officer taking the acknowledgment shall note in his certificate thereof "that the person making such acknowledgment is the individual who executed and is described in the instrument." Sayles' Civ. St. art. 4617. But we think the officer substantially complied with the statute in stating that Jordan, vice president, and Richardson, secretary, of the railway company, were well known to him as such, and each acknowledged that he executed the deed, etc. This clearly identifies the persons whom he knew by those names as vice president and secretary of the company as the persons who acknowledged the execution and delivery of the deed, and this, we think, is sufficient. *Schramm v. Gentry*, 63 Tex. 583; *Schleicher v. Gatlin*, 85 Tex. 270, 20 S. W. 120.

This, we think, disposes of all the questions raised in appellant's brief which require any particular notice, or which the counsel of appellant seriously insist upon, though all the assignments have been carefully considered and are overruled. Finding no error in the judgment, it is affirmed.

CONNER, C. J., not sitting.

FULCHER v. WEST.

(Court of Civil Appeals of Texas. May 31, 1899.)

DISTRESS WARRANT—SUFFICIENCY OF AFFIDAVIT—SCOPE OF RECOVERY—DAMAGES.

1. An affidavit for a distress warrant, alleging that defendant "is indebted" to plaintiff in a sum "due for rents and advances" made to him by plaintiff to enable him to make a crop on plaintiff's land, shows that the amount is due, and that cause exists for issuing a warrant.

2. One instituting an action by suing out a distress warrant returnable to the district court may recover on a petition afterwards filed for unliquidated damages for breach of the rent contract.

Appeal from district court, Blanco county; W. M. Allison, Judge.

Action by P. G. Fulcher against R. M. West. From a judgment for defendant, plaintiff appeals. Reversed.

Baines & Stubbs and J. G. Cook, for appellant. W. C. Linden and R. C. Walker, for appellee.

KEY, J. Appellant sued out a distress warrant against appellee before a justice of the peace. The amount in controversy exceeded the justice's jurisdiction, and he made the writ returnable to the district court. In the latter court appellant filed a petition, charging, in substance, that in November, 1897, he made a rent contract with appellee, by the terms of which he rented appellee about 70 acres of land for the term of one year. He pleaded with reasonable certainty the terms of the contract, and alleged that in certain particulars appellee had breached it. The court sustained a motion to quash the distress warrant, upon the ground that the affidavit upon which the warrant issued failed to state that the rent and advances therein claimed were due at the time the affidavit was made, and failed to set out any cause authorizing the issuance of a distress warrant. The affidavit states, in express terms, "that Robert M. West, the defendant, is indebted to Pat G. Fulcher, plaintiff, in the sum of two hundred and fourteen and $\frac{75}{100}$ dollars, due for rents and for advances made to said defendant during the present year to enable him to make a crop upon the plaintiff's land." We think this affidavit was in compliance with the statute. It states that the sum named is for rents and advances, and that it is due. We therefore hold that the court erred in sustaining the motion to quash, and in charging the jury, in stating the law applicable to the defendant's cross action, that the distress warrant was illegally sued out.

The court also sustained exceptions to paragraphs 3, 4, 5, and 6 of the plaintiff's petition; holding that, as the plaintiff had instituted his action by suing out a distress warrant, he was not entitled to recover unliquidated damages for a breach of the contract. In our opinion, this ruling was wrong. Under the liberal system of practice that prevails in this state, we can see no reason why the plaintiff should not be permitted to assert in the district court all of his rights that are founded upon the rent contract. It has heretofore been held that, although the distress proceedings may be invalid, the landlord may foreclose his statutory lien. *Brown v. Collins*, 77 Tex. 159, 14 S. W. 173. This case establishes the proposition that the plaintiff is not limited to the distress proceedings, but may assert rights that flow from another source, and are entirely independent of such proceedings.

Other errors were committed during the progress of the trial, resulting, in the main, from the erroneous views of the trial court on the questions above discussed; and we deem

it unnecessary to refer to and discuss them in detail. For the errors pointed out, the judgment is reversed, and the cause remanded. Reversed and remanded.

CAMPBELL et al. v. ANTIS et al.¹

(Court of Civil Appeals of Texas. April 19, 1899.)

TRANSPASS TO TRY TITLE—PLEADING—JUDGMENTS
—EVIDENCE—APPEAL—EXECUTION—TITLES
—COMMUNITY PROPERTY.

1. In an action to try title to land, a cross action setting up plaintiff's fraud in obtaining a deed to the land through an execution on a dormant judgment, and, as a matter of inducement, setting up facts in regard to the judgment which incidentally show defendant's title, is not a special plea of title.

2. In an action to try title to land, a cross action attacking plaintiff's title on the ground of fraud does not waive a plea of not guilty.

3. A decree awarding each party to a suit an undivided half interest in certain land, though recorded before the commissioners appointed to partition the land had reported, is admissible to support a title thereunder, since "a decree by which the title to any tract of land or lot is recovered," within Rev. St. art. 4649.

4. A grantor may testify, as against his grantee, that he (grantor) had actual notice of an adverse title to part of the land at the time he purchased.

5. Error in admitting evidence is not prejudicial, where the same facts were testified to by another.

6. A judgment creditor bought in the property sold at execution sale. Afterwards he bought the property of the debtor, making payment in part by a note secured by a vendor's lien expressly retained in the deed. Plaintiff bought the note of the debtor, with constructive notice of an adverse claim to part of the property, and afterwards foreclosed the lien and bought in the property. *Held*, that plaintiff did not derelict title through the execution sale, but, on the other hand, stood in the shoes of the payee of the vendor's lien note.

On Rehearing.

A judgment creditor may sell merely the interest of the husband in the community property, where the husband does not object, notwithstanding the wife's share was liable under the judgment.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by Mary F. Campbell and another against Julia Antis and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

W. W. King, for appellants. Otto Staffell and Dibrell & Mosheim, for appellees.

FLY, J. Mary F. Campbell, joined by her husband, Thomas Campbell, instituted this action to try title to the east half of a six-acre tract of land out of a survey originally granted to Samuel Kinney. Appellees filed a plea of not guilty, and further pleaded that they were married on July 4, 1893; that previous to that time Julia Antis had been Julia Haerberle; that on May 6, 1893, she had obtained a divorce from Albert Haerberle, then her husband, and had at the same time recovered from him a judgment for an undivided one-

¹ Writ of error denied by supreme court.

half interest in six acres of land, and all costs of suit; that commissioners had been appointed, who had reported, giving to her the half of the land in controversy; and that, long after said judgment had become dormant, appellants had procured an execution for costs, and attempted to sell the said land, and obtained a deed from the sheriff of Bexar county, and were claiming the land by virtue of said sale. Appellees prayed for the cancellation of said deed. The cause was tried by the court, and judgment was rendered in favor of appellees. Appellants do not set up any claim to the land in this court through the deed mentioned in the answer of appellees.

We adopt the following conclusions of fact made by the trial court: "(1) John W. Kinney and Eliza A. Kinney were the common source of title. (2) Albert Haeberle and Julia Haeberle were husband and wife ever since A. D. 1887, and lived together as such up to the year 1890, and during their marriage acquired, by deed executed by John W. Kinney and Eliza Kinney unto Albert Haeberle, in 1890, six acres of land in Bexar county, which constituted community property of said Haeberle, and the east half of which is the land in controversy. There was a house on the land, which land and house were occupied by them as and constituted their homestead until they separated, in 1890, when they removed from Bexar county to Guadalupe county, and have resided beyond the limits of Bexar county ever since said separation of 1890, and abandoned their said homestead. (3) In December, 1892, Mrs. Julia Haeberle brought suit for divorce in the district court of Guadalupe county against Albert Haeberle for alleged cruel treatment, and also sued for said six acres of land, claiming the same as her separate property, and also prayed for custody of the children. (4) Albert Haeberle was duly cited in the same month, and on May 6, 1893, said district court rendered judgment in said suit, granting the divorce prayed for, giving the custody of the children to her, and vesting a one half undivided interest of the six acres in her and the other half in the husband, and adjudging all costs of the divorce proceedings against Albert Haeberle, and appointing three commissioners to make partition of said land. (5) At a subsequent term the commissioners were removed, and others appointed, who filed their report on November 1, 1895. (6) At the November term, 1895, the report of commissioners of partition was confirmed by decree of said district court, allotting to and vesting in Julia Haeberle the property in controversy and unto Albert Haeberle the other portion, and adjudging to each one-half of the costs of the partition proceedings; which report of the commissioners, with the decree of partition, was recorded in Bexar county on the 1st day of February, 1898, at the instance of plaintiffs. (7) No execution was ever issued on said judgment, either for costs or any other purpose. (8) On June 12, 1893, shortly after the divorce was granted, execution was issued from the

justice court on a judgment nearly 10 years old, but not dormant, for \$106.58, said judgment being in favor of Wilkins against Albert Haeberle, and rendered during his marital life with Julia, and said judgment having been kept alive by issuance of execution. (9) The constable levied upon the six acres on June 12, 1893, and on July 4, 1893, sold the same at public sale to Jay Minter, who was the attorney of Wilkins, for \$50. (10) At the time of sale under the Wilkins judgment the six acres were worth \$4,000. (11) At the time of sale Minter had actual knowledge of the divorce and of Mrs. Haeberle's interest in the property, and recognized her half interest therein. The constable executed a deed to Minter the same day, purporting to convey all the right, title, and interest of the said Albert Haeberle in the six acres which he may have had at the time of levy. (12) This deed was filed and recorded the next day, July 5, 1893. (13) The next day, July 6, 1893, Albert Haeberle executed unto Jay Minter a deed purporting to convey unto him the same six acres for a consideration of \$1,600, \$1,100 of which Minter paid in cash, and \$500 by a promissory note executed by Minter unto Haeberle, and due six months thereafter, which note was secured by a vendor's lien expressly retained by Albert Haeberle in the deed last aforesaid. (14) On July 14, 1893, the decree of divorce was filed and recorded in the county clerk's office of Bexar county. (15) In February, 1894, Haeberle negotiated said vendor's lien note for value unto plaintiff Mary F. Campbell. That Attorney Bergstrom, in the sale of said note to plaintiff, was not acting as her agent. Before plaintiff Campbell purchased the note there was indorsed upon the back of said note an extension of one year. (16) In 1896 Mrs. Campbell brought suit in the district court for the Forty-Fifth judicial district of Bexar county against Minter on said note, and for foreclosure of said vendor's lien on said six acres, and recovered judgment in her own separate right on June 10, 1896. Accordingly and thereafter an order of sale was issued under said judgment, and by virtue thereof the sheriff made sale of said six acres on October 6, 1896, and the same was bid in by plaintiff Mary F. Campbell, and the sheriff made a deed to her purporting to convey all the estate, right, title, and interest that the said Minter had on July 6, 1893. (17) In December, 1897, and ever since, Judge W. W. King has been the attorney of plaintiff Mary F. Campbell, and as such he procured from the clerk of Guadalupe county a bill of costs containing all items of costs incurred in the divorce proceedings and in the partition proceedings, and also an item of \$1.75 incurred by said plaintiff Campbell in said month of December for copy of partition decree. (18) Neither the clerk nor the sheriff nor any one else ever made demand of said Julia Haeberle for the payment of such costs, or any part thereof. (20) Judge King placed said bill of costs in the hands of the sheriff of Bexar

county, who made a levy, by virtue thereof, on the interest of Mrs. Julia Haeberle in the land in controversy, and sold the same at public sale on February 1, 1898, unto Mary F. Campbell for the sum of \$20. Whereupon the sheriff made a deed unto Mary F. Campbell, purporting to convey unto her all the estate, right, title, and interest that the said Julia Haeberle had on the 4th day of November, 1895, or at any time afterwards. (21) After the sale, on February 9, 1898, before the sheriff made his return, said Julia Haeberle appeared in the district clerk's office of Guadalupe county, and paid all costs that she was liable for under said judgments. (22) Thereafter the sheriff of Bexar county made his return, and, after deducting \$5.20 for his fees, sent the balance of \$14.80 to the district clerk of Guadalupe county, who promptly returned the same to the sheriff of Bexar county. (23) Julia Haeberle (now Antis) was married to her co-defendant, Adolph Antis, on July 4, 1893. (24) On July 1, 1893, Julia Haeberle conveyed to J. B. Dibrell and Emil Mosheim an undivided one-eighth interest in said six acres of land, which undivided interest was thereafter, on July 19, 1893, conveyed by said Dibrell and Mosheim to Adolph Antis. (25) That the plaintiff Mary F. Campbell had constructive, but not actual, notice of the judgment recorded in Bexar county on July 14, 1893, giving to Julia Haeberle (now Antis) the land in controversy, and that she likewise acquired her interest pending the partition proceeding in the divorce suit in Guadalupe county. At the time plaintiff purchased the note she had no actual notice of any claim to the land by Julia Haeberle or Adolph Antis. (26) At the time of the levy and sale under the Wilkins judgment the property in controversy had been abandoned by Julia and Albert Haeberle as their homestead, and they had ceased to use the same as their homestead. (27) The plaintiff went into possession of the property in controversy at the date of her purchase under the foreclosure sale against Minter, and remained in possession, by tenant, until two or three days before the institution of the suit, when Julia Haeberle placed a tent upon the property and moved therein; whereupon plaintiff sued out a writ of sequestration."

The first assignment of error complains of the action of the court in admitting in evidence deeds from Julia Haeberle to Dibrell & Mosheim, and from the latter to Adolph Antis, conveying a part of the property in controversy; the ground of complaint being that appellees had specially pleaded their title, and said deeds were no part of the title pleaded by them, and were therefore inadmissible. The answer of appellees did not specially plead their title. There was a plea of not guilty, followed by a cross action setting up fraud in appellant in obtaining a deed to the land through an execution under a dormant judgment, and the facts pleaded in regard to the divorce and partition of the land were not

a special plea of title, but mere matters of inducement leading up to the plea of fraud. The cross action did not affect the vitality of the plea of not guilty. *Mexia v. Lewis* (Tex. Civ. App.) 34 S. W. 158.

It is contended in the second assignment that it was error to admit in evidence a decree of the district court of Guadalupe county rendered in a divorce suit between Julia Haeberle (now Antis) and Albert Haeberle, awarding each party an undivided one-half interest in six acres of land, which judgment was recorded in Bexar county on July 14, 1893, because said judgment was recorded before commissioners appointed to partition the land had reported and had their report confirmed. It is provided in article 4649, Rev. St., that "every partition of any tract of land or lot, made under any order or decree of any court and every judgment or decree by which the title of any tract of land or lot is recovered, shall be duly recorded in the clerk's office of the county court in which such tract of land or lot or part thereof may lie, and until so recorded, such partition, judgment or decree shall not be received in evidence in support of any right claimed by virtue thereof." If the judgment did not partition the land, it was still a "judgment or decree" of a court "by which the title to land was recovered," and, being duly recorded, was by the terms of the statute admissible for that reason.

Jay Minter, through whom appellant claimed title, was permitted to testify that at the time he purchased the land he had notice that Julia Haeberle had title to one-half of it, and objection is urged to the testimony on the ground that Minter should not have been allowed to impeach his title after having parted with the title to it. Mrs. Campbell claimed the land through Minter, and if he had been a bona fide purchaser of the land, without notice, his good faith would have inured to her benefit, and it was therefore admissible to show by Minter that he had actual notice of the title of Mrs. Haeberle when he acquired title. If the testimony was improperly admitted, it was not injurious, for the reason that the same facts were testified to by Dibrell. The testimony of Minter did not tend to impeach any title conveyed by him; the title he had being the interest that Albert Haeberle had in the six acres of land, and being the only title conveyed to appellant. Jay Minter testified that the six acres of land were originally worth \$4,000, and afterwards \$3,500, and was allowed to state, over the objection of appellant, that he had been offered \$4,000 for the land. Appellant does not attempt to show how the evidence was injurious to her cause, if not admissible, and we fail to see how it could have affected the judgment of the court. The judgment of the district court of Guadalupe county was duly recorded when Mrs. Campbell purchased the note executed by Minter, and it put her upon notice that Mrs. Haeberle was the owner of an undivided one-half interest in the six acres

of land, and that commissioners had been appointed to divide the land. It does not matter that the judgment was not recorded when Minter bought from Albert Haeberle, for the reason that Minter had actual notice of the claim of Mrs. Haeberle at the time he bought, and she cannot claim through his bona fides; but her title must rest upon the fact that, when she bought the note, she had no notice of the claim of Mrs. Haeberle.

In the fifth assignment it is claimed that the judgment in this case is erroneous because appellant deraigned title through a judgment for which the community estate of Albert and Julia Haeberle was liable, and that the partition could not affect that liability. Appellant did not deraign title through the execution sale made under the judgment against Albert Haeberle, but claimed the land through the foreclosure of a vendor's lien that was given by Minter to Haeberle. Minter, after buying at the execution sale, bought the land from Haeberle, knowing that he owned only one-half of it, and gave him the note, afterwards bought by appellant, for the purchase money. When appellant bought that note she occupied the same position occupied by Albert Haeberle. If he had sought a foreclosure of the lien held by him, it could have been only on the interest owned by him in the land when he sold, and Minter could not have avoided the effect of the lien by showing that he had bought the land at execution sale. In other words, under the facts of this case, the matter should be viewed as though no execution sale had ever taken place, because appellant does not and cannot possibly deraign title through that sale, but must get it through a sale made by a man whose title is antagonistic to the execution sale. In order for appellant to have occupied a different and more impregnable position than that occupied by the payee in the vendor's lien note, she must have become the owner of the note, before maturity, for a valuable consideration, and without notice of the claim of Mrs. Haeberle. But we have seen that she did have notice of the claim, and must therefore occupy the position of the husband who undertook to sell and retain a lien on property which had been decreed to belong to his divorced wife. There is no error in the judgment, and it is affirmed.

On Motion for Rehearing.

(May 17, 1899.)

Minter testified that at the time he bought the land he knew that Mrs. Haeberle owned one-half the land, that he knew of the partition, and participated in it, and that the partition had been made at his suggestion. He did not intend to buy the interest of Mrs. Haeberle, and in his deed from the sheriff only the interest of the husband was conveyed. It does not matter that the land set apart in the partition may have been liable for the debt. It was not bought by Minter. The execution was levied after the partition. It

does not enlarge the claim of appellants, if the interest bought by Minter at execution sale is tacked to that obtained through Haeberle, because the interests are identical. There is not the semblance of a conflict between the opinion in this case and that in the case of *Grandjean v. Runke* (Tex. Civ. App.) 39 S. W. 945. As in the latter opinion, we hold that the whole of the community property was liable for community debts; but that doctrine does not prevent a judgment creditor from selling the interest of the husband, and not that of the wife. The only one who would have any ground of objection to such proceeding would be the husband. In this case Wilkins, the judgment creditor, through his attorney, Jay Minter, chose to sell only the interest of Haeberle in the land, and not the interest of his divorced wife, and obtained title through the execution sale to Haeberle's interest alone. Those claiming through Minter can claim no more than he obtained at the execution sale. The motion for rehearing will be overruled.

MONDAY et al. v. VANCE et al.¹
(Court of Civil Appeals of Texas. March 1, 1899.)

TRUSTS—FRAUDULENT CONVEYANCE—VALIDITY—SUBSEQUENT CONVEYANCE—EFFECT—TRUSTEE'S RIGHTS—BENEFICIARIES' RIGHTS—REPLEVIN—VALUE OF PROPERTY—RECOVERY ON BOND—AMOUNT.

1. A conveyance of land by a husband and wife in trust for the benefit of the wife and minor children, though voluntary, or made with intent to defraud the husband's existing creditors, cannot be impeached by subsequent creditors with record notice thereof.

2. A husband and wife conveyed certain property to a trustee, to the use of the wife and certain minors, without prescribing the disposition of the property after the trust should have been executed. Subsequently the grantors conveyed a moiety of their interests in the trust property to defendants. Held, that the latter deed was not void, but conveyed the reserved or remaining estate of the husband and wife after the execution of the trust.

3. The trustee was entitled to the possession and control of the property, under the trust deed, during the life of the wife and the minority of the children, as against the subsequent grantees.

4. Where an active trust of property is created for the use of a married woman and her minor children, and an alienation of their interests would be incompatible with the purposes of the trust, the beneficiaries have no power to alienate such interest, though no restriction of such power was expressed in the conveyance.

5. Plaintiffs in replevin, having alleged the value of the property, are not entitled to judgment on defendant's replevin bond exceeding the sum alleged.

6. In the absence of proof of the value of property replevied at the time of the trial, it will be presumed to be of the same value then as found by the court when replevied.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Suit by J. M. Vance and others against Robert Monday and others. From a judg-

¹ Writ of error denied by supreme court.

ment for plaintiffs, defendants appeal. Modified and affirmed.

Carlos Bee, Jos. Ryan, R. L. Summerlin, and Clark & Guinn, for appellants. Franklin, Cobbs & McGown, for appellees.

NEILL, J. This suit was brought by J. M. Vance, trustee, and John P. Rice, Virgie Lee Rice, Daisy Rice, Frank Rice, and Lettie Rice, who sued by their next friend, J. M. Vance, against J. P. Rice and wife, M. F. Rice, parents of the aforementioned minors, and Robert Monday, Newton Monday, Hermann Schultze, Jr., and his wife, Glenn L. Raymond, L. Mahncke, and H. Rilling, to recover certain real and personal property described in the first instrument copied in our conclusions of fact, and to cancel a deed made by J. P. Rice and wife to Robert and Newton Monday, and also one from Robert and Newton Monday to Glenn Raymond, which deeds are more particularly described in our conclusions of fact. The appellants (defendants below) answered by general and special exceptions, a general denial, and interposed a special plea in which they pleaded that the property conveyed by the deed of November 29, 1893, by Mary F. and J. P. Rice to J. M. Vance, as trustee, was the community property of the grantors, and subject to the payment of their community debts; that J. P. Rice at and before the date of the execution of the deed was insolvent, and that it was made for the purpose of defrauding his creditors; that said deed was not recorded until the 14th day of December, 1893, and that, on the day after it was filed for record, defendants J. P. Rice and wife entered into a contract with Robert Monday, one of defendants, for the sale of said property, and at that time a part of the consideration paid by the latter for the property was delivered to J. P. Rice and wife; that afterwards, on the 2d of January, 1894, the said J. P. Rice and wife received the full consideration for said property, and executed and delivered to Robert and Newton Monday one of the deeds sought to be canceled; that, at the time said deed was delivered, Rice and wife represented that they had a good and indefeasible title to all of said property, and that defendants, relying on their representations, did not examine the deed records, and were induced not to do so by said representations of Rice and wife; that neither they nor any of them knew of the execution or delivery of said deed to Vance. Plaintiffs excepted to that part of the special answer which set up the insolvency of J. P. Rice at the time the deed was made to Vance, upon the ground that it was immaterial whether he was solvent or insolvent at that date, and did not affect the instrument under which plaintiffs claim the property, because it appeared from the allegations of the defendant that, at the time of its execution and record, Newton and Robert Monday were not creditors of John P. and Mary F. Rice, and that they were not purchasers for a valu-

able consideration without notice, for the reason that at the time of their alleged purchase the conveyance to James Milton Vance, trustee, had been duly recorded. This exception was sustained by the court. The case was tried before the court without a jury, and judgment was rendered in favor of appellees against appellants, as prayed for, from which judgment this appeal is prosecuted.

Conclusions of Fact.

The instrument under which appellees claim the property in controversy is as follows: "The State of Texas, County of Bexar. This indenture, made this 29th day of November, 1893, witnesseth that Mary F. Rice, who before her marriage was Mary F. Vance, who was a daughter of William Vance, of the city of San Antonio, Bexar county, Texas, inherited before her majority, from her father, who died when she was a child, the real property hereinafter described. Whereas, said property is the separate property of Mary F. Rice; and whereas, it was necessary for her to receive the rents, profits, increase, and income of all of said property hereinafter described as a support for herself and maintenance of her family and the proper education of her children: Therefore the said Mary F. Rice, joined by her husband, J. P. Rice, does hereby bargain, sell, and convey unto James Milton Vance, of Bexar county, state of Texas, the following described property, to wit: Being in Bexar county, and the state of Texas, on the south bank of the Medina, beginning at the N. W. corner of land of E. G. Butler, at a point on the bank of the Medina river; thence along Butler's west line south, 24¼ degrees west, to Corpus Christi road; thence along said road to a line recently made by William Locke, county surveyor, for G. Toudouza; thence north, 24¼ degrees east, to the Medina river; thence along said river, with its meanders, to the place of beginning,—containing 281 acres of land; being a portion of the Manuel de Luna league, and more fully described in a deed from De Hymel to the grantees herein, recorded in book vol. 44, page 222, Bexar County Records. All that tract or parcel of land situated in Bexar county, Texas, within the corporate limits of the city of San Antonio, being a business lot fronting twenty-two and one-fourth feet on the south side of West Commerce street, and the next lot east from the lot on the southeast corner of West Commerce and Yturri streets, with a two-story stone building thereon. Said lot is bounded on the north by West Commerce street, east by property of Peter Gallagher, south by property of Eliza Gallagher, and west by property of Francis E. Vance. The property herein described is the same vested in Mary Francis Rice (formerly Vance) by the last will of her father, William Vance, deceased, and all the cattle, fifty head; horses, eighteen head; sheep, twenty head; goats, fifty-one head; hogs, seventy head,—now owned by her, and upon the farm herein first de-

scribed, in Bexar county, Texas. To have and to hold the same unto the said James Milton Vance, trustee for the said Mary F. Rice and her children, to be by him held, managed, and controlled for the purpose of making the same produce all the income, rents, and profits possible, and to use all the income, rents, and profits of said property received by him, after paying taxes and other necessary expenses, in furnishing to said Mary F. Rice and her children a support and maintenance, and the education of her children; and the said James Milton Vance does hereby execute this deed, and by so doing hereby acknowledges himself bound to carry out every provision thereof. Witness our hands this 29th day of November, 1893. [Signed] M. F. V. Rice. J. M. Vance. J. P. Rice." This deed was filed for record on the 14th day of December, 1893, in the office of the county clerk of Bexar county. On said date James M. Vance, one of appellees, accepted the trust imposed upon him by said instrument, and proceeded to execute it. It is by virtue of this instrument the appellees seek to recover the property in controversy. It does not appear from the evidence adduced upon the trial in the court below whether the property conveyed was the separate property of Mary F. Rice, or the community property of herself and husband, J. P. Rice, though evidence was offered (which was excluded) to show that it was community property. On the 23d day of January, 1894, J. P. Rice and his wife, Mary F., executed and delivered to Robert and Newton Monday the following deed: "The State of Texas, County of Bexar. Know all men by these presents that we, John P. Rice, herein joined by my wife, Mary F. Rice, of the county of Bexar, and state of Texas, for and in consideration of the sum of \$4,000 to us in hand paid by Robert Monday and Newton Monday, both of Lathrop, Clinton county, in the state of Missouri, have granted, sold, and conveyed, and by these presents do grant, sell, and convey, unto the said Robert Monday and Newton Monday, one-half of all and each of our right and interest in what is known as the 'Riverside Stock Farm,' situated in Bexar county, state of Texas, about 15 miles south from the city of San Antonio, and fronting on the S. bank of the Medina river, bounded and described as follows, to wit: On the north by the Medina river, on the west by land belonging to Mr. Gustave Toudouza, south by the Corpus Christi road, and east by property formerly belonging to E. G. Butler, deceased, at a point on the Medina river; thence along said Butler's west line, S., 22½ deg. W., by the Corpus Christi road; thence along said road to west line made by W. M. Locke, county surveyor of Bexar county, for Mrs. Gustave Toudouza; thence north, 22½ deg. E., to the Medina river; thence along said river, with its meanders, to the place of beginning,—and containing 281 acres of land, more or less, and being a portion of the Manuel de Luna's league of land; and the same was conveyed to

us by F. O. De Hymel and his wife, Catherine De Hymel, by deed dated Dec. 30, 1888,—together with ½ interest in all the improvements thereon, and ½ interest in all the stock, consisting in horses, cattle, sheep, goats, and hogs, and also ½ interest in all the farming implements. To have and to hold the above-described premises and property, together with, all and singular, the rights, privileges, and appurtenances to the same belonging in any manner, unto the said Robert Monday and Newton Monday, their heirs and assigns, so that neither ourselves nor our heirs, nor any person or persons under or through us, shall at any time hereafter have any claim or demand, any right or title, to the said premises and property, or its appurtenances, or to any part thereof: In witness whereof we have hereunto subscribed our hands, in the city of San Antonio, this 2nd day of January, A. D. 1894. [Signed] John P. Rice. M. F. V. Rice." On the 29th day of May, 1894, Robert and Newton Monday, by their deed of that date, conveyed to Glenn Raymond their interest in the real property described in the foregoing deed. The two deeds last mentioned were filed for record in the office of the county clerk of Bexar county on the 29th day of May, 1894. The plaintiffs below (appellees) allege these two deeds are a cloud upon their title, and pray for their cancellation. On the 1st day of May, 1894, Robert and Newton Monday conveyed the personal property described in their deed from J. P. Rice and wife to Hermann Schultze, Jr., and his wife, who claim said personal property by virtue of said conveyance. This personal property was on June 4, 1894, seized by virtue of a writ of sequestration issued in this case. After its seizure, on June 6, 1894, Hermann Schultze, Jr., and Mrs. Hermann Schultze, Jr., his wife, as principals, and L. Mahucke and H. Rilling, as sureties, filed with the officer, in accordance with the statute, a replevy bond, whereby they obligated themselves to pay James Milton Vance, trustee, the sum of \$890, conditioned in the manner required by the statute. No evidence as to the value of the personal property at the time of trial was introduced, but the proof showed that its value, as it existed at the time replevied and converted, was, in the aggregate, \$1,860.

Conclusions of Law.

1. The court did not err in sustaining appellees' exception to appellants' special answer. The deed from Rice and wife to Vance, as trustee, conveyed the legal title to Vance for the use and benefit of Mary F. Rice and her children, and whether a voluntary gift, or made with the intention of defrauding Rice's then existing creditors or purchasers with notice; and the defendants, in their special answer, admitted that they were not creditors of Rice when he made the deed, but were subsequent purchasers, with record notice of the deed. *De Garca v. Galvan*, 55 Tex. 53; *Clay-*

brooks v. Kelly, 61 Tex. 634; Lewis v. Simon, 72 Tex. 474, 10 S. W. 564; Bavoust v. York (Tex.) 46 S. W. 61.

2. It is contended by appellants, in their ninth assignment of error, that no title whatever passed, or was intended to pass, by virtue of the deed from Rice and wife to Vance. After a preliminary statement of the facts in this case, we certified to the supreme court the following questions: "(1) Was the effect of the deed first mentioned in the statement such as to divest Rice and wife of title to the property, and vest it in Vance, and render the subsequent conveyance of Rice and wife to Robert and Newton Monday absolutely void? (2) If its effect was not to render the subsequent conveyance void, what title, if any, passed to the grantees in such subsequent conveyance?" To which we received the following answers: "(1) We are of the opinion that the deed from Rice and wife to Vance, as trustee, conveyed to the latter a title which was limited to the purposes of the trust. In other words, we think that the title of the trust would, of necessity, cease upon the death of all the beneficiaries. It may possibly cease upon the death of Mrs. Rice, and upon all of her children attaining their majority. The conveyance does not undertake to prescribe how the property shall devolve after the trust should have been completely executed; that is to say, after the death of the wife, and death or majority of the children, as the case may be. It follows, therefore, we think, that the effect of the first deed was merely to carve out of the estate in the property the usufructuary interest for the support of the wife and the maintenance and education of her children, and to leave what remained unaffected by the conveyance. That reserved or remaining estate could be conveyed by the joint deed of the husband and wife. We therefore answer that the deed of Rice and wife to Robert and Newton Monday was not void. (2) The second question is one of more difficulty. It is well settled in England, as a general rule, that an equitable estate for life carries with it the power of alienation by the beneficiaries, and that it may be subjected to the payment of their debts. A different rule prevails in some of the courts of this country, and notably in our own state. Wallace v. Campbell, 53 Tex. 229; Nichols v. Eaton, 91 U. S. 716; Shankland's Appeal, 47 Pa. St. 113; White's Ex'rs v. White, 30 Vt. 338; Pope's Ex'rs v. Elliott, 8 B. Mon. 56; Campbell v. Foster, 35 N. Y. 361. But all the authorities recognize an exception in favor of married women, and it is universally held that a conveyance may be made in trust for their benefit, with a restriction upon their power of alienation. Certainly there is no rule of law or equity which stands in the way of the interest which passed to Mrs. Rice under the deed being made inalienable by her. But the conveyance contains no words which expressly restrict her power of conveying her beneficial interest. While this is true, it is

also true that the right of alienation by the beneficiaries in the deed in question is utterly inconsistent with the purposes of the trust. The trust is an active one. The deed makes it the duty of the trustee to manage and control the property so as to produce the greatest possible income, and to appropriate the entire net income to the support of Mrs. Rice and to the education and maintenance of her children. The very purpose of the deed in question was to provide a permanent support for the wife and children, and the means of educating the latter. To permit an alienation of the interest of the beneficiaries is destructive of the trust and incompatible with its purposes. In such cases the authorities hold that there is no power of alienation, although no restrictions upon the power are expressed in the conveyance. Perkins v. Hays, 3 Gray, 405; Smith v. Towers (Md.) 14 Atl. 497; Keyser v. Mitchell, 67 Pa. St. 473; Barnes v. Dow, 59 Vt. 530, 10 Atl. 258; Page v. Way, 3 Beav. 20. Besides, to hold that the wife could alienate her beneficial interest in the property conveyed in trust to Vance would be to hold that she had reserved, so far as her own interest is concerned, the power of revocation. But a grantor in a voluntary settlement cannot revoke his grant unless the power of revocation be reserved in the conveyance. Ewing v. Jones (Ind. Sup.) 29 N. E. 1057; Thurston, Petitioner, 154 Mass. 597, 29 N. E. 53; Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 359. We answer that while the wife and children live, and at least while the children are minors, Vance, the trustee, is entitled to the possession and control of the property, to the end that he may execute the purposes of his trust." These answers, which we adopt as our conclusions, dispose of all of appellants' assignments relating to the effect of said deed.

3. The value of the personal property sequestered from the possession of Hermann Schultze and replevied by him was alleged in plaintiffs' petition to be \$1,000. The trial judge found the value of said property, at the time it was replevied, to be \$1,860, and rendered judgment against him for that amount, and against the sureties on his replevy bond for the sum of \$890, and provided in the judgment that Schultze and the sureties on his replevy bond could, in accordance with the statute, within 10 days of the date of judgment, satisfy it by delivering to the officers authorized to receive the same all or any of the cattle described in the judgment (each head of cattle being particularly described, and its value found by the court), and that he and his sureties should be entitled to receive as a credit upon said judgment the value of the animal or animals returned to the officer authorized to receive the same in accordance with statute. The plaintiffs, having alleged the value of the property to be \$1,000, could not recover a greater value, and the judgment of the court in excess of that amount is manifestly erroneous. There being no proof as to the value of the cattle at the time of

trial, the presumption is that they were of the same value then as found by the court when they were replevied. *Norwood v. Bank* (Tex. Civ. App.) 45 S. W. 297; *Id.* (Tex. Sup.) 48 S. W. 8.

The judgment of the district court, in so far as it cancels the deeds under which appellants claim the property, is reversed and set aside; its judgment against H. Schultze for \$1,860 is also reversed and set aside; and judgment is here rendered in favor of plaintiffs against him for \$1,000, which was all they alleged in the petition the personal property appropriated by him was worth. This judgment against him includes the judgment rendered against the sureties on his replevy bond of \$890, which said sum of \$890 shall bear interest only from the date of the trial; and it may be satisfied in whole or in part by delivering to the officers authorized to receive the same any or all of the cattle described in the judgment of the district court, as provided by statute, and he and his sureties shall be entitled to receive as a credit upon said judgment for \$1,000 here rendered the value of the animal or animals returned to the officer authorized to receive the same, in the proportion that the value assessed by the trial court bears to \$1,860. The judgment against the sureties for costs is also set aside. The judgment of the district court in all other respects is affirmed.

DULIN et al. v. KNECHTEL.

(Court of Civil Appeals of Texas. May 10, 1899.)

LEASE—ASSUMPTION—EVIDENCE—BREACH—DAMAGES.

1. Where a tenant, in the presence of the landlord, charged plaintiff with having assumed his contract, and no denial was made, and there was but one lease, it is evidence of assumption.

2. A lessee who refuses to perform is liable for the stipulated rent while the premises are unavoidably vacant, and for the difference between the sum for which they are rented to others and the stipulated rent.

Appeal from Grayson county court; J. H. Wood, Judge.

Action by Fritz Knechtel against R. R. Dulin and others. From a judgment for plaintiff, defendants appeal. Reversed.

J. F. Holt and J. W. Finley, for appellants. Barrett, Simmons & Freeman, for appellee.

FLY, J. Appellee sued R. R. Dulin and J. W. Finley as guardians, the first of a minor and the latter of a person non compos mentis, and their sureties, and the sheriff of Grayson county, for damages alleged to have resulted from the unlawful seizure of certain personal property under a warrant of distress for rent of a certain storehouse. Certain sureties on an indemnity bond were made parties at the instance of the sheriff. The cause was tried by jury, and resulted in a verdict and judgment for appellee for \$100, and in favor of the sheriff against the par-

ties who signed the indemnity bond for \$110. It was proved that the house was rented by appellee from Dulin and Finley for the month of December, 1897; that on December 17th, appellee sold out to one Pack; that the latter made a contract with the guardians, Dulin and Finley, to rent the house for the year 1898 for \$25 per month. On the same day that Pack bought the goods from appellee, for some reason, not shown by the evidence, he sold back to appellee, who shortly afterwards attempted to remove the goods from the building, and the distress warrant was levied. Pack, in the presence of Dulin, charged appellee with having assumed his (Pack's) contract, and no denial was made, but he attempted to justify his removal of the goods on the ground that he was not making money, and therefore moved out. There was but one contract for rent made by Pack with Dulin and Finley, and reference could have been had to no other by Pack when addressing appellee. It was therefore error to refuse an instruction to the effect that appellee would be liable for the rent at \$25 per month while the building was unavoidably vacant, and for the difference between the sum for which the building had been rented and that agreed to be paid by Pack, if appellee had assumed the payment of the rental contract made by Pack. For this error the judgment is reversed, and the cause remanded.

WHITE v. CROSBY.¹

(Court of Civil Appeals of Texas. May 10, 1899.)

SUBSCRIPTIONS—DELIVERY.

Where a subscription paper is given to one of the subscribers before acceptance, with instructions not to deliver it, and it is never delivered, it is not binding.

Appeal from El Paso county court; James R. Harper, Judge.

Action by J. F. Crosby against Z. T. White. Judgment for plaintiff, and defendant appeals. Reversed.

Turney & Burges, for appellant. Leigh Clark, for appellee.

FLY, J. This is a second appeal of this case (43 S. W. 532), and the statement of the nature of the case need not be repeated here. The case turned upon the question of delivery of the subscription list, which was signed by appellant. From a thorough investigation of the statement of facts, we conclude that there was not a delivery of the subscription paper, and that no liability upon the part of appellant was shown to exist. After the paper had been signed by the subscribers, and before any acceptance upon the part of appellee or the prospective railroad company, appellant and others, who constituted a committee to whom the matter of subscription had been

¹ Rehearing denied May 31, 1899.

Intrusted, gave, the same to one of their number, with the positive instruction that it should not be delivered to appellee, and it was never so delivered. It was not even a proposal to do a certain thing for a certain consideration, because it was never, by consent of those who controlled the proposed subscription, made known or tendered to appellant. The verdict not being supported by the testimony, the judgment is reversed, and the cause remanded.

CITY OF MINERAL WELLS v. DARBY et al.

(Court of Civil Appeals of Texas. May 31, 1899.)

CITIES—POWERS—NOTES.

A city may execute a note for a just and legal obligation.

Appeal from Lampasas county court; John Nichols, Judge.

Action by Darby & Cauthen against the city of Mineral Wells. From a judgment for plaintiffs, defendant appeals. Affirmed.

F. W. Girand, for appellant. Matthews & Browning, for appellees.

FISHER, C. J. This is a suit by appellees against the city of Mineral Wells to recover on a promissory note executed by the city as part consideration for the construction of a waterworks system for the city. The court below rendered judgment in favor of appellees against the city.

Appellant contends that the city of Mineral Wells had no authority to execute the note in question; that the only method by which it could create a debt against the city was by the issuance of bonds. There are statutes that authorize an incorporated city, such as Mineral Wells, to issue bonds in certain instances; but we have been unable to find any statute or decision of the courts of this state which denies the right to a city to execute a promissory note for a just and legal obligation due by the city. The note is simply the evidence of an indebtedness, and, if the city is justly due the amount, we see no reason why the city might not place it in the form of a note.

The bill of exceptions which purports to complain of a ruling of the court concerning the original tax rolls of the city of Mineral Wells is incomplete. We cannot determine from the bill of exceptions what was the ruling of the court. It does not appear from the bill of exceptions that the court excluded the tax rolls. The appellant, in its assignment of error, complains of the refusal of the court to admit the tax rolls, and relies upon its bill of exceptions as evidence of this ruling. There is nothing upon the face of the bill of exceptions which shows whether the court admitted or refused to admit the tax rolls in evidence. But, however, if the bill of exception had shown that the court refused

to admit the tax rolls, the ruling was harmless, because the admission of the tax rolls would not have been material to any issue in the case, as it does not appear that Mineral Wells had exceeded the amount or rate of indebtedness allowed by law. We find no error in the record, and the judgment is affirmed. Affirmed.

TEXAS & P. RY. CO. v. LEE.¹

(Court of Civil Appeals of Texas. April 28, 1899.)

CARRIERS—INJURY TO PASSENGERS—NEGLIGENCE—DAMAGES—PLEADING—EVIDENCE—INSTRUCTIONS.

1. Complaint for personal injury, not being specially demurred to, authorizes proof of reasonableness of physician's bills, though alleging merely that by reason of the injury plaintiff has paid, and become liable to pay, physicians' bills of a certain amount.

2. Testimony that plaintiff, the night she was injured, said, while at witness' house, that she tasted blood, is admissible as against objection that it is immaterial, irrelevant, or self-serving.

3. Witnesses cannot testify that, in their judgment, the train stopped at the station long enough for plaintiff to alight; this being an issue of fact for the jury.

4. It is proper to instruct that it is the duty of a carrier to stop a reasonably sufficient time at a depot to enable passengers to get off safely, and also in the nighttime to provide sufficient light to enable them to get off with safety, and that a failure to use such care and diligence to perform such duties as a person of ordinary prudence would exercise under the circumstances would be negligence.

Appeal from district court, Lamar county; E. D. McClellan, Judge.

Action by Emily Lee against the Texas & Pacific Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

T. J. Freeman and Head, Dillard & Muse, for appellant. W. S. Hutchison and Allen, Hathaway & Allen, for appellee.

JAMES, C. J. There was testimony of negligence on the part of defendant as the cause of the injury to plaintiff, and testimony showing the absence of contributory negligence on the part of plaintiff. The petition alleged that plaintiff, by reason of the negligence of defendant, as set out, and of the injuries inflicted upon her, has been compelled to expend and become liable for the sum of \$25 worth of medicines, and has paid and become liable to pay physicians' bills to certain doctors in the sum of \$125. There was no allegation that above sums were reasonable, and the first assignment is that the court erred in allowing proof of the reasonableness of the physicians' bills. There was no special demurrer. We conclude that the testimony was admissible. *Railroad Co. v. Stuart* (Tex. Civ. App.) 48 S. W. 803. This disposes also of the sixth assignment.

The second assignment complains of the testimony of Rev. Henry Dedman on cross-examination, as follows: "I don't know whether she [plaintiff] said anything about her side,

¹ Writ of error denied by supreme court.

but she called my wife, and said she tasted blood. I remember that. I didn't hear her say anything about her side." On direct examination he had testified that he saw the accident, and testified as to the circumstances of the accident, and that plaintiff stayed all night at his house, and left his home the next morning. The statement in question was made during the night of the accident, while plaintiff was at the house of witness. That such a statement of the injured party would be admissible under some circumstances, is clear from the authorities. Statements of this character are not excluded as being immaterial, irrelevant, or self-serving. These were the only objections made to the testimony. The objection that the statement was made to another than an attending physician, or even that it was hearsay, was not presented. Therefore, from the objections made, and under the ruling of the supreme court in *Wheeler v. Railway Co.*, 43 S. W. 876, we overrule this assignment.

The third assignment states that the court erred in excluding testimony of witnesses that, in their judgment, the train stopped at the station a sufficient length of time to have permitted plaintiff to alight in safety. This was an issue of fact for the jury, and the witnesses should therefore have stated the facts, and not given their solution of the issue. The ruling was correct.

The fourth and fifth assignments present objections to the charge that it was the duty of defendant to stop its train at Brookston a length of time reasonably sufficient to afford passengers who wished to get off there to alight with reasonable safety to themselves, and to provide lights there at night sufficient to enable such passengers to see how to get off with reasonable safety, and to exercise proper care not to injure its passengers while alighting from the train, and that a failure to use proper care and diligence to perform any of the above duties would be negligence. We have, it seems, no statute which directs carriers of passengers to stop their trains at stations a reasonably sufficient time to enable passengers to alight, nor to provide for proper lighting of platforms for that purpose, but that such is their duty or obligation to passengers is well settled. *Stewart v. Railroad Co.*, 53 Tex. 289; *Railway Co. v. Brown*, 78 Tex. 397, 14 S. W. 1034; *Railway Co. v. Copeland*, 60 Tex. 328; *Hamilton v. Railway Co.*, 64 Tex. 253; *Railway Co. v. Gorbett*, 49 Tex. 575; *Railway Co. v. Wortham*, 73 Tex. 27, 10 S. W. 741. A case that approaches this one as to the question at issue is *Railway Co. v. Barnett* (Tex. Civ. App.) 47 S. W. 1040. While we incline to the opinion expressed in that case, we consider the charge before us materially different. Here the court did not tell the jury that a failure to observe the above duties to the passenger was negligence, or that plaintiff could recover for the mere failure to perform such duties. It charged that a failure on the part of defendant to

use proper care and diligence, such as a prudent person would have exercised under the circumstances, to perform any of the above duties, would be negligence. The charge was the law. It left the question of negligence to the jury. In *Railway Co. v. Rogers*, 91 Tex. 52, 40 S. W. 956, the district court, in its charge, assumed that to be the duty of a railway company which neither a statute nor the decisions declared was its duty. It is universally held to be the duty of carriers of passengers to stop a reasonably sufficient time at depots to enable them to get off or on safely, and also in the nighttime on such occasions to see that sufficient light is provided to enable passengers to get on or off with safety. We concur with the views on this subject expressed in *Railroad Co. v. Stuart* (Tex. Civ. App.) 48 S. W. 799; *Railroad Co. v. Stewart* (Tex. Sup.) 50 S. W. 334. If such were the recognized duties of the carrier in this case, we can see no valid objection to so stating to the jury, where they are further instructed, as was done in this case, not that the failure to perform said duties would be negligence, but that the failure to use such care and diligence to perform them as a person of ordinary prudence would exercise under the circumstances would be negligence. In view of the charges given, we think there was no error in refusing the special instructions referred to in the seventh and eighth assignments. Affirmed.

WALTON et al. v. PRIGMORE.

(Court of Civil Appeals of Texas. May 10, 1899.)

STATEMENT ON APPEAL.

Where, within the time allowed for filing a statement of facts, appellant submits one, and the judge does not act in the matter for many months, when, from such statement, and one submitted by appellee, he prepares the statement found in the record, the statement will be disregarded, and the judgment reversed.

Appeal from Dallas county court; Kenneth Foree, Judge.

Action by J. E. Prigmore against T. J. Walton and others. Judgment for plaintiff. Defendants appeal. Reversed.

Gillespie & Dye, for appellants. I. R. Oel and, for appellee.

JAMES, C. J. This cause was tried at the December term of the county court, which ended January 1, 1898. Ten days were allowed for filing a statement of facts, and within that time appellants submitted a statement of facts to the judge, who did not act in the matter until about the end of the year 1898, when, as he certifies, appellee submitted his statement; and he thereupon, from the two statements, prepared and filed on December 29, 1898, the one found in the record.

The first assignment of error complains of the action of the judge in reference to the statement of facts. Under the rule announced

In *Hilburn v. Preston* (Tex. Civ. App.) 32 S. W. 702, the statement of facts filed should not be considered. The statute does not authorize us to do so, as is explained in the opinion in the case just cited. If the statement filed had been the one tendered by the appellants in time to the judge,—they not being at fault, as would clearly appear,—there would be statutory authority for considering it. The injustice likely to happen to appellant from so long a delay as one year in the preparation of the statement is apparent. It is not probable that the judge, after so long a time, could prepare a correct statement of the evidence. The parties had a right to an appeal, of the benefits of which they could not be deprived, and they are not required to submit their appeal upon a statement of facts prepared and filed under the circumstances we have here. The judgment is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. DINWIDDIE.

(Court of Civil Appeals of Texas. May 31, 1899.)

CARRIERS OF GOODS—DUTY TO FURNISH CARS—AGENCY.

Where a contract to furnish cars to a shipper was made with an agent having no authority to make it, and he did not report it to the carrier, and the carrier did not learn of it, it was not binding on the carrier.

Appeal from Tom Green county court; T. C. Wynn, Judge.

Action by T. M. Dinwiddie against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Chas. K. Lee and J. W. Terry, for appellant.

KEY, J. This is an action brought by appellee to recover from appellant damages for breach of a contract to furnish appellee cars, and transport for him 29 car loads of wood from Bangs station, on appellant's railroad, in Brown county, to San Angelo, in Tom Green county. The undisputed evidence shows that the contract sued upon was made with appellant's station agent at San Angelo; that said agent had no authority to make contracts for appellant for cars to be furnished at Bangs, or any station other than San Angelo; that he did not report to appellant any contract or agreement made by him to furnish cars to appellee at Bangs station; that appellant had no notice of any such contract with said agent, and did not ratify such contract. Under these facts, it must be held that the contract sued upon was not binding upon appellant. *Railway Co. v. Belcher* (Tex. Sup.) 32 S. W. 518; *Id.*, 35 S. W. 6; *Railway Co. v. Hodge* (Tex. Civ. App.) 30 S. W. 829. The case appears to have been fully developed, and as, upon the undisputed facts, appellee has no cause of action against appel-

51 S.W.—23

lant, the judgment of the county court will be reversed, and judgment here rendered for appellant. Reversed and rendered.

KABELMACHER v. KABELMACHER.

(Court of Civil Appeals of Texas. May 31, 1899.)

TRANSCRIPT—DISTRICT CLERKS—COMPENSATION.

Acts Called Sess. 25th Leg. p. 12, § 22, provides that in civil cases district clerks may charge 10 cents per 100 words for making transcripts on appeal. Section 7 exempts certain district clerks from certain sections, not including 22, which relate to criminal cases. *Held*, that section 22 governs in civil cases, and applies to all district clerks.

On motion for retaxation of costs. Sustained.

For opinion on appeal, see 50 S. W. 1118.

KEY, J. In the bill of costs in this case the clerk of the district court has charged for making the transcript, 15,789 words, at 20 cents per 100, \$31.60. A motion has been filed to retax this cost, the contention being that the clerk is entitled to only 10 cents for each 100 words, as compensation for making the transcript. Section 22 of the fee bill, passed by the 25th legislature (Acts Called Session 25th Leg. p. 12), prescribes the fees which district clerks may charge in civil cases, and, among other items, contains the following: "Making transcript of the records and papers in any cause upon appeal or writ of error, with certificate and seal, each one hundred words, ten cents." It is true that section 7 of the act of the legislature referred to exempts certain officers, including the district clerk in counties which cast less than 8,000 votes in the last presidential election, from the operation of sections 1, 2, 3, 4, 5, and 6 of said act; but these sections all relate to fees to be paid by the state in criminal cases, and have no reference to fees earned in civil actions. Section 7 of the act is not a limitation or qualification of section 22, which, in our opinion, applies to the clerk of the district court of every county in the state. The motion will be sustained, and the item of costs referred to reduced to \$15.80.

EDMISTON et al. v. CONCHO COUNTY.

(Court of Civil Appeals of Texas. May 31, 1899.)

COUNTIES—BOND OF TREASURER—COMMON-LAW OBLIGATIONS—PLEADING.

1. A bond requiring a county treasurer to faithfully execute the duties of his office and pay over, according to law, all moneys that should come into his hands as county treasurer, is valid as a common-law bond, though it does not require an accounting to the county court, as required by statute.

2. A recovery on the bond, as a common-law obligation, was justified, where the petition alleged that the treasurer embezzled a sum received by him as such, and failed to pay it over to the county on demand, and that by reason of such

default, and the terms of the bond, he and his sureties became liable, and promised to pay to the county the sum referred to.

Appeal from district court, Concho county; J. O. Woodward, Judge.

Petition by Concho county against D. A. Edmiston and others. From a judgment for plaintiff, defendants appeal. **Affirmed.**

R. B. Truly, for appellants.

KEY, J. This is a suit by Concho county on a bond executed by D. A. Edmiston, county treasurer, as principal, and the other appellants as sureties. At the trial in the court below, appellants objected to the introduction in evidence of the bond sued on, for the reason that it did not require the principal to render a just and true account to the commissioners' court of Concho county, as prescribed by statute. The bond does require Edmiston to render a just and true account to "said court," but there is nothing elsewhere in the bond to show that "said court" referred to the commissioners' court. However, if it be conceded that, in this respect, the bond was defective as a statutory bond, we are of opinion that it was admissible in evidence. It was a valid common-law obligation. *City of Marshall v. Bailey*, 27 Tex. 696; *Elchoff v. Tidball*, 61 Tex. 421.

The bond required Edmiston to faithfully execute the duties of his office, and pay over, according to law, all moneys which came into his hands as county treasurer, and the other appellants became sureties for the performance of this obligation. The plaintiff's petition was so framed as to entitle it to recover upon the bond, either as a statutory or common-law obligation. It alleged that Edmiston had been duly elected and qualified as county treasurer; that the bond in question was executed by him and the other defendants; states the conditions of the bond, one of which was that Edmiston should pay over, according to law, all moneys coming into his hands as county treasurer; that he made default, and failed to pay over to the county the sum of \$486.36, so received by him, which sum he misapplied, embezzled, and converted to his own use, to the county's damage \$500. It also alleges a demand by the county upon Edmiston for the payment of the \$486.36, and his refusal to pay the same. It also avers that, by the terms of the bond and the default referred to, Edmiston and the sureties on the bond became liable and promised to pay to the county the sum of \$486.36. It alleges that the bond was made payable to D. W. Hudson, county judge of Concho county, and his successors in office, in the sum of \$10,000, which, in connection with other averments, sufficiently shows that the bond was executed for the benefit of the county. In our opinion, the trial court did not err in admitting the bond in evidence, and, as this is the only question presented in appellants' brief, the judgment will be affirmed. **Affirmed.**

MISSOURI, K. & T. RY. CO. OF TEXAS v. COCK et al.

(Court of Civil Appeals of Texas. May 17, 1899.)

APPEAL—RECORD—REVIEW—PRESUMPTIONS.

1. A bill of exceptions not approved by the trial judge will not be considered on appeal.
2. It is presumed that the facts relied on by a defendant appellant to sustain a plea of privilege were not proved, in the absence of a statement of facts, the plea having been overruled.

Appeal from Harrison county court; James W. Pope, Judge.

Action by E. R. Cock and J. T. Cock against the Missouri, Kansas & Texas Railway Company of Texas and another. From a judgment against it, said company appeals. **Affirmed.**

W. H. Mobley, for appellant. Scott & Jones and A. G. Carter, for appellees.

FLY, J. Appellees sued the appellant and the Texas Pacific Railway Company to recover the sum of \$825 as damages inflicted on two cars of horses and mules shipped over their lines of railway. The cause was tried without a jury, and resulted in a judgment in favor of appellees for \$257, as against the appellant, and that the Texas & Pacific Railway Company be discharged, with its costs. There is no statement of facts in the record. The first assignment of error is based on a bill of exceptions, which was not approved by the judge, and cannot meet with consideration by this court. The second assignment of error is based on a bill of exceptions to the action of the court in overruling a plea of privilege. The ground of the plea was that a settlement had been made by appellees with the Texas & Pacific Railway Company, and that, the court having jurisdiction over appellant only by reason of its being joined with the Texas & Pacific Railway Company, when it appeared that the latter company was joined with appellant merely to get jurisdiction of the latter, jurisdiction was lost as to appellant. The plea of privilege, as shown by a judgment, was fully passed upon by the court, and overruled, and in the absence of a statement of facts, it will be presumed that the facts relied on by appellant were not established by the proof. The judgment is affirmed.

CONNOR et al. v. THORNTON et al.

(Court of Civil Appeals of Texas. May 10, 1899.)

ALTERATION OF NOTE—RELEASE OF SURETY—PLEADING—RECORD—PRESUMPTION.

1. Sureties on a note are released by the erasure, without their knowledge, before delivery of the note, of the name of a signer thereof, though after its delivery the one to whom it was delivered procured such person to re-sign.
2. Where the addition to a note, after its delivery, of the name of a signer will release sureties, in the absence of their consent, their consent will be presumed in support of the judg-

ment against them, there being no statement of facts and no finding as to consent on their part.

3. Defendants, under their answer, pleading only the general denial and their suretyship, cannot use the defense that the note sued on was altered, after delivery, by the addition of a signer.

Appeal from district court, Morris county; J. M. Talbot, Judge.

Action by the National Bank of Dangerfield against F. J. Thornton and others. From the judgment for plaintiff against certain defendants, defendants Connor Bros. & Co. appeal. Affirmed.

Sheppard, Jones & Sheppard and J. W. Bolin, for appellants. J. M. Moore and Henderson & Robison, for appellees.

FLY, J. This suit was instituted in the justice's court by the National Bank of Dangerfield against F. J. Thornton, R. J. Wise, J. H. Terrell, G. P. Giles, Green Williams, and Connor Bros. & Co. to recover the sum of \$75 as evidenced by a promissory note. The bank recovered judgment in the justice's court for the amount of the note against Thornton, Williams, and appellants. The latter appealed to the district court, where a like judgment was rendered. This appeal is prosecuted by Connor Bros. & Co. There is no statement of facts, but the findings of fact of the trial judge are to the effect that Thornton, desiring to obtain \$75 from the bank, prepared a note for that amount, to which he first obtained the name of Green Williams, which was signed in the place usually occupied by the name of the principal, and then procured the names of R. J. Wise, J. H. Terrell, and G. P. Giles, and carried it to the bank, where, with advice of the bank, the name of Williams was erased. Thornton promised to sign the note when he procured the names of Wise, Terrell, and Giles, and did so on the same line with the signature of Williams, before he presented it to the bank. After the name of Williams was erased from the note, the bank refused to pay any money on it, and Thornton then went out, and procured the name of appellants on the note. The note was then presented to the bank, and the sum of \$67 was received on it by Thornton. The erasure of the name of Williams and the procurement of the name of appellants was done without the knowledge or consent of the sureties Wise, Terrell, and Giles. After the note had been delivered to the bank, and the money paid to Thornton, learning that Wise, Terrell, and Giles were complaining about the erasure of the name of Williams, the bank obtained the signature of Williams again to the note. We are of the opinion, when the name of Williams was erased without the knowledge or consent of Wise, Terrell, and Giles, it was such an alteration of the contract as released them from further liability. Brandt, Sur. § 381; Davis v. State, 5 Tex. App. 48. The procurement of the name of Williams to the note after it had become the

property of the bank could not, in our opinion, restore the note to its former position, and again make the sureties liable for its payment. The status it occupied at the time it was received by the bank could not be altered by the acts of the holder of it without receiving their sanction. The addition of the name of Williams to the note after its delivery to the bank would have the effect of releasing appellants from liability had there been any proof of a want of consent on their part. Harper v. Stroud, 41 Tex. 367. But, there being no statement of facts, and there being no finding as to consent on their part, it should be presumed in support of the judgment that they did consent. If this were not true, there is no pleading shown by the record upon which the defense could be based. In their brief, appellants do not claim to have pleaded anything except general denial and their suretyship. We conclude that the judgment should be affirmed.

S. S. WHITE DENTAL MFG. CO. v. HERTZBERG.

(Court of Civil Appeals of Texas. April 19, 1899.)

APPEAL FROM JUSTICE OF THE PEACE—PLEADING—RESTRAINT OF TRADE.

1. On appeal from a justice of the peace, defendant can plead new matter to the effect that plaintiff's claim is based on a contract in restraint of trade.

2. A contract by which defendant was to have the exclusive agency and right to sell any and all goods manufactured or kept in stock by plaintiff, and was not to sell any other line of dental goods than those furnished by plaintiff, is in restraint of trade, under the laws of the state, so that plaintiff cannot recover for goods furnished defendant thereunder, though the sale and delivery to defendant was an interstate transaction.

Error from district court, Bexar county; J. L. Camp, Judge.

Action by the S. S. White Dental Manufacturing Company against E. Hertzberg. There was judgment for defendant on appeal from a justice of the peace, and plaintiff brings error. Affirmed.

O. A. Keller, for plaintiff in error. J. D. Guinn, for defendant in error.

FLY, J. Plaintiff in error sued on an account for \$84.35, being a balance due by defendant in error on an account for merchandise. In the justice's court, where the suit originated, defendant in error pleaded damages in reconvention; but in the district court an amended original answer was filed, in which it was alleged that the claim of the plaintiff was based upon a contract by which defendant was to have the exclusive agency and right to sell any and all goods manufactured or kept in stock by plaintiff, and that defendant was not to sell any other line of dental goods than those furnished by plaintiff, and that the contract was in restraint of trade. It was also pleaded that in 1894 and

1895, before the goods for the value of which the suit was brought were delivered, plaintiff had violated the aforesaid contract by selling to another party. The latter plea, upon exception of plaintiff in error, was stricken out. The court held the contract one in restraint of trade, and rendered judgment for defendant in error.

In answer to a certified question by this court, the supreme court has held that any new matter, not amounting to a cross action, can be set up by the defendant in the county or district courts in cases appealed from justice's court; and, deferring to that opinion, we hold that the illegality of the contract was properly pleaded in the district court. *Manufacturing Co. v. Hertzberg*, 50 S. W. 122.

It has been definitely held by the supreme court that contracts like the one pleaded and proved in this case are in restraint of trade, and therefore not enforceable at law. *Coal Co. v. Lawson*, 89 Tex. 395, 32 S. W. 871, and 34 S. W. 919; *Houck v. Association*, 88 Tex. 184, 30 S. W. 869. The contract was shown to have been in effect when the goods were sold. The judgment is affirmed.

On Motion for Rehearing.

(May 31, 1899.)

It is evident from the pleadings and testimony that the alleged sales made in 1894 and 1895 to other parties were made without the knowledge of defendant in error, and the goods for whose price he was sued were sold under the contract. As late as 1892, plaintiff in error, in answer to a letter written to it by Dr. G. A. Johnson, stated to him that it had a contract with Hertzberg, and that parties would be compelled to buy from him.

There is no merit in the contention that the sale was an interstate transaction, and not subject to the laws of Texas. The contention is settled against plaintiff in error by the case of *Fuqua v. Brewing Co.*, 90 Tex. 298, 38 S. W. 29, 750. The sale and delivery to defendant in error may have been an interstate transaction, but after the interstate portion of the transaction had ended, then the trust part of the contract arose. It was not the intention of this court to hold that the contract was in restraint of trade under the common law, but by reason of the laws of this state; and we think that intention was obvious from the Texas authorities cited in our former opinion. The motion for rehearing is overruled.

MISSOURI, K. & T. RY. CO. OF TEXAS v. SCARBOROUGH.¹

(Court of Civil Appeals of Texas. May 3, 1899.)

CARRIERS—DUTIES TO PASSENGERS—INSTRUCTION—LEADING QUESTION.

1. Allowing plaintiff to ask a witness leading questions will not be held error, the judge having qualified the bill of exceptions as follows:

¹ Rehearing denied May 31, 1899.

"The witness answered the questions slowly and hesitatingly, and it appeared to me was not disposed to tell anything he could avoid telling."

2. An instruction that railroad companies are not insurers of the safety of their passengers, but are bound to exercise the highest degree of care to secure their safety, and must exercise that degree of foresight as to possible dangers to their passengers, and that high degree of prudence in guarding against them, as would be used by very cautious, prudent, and competent persons under similar circumstances, is not erroneous, as it requires of the carrier no more than the highest degree of care, in reference to possible dangers that the passenger may be exposed to, and does not require it to foresee any and all possible dangers.

Appeal from district court, Hunt county; Howard Templeton, Judge.

Action by S. E. Scarborough against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff. Defendant appeals. Affirmed.

T. S. Miller and Head, Dillard & Muse, for appellant. T. D. Montrose and L. A. Clark, for appellee.

JAMES, C. J. The assignments relate only to the correctness of a charge, and to the propriety of plaintiff being permitted to ask leading questions of a witness, and we believe it is unnecessary to state any conclusions of fact. We are of opinion that the court did not err in allowing plaintiff to ask the witness leading questions, in view of the judge's qualification to the bill of exceptions as follows: "The witness answered the questions slowly and hesitatingly, and it appeared to me was not disposed to tell anything he could avoid telling." The court prefaced its charge thus: "Railroad companies are not insurers of the safety of their passengers, but are bound to exercise the highest degree of care to secure the safety of their passengers. They must exercise that degree of foresight, as to possible dangers to their passengers, and that high degree of prudence in guarding against them, as would be used by very cautious, prudent, and competent persons under similar circumstances, and a failure to do so is negligence," etc. The proposition, under the first assignment of error, is that the above rule as to the carrier's duty to passengers is too onerous in using the expression "possible dangers." The rule, in the very language of the charge, has been announced and approved by the supreme court of this state. *Railway Co. v. Halloren*, 53 Tex. 53; *Railway Co. v. Welch*, 86 Tex. 204, 24 S. W. 390. The charge requires of the carrier no more than the highest degree of care, in reference to possible dangers that the passenger may be exposed to. It does not require it to foresee any and all possible dangers. The first special charge asked by defendant, and given, makes this meaning more plain. The clause complained of was not erroneous.

But, if it were erroneous in the use of the words "possible dangers," it would be difficult to see why it should vitiate this trial. The negligence in question was the conduct

of defendant's employes while plaintiff was in the act of alighting from the train. The presence of danger to the passenger in such a situation, by the movement of the train or by insufficient light, is a matter of common knowledge, and was a danger that a high degree of prudence would certainly anticipate. The judgment is affirmed.

HILL et al. v. JACKSON.¹

(Court of Civil Appeals of Texas. May 3, 1899.)

DEED—GRANTEES—CONSIDERATION—PARTITION—PARTIES.

1. A deed is not invalid because not naming the grantees, but describing them as the heirs of certain persons.

2. A deed being lost, a quitclaim to replace it, executed by the grantors, after the death of the grantees, to the heirs of the latter, is not without consideration.

3. It is not necessary, in a suit for partition among heirs of land inherited by them, that the wife of one of them be made a party, to conclude her right as to homestead therein.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

Action by Lytt Jackson against Wash Hill and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Henry & Henry, for appellants. John J. King and Vaughan & Vaughan, for appellee.

FLY, J. This is an action of trespass to try title, instituted by appellee, the land involved being 33 acres, a part of the Ashley McKinney survey. A writ of sequestration was issued at the instance of appellee, and placed on the land. Appellants pleaded not guilty, and limitation of three and ten years, and also pleaded damages for the wrongful suing out of the writ of sequestration. The cause was tried by the court, and judgment rendered for appellee.

It was established by the evidence that the title to the land was in appellee, and not only did appellee establish by evidence that appellants had not acquired title by limitation, but their own testimony failed to establish such title. This finding disposes of the first assignment of error, which questions the sufficiency of the evidence to establish title in appellee.

A quitclaim deed, made by E. T. Estes and I. M. Ball to "the heirs of John Jackson and Sabina Jackson (or to whoever under the law is entitled to take the same)," was introduced in evidence, over the objection of appellants; the grounds of objection being that no grantee was named in the deed, that the land conveyed was not that sued for, and that it was without consideration to support it, and did not purport to convey the land, but was merely a quitclaim of the interest of the vendors in the land. None of the objections can be sustained. The deed recited that in 1876 the vendors had made a deed conveying to

John Jackson certain land off the Ashley McKinney survey, which was fully described, and that the original deed had been lost or mislaid, and that the deed then made was executed to replace it. It was shown by the evidence that the land therein described was the tract of which the land sued for was a part, and there was sufficient consideration for its execution. The deed also recited that John and Sabina Jackson were dead, and that the deed was made to their heirs. The grantees could be identified by the description given of them, and the deed was as valid as though they had been named. Devl. Deeds, § 184; Jones, Real Prop. § 225.

Prior to the institution of this suit, appellee and the other heirs of John and Sabina Jackson had sued Wash Hill for partition of the land owned by John and Sabina Jackson at their death. In the decree of partition the 33 acres herein sued for were set apart to appellee, and the decree was offered in evidence, and admitted as to Wash Hill and his wife, Mary Hill. It is contended that Mary Hill, not being a party to the judgment, and having homestead rights in the land, was not bound by the judgment. The land was the separate property of Wash Hill by inheritance, and the fact that it afterwards became a homestead did not render it necessary to make his wife a party in order to conclude her rights in the partition suit. Thompson v. Jones (Tex. Sup.) 12 S. W. 77. The judgment was properly admitted in evidence. We conclude that the judgment should be affirmed.

STROUBE v. STATE.

(Court of Criminal Appeals of Texas. May 17, 1899.)

COUNTERFEITING—JURISDICTION OF STATE COURTS—APPEAL—BILL OF EXCEPTIONS—VENUE.

1. The state courts have jurisdiction of the offense of counterfeiting.

2. A recitation in a bill of exceptions that the state offered accused's confession in evidence, is not sufficient. It must show that it was admitted, and it must be set out as introduced.

3. Where the court charged that one making, in the semblance of true silver coin, any coin containing a less proportion of silver than the true coin sought to be counterfeited, is guilty of counterfeiting, and applied the law to the facts, and charged properly in regard thereto, a requested charge was properly refused that one of the main ingredients of the offense was that the coin made in the semblance of silver half dollars contained less silver than the true coin, and that the evidence must show beyond a reasonable doubt that the coin made in imitation of silver half dollars contained less silver than the coin sought to be imitated.

4. Where it appears that accused counterfeited half dollars in a certain county, and that he passed them in that county, he is triable therein, under Code Cr. Proc. art. 226, providing that a prosecution for counterfeiting coin may be brought in any county where the coins were passed.

Appeal from district court, Llano county; W. M. Allison, Judge.

¹ Rehearing denied May 31, 1899.

Sam Stroube was convicted of counterfeiting, and he appeals. Affirmed.

J. H. McLean and John C. Oatman, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of the offense of counterfeiting. He moved in arrest of judgment, because, under the constitution of the United States the federal courts alone have jurisdiction of this offense. The law has been so long settled contrary to this contention that we deem it unnecessary to discuss this question. Congress has expressly reserved and recognized the jurisdiction of state courts over counterfeiting. *Ex parte Gelsler*, 50 Fed. 411; *Martin v. State*, 18 Tex. App. 224; 7 Am. & Eng. Enc. Law, pp. 878, 879, and especially note 2 on page 879. In *State v. Brown*, 2 Or. 221, it was held that authority for punishing the counterfeiting of coin rested exclusively in the federal courts; but this decision has never been followed. It was also so held in *Mattison v. State*, 3 Mo. 421, but this was overruled in *Truman's Case*, 44 Mo. 181.

The first bill of exceptions recites that the state offered appellant's confession in evidence. Several objections were urged, but the bill fails to show that the confession was in fact admitted in evidence. It does recite that the confession was offered, but this is not sufficient. The bill must show, not only that the confession was offered, but that it was admitted, and must set out the confession as introduced. *Burke v. State*, 25 Tex. App. 174, 7 S. W. 873.

Appellant requested the court to charge the jury that one of the main ingredients of this offense was that the articles made in the semblance of silver half dollars contained a less proportion of the precious metal of which the true coin intended to be counterfeited is composed than is contained in such true coin; and, before he could be found guilty, the evidence must show beyond a reasonable doubt that the articles made, if any were made in imitation of the silver half dollars, contained a less amount of silver than the coin attempted to be imitated, and, if that was not shown, appellant must be acquitted. Under a particular state of case such a charge might be applicable. The court did charge the jury that "he is guilty of counterfeiting who makes, in the semblance of true silver coin, any coin, of whatever denomination, having in its composition a less proportion of the precious metal of which the true coin intended to be imitated is composed than is contained in such true coin, with intent that the same should be passed, in this state or elsewhere." He then applied this law to the facts, and instructed the jury properly in regard to this matter. There was no issue, as we understand the evidence, upon this question.

Exception was also reserved to the charge in several respects, alleging the failure to

charge the law applicable to the case. They pertain to venue, etc. The evidence shows, beyond any question, venue in Llano county. The circumstances show with reasonable certainty that he made the counterfeit half dollars in the town of Llano, in Llano county. It further shows that he passed said counterfeit half dollars in said county, and, even if the evidence did not show that he did the counterfeiting in said county, the fact that he passed the same in that county would authorize venue. This is so by statutory provision. See Code Cr. Proc. art. 226.

We find no error in the record authorizing a reversal of this case, and the judgment is affirmed.

MORRISON v. STATE.

(Court of Criminal Appeals of Texas. May 3, 1899.)

HOMICIDE—ADMINISTRATION OF POISON—INDICTMENT—TRIAL—COMPETENCY OF JUROR—EVIDENCE—ADMISSIBILITY—SUFFICIENCY—INSTRUCTIONS—APPEAL AND ERROR—BILL OF EXCEPTIONS.

1. An indictment charging accused with killing deceased by a poison is sufficient, without an allegation that the act was unlawfully done.

2. An indictment for murder by the administration of poison need not specially allege that accused knew that the drug was deadly in nature and quantity, or that the quantity given was sufficient to cause death.

3. Accused is not entitled to have incriminating letters written by him produced by the prosecution for his inspection before the trial.

4. It was not error to refuse to allow accused to withdraw his announcement of readiness for trial when certain incriminating letters were produced by the prosecution, if it does not appear that accused was surprised, or that he could have disproved the letters if a continuance had been granted.

5. Incriminating letters written by accused are not inadmissible merely because other letters between the same parties are not produced.

6. Incriminating letters written by accused are not inadmissible, merely because produced for the first time at the trial, when counsel for accused are so occupied that they have no opportunity to meet and explain them.

7. Where a juror had scruples against the infliction of the death penalty on circumstantial evidence, it was not error for the court to explain circumstantial evidence by means of an illustration, though the illustration stated an extreme case.

8. If a juror's opinion is based on the truth of rumors and newspaper articles, and he states that if the evidence presents a different state of facts he will disregard his opinion, the juror is competent.

9. Accused cannot complain of an order overruling a challenge for cause, whereby he was compelled to exhaust his peremptory challenges, if, after the juror was excused, but one more juror was drawn, and accused accepted him without objection.

10. In a prosecution for murder by poisoning, in which the defense was that deceased died from a disease, evidence of deceased's statements that she did not suffer from such disease, made some time prior to her death, and in the absence of accused, was admissible.

11. Where accused formed the design of killing his wife, and manufacturing sufficient evidence of wealth to induce another to marry him, deeds and letters of recommendation, forged by accused, were admissible to show

the motive, though the instruments were not forged until after the murder.

12. In a prosecution for murder, the court admitted evidence tending to prove accused guilty of forgery, for the purpose of showing the motive of the crime. *Held*, that the admission of the evidence was not erroneous, as tending to prove an independent crime, where the court instructed the jury to consider the evidence for the sole purpose of determining the motive for the killing.

13. In a prosecution for murder by poisoning, in which it was contended, in defense, that deceased died from a disease, or by her own hand, evidence was admissible to show that deceased was apparently healthy, and of a contented and joyful disposition.

14. In a prosecution for murder by poisoning, in which it was contended that deceased died from a disease, or by her own hand, friends and neighbors of the deceased were competent to testify that she was apparently healthy, and of a contented and joyful disposition, as such evidence was not a matter of expert opinion.

15. Accused, who killed his wife that he might marry witness, told witness that he was not married, but that his cousin resided in the same town and was married; and, after the death of his wife, wrote a letter in which he spoke of the death of G.'s wife. *Held*, that the witness was properly allowed to explain that she understood G. to be the cousin of accused.

16. In a prosecution for murder by the administration of strychnine, in which witnesses testified as to the symptoms and actions of deceased in her last sickness, it was not necessary that physicians' opinions as to the cause of her death should be based on a hypothetical case, but they were properly allowed to base their opinion on the testimony of the witnesses, if they have heard all of the testimony.

17. Evidence that deceased was generally known in the neighborhood by the name alleged in the indictment is sufficient to support the allegation of the name of deceased as contained in the indictment.

18. Under an indictment charging accused with administering strychnine to deceased, accused can be convicted on evidence showing that he laid the strychnine where deceased could get it.

19. It was not error to refuse an instruction that accused was not guilty if deceased died from natural causes, took the poison by accident, or administered it with her own hand, where the court, in his instructions, charged that accused should be acquitted if the jury did not believe that defendant poisoned deceased, or if deceased committed suicide, or died from causes other than poison administered by accused.

20. Where the court's instructions contained all the law applicable to the facts, a conviction will not be reversed for failure to give an instruction asked by accused.

21. Improper remarks of counsel cannot be taken advantage of on appeal, if, at the trial, appellant did not tender a special charge instructing the jury to disregard the remarks.

22. In a prosecution for murder, the prosecuting attorney stated in his argument: "They talk about defendant having his throat treated. In my opinion his throat needs one more application, and that is about 20 feet of rope." *Held* not ground for reversal.

23. Before counsel for defense had completed their argument the prosecuting attorney informed them that he would read certain authorities on the law of reasonable doubt, and handed them a memorandum of the authorities in time for them to comment thereon. *Held*, that it was not error to permit the prosecuting attorney to read such authorities in his closing argument.

24. Where the trial judge desires to incorporate explanations of his rulings in the bill of exceptions, he need not make up a separate bill,

but the explanations may be introduced in the bill presented by appellant.

25. In a prosecution for murder, it was not error to refuse an instruction that defendant's failure to take the stand in his own behalf should not be considered as a circumstance against him.

Appeal from district court, Willbarger county; G. A. Brown, Judge.

G. E. Morrison was convicted of murder, and appeals. Affirmed.

Houston & Marum, Plemons & Veal, and Huff & Hall, for appellant. Matlock, Cowan & Burney and Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of the murder of his wife by poisoning, and his punishment assessed at death.

We will briefly state the facts in the case. During the year preceding the death of deceased, appellant resided at Panhandle, Carson county, and was engaged in preaching there two consecutive Sundays in each month, and one Sunday in each month at Canadian, some 50 miles from Panhandle, on the Southern Kansas Railroad, and one Sunday at Higgins, some 20 miles further on, being between 70 and 80 miles from Panhandle. Appellant had been married to his wife about 17 years, and had lived at different places, and at one time had lived in California, and at another time in Oklahoma territory, from which last place he moved to Panhandle. He was born and raised in Illinois, and went to school at Carbondale, and there became acquainted with the main prosecuting witness, Miss Anna Whittlesey, and went to school with her. Subsequently Miss Whittlesey moved, with her father and mother and brother-in-law, to Topeka, Kan., and resided there 10 years previous to the death of the deceased. Appellant, in August previous to the death of his wife in October, 1897, met Miss Whittlesey (his school-days' sweetheart) at Topeka, and made offers of marriage. This offer of marriage occurred in August, at which time appellant pretended to Miss Whittlesey's brother-in-law, Norris, that his wife was dead, and had been dead 11 years; that he had quit preaching on account of throat trouble, and had been engaged in the cattle business for 8 years near Higgins, Tex., which was his post office. He represented, also, that he was doing a thriving business, and made the same representations to Miss Whittlesey, and also stated to her that his cousin, Guy E. Morrison, whom Miss Whittlesey had known, 20 years before, at Carbondale, Ill., was married, and lived at Panhandle, and that he was the Methodist preacher at that place. The evidence discloses that this statement was wholly false. After appellant's engagement to Miss Whittlesey, he began a correspondence with her, urging his proposition of marriage, stating that he had intended for a number of years to come to her when he could do so honorably, and he believed he could now see the time. This statement was

made on September 10th (one month before the death of his wife). In all of his letters to her he continuously represented himself as being in the cattle business, and a ranchman. He made another visit to Topeka, after his first, and previous to the death of his wife, and while returning from there, on one occasion, talked to a doctor relative to the doses and effect of strychnine and quinine. The death of the deceased was shown conclusively, by the testimony of experts, to have been caused from strychnine poison. Appellant procured strychnine for the ostensible purpose of poisoning "varmints," which he said were catching his chickens; and this was procured on Friday before his wife's death on Sunday. On the day previous he had procured a box of quinine, with some empty capsules. On the Friday night before her death, deceased went to the Swiss Bell Ringers, leaving appellant at home. Appellant then had possession of the strychnine, which he had secured about supper time that evening. The next morning he took the strychnine back to the drug store, telling the druggist that he was afraid to use it for fear he would poison his neighbors' chickens. The druggist had not charged him anything for the strychnine, and opened the package, and poured it back in the bottle, but did not notice whether any of it was gone, save and except that he noticed the string around the package was looser than it was when he let appellant have it. Sunday night appellant preached, and alluded in a pathetic manner to the parting with loved ones at death. About 10 o'clock Sunday night, he called upon his neighbors for assistance, after announcing the serious illness of his wife. The neighbors responded promptly, and found her in paroxysms and spasms, evidently due to strychnine poison. He made a number of false statements in regard to the manner in which he had retired, and the like, and announced the fact that his wife had taken nothing except quinine, and he exhibited this quinine to most every one, with the announcement that there was nothing wrong with the quinine. The bed upon which deceased was resting was the only bed in the room, and it showed that no one had lain on it except deceased. The neighbors further testified that when they reached the house he was in full dress, and showed no evidence whatever of having retired for the night. Deceased died at 12:30 that night, and shortly after her death appellant made statements to the effect that her death was due to a complication of kidney disease and deranged menstruation, and also falsely stated that Dr. Warner, who had been sent for, and arrived after her death, had told him that deceased's death was due to blood poisoning as a result of kidney trouble, which statement appellant repeated by letter to his wife's kin people and several persons. In the meantime he kept up his correspondence with Miss Whittlesey, writing her a letter two days before the death of

his wife, and the day after her burial, asserting his love in the most lavish terms, and announcing "the death of Guy's wife," and immediately after the death of the deceased notified her of his early contemplated visit to Topeka. About a week after deceased's death, Miss Whittlesey wrote him that her sister, Mrs. Norris, said that he might have a wife in Texas. In reply to which he announced his fear that Miss Whittlesey's people might separate them, and proposed to show recommendation papers to prove that all he told her was true; and in carrying out this deception he procured a map, and marked a ranch on it, and forged a recommendation as to his character, and that he had no family, and was engaged in the stock business, and also forged a deed to himself, which papers he presented to Miss Whittlesey about October 24th. These papers were found on his person when he was arrested on his return to Topeka after his wife's death. When appellant was arrested he was held a few days; was released, and fled; and about three months thereafter was re-arrested in San Francisco. Prior to the trial depositions were taken of Dr. and Mrs. Holland, residing in California, who testified that deceased had made statements to them indicating the desire to take her own life on account of distress arising from female derangement, which depositions were on file at the time of the trial. A medical analysis of the stomach of deceased was made about six weeks after her death, and showed strychnine; and the witnesses who saw her dying agonies all testify to the distinctive symptoms of strychnine poison. The motive for the killing, as contended by the prosecution, was in order that he might marry Miss Whittlesey, and obtain her money. These are substantially the main facts adduced, as disclosed by the record.

Appellant's first assignment of error is "that the court erred in overruling his motion to quash the indictment, for the reasons set out in the motion, as follows: (1) The acts and facts alleged against defendant, as alleged, are not sufficient to constitute an offense. (2) The indictment fails to show that the charge therein contained is alleged as a statutory offense, in that it fails to show that the act was unlawfully done. (3) Because the same charges no offense against the law of the state, in that it nowhere alleges that the poison charged to have been administered was in quantities sufficient to produce death. (4) The same nowhere charges that defendant knew that the drug charged to have been given deceased was deadly, either in nature or quantity. (5) Same nowhere alleges the quantity of said drug administered, or that same was given in amount sufficient to have caused the death of the deceased." The charging part of the indictment is as follows: Defendant "did then and there, with malice aforethought, kill Mrs. G. E. Morrison, by poison, to wit, the said G. E. Morrison did then and there mingle and cause to be min-

gled certain poison, called 'strychnine,' with a certain medicine, called 'quinine,' with the intent then and there to injure and kill the said Mrs. G. E. Morrison, he, the said G. E. Morrison, then and there well knowing that the said Mrs. G. E. Morrison would take and swallow the said poisoned medicine, and then and there intended that the said Mrs. G. E. Morrison should do so; and the said Mrs. G. E. Morrison did then and there, not knowing that the said medicine was so poisoned, take and swallow the same, and the said Mrs. G. E. Morrison, of the poison aforesaid, so mingled in the said medicine as aforesaid, and by her swallowed as aforesaid, did, on or about the 10th day of October, A. D. 1897, in the county and state aforesaid, die. And the grand jurors aforesaid, upon their oaths in said court, do further present that G. E. Morrison, on or about the 10th of October, 1897, in the county of Carson and state aforesaid, did with malice aforethought kill Mrs. G. E. Morrison, by then and there, with intent to injure and kill the said Mrs. G. E. Morrison, causing her, the said Mrs. G. E. Morrison, to take and swallow certain poison, called 'strychnine,' the manner and means used by the said G. E. Morrison to cause and induce the said Mrs. G. E. Morrison to take and swallow the said poison being to the grand jurors unknown, with the intent then and there to injure and kill the said Mrs. G. E. Morrison, the said G. E. Morrison well knowing that the said Mrs. G. E. Morrison would take and swallow the said poison, and intending that she should do so; and the said Mrs. G. E. Morrison did then and there, not knowing that the same was poison, take and swallow the said poison, and the said Mrs. G. E. Morrison, of the poison so taken and swallowed by her as aforesaid, did, on or about the 10th of October, 1897, die," etc. We think the indictment is in all things sufficient in this case. It is not necessary that the indictment should allege that the act was unlawfully done, nor is it necessary for it to allege that the poison charged to have been administered was in quantities sufficient to produce death. And, furthermore, it is not necessary to allege that the drug charged to have been given was deadly, either in its nature or quantity. Neither was it necessary to allege how much of the strychnine was taken. See *Calvin v. State*, 25 Tex. 789; *Thompson v. State*, 36 Tex. 326; *Bean v. State*, 17 Tex. App. 60; *Stephens v. State*, 20 Tex. App. 255; *Jackson v. State*, 25 Tex. App. 314, 7 S. W. 872.

Appellant's second assignment of error is "that the court erred in refusing to grant an order compelling the prosecution to produce and file the letters requested in his motion to that effect, because he had a right to inspect the same before going into the trial, so that he might take the proper steps to prepare his defense." It appears that, before the trial began, appellant was apprised of the fact that the prosecution was claiming to have possession of the letters alleged to have been writ-

ten by appellant to Miss Anna Whittlesey, and which it was claimed were incriminative evidence against him. Upon the motion of appellant to compel the prosecution to show said letters, S. H. Cowan, one of state's counsel, testified that there were some letters, as mentioned in the motion, shown him, and that they were in the hands of one Steel, a witness for the state; that he saw them at the Canadian court, before the change of venue; that said Steel took the letters with him, and stated that he had promised Miss Whittlesey to not let them go out of his hands; and that, if Steel was now present, in attendance upon the court, he did not know it. It appears that these letters, however, were produced upon the trial of the case; the witness Steel and Miss Anna Whittlesey appearing there in ample time to testify upon the trial. We know of no law compelling the prosecution to disclose the character and kind of evidence that it has against the defendant. Furthermore, it is not made to appear in the record before us in what way appellant's rights were injured, or that he was deprived of any substantial privilege. The evidence showed that all the letters were written by him. This being true, and uncontroverted, certainly he knew the contents of the letters, and could not claim any character or kind of surprise. If he could, the record does not disclose that he did claim any such surprise. We do not think the court erred in refusing to grant the motion, because, at the time the same was made, it could not be complied with; and, besides, appellant had the full right of cross-examination as to these letters during the trial.

Appellant's third assignment of error complains of the action of the court "in refusing to permit appellant to withdraw his announcement of ready for trial, for the reasons set out in his motion, and as shown by bill No. 4: * * * The appearance of said witness Steel, and the production of said letters after the announcement of ready for trial, and proceeding with the case for one day, was calculated to surprise and injure defendant, and did not give him an opportunity to prepare his defense, to which he was entitled." For the reason stated in the disposition of the second assignment above, we do not think the court erred in refusing to permit counsel to withdraw his announcement of ready. There are no elements of surprise shown by his motion, nor is there any evidence in the record before us to indicate that appellant has been deprived of any right whatever by the refusal of the court to permit his withdrawal of the announcement of ready. There is nothing shown to indicate that appellant would have disproved said letters, or that he would have been able on another occasion to have shown their falsity, or to have explained their incriminative features.

Appellant's fourth assignment complains of the admission in evidence of letters purporting to be from defendant to Anna Whittle-

say, as shown by bill No. 11, "because the same was not all the correspondence, as shown from the face of the letters themselves, but only a part, and because defendant or his counsel were not given an opportunity to examine the same before trial, as requested by them in their motion, and because he was for the first time confronted with them at the trial, after the trial had progressed one day, and when they were so occupied that they could not look into them, to properly meet them and explain them." The record in this connection shows that appellant had written various and sundry letters to Anna Whittlesey; that she had sent him back his ring when he was arrested in Topeka, Kan., and received, at her request, in return, all of her letters to appellant, which letters she says she destroyed. If there were any other letters written by appellant to witness, there is nothing in the record to indicate it. The witness was on the stand, and appellant could have disclosed the fact, by cross-examination, that there were other letters, if he had so desired; or, if he desired to ask her anything about the letters which she had destroyed, he could have done so. There appearing no effort in this direction on the part of appellant, we hold that the mere fact of there being other letters would not be any reason or cause why the letters produced should not be introduced. If appellant could explain them by any evidence, this fact should have been made apparent, by motion or otherwise. It was not done, however. As to the suggestion, made by appellant's counsel, that they were introduced at a time "when they were so occupied they could not look into them, to properly meet and explain them," this is an emergency that confronts attorneys in the defense of parties charged with crime; and it certainly is not a reason why this court should reverse the judgment. Evidently, the criminative features of these letters were much of a surprise to appellant's counsel; but the fact of surprise alone is not a ground for the postponement of the case, or of the withdrawal of announcement of ready. Code Cr. Proc. art. 751; *Early v. State*, 9 Tex. App. 476.

Appellant's fifth assignment of error is "that the court erred in explaining to the veniremen what circumstantial evidence was, and the case as given was an extreme one, and calculated to mislead the jury, and in overruling his challenge for cause to Juror Lisman, and certain other jurors, who answered they had conscientious scruples in regard to the infliction of the death penalty as a punishment for crime on circumstantial evidence, as shown by bill No. 2." This bill shows: "That while the juror Lisman was being examined on his voir dire, as well as other jurors and veniremen, he, in answer to the question 'whether or not he had conscientious scruples in regard to the infliction of the death penalty as a punishment for crime,' stated he did, if the evidence was circum-

stantial. A challenge was made for cause. The court thereupon explained to the venireman, in the presence and hearing of the jurors selected, what was meant by 'circumstantial evidence.' The court said: 'I will state to you a circumstantial evidence case, which is not the case on trial, or like it. Suppose a man was seen going into a house, with a knife, where there was a lady, and after he got in there a cry of murder was heard, and the same man was then seen coming out of the house with a bloody knife, and that, on entering the house, the woman was immediately found murdered by a fresh knife wound; this would be circumstantial evidence.' The venireman then stated that under such a case he would not be opposed to the death penalty. The court then told him that was circumstantial evidence, and held the juror qualified. The court, of several of the jurors and veniremen who had answered they had conscientious scruples in regard to the infliction of the death penalty, asked them if they had heard his illustration given Lisman, and many of them, after answering that they had scruples on circumstantial evidence, would say they had none under such circumstances, and a number of them were so held qualified." The court added the following qualification: "That on examination this juror, and the others referred to in this bill as held by the court to be qualified, without a single exception, stated they had conscientious scruples only in cases wholly of circumstantial evidence, and that if such evidence was strong enough to satisfy them, beyond a reasonable doubt, that a person charged with a capital offense was guilty, they would have no such scruples. The juror Lisman was accepted by defendant, and the second taken in the case." We know of no rule of law that says the court cannot explain to a juror what is meant by circumstantial evidence, and the mere fact that the court states an extreme and strong case of circumstantial evidence does not change the proposition that the court can explain what is meant by circumstantial evidence in the effort to select a fair and impartial jury. If appellant, as indicated in his bill, thought the instance cited by the court extreme, certainly he had a right to cross-examine the juror on his voir dire, and, if such examination disclosed the fact that he was not qualified under the law of this state to sit in a capital case, the facts evidencing this should be embodied in a bill of exceptions, and presented for our consideration. An inspection of this bill, however, does not disclose that appellant has been injured in any respect whatever; and it appears from the statement of the judge that the juror Lisman was not as objectionable to appellant as his long bill of exceptions would indicate, as he was the second juror taken. *Suit v. State*, 30 Tex. App. 319, 17 S. W. 458; *Adams v. State* (Tex. Cr. App.) 33 S. W. 354.

Appellant's sixth assignment complains of

the action of the court in holding the venireman D. H. Vaughan qualified, and overruling his challenge for cause, compelling him to peremptorily challenge said Vaughan, for the reason that said Vaughan stated that he had formed an opinion in regard to the guilt or innocence of the defendant, and such opinion might influence him, and defendant was compelled to use his peremptory challenge, as shown by bill No. 3. This bill was allowed with the following qualification, to wit: "In answering the question asked by defendant's counsel, the juror was asked if what he had heard, and the opinion he had formed, might not influence his verdict, and he answered, 'It might; but, if the evidence was different from what he had heard, he did not think that what he had heard, or the opinion formed, would have influenced his verdict.' Then, on examination by the court, the juror said he had not heard any witness speak of the case, nor any person detail facts known to them; that what he had heard was simply rumor; that what he had read was simply a newspaper account of the matter, and the opinion he had formed was upon the condition that what he had heard and read was true; and that, if taken on the jury, and the evidence should be different, he could and would entirely disregard what he had heard and read, and the opinion formed therefrom, and try the case exclusively upon the evidence adduced upon the trial and under the charge of the court. There was but one juror selected and impaneled after defendant exhausted his peremptory challenges, and no objection was made by defendant or his counsel to said juror." We think the explanation of the court effectually disposes of this assignment; and, furthermore, it appears from said explanation that appellant accepted but one juror after he had exhausted his peremptory challenges, and made no objection to him.

The seventh assignment of error is to the action of the court in permitting Mrs. Hill and Mrs. Carhart to testify to declarations made by deceased, some time prior to her last sickness, to the effect that she was not troubled with her monthly period, and could not properly sympathize with those who were, and that she had no female trouble, and was regular in her monthly period, "because this purported conversation was in the absence of defendant, was hearsay, and no part of the *res gestæ*, as shown by bills Nos. 5 and 6." When it becomes necessary to prove the physical or mental condition of deceased, it is permissible for the state to prove the acts and declarations of deceased, made on previous dates, as to her general mental and physical condition. Therefore the courts hold that acts and declarations of a party, immediately before death, as to mental condition or physical condition, are admissible, when pertinent to the issue, and it is immaterial if said declarations refer to past events and conditions. 1 *Rosc. Cr. Ev.* p. 31; *Rogers v. Crain*, 30 Tex. 284; *New-*

man v. Dodson, 61 Tex. 95; 2 *Jones, Ev.* § 352; *Steph. Dig. Ev.* p. 32.

Appellant's eighth assignment of error is "that the court erred in admitting the evidence of W. M. Pugh and E. C. Gray that the deed purporting to be from Robert B. Brogdie to George Edgard Morrison, bearing date at Higgins, June 20, 1890, and witnessed by Gentry Abbott, was forged, and that the signatures of the grantor and grantee were both in the handwriting of the said defendant, because said evidence was sought to prove defendant guilty of an independent crime, the acts were too remote, and, if committed, were after the death of his wife, and could not prove motive or knowledge, and was immaterial, and did prejudice the jury against defendant, as shown by bill No. 6." Any evidence that goes to explain, illustrate, or prove motive for which a crime has been committed is admissible. It appears from the record before us that appellant formed the design to kill his wife and manufacture sufficient evidence as to his wealth to induce Miss Whittlesey to marry him. In carrying out this design, he forged this deed, as testified by the witnesses, in order to induce her to believe that he (defendant) was a man of considerable means and wealth. In the death of his wife, as indicated by the evidence, he had removed one obstacle to his marriage; and by manufacturing evidence indicating his wealth he had reached another step in "the consummation devoutly to be wished" by him. The mere fact that this evidence of appellant's guilt was created subsequent to the death of his wife does not change the rule in reference to its admissibility; but, if true, this circumstance is a potent circumstance to indicate that sedate and formed design actuated him in killing his wife. We note, in passing, here, that appellant does not complain of the admission of a letter, addressed to his mother, written by himself, wherein he describes in pathetic language the death and burial of his wife. The circumstance complained of in this instance is admissible upon the same theory that the letters were admissible,—as part and parcel of one general system to destroy the life of his wife, and to marry the woman with whom he was infatuated.

Appellant's ninth assignment of error is "that the court erred in permitting H. S. Mugg, George Patton, George Farlow, and E. C. Gray to testify that the recommendation of defendant, dated Higgins, October 20, 1897, and purporting to be signed by said witnesses and others, as to some of said witnesses (who testified) the motive and purpose of said recommendation was misrepresented to them, and others of said witnesses, Patton and Farlow, testified their names were signed to same by some person other than themselves, and without their knowledge and consent, because by said evidence it was sought by the state to prove defendant guilty of an independent crime, and the said evidence was immaterial, irrelevant, and too remote to show

motive or knowledge on the part of defendant, and was calculated to, and did, prejudice the jury against defendant, all of which is shown by bill of exceptions." In reference to the evidence admitted as indicated in this assignment, and the eighth assignment, above, the court charged the jury: "In this case the state has introduced evidence which, in your opinion, may tend to prove that defendant forged the name of certain persons to certain written instruments in evidence before you. I instruct you that you can only consider such evidence or testimony for the purpose for which it was admitted; that is, as a mere circumstance which, if you deem it worthy, may be considered by you, with other evidence, if any, in determining whether defendant killed Mrs. G. E. Morrison as charged in the indictment, and, if so, his motive in so doing; and you cannot and must not consider it for any other purpose, for you cannot convict defendant for any offense other than that named in the indictment." We think this evidence is admissible, as indicated in the charge, on the question of the motive of appellant in the commission of the offense, and the charge of the court limiting it to that purpose was proper. *Hudson v. State*, 28 Tex. App. 323, 13 S. W. 388; *Leeper v. State*, 29 Tex. App. 63, 14 S. W. 398. This also disposes of appellant's sixteenth assignment of error, wherein he complains of the charge of the court above quoted.

Appellant's tenth assignment of error is: "The court erred in permitting the witnesses L. J. Thomason, F. H. Hill, Mrs. F. H. Hill, H. B. Pollard, Mrs. Pollard, Al Holland, Mrs. Ed. Carhart, and Ed. Carhart to testify that the deceased was apparently happy, contented, and joyful in disposition; that she did not appear to be sick, but had the appearance of a healthy woman; that if she had any female trouble they did not know it,—because said witnesses were not qualified to speak, as they were not physicians, and because the evidence was immaterial and irrelevant." We think the witnesses were qualified to speak, they being her neighbors, friends, and acquaintances. It certainly is not a matter for expert testimony for one to be able to testify as to the general temper and disposition of one with whom he is constantly associated, and certainly the neighbors and friends of the deceased could testify, if they knew, as to whether deceased had any female trouble. Nor do we think that the evidence was irrelevant or immaterial, but is a potent circumstance to show that deceased came to her death by some character of violence, in view of the fact that she was apparently well the evening before. 7 Am. & Eng. Enc. Law, p. 498; *Culver v. Dwight*, 6 Gray, 444; *Com. v. Sturtivant*, 19 Am. Rep. 406; *Whart. Cr. Ev.* 460.

Appellant's eleventh assignment is "that the court erred in permitting the question to be asked by state's counsel of Miss Anna Whittey, whom she understood defendant to

mean by 'Guy' in the letter of October 13, 1897, written to witness, and in permitting witness to testify 'she understood him to mean his cousin Guy E. Morrison, the one she had known in Illinois at school.'" The ground of objection is that the same was the opinion of the witness. The testimony of this witness discloses the fact that appellant had told her that his cousin Guy E. Morrison was a minister, married, and living at Panhandle; and certainly, when a letter was introduced, alluding to Guy and the death of Guy's wife, it could be explained by witness, without it coming within the objection of being opinion testimony. There was no error in the action of the court.

Appellant's twelfth assignment complains of the "court permitting Drs. Walcott, Warner, Carter, Morris, and Dodson to testify that in their opinion deceased died from strychnine poisoning, from the description of the symptoms detailed by the witnesses in their hearing, and from the evidence produced in their hearing, because they should have testified from a hypothetical case given them, and give their opinion on such a case, and describe the effect strychnine would have on the patient, and let the jury say whether the deceased was so poisoned." Judge White, delivering the opinion of the court in *Leache v. State*, 22 Tex. App. 306, 3 S. W. 541, uses this language: "Medical experts may state their opinion upon the whole evidence, if they have heard it all, or upon a hypothetical statement which is in conformity with the whole evidence. Where the expert has not heard the evidence, each side has the right to an opinion from the witness upon any hypothesis reasonably consistent with the evidence. And, if meagerly presented in the examination on one side, it may be fully presented on the other; the whole examination being within the control of the court, whose duty it is to see that it is fairly and reasonably conducted." *Webb v. State*, 9 Tex. App. 490; *Burt v. State* (Tex. Cr. App.) 43 S. W. 344. We therefore hold that it was not error to permit the witnesses to give their opinion.

Appellant's thirteenth assignment is "that the court erred in refusing to grant him a new trial, because the evidence did not sustain the allegations in the indictment that deceased was named Mrs. G. E. Morrison, but the evidence shows her name to have been Minnie Morrison." We cannot agree to this contention of appellant. Several witnesses testify that deceased was generally known in the neighborhood as Mrs. G. E. Morrison.

Appellant's fourteenth assignment complains "of the court's charge wherein he tells the jury they can convict defendant if he knowingly placed or laid strychnine where it might be taken by deceased, etc., for the reason that the indictment does not charge him with placing or laying same where deceased could get it, but that he administered it to her, and because the evidence did not authorize such charge." The evidence shows that

appellant, on Friday before the death of deceased on Sunday night, secured strychnine from the drug store, and had also secured some quinine, with some empty capsules; that he carried it home, left the quinine there, with the empty capsules, and on Saturday morning returned the strychnine to the drug-store, apparently in the same condition that it was when he secured it, except the druggist testified that he thought the string was some looser around the package of strychnine than it was when he let him have it. Now, then, on this state of facts, we think the charge complained of was applicable. We do not understand that the indictment should present all the facts that might be introduced in evidence as to the character and means by which the killing is done.

Appellant's fifteenth assignment complains of the "court's charge which attempts to apply the law to the defense of appellant, because the same does not submit a plain and substantive charge, submitting the defense unmixed by the state's theory, but the same is vague, uncertain, and indefinite, and calculated to confuse the jury, and, further, required the jury, before they found defendant not guilty, to apply the rule of reasonable doubt as to whether the deceased came to her death by natural causes or by suicide, and to believe beyond a reasonable doubt that deceased came to her death by one of these causes, before they could acquit defendant." We have carefully examined the charge complained of by appellant, and must say that we do not think the same is subject to the criticism above, but the charge aptly and properly presents the defense urged by him. It is plain and unambiguous, and was not calculated in any respect to militate against the rights of appellant.

Appellant's seventeenth assignment complains of the refusal of the court to give the following requested instruction: "If you shall believe that deceased came to her death from a natural cause or causes, or that she was poisoned accidentally by taking such a potion, or that she by her own hand administered the poison for the purpose of ending her existence, then the court charges you that, in either event, defendant would not be guilty of the offense charged, and you must acquit him,"—"because the court did not, in his main charge, submit the defense in a plain and substantive charge, but confused the same with the state's theory, and because he did not, in his main charge, give the above, but refused the same, and because said charge is the law of this case." In this connection we quote the following from the court's charge: "And if you have a reasonable doubt as to whether defendant poisoned his wife with strychnine, with intent to kill her, as charged in the indictment, and if you have such doubt as to whether defendant, with intent to kill her, placed strychnine poison where he knew or believed deceased might take it, or if you have such doubt as to wheth-

er deceased committed suicide, or died from other causes than poison administered by defendant with intent to kill her, you will acquit defendant." We think this charge is all that appellant could ask in this respect.

Appellant's eighteenth, nineteenth, twentieth, twenty-first, and twenty-second assignments of error complain of the action of the court in refusing to give special charges asked by him. We have examined all of said charges carefully, and, as far as the same are applicable to the facts in this case, they were given in the court's main charge. We do not think there was any error in refusing to give them. Furthermore, the court's charge contains all the law applicable to the facts of this case, and the same is an admirable presentation of the law.

Appellant's twenty-third assignment complains that the court failed to properly define the term "malice" to the jury. An inspection of the charge shows that this assignment is not well taken. The court did define malice.

Appellant's twenty-fourth assignment is "that the court erred in allowing the county attorney, W. D. Berry, to use the following language in his address to the jury: 'Gentlemen of the jury, they talk about defendant having his throat treated. In my opinion his throat needs one more application, and that is about 20 feet of rope.'" We have repeatedly held that, where counsel excepts to the remarks of the prosecuting attorney, they must, in addition to the exception, tender a special charge to the court telling the jury to disregard the statements. This was not done. Furthermore, we cannot see how appellant was injured in any respect by the laconic declaration of the county attorney. Certainly he would have the right to say that appellant should be hanged from the testimony. This would be a legitimate argument or statement adduced from the evidence. All that we can see appellant can complain of is the original and terse way in which the county attorney put the statement. We do not think there was any error in this.

Appellant's twenty-fifth assignment complains of the court permitting S. H. Cowan to read, in his closing argument for the prosecution, from the American & English Encyclopedia of Law, the definition of "reasonable doubt," for the reason that defendant's counsel had not an opportunity to answer or reply to same, as none of the other counsel for the state, preceding defendant's counsel, had read anything from the books on the question, or presented any argument along that line, and, besides, the paragraph was not the law, and the jury should have received the law from the court. It appears from the bill that Cowan, before Hall and Houston, attorneys for defendant, made their argument to the jury, handed them a slip of paper, stating certain authorities from which he expected to read in his argument before the court; and among other authorities was the ninth volume of American & English Ency-

lopedia of Law, and the authority referred to, but did not hand them the book. This statement discloses that appellant's counsel had the privilege of arguing and commenting upon this authority to the judge and jury, if he had desired to do so. If he failed to avail himself of the privilege, we cannot see how he can here complain. Again, the conduct of the trial on the question of argument is left largely to the sound discretion of the trial court, and we do not think the record before us discloses the fact that in this instance this discretion has been abused.

Appellant's twenty-sixth assignment complains of the action of the court in qualifying bills of exceptions Nos. 2 and 4, for the reason that, if the court could not give the bill as presented, he should have drawn up one of his own, and then, if defendant was not satisfied with the bill as presented by the court, he could prove up the bill by bystanders, and such qualifications materially change the bill as presented and allowed, which was only returned defendant in the last hours of the expiring court, with the qualifications indorsed on same. We think it sufficient answer to this criticism to say that we have held the court could, in his discretion, very properly explain the rulings excepted to when signing the bill. *Bejarano v. State*, 6 Tex. App. 265; *Hardy v. State*, 31 Tex. App. 289, 20 S. W. 561.

Appellant's twenty-seventh and last assignment of error complains of the action of the court in failing to charge the jury that they could not consider, as a circumstance against defendant, the fact that he failed to testify in his own behalf. We do not think it was error for the court to fail to charge this. We have heretofore held that it was not error to do so, nor do we think it error not to do so.

We have examined all of appellant's assignments of error in the order in which they are stated in the record, and find no reversible error therein. The facts show that for deliberate fiendishness they are almost without a parallel in the annals of criminal jurisprudence. The jury inflicted the punishment of death upon appellant, and, according to the record before us, this is just. The judgment is in all things affirmed.

TURNER v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1899.)

HOMICIDE—EVIDENCE—THREATS—IMPEACHMENT.

1. Though accused be on trial for manslaughter only, his threats against deceased may be shown, notwithstanding they tend to prove murder; it being competent for the state to develop all the facts connected with the case.

2. It is sufficient predicate for the impeachment of a witness, by proof of what she had previously testified to before a grand jury, to ask her if she "had not testified before the grand jury on a former occasion" to certain facts.

3. Where a witness testified that her father (deceased), after he had whipped her for going

with accused, and shortly before the encounter resulting in his death, stated he would go to town and settle with accused, it was competent for her to testify that he then appeared in a "calm and pacific mood."

4. Where accused testified that the difficulty between him and deceased, resulting in the death of the latter, grew out of his paying attention to deceased's daughter, and that he made declarations of love to her, which had been favorably received, proof of his making declarations of love to other women was incompetent.

5. Where a homicide grew out of deceased's objection to accused paying attention to his daughter, it was error to permit a witness to testify, on cross-examination, that accused's attentions to her were also against her father's objection.

6. On cross-examination accused admitted he had not testified on a former trial as on the trial at bar, and on redirect proposed to show why he had not so testified, and was not permitted to testify to this statement, and proposed to show by the record of the former trial why he had not testified. The evidence offered fully explained the reason, but the court excluded it. *Held* error.

Appeal from district court, Burnet county; John M. Furman, Judge.

James Turner was convicted of manslaughter, and he appeals. Reversed.

R. L. Harrell, Matthews & Browning, and J. G. Cook, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of four years, and he appeals.

This case was before this court on a former appeal, and was reversed and remanded, and now comes before us on appeal from a second conviction. The case will be found reported in 46 S. W. 830. We refer to the same for the statement of the facts of the case, as the facts presented in this record are in effect the same, the only substantial difference being that on this trial the defendant introduced Miss Carrie Jennings, the daughter of deceased, who testified on behalf of defendant. She testified to the trip with defendant to the concert at Concord, some seven or eight miles, on the night of March 11th, without the consent of her father, and that on her return home the next day her father whipped her about the same. She also testified to her father going to the little town of Bertram that day, carrying his gun with him, stating that he had talked with her about going with defendant, and that it did not do any good; that he was going to town to settle with James Turner. In connection with her testimony, a letter was introduced from her to defendant, written a short time before the homicide, and she, in effect, admitted that appellant was a favorite suitor for her hand. She also testified that her uncles had threatened her if she testified for defendant. Otherwise, as stated before, the testimony was substantially the same as developed upon the former trial.

Appellant reserved a number of bills of exception to the action of the court, but, in

the view we take of the case, it is only necessary to consider a few of them.

There was no error in the action of the court admitting threats and declarations of defendant against deceased prior to the difficulty, although the same may have tended to prove murder in the first degree. While defendant was not on trial for murder in the first degree, it was competent for the state to develop all the facts connected with the case.

Appellant introduced Miss Carrie Jennings, and proved by her, among other things, that, on the next morning after she had gone to Concord with defendant, deceased had a talk with her, and, after he had whipped her for going with defendant, he stated that he had talked with her, and it did not seem to do any good, and he would go to town and settle with defendant. On cross-examination, the state asked her if she had not testified before the grand jury, on a former occasion, that when her father whipped her he talked with her about going with the defendant, and stated it did not seem to do any good, and that he (deceased) was going to town to have a talk with defendant; and that deceased did not then appear to be angry, but seemed to be in a calm and pacific mood. She denied this, or stated that she did not remember whether she had so testified or not. The state was then permitted, by Ben Stewart, a member of the grand jury, to prove that she had so sworn before the grand jury. All of this testimony was objected to by defendant, on the ground that sufficient predicate had not been laid for the impeachment of the witness; and that it was not competent for her to state in that connection that her father, when he made the statement, appeared to be in a calm and pacific mood. We differ from appellant. According to our view, this testimony was clearly admissible.

When appellant was on the stand, he testified that the difficulty occurred between him and deceased on account of his paying attention to the daughter of deceased; that he had made declarations of love to Miss Carrie Jennings, and that such declarations had been favorably received. On cross-examination, the district attorney was permitted to prove, over the objections of appellant, that he had made declarations of love to other women besides Miss Carrie Jennings. This was objected to, because irrelevant and calculated to prejudice appellant. We think the testimony was improperly admitted.

One Lewis testified for the state that, some six days before the homicide, defendant had a conversation with him, in which he used threatening language concerning deceased. Said Lewis, on cross-examination, stated that he had no ill feelings against defendant, and that he and defendant had always been friends. In that connection Miss Annie Ferguson was introduced for defendant, and testified that in the summer or fall of 1896 defendant and Lewis were both paying attention to her at the same time, and that Lewis

during said time used language or made some remarks with reference to defendant that indicated that he did not entertain kindly feelings towards him. The district attorney, on cross-examination of the witness Annie Ferguson, over objection of appellant, was permitted to prove by her that, when defendant was paying his attentions to her, such attentions and visits were against the wishes of her father, and that her father objected thereto. The court, in explanation of this bill, states that he permitted the cross-examination in order to show that Miss Annie Ferguson had bias in behalf of defendant; that it was so strong that she kept his company in disobedience to her father's command not to do so. We do not see the logic of the court's explanation of his reason for the admission of this testimony. The witness Annie Ferguson was evidently introduced by defendant to show that the feelings of Lewis were unkindly towards defendant, as he had testified they were kindly. Any competent testimony that would show that Annie Ferguson was also biased in favor of defendant might be admissible on cross-examination, but, so far as we are advised, she was not asked as to whether she was biased in favor of appellant, nor did she deny the same. But, as an independent fact, the state was permitted to prove, over the objections of appellant, that she associated with appellant, and received his visits, in opposition to the wishes of her father. While this testimony was, in our opinion, irrelevant, and, ordinarily, it might not be hurtful, under the circumstances of this case it was well calculated to prove injurious to appellant. The homicide here occurred on account of a difficulty between him and deceased, because deceased opposed his (appellant's) visits to his daughter; and to permit proof of other persons opposing appellant's visiting their daughters was to suggest that there was something wrong about appellant; that he was not a fit associate for the young ladies of that community,—in other words, it was an indirect method of putting his character in issue, and could not prove otherwise than prejudicial to him. This testimony should not have been admitted.

Defendant took the stand on his own behalf, and, among other things, testified to the conversation between him and deceased which immediately preceded the difficulty, and stated that deceased told him, "I have whipped Carrie for going with you, and I have come to settle with you." On cross-examination of defendant by the state, he was asked if he did not testify at the former trial of the case, and in that conversation he did not state that deceased told him, "I have come to settle with you." Defendant admitted that he did not so testify on the former occasion. On re-examination, defendant proposed to prove, as a reason why he had not testified to this statement, that he was not permitted to testify to same; that

his counsel proposed to examine him on that branch of the case, but the district attorney objected, and the court would not permit him to testify in regard to said matter; and in that connection he proposed to introduce the record of said former trial to substantiate his reason for not testifying. But, on objection, his testimony was excluded, and the record was also excluded. We can see no reason why this evidence was not admitted. The testimony elicited on this trial by defendant on his own behalf was very material, and inasmuch as there had been a former trial, and the matter was not developed as shown by the cross-examination of said witness, it no doubt was a very material matter of inquiry before the jury as to why this important evidence was not testified to by appellant at the former trial; and the further fact that it was shown not to have been then stated, and no explanation was offered as a reason for its suppression, was suggestive to the jury that it must be of recent fabrication. The excluded testimony fully explained the reason why it was not adduced before, and unquestionably this explanation should have been admitted by the court.

A number of exceptions were taken to the charge of the court and the failure of the court to give certain requested charges. As a whole, the charge of the court appears to us to be full and comprehensive, fairly presenting the issues in the case, and it does not occur to us that there was any necessity to give any of the requested instructions. For the errors of the court in regard to the admission and rejection of testimony, the judgment is reversed, and the cause remanded.

MOTT v. STATE.

(Court of Criminal Appeals of Texas. May 24, 1899.)

CRIMINAL LAW—CHANGE OF VENUE—HEARING OF APPLICATION—VENIREMEN AS WITNESSES—OBJECTIONS—REMARKS OF STATE'S ATTORNEY—HOMICIDE—RES GESTÆ—DECLARATION OF ACCUSED.

1. It is not an abuse of discretion, in a homicide case, to refuse a change of venue because of prejudice against accused, where his witnesses testified that on account of the homicide some prejudice existed against him, but that he could get a fair and impartial trial in the county in spite thereof, and where witnesses for the state testified that, while they had heard the case discussed more or less, they knew of but little prejudice against accused, though the discussion of the case was generally unfavorable to him.

2. Accused cannot complain on appeal that on the hearing of his motion for a change of venue because of prejudice the court permitted the persons summoned by special venire to appear as witnesses, where no bill of exceptions was reserved to the action of the court.

3. In a prosecution for homicide, the declaration of accused, on the day preceding the difficulty, that he feared he would have trouble with deceased, is admissible.

4. Where the theory of the defense in a homicide case involves a mutual combat, evidence that accused was the larger and stronger man is admissible.

5. Though the homicide was charged to have been committed with a knife, evidence that on the day of the killing deceased's head and face were found to be bruised as with a blunt instrument, and that later such bruises turned black, is admissible as part of the *res gestæ*.

6. An objection to a remark of the district attorney during the trial of a criminal case that the remark is unauthorized by law is too general.

7. Where, in a prosecution for homicide, a physician testifying for accused was asked to examine and point out to the jury the wounds alleged to have been inflicted on accused in the scuffle which resulted in the killing, a remark by the district attorney that he objected to two witnesses being placed on the stand at once was not prejudicial, as referring to accused's failure to testify, since at that time the state did not know whether accused would be a witness.

Appeal from district court, Callahan county; N. R. Lindsey, Judge.

W. N. Mott was convicted of murder, and he appeals. Affirmed.

J. E. Thomas and Arthur Yonge, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life, and he appeals.

The first bill of exceptions is to the action of the court overruling appellant's motion for a change of venue. In the motion, as is required by law, may be found the statement of facts on which the court acted in refusing to change the venue; and, after a careful perusal of the same, we cannot agree with counsel that the court committed any error in this regard. Appellant introduced a number of witnesses stating that some prejudice existed in the county against him on account of the homicide, but nearly all stated that notwithstanding this they believed appellant could get a fair and impartial trial in the county. The state also introduced a number of witnesses, and all, except the county clerk, appear to have been on the special venire summoned to try the case. Some of these state that they had heard the case mentioned, and some stated that they had heard it pretty generally discussed. The majority, however, said they had not heard very much said about it. All stated that, in their opinion, appellant could get a fair and impartial trial in Callahan county, and that they knew but little prejudice against him; that the discussion of the case, however, was generally unfavorable to defendant. On this testimony the court refused to change the venue, and we do not believe the court in this particular abused his discretion. Appellant, however, has contended in his argument that the court committed fundamental error in allowing the state to introduce the special venire summoned in this case on the question of the change of venue. It is sufficient answer to this to state that the action of the court as to this matter does not appear to have been challenged. At least no bill of exceptions pre-

sents it for our consideration. We have no statute interdicting the use of the special venire as witnesses on this question. As to a matter of mere practice, inasmuch as it is not presented by bill of exceptions, we do not deem it necessary to discuss it. It might be that on a proper motion, made at the time, the court might refuse to authorize the special venire to be used as witnesses on the question of the change of venue; or it might, after such use, on a timely motion, quash that venire, and order another. However, this matter is not presented for our consideration, and we would not be understood as holding one way or the other on the question, or as suggesting a proper practice.

The state introduced one Charley Merrick as a witness to prove a conversation between him and defendant on the day preceding the homicide, in which said witness testified, among other things, that defendant stated to him he feared he would have trouble with deceased, and that deceased "was another Zoomrie Hudson." Appellant objected to this testimony on the ground that it was not responsive to any issue in the case, was extraneous matter, and prejudicial to defendant. Unquestionably it was competent to prove the declaration of defendant to the effect that he feared he would have trouble with deceased. The record does not sufficiently inform us as to who Zoomrie Hudson was, so as to authorize us to say that this testimony was inadmissible, or was calculated to prejudice appellant. The bill merely informs us that Zoomrie Hudson had worked for defendant as a hired hand about a year before the homicide.

Appellant also objected to the proof that defendant was a larger and stouter man than deceased. He says that such testimony was only admissible in case of mutual combat. We understand the theory relied on by defendant involved a mutual combat. It occurs to us that this testimony was relevant, as reinforcing the theory of the state.

The state also proved, over appellant's objection, that one Gardner examined the face of deceased, after the body had been washed and placed in the coffin, and that it had turned black on the jaw, and on a puffed place over the right eye. This was objected to on the ground that it was too remote; that the killing was charged to have been committed with a knife or sharp instrument; that the bruises on the face could shed no light on the homicide. The same witness (Gardner) who testified as to the condition of deceased's face after he was laid out, according to the explanation of the judge had previously testified, without any objection, that he had examined the head and face of deceased on the day of the killing, and he then testified as to the bruises on his face, to wit, the puffed place over the right eye, and that on his forehead, and also of an abrasion on deceased's jaw. These bruises were evidently inflicted by defendant at the time he committed the

homicide. Although the proof showed the homicide was committed with a knife, yet the infliction of these wounds by some blunt instrument were admissible as a part of the *res gestæ* of the homicide itself; and there was testimony tending to show that they were inflicted with an ax handle found in the room after the homicide had been committed.

When Dr. Richardson was on the stand on behalf of defendant, he was asked to examine the wounds then on defendant's body, claimed to have been inflicted by deceased in the struggle in which the homicide occurred. When defendant was asked to stand up, and have his wounds examined and pointed out to the jury, the district attorney objected to that mode of examination, stating, in that case it would be placing two witnesses on the stand at one time. Appellant objected to this remark on the ground that same was unauthorized by law. It would be a sufficient answer to this bill to state that the ground of objection here urged is too general. Appellant, however, in argument, contends that the remark of the district attorney was fraught with a reference to appellant's failure to testify in the case. It seems to us that this is a rather subtle suggestion. We do not believe that the remark can bear any such construction. Indeed, it was impossible for the state to know whether or not defendant would be a witness on his own behalf. It does not occur to us that there is anything in this matter.

Appellant also complains of the court's charge on self-defense, on the ground, as he claims, that it is in a negative form. We have examined the charge carefully, and do not believe it is subject to the criticism attributed to it by appellant. We believe also that the court properly charged on the appearance of danger. The testimony as to what occurred between the parties during the struggle is of a circumstantial character, and the court very properly charged not only on actual, but on apparent, danger.

Nor do we believe that the verdict of the jury is unsupported by the testimony. No eyewitness saw the homicide, but the evidence, though circumstantial in this regard, brought appellant in such juxtaposition with the actual killing as to render a charge on circumstantial evidence unnecessary. Besides, appellant confessed to the act of killing. The circumstances immediately connected with the killing, being mainly of physical facts and appearances in the room where it occurred, were such as to convince the jury that appellant prepared himself beforehand, and took an undue advantage of deceased. In all probability he felled him to the floor with the ax handle, and, while lying there, cut his throat from ear to ear. At least the facts were of that cogent character as to induce the jury to take that view of the homicide, and we do not feel authorized to say that they were not correct in their conclusion. There being no error in the record, the judgment is affirmed.

CLAY v. STATE.

(Court of Criminal Appeals of Texas. May 24, 1899.)

HOMICIDE — EVIDENCE — JURY — SUMMONING SPECIAL VENIRE—EXCUSE OF VENIREMEN—RIGHTS OF ACCUSED.

1. An accused cannot be compelled to go to trial by a jury impaneled from a special venire, not all of which was present, unless the venire is summoned as required by law, though he is furnished with a fair and impartial jury, and is not prejudiced by the failure to summon the venire as the statute provides.

2. Special veniremen cannot be excused in the absence of defendant.

3. After defendant takes the stand and testifies, he may be recalled by the state to lay a predicate for his impeachment, the same as other witnesses.

4. In a prosecution for murder, defended on the ground of self-defense, testimony that, about 15 minutes before the homicide, defendant and his brother treated a witness in a saloon in a violent and lawless manner, endeavored to make him treat, and abused him, and that he escaped from them by running away, was competent to show defendant's condition of mind immediately preceding the homicide.

Appeal from district court, Dallas county; Charles F. Clint, Judge.

A. L. Clay was convicted of murder, and appeals. Reversed.

Hudson & Woody and Joe W. Taylor, for appellant. R. B. Allen, W. M. Chandler, Stillwell H. Russell, and Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 20 years; and he appeals.

Two distinct theories are presented in the case. The state's testimony shows an unprovoked and deadly assault on the part of defendant, A. L. Clay, and his brother, E. G. Clay, on the deceased, Brady, and his two companions, Helman and Ogden. Appellant's theory was self-defense, and his testimony suggested an unprovoked and deadly assault on himself and his brother, E. G. Clay, by deceased, Brady, and his companions, Helman and Ogden.

Appellant reserved a number of bills of exception to the action of the court with reference to the summoning of the special venire and the impanelment thereof. A special venire of 60 men appears to have been properly drawn in the case under the direction of the court. The sheriff undertook to summon them by addressing to each of said jurors, at his post office, a postal card, informing him that he had been drawn on said special venire, and the day the case was to be tried, and notifying him to be present; and attached to said card was a return postal card, addressed to the sheriff, which said venireman was instructed, in the said postal received by him, to tear off and mail back to the sheriff, notifying him that such juror was served. The return of the sheriff was

made up from the replies so received,—merely showing on its face that the jurors so notifying the sheriff had been served. Out of said list of 60, 16 appeared, 25 did not appear, and 16 had been excused by the court, and 3 were returned "Not found." As stated above, the return, on its face, only showed a regular service in the ordinary way, according to the statute. Appellant made a motion to quash the venire, setting up the facts, and asked that the sheriff be required to amend his return, stating how said service was made. This motion was refused by the court. Appellant also offered to make proof of how said service of the venire had been made. This, also, was refused by the court. Appellant presented this same matter in a bill of exceptions when the special venire were presented in court, and he was required to pass on same, setting up the same facts substantially as presented in his motion to quash. In this connection the court offered to have an attachment issued for each of said jurors who appeared to have been served, but were not present, and who had not been excused by the court. Appellant objected to this, unless he should be furnished with a list one entire day before he was compelled to pass upon the same. The court explains this bill by stating that the list showed that all of said special venire had been served, except three, and the defendant objected to said venire because it had been summoned by postal card. And the court offered to have process issued for said defaulting jurors, and defendant objected because they had not been legally summoned. The court further states that the sheriff did actually summon in person all of the jurors who failed to appear in answer to the original service, but how many actually came into court the court had no record of. The court did not wait for the absent veniremen, but had talesmen summoned, whom the defendant was required to examine and pass upon without reference to whether the absent veniremen had been summoned or not. When the special venire had been exhausted, the court ordered the talesmen. When these were brought in, the same objections were urged, to wit, that appellant had never been confronted with a special venire summoned according to law, and that he should not be compelled to go to trial until he had a legally summoned venire. So it seems that, in every conceivable way, appellant insisted that a special venire had never been legally summoned in his case; and we are accordingly presented with the question whether in a case in which the law guarantees to a defendant a trial by special venire, he is entitled to have same summoned according to law. Article 650, Code Cr. Proc., reads as follows: "The sheriff or other officer executing the writ shall summon the persons whose names are upon the list attached to the writ, to be and appear before the court at the time named in such writ, which summons shall be made verbally upon the jurors in person." The

succeeding article requires the officer to return the writ promptly on or before the day the writ was made returnable, stating the names of those who had been summoned; and, if any names are on the list that have not been summoned, the return must state the diligence which has been used to summon them, and the cause of failure. A copy of the list as returned by the sheriff shall be made out and certified by the clerk and served on defendant at least a day before his case is called for trial. And it has been held that, unless this is waived, it is mandatory. *Burries v. State*, 36 Tex. Cr. R. 13, 35 S. W. 164. If appellant is entitled to a special venire, he is entitled to have one drawn and summoned according to our statutes on the subject. The service of the venire in this case illustrates the necessity of adhering to the plain letter of the statute in summoning the list as drawn. The article quoted above requires a personal service by the sheriff on each juror drawn on the special venire. Not only so; if he fails to make the summons on any particular juror, he is required to state the diligence used to procure such juror. In this case no attempt was made to follow the statute, but an absolutely new departure was made, unknown to and unauthorized by the law. As a result, no obligation rests upon those who were written to, to attend the court; and we find that but few obeyed the summons,—no doubt, from knowledge of the fact that they were not required to obey such service. Out of the total list of 60, but 16 were present, when ordinarily there should have been at least 50 present on the special venire, from which to draw a jury. The great majority of them were absent. It is not a question of prejudice, for it would be difficult to show prejudice under such circumstances. Nor is it a response to the proposition to say that appellant was furnished with a fair and impartial jury. However this may have been, it was not the tribunal erected and provided by law for his trial. And if the court can abrogate the statute, as was done in this case, he can do it in every instance; and, instead of furnishing the defendant with a special venire as provided by law, the court may furnish a defendant with a jury selected by the court, and not through the legal machinery as required by our statutes on the subject. It is not necessary here to discuss the importance to a defendant in a capital case of being tried by a jury of his peers as provided by law. Its importance is too well recognized to require discussion or authority, and all of our statutes in this connection are made as safeguards to preserve it; and to hold that the jury as summoned in this case, and who responded to the summons, was a legal venire, would be to undo and destroy the procedure provided by law, and to authorize another mode of summoning the jury in a capital case. We are not now discussing a case in which all of the special venire as drawn were present. Here only 16 out of a

total of 60 attended the trial. We hold that the service made by the sheriff in this case was tantamount to no service at all, and that appellant was, in effect, deprived of a special venire, which the law guaranties him.

The court excused a number of jurors in the absence of appellant. If we could consider that appellant was furnished with a special venire, of course there was no authority on the part of the court to excuse such special veniremen in the absence of appellant. *Livar v. State*, 26 Tex. App. 115, 9 S. W. 552.

It appears that appellant took the stand in his own behalf, and was examined in chief, and cross-examined by the state, and stood aside. Subsequently he was recalled by the state, and asked "if he did not, on the night of the homicide, a short time before, near the place of the homicide, when he and his brother were going in a certain saloon,—if he [defendant] did not try to make one Broadhurst treat, and if he did not catch Broadhurst by the arm, and say to him, 'Set 'em up, you damn son of a bitch.'" And further he was asked "if, a short time before that, in a restaurant on the same night, his brother, E. C. Clay, did not say, in his presence, to a certain party, that 'we are out on our toughness tonight.'" This was objected to on the ground that it was incompetent for the state to put him back on the stand and prove these matters by him; that, his examination having been closed, to again put him on the stand was to make him a witness against himself, and, besides, the testimony elicited was not germane to his examination in chief, and was also objectionable, as his testimony did not concern the homicide. With reference to the first objection (that is, "that it was not competent to put him on the witness stand again"), we know of no rule that would make any distinction between him and any other witness; and it is allowable to call a witness back who may have been previously examined, in order to lay a predicate for the impeachment of such witness. We do not regard the testimony as irrelevant. On the contrary, in our opinion, it was original testimony, tending to show the condition and state of mind of appellant immediately preceding the homicide. It was competent for the state to show the movements of the defendant and his brother shortly before the homicide. There was a sharp issue between the state and the defendant as to who provoked and brought on the difficulty; the state's testimony showing that defendant and his brother, acting together, brought it on, and defendant's testimony tending to show that deceased and his companions brought it on. All the evidence indicates that whichever side provoked it was actuated by a reckless disposition, and utterly disregardful of the rights of others. As illustrative of this, and as tending to support the theory of the state, it was competent to show that defendant and his brother, who were shown to be acting together in the difficulty, were together before

the difficulty, were drinking and carousing, and manifesting a turbulent and lawless disposition; and the testimony admitted, as we understand it, tended to show this state of things. More than that, the testimony on the part of the state shows that defendant and his brother, as they approached deceased, remarked, "Yonder are the sons of bitches now." The testimony admitted and complained of shows that, some 15 minutes before, appellant and his brother were treating witness Broadhurst in a violent and lawless manner, and endeavored to make him treat, and called him a "son of a bitch," and that he escaped from them and ran out of the saloon. This testimony is suggestive of what subsequently occurred when these parties approached deceased and his companions. In our opinion, the testimony was admissible.

Appellant raises a number of questions as to the charge of the court, but, in the view we have taken of the case, we deem it unnecessary to discuss the questions therein raised. For the error discussed, the judgment is reversed and the cause remanded.

DUNCAN v. STATE

(Court of Criminal Appeals of Texas. May 24, 1899.)

CRIMINAL LAW — EVIDENCE — OBJECTIONS — WITNESSES — PRIVILEGES — EXAMINATION — LEADING QUESTIONS.

1. An accused cannot object to the testimony of a co-principal on the ground that it would tend to incriminate him, as the witness only can raise such an objection.

2. A witness is not incompetent for the state by reason of his having been indicted for the same offense.

3. Leading questions may be propounded to an unwilling prosecuting witness, whose testimony had been given at a previous trial.

Appeal from district court, Frio county; M. F. Lowe, Judge.

Ben Duncan was convicted of fornication, and he appeals. Affirmed.

L. N. Spann and J. M. Eckford, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, J. This conviction was for fornication.

During the trial the state called Olivia Cruz, the alleged paramour, as a witness. Her testimony was objected to on various grounds, to wit, because it tended to criminate her, was improper and immaterial, and her examination was not the detailing of facts, but simply the statement of what she had testified on a former trial. The court overruled these objections, and permitted her to testify. As a usual rule, a witness will not be compelled to incriminate himself, but there are exceptions to this rule, as well established as the rule itself. But, where the rule applies, the witness only can take advantage of it. It does not lie in the mouth of the defendant to object. The witness was

not incompetent for the state by reason of the fact that she had been indicted or informed against for the same offense. A witness may, under such circumstances, testify for the prosecution, under the statute, but not for the accused, pending the prosecution against the witness. This witness had testified on a previous occasion, and, being an unwilling one on the subsequent trial, the court permitted the county attorney to lead her. Under the facts stated by the trial judge, we see no error in this matter.

We are of opinion the evidence fully justifies the conviction. It shows that defendant was an unmarried man, and also shows habitual carnal intercourse between the parties without living together. Fornication itself was sufficiently proved, in our judgment, independent of the paramour's testimony. The judgment is affirmed.

ELKINS v. STATE

(Court of Criminal Appeals of Texas. May 24, 1899.)

FENCES—FAILURE TO REMOVE FROM LANDS OF ANOTHER—INFORMATION.

Since Pen. Code, art. 798, requiring the owner of a fence on the land of, and connected with that of, another, to remove such fence after 6 months' notice so to do, makes each 10-days failure to make the removal after such notice a separate offense, an information for failing to disconnect a fence from that of another and remove it must allege that the fence was not removed within 10 days after the expiration of 6 months after notice to remove it.

Appeal from Wilson county court; A. R. Stevenson, Judge.

George Elkins was convicted of an offense, and he appeals. Reversed.

Polley & McCracken and T. P. Morris, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged by affidavit and information with failing to disconnect his fence from that of another, and remove the same back upon his own land, after 6 months' notice in writing, was convicted, and appeals.

Motion was made to quash, as well as in arrest of judgment. This information was brought under article 798, Pen. Code, which requires the owner of any fence, whose fence is upon the land of, and connected with that of, another, to remove the same after 6 months' notice under the terms of the statute. The statute provides that each 10-days failure after such notice shall constitute a separate offense. We suppose the legislature intended to make this 10-days failure to remove the fence, which is said to constitute a part of the offense, to apply only after the expiration of the 6-months notice. It was certainly not intended that the party should be guilty for every 10 days during 6 months required to perfect the notice. The information fails to negative the fact that the

fence was removed within the 10 days after the expiration of the 6-months notice. It occurs to us that the information should have charged that the fence was not removed within 10 days after the perfection of the notice. If it takes the failure to remove the fence for 10 days to constitute the offense, then this must be alleged. This has not been done, and, in our judgment, the information is defective in this respect; and the judgment is reversed, and the prosecution ordered dismissed.

HOLLENBECK et al. v. STATE.

(Court of Criminal Appeals of Texas. May 24, 1899.)

CRIMINAL LAW—FORFEITURE OF BAIL—APPEAL—FILING TRANSCRIPT.

An appeal from a forfeiture of a bail bond will be dismissed unless the transcript is filed in the appellate court within 90 days after the filing of the appeal bond, as required by Rev. St. art. 1015.

Appeal from district court, Hardeman county; G. A. Brown, Judge.

A bail bond in a criminal case was forfeited, and Lew Hollenbeck and others, the signers of the bond, appeal. Dismissed.

B. E. Green, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This appeal is prosecuted from a forfeiture of a bail bond. The appeal bond was filed March 22, 1898. The transcript was filed in this court on January 13, 1899. Motion is made to dismiss the appeal, because said transcript was not filed within 90 days after filing the appeal bond, as required by article 1015 of the Revised Statutes. By an act of the legislature, appeals in forfeited bail bonds are governed by the same rules as those prescribed for appeals in civil cases. Among other things, in regard to the appeal in civil cases, the transcript is required to be filed in the appellate court within 90 days after the perfection of the appeal, or good cause shown why this was not done. A considerable time over 90 days elapsed after the filing of the appeal bond before the transcript was filed in this court, and no attempt has been made to explain this delay. The motion is well taken, and the appeal is dismissed.

SESSUM v. STATE.

(Court of Criminal Appeals of Texas. May 24, 1899.)

CRIMINAL LAW—APPEAL—DISMISSAL.

Where the recognizance does not set forth the punishment assessed against the appellant, as required by Code Cr. Proc. art. 887 (Acts 1897, p. 5), the appeal will be dismissed.

Appeal from Uvalde county court; J. F. Robinson, Judge.

G. W. Sessum was convicted of an offense, and he appeals. Dismissed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. The assistant attorney general moves the court to dismiss this cause because the recognizance does not comply with article 887, Code Cr. Proc. (Acts 1897, p. 5), in that it fails to set forth the punishment assessed against appellant. The recognizance is in the condition stated, and the motion is accordingly sustained. May v. State (Tex. Cr. App.) 49 S. W. 402. The appeal is dismissed.

MCCARLEY v. STATE.

(Court of Criminal Appeals of Texas. May 24, 1899.)

GAMING—INFORMATION—SUFFICIENCY.

An information charging an unlawful playing at cards in a public place, "to wit, a cedar brake in Dr. K.'s pasture, near the town of San Saba, * * * said pasture containing about fifty acres of land," is an insufficient designation of the locus in quo.

Appeal from San Saba county court; John Seiders, Judge.

Frank McCarley was convicted of unlawfully playing at cards, and he appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of unlawfully playing at a game with cards, and his punishment assessed at a fine of \$10. The charging part of the information is as follows: "Frank McCarley did then and there unlawfully play at a game with cards, in a public place, to wit, a cedar brake, in Dr. N. Ketchum's pasture, near the town of San Saba, said county. Said pasture contained about fifty acres of land, and said cedar brake and said pasture was then and there a place where people commonly resorted to for the purpose of card playing and gaming," etc. This information is not as definite in its terms as the one in Crutcher v. State (Tex. Cr. App.) 45 S. W. 594. Under the authority of that case, we do not think the information is good. The case of Crutcher v. State was quoted with approval by us in Nail v. State (decided at present term) 50 S. W. 704. For the reasons stated in said cases the judgment is reversed, and the prosecution ordered dismissed.

TINDALE v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1899.)

INDICTMENT—THREATS.

An indictment charging one with seriously threatening to inflict bodily injury on another with a rope was insufficient, in failing to allege accused had serious intention of executing the threat, or to allege the manner and force with which the rope would be used.

Appeal from Williamson county court; W. F. Robertson, Judge.

Floyd Tindale was convicted of crime, and he appeals. Reversed.

W. W. Nelms, for appellant. Dan S. Chesher, Co. Atty., for the State.

BROOKS, J. Appellant was convicted under the following indictment, and his punishment assessed at a fine of \$250, to wit: "That M. M. Williams and Floyd Tindale, in said county and state, on or about the 18th day of November, 1897, did then and there unlawfully and seriously threaten to inflict serious bodily injury upon a human being, viz. P. A. Smith, in this, to wit: The said M. M. Williams and Floyd Tindale did then and there seriously threaten to whip the ass (meaning the arse) of said P. A. Smith with a wet rope," etc.

Appellant filed a motion in arrest of judgment, setting up the following reasons why the indictment should be quashed: "(1) Because the indictment, as a whole, charges no offense against the laws of this state, and is not sufficient to support a judgment. (2) Because said indictment charges no offense against the laws of this state, in this: that the said indictment charges this defendant with seriously threatening to inflict upon one P. A. Smith serious bodily injury, in that the defendant threatened to whip the ass (or arse) of the said P. A. Smith with a wet rope, said charge being insufficient, in that the injury, as charged to have been threatened, as set out in the indictment, is not one to inflict serious bodily injury, but is an injury that might have been inflicted upon the said Smith by the defendant without any serious results; and because the said indictment does not allege the size of the rope with which the injury was threatened to be inflicted, nor the manner nor force with which the said rope was to be used, or would be used or applied to the said Smith, by defendant. (3) Because the said indictment is insufficient in that it fails to allege that at the time that the alleged threats were made by defendant, as charged in the indictment, the defendant had any serious intention of executing said threats." We do not think it necessary to allege the size of the rope that appellant intended to use upon the prosecuting witness, but the other errors assigned in the motion we hold to be well taken, and the indictment accordingly defective. The judgment is reversed, and the prosecution ordered dismissed.

PICKETT v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1899.)

CRIMINAL LAW—REFERENCE TO FORMER CONVICTION—REVERSIBLE ERROR.

A reference by a prosecutor, on a second trial, in his argument, to accused's former conviction, being violative of Code Cr. Proc. art. 823, providing that on a new trial the former conviction shall not be alluded to in the argument, is cause for reversal.

Appeal from district court, Brown county; J. O. Woodward, Judge.

G. W. Pickett was convicted of manslaughter, and he appeals. Reversed.

Jenkins & McCartney, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of two years; and he appeals.

We have examined all of appellant's assignments of error, and, in the view we take of this case, it is only necessary to discuss one of them. Appellant's bill of exceptions No. 8 complains of the action of the district attorney in his opening argument to the jury. In that he used the following language, to wit: "Cliff Westerman says that he never told any one of the threats made by Foster until after defendant was convicted. Ah! Then was the time to dig this evidence up, and they dug it up." To which defendant excepted, and the district attorney proceeded with his argument, without any statement being made by the court. And T. C. Wilkinson, private prosecutor, in his closing address to the jury, said: "The defendant has been three times tried, and once convicted." To which statement the defendant excepted. The court charged the jury in reference to this matter as follows: "The remarks made by the prosecution, that defendant had been once before convicted, will not be considered by you for any purpose." Article 823 of the Code of Criminal Procedure provides: "The effect of a new trial is to place the cause in the same position in which it was before any trial had taken place. The former conviction shall be regarded as no presumption of guilt, nor shall it be alluded to in the argument." Judge White, in delivering the opinion of the court in *Hatch v. State*, 8 Tex. App. 420, uses this language: "There can be no mistake as to the meaning of the words used, or the intention of the legislature in prescribing that upon a second or new trial in a criminal case a former conviction shall be regarded as no presumption of guilt, nor shall it be alluded to in the argument. Men are oftentimes convicted illegally, and in contravention of some important right conferred by law; and it would be not only unjust, but inhuman, to claim that such conviction should weigh a single particle in the estimation of their guilt upon another trial. The fact that the former conviction has been set aside and a new trial awarded, even if done upon grounds merely 'technical,' or upon grounds which, in the estimation of some, may appear 'foolish,' does not in the slightest alter the rule, or the reason of the rule." Ever since the decision in the above-cited case, this court has uniformly held that the fact of a former conviction shall not be alluded to in the argument of the case by the prosecution, and yet we find in this case that it was done in two several instances by the prosecuting attorneys. The stat-

ute above quoted is mandatory. We have no inclination or power to disregard its beneficent provisions. We are constrained to reverse this judgment because of the violation of a plain and positive provision of the statutory law of this land. *House v. State*, 9 Tex. App. 567; *Moore v. State*, 21 Tex. App. 686, 2 S. W. 887.

The court's charge, together with the requested charges given, cover the law of this case. For the error discussed, the judgment is reversed, and the cause remanded.

PRYOR v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1899.)

MURDER — EVIDENCE—MOTIVE—CONFESSIONS —WARNING—PRINCIPALS.

1. In a prosecution for murder, evidence that the slayer of defendant's brother had been killed, and that defendant had been arrested, but not indicted, on a suspicion of having killed such slayer, is inadmissible.

2. In a prosecution for murder, evidence that deceased and another had killed defendant's brother is admissible to show motive.

3. A warning to accused while under arrest that any statement made by him may be used "for or against" him is insufficient to render his confession admissible, under Code Cr. Proc. art. 750, authorizing the admission of a confession that was made after accused was "cautioned that it may be used against him."

4. A confession made after arrest is not admissible against a co-principal.

5. Defendant is a principal, and not an accomplice with another who shot and killed a person through a window, after it had been agreed that defendant was to shoot him if he went out of the door.

Appeal from district court, Waller county; Wells Thompson, Judge.

Will Pryor was convicted of murder, and he appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 35 years, and appeals.

During the trial the state was permitted to prove that Abe Pryor, appellant's brother, was killed about two years before by Gibson and Charley Williams; that Gibson Williams was waylaid and killed about one year ago; and that defendant and his brother-in-law Brown were arrested on suspicion for the murder of Gibson Williams. Appellant was not indicted, however, for the murder of said Gibson Williams. Objection was urged to this testimony, on the ground that the defendant was in no way connected with the killing of Gibson Williams, and that said testimony was irrelevant, and calculated to prejudice appellant's cause before the jury. We believe the testimony as to Gibson Williams should have been excluded upon appellant's objection. The testimony as to the killing of Abe Pryor

by Gibson and Charley Williams was permissible, as it tended to prove motive on the part of appellant for the killing of Charley Williams. The court permitted Lipscomb, Crook, and Greer to testify to a confession or statement of defendant. In the warning given, appellant was told that any statement he should make might be used "for or against him." This is not such a warning as is required by the statute. *Guinn v. State* (Tex. Cr. App.) 45 S. W. 694. Exception was also reserved to the confession of Joe Sullivan, to the effect that he killed deceased by shooting him through the window, and that he had agreed with Will Pryor (appellant) to "case" deceased; that, should deceased come out the front part of the house, Will Pryor was to shoot him, and he (Sullivan) was to go around the house and shoot him through the window. The warning given as to this confession was the same as that given defendant, to wit, that whatever statement he might make could be used "for or against him." This is not such a warning as is required by the statute.

We would observe further that at the time these confessions were made the parties were under arrest. It was subsequent to the killing. And, being under arrest, the statement made by one as against the other could not be used. If defendant was present when Sullivan made the statement implicating him, being under arrest, he was not bound by the statement, nor called upon to deny it; and, being subsequent to the arrest, it was not such an act, declaration, or confession by one co-conspirator as could be used in evidence against the other as original testimony. *McKenzie v. State*, 32 Tex. Cr. R. 568, 25 S. W. 426.

There is another question suggested that we deem unimportant, to wit, that, under the facts, the court should have charged the jury with reference to the law of accomplices, inasmuch as the testimony suggests that he was an accomplice, and not a principal. We do not agree with this contention. Appellant, under the facts, was clearly a principal. For the reasons indicated, the judgment is reversed, and the cause remanded.

SULLIVAN v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1899.)

HOMICIDE—CONFESSIONS — CORROBORATION— EVIDENCE—WAIVER OF OBJECTIONS.

1. Defendant's confession that he shot deceased through a window while he was dancing in a ballroom is sufficient to sustain a conviction of murder, when taken in connection with other evidence that deceased was shot and killed while dancing, though no one saw defendant shoot.

2. The fact that an officer, who was present at the time and place (fixed by another officer in his testimony) that defendant made a confession, after being warned, did not hear the warning or confession, does not justify a submission to the jury of an issue as to whether the confession was made freely and voluntarily.

8. Error in the admission of testimony that was admitted without objection is waived by a failure to raise the question in the record, though the same evidence was admitted in a companion case, and, being specified in a bill of exceptions, the conviction was reversed by reason thereof.

Appeal from district court, Waller county; Wells Thompson, Judge.

Joe Sullivan was convicted of murder, and he appeals. Affirmed.

H. M. Browne and T. D. Pinckney, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 30 years, and appeals.

Appellant contends the court erred in refusing to give certain special instructions requested by him, in which it was sought to present his theory of the case. They are based upon the proposition that the uncorroborated confession of an accused is not sufficient to justify a conviction. That is a very sound proposition of law; but, as we understand the record, it has no application to this case. The evidence places beyond question that deceased (Charley Williams) was in a ballroom, engaging in the festivities, when some one approached from the outside, and shot him through the window. It is also shown that at the time this shot was fired two shots were fired in the ballroom, one taking effect in the leg of one Gentry. There is no direct positive evidence as to who fired the shot from the outside, except the confession of defendant. His confessions are clear and unequivocal. He states that, while standing outside, he shot deceased through the window. It is well settled that the confession of the accused alone will not justify a conviction. This question has been frequently decided by various decisions in this state; but, so far as we are aware, it is settled that, the death of the deceased being shown to have been brought about by the criminal agency or procurement of some one, the confession is sufficient to connect the party making the confession with the crime. The finding of the body was not in pursuance of appellant's confession. He was shot down in the midst of an assembly of people engaged in dancing, he was seen by every one present to have been murdered, shot in the back, and through the window, the assassin standing on the outside. The rule sought to be enforced by appellant has no application to this case. *Attaway v. State*, 35 Tex. Cr. R. 403, 34 S. W. 112; *White v. State* (Austin Term, 1899) 50 S. W. 705.

Appellant requests the court to charge the jury that the confession must be freely and voluntarily made; that the accused should be warned that he need not make the statement, and, if he did, it would be used against him; that such confession must be corroborated by facts and circumstances other than the con-

fession itself; and that, unless all these matters had been shown, the accused should be acquitted, or, if they had a reasonable doubt that all of the matters had been shown, to acquit. The point insisted upon seems to be that at the time the confessions were made one of the officers present failed to hear the confession testified to by the other officer, and therefore there was an issue raised as to whether this confession was freely and voluntarily made. It is true Alken testified that he did not hear the confessions about which Lipscomb testified, but he states that Lipscomb informed him in a whisper directly after it occurred that defendant had made the confession. The mere failure of Alken to hear the confession of the accused, and the warning given by Lipscomb, does not raise an issue as to the correctness of Lipscomb's testimony as presented. If Lipscomb had testified to the warning and subsequent confession, and Alken had testified that the accused was not warned, then it would have become the duty of the court to submit the question in the charge as to whether the warning was in fact given. But Alken does not contradict Lipscomb on this point. The mere failure of a witness to hear statements about which other witnesses testify ordinarily raises no issue of fact.

This is a companion case to that of cause No. 1,743, *Pryor v. State* (just decided) 51 S. W. 375. We reversed that judgment because of the admission of certain testimony specified in the bills of exception. These questions are not raised in this record. The same testimony, in substance, went before the jury in this case without objection, and whatever error there may have been was waived because the points were not reserved. The evidence, in our opinion, fully justified the conviction, and the judgment is affirmed.

POYNER v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1899.)

INCEST—EVIDENCE—DECLARATIONS OF PROSECUTRIX—RES GESTÆ—PREJUDICIAL ERROR—CRIMINAL LAW—WITNESSES—IMPEACHMENT—INSTRUCTIONS.

1. In a prosecution for incest, the statement of the prosecutrix to her father, soon after giving birth to a child, that accused was its father, is inadmissible as part of the *res gestæ*.

2. It is inadmissible, though accused attempted to show on the cross-examination of prosecutrix that she had formerly stated that she had had intercourse with him but twice.

3. In a prosecution for incest, the admission of evidence that, soon after giving birth to a child, prosecutrix told her father that accused was its father, is prejudicial, though prosecutrix testified that accused was the father of the child, and had, shortly after its birth, accused him thereof, in his presence, which he at the time denied; since the evidence as to her accusation against him in his presence was itself inadmissible.

4. The state cannot show, in a prosecution for incest, that prosecutrix never charged any one but accused with being the father of the child, where accused has made no attempt to impeach

her testimony that accused was its father by proof of contradictory statements made by her.

5. The state cannot show that fact, though a witness for the state had been cross-examined at length as to prosecutrix's statements to him concerning the paternity of the child, and that the witness had stated that she had lied to him.

6. A charge that the jury is not bound to disbelieve a witness who has been impeached by proof of statements inconsistent with his testimony, but that his testimony is to be given such weight as the jury thinks it entitled to, is erroneous.

Appeal from district court, Nacogdoches county; Tom C. Davis, Judge.

V. E. Poyner was convicted of incest, and he appeals. Reversed.

Branch, Garrison & Blount, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of incest, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.

The relationship between appellant and prosecutrix was conceded. The state's evidence showed, by the positive testimony of the prosecutrix, who was an accomplice, carnal intercourse between her and defendant, and the state introduced testimony which it claimed tended to corroborate her. Defendant took the stand on his own behalf, and denied any act of carnal intercourse between him and prosecutrix; so that the crucial point in the case was whether or not appellant was the father of the child which prosecutrix gave birth to.

On the trial defendant objected to certain testimony of Jesse Turner (the father of the prosecutrix), and presented the question in the following bill of exceptions: "Be it remembered that, on the trial of the above-entitled cause, the state offered to prove the following facts, viz.: By the witness Jesse Turner, while stating in connection with other facts: 'We gave Nannie a bath, and I went to bed. My oldest daughter was sitting up reading. I was asleep, and my older daughter woke me up screaming. I jumped up, and ran into the room, and asked her what was the matter. She said, "Listen in the room;" and I heard the baby screaming. I ran into the room where Nannie was, and says, "Who has done this?" Nannie said, "Verner." I then said, "My God! Who has done this?" and she says, "Verner put it here,"'—to which the counsel for defendant objected, for the following reasons, viz.: (1) Because the answer of the witness Nannie Turner, accusing defendant of being the father of the child, was in answer to questions asked her by her father; (2) because the same was not repeated, and the defendant was not present when said statement was made; (3) because, if any crime was committed, it was at the time the sexual intercourse was had, and statements made by prosecuting witness, Nannie Turner, after the birth of child, is not admissible as res

gestæ, the defendant not being present; and the court overruled the objections, and defendant excepted," etc. The judge appends the following explanation to the bill: "The matter came up in this way: The witness Turner said, 'I was awakened by my daughter Needy screaming. I sprang to my feet, and said, "What is the matter?" She said, "Listen in the other room." I heard the baby crying, and ran at once into the other room, where my daughter Nannie was lying in bed, and the baby was there crying. I said, "What was the matter, and who in the name of God done this?" She [Nannie] said, "Verner put it here."'"

It is suggested that this testimony was admitted as *res gestæ*, and, from the explanation of the court, we gather that he admitted it on this ground. We cannot so regard it. Appellant was prosecuted for an act of copulation, which happened some nine months before the birth of the child, and it cannot be claimed that the evidence was a part of the *res gestæ* of that act. Nor do we understand it now to be seriously contended by the assistant attorney general that it is a part of the *res gestæ* of the birth of the child. It is not an exclamation of pain or anything of that sort, but, after the child was born, it appears that, when her father came in, he asked her as to its paternity, and she attributed it to defendant. It is insisted that this testimony is admissible because, on the cross-examination of the prosecutrix, defendant attempted to show that she had formerly stated that the defendant did not copulate with her but twice, and she was also cross-examined as to the method in which appellant may have copulated with her. But even if we could go beyond the bill of exceptions, and look to the statement of facts, we do not believe this character of cross-examination would authorize the witness to corroborate herself in this method. We understand the rule to be, if it had been shown on the cross-examination of said witness that she had told a different story in regard to her acts of intercourse,—for instance, had stated that some one else was the father of her child,—then it would have been permissible on the part of the state, in order to corroborate her, to show that recently after the alleged offense she made the same statement as given by her in evidence on the trial. We have searched the record in vain, but find that she did not make a statement in regard to this matter inconsistent with her testimony on the stand. It is further insisted that, although this testimony may have been improperly admitted, yet it is harmless; and in that connection we are told that defendant, a short time after the birth of the child, came into the presence of the prosecutrix, and she there charged him with it. This he denied. This testimony itself was inadmissible. And also, in the same connection, that she testified to the same fact on the stand, and that, therefore, the testimony offered as to what she said, directly after

the child was born, as to who was its father, was harmless. Evidently it was not regarded by the state, when introduced, as harmless. The state undoubtedly had a purpose in introducing this testimony, and it not only corroborated the prosecutrix's testimony while on the stand, but corroborated her testimony by a statement made under the circumstances narrated, and was calculated to impress the jury with its truth. We cannot conceive how it could prove otherwise than hurtful to appellant.

Nor do we believe the testimony presented in appellant's second bill of exceptions was admissible. The defendant had never shown, or attempted to show, that Nannie Turner had ever made any other statement in regard to the paternity of the child than that sworn to by her on the stand, and we do not believe it was competent for the state to show that she had never accused any one else of being the father of her child. And the fact that Jesse Turner may have been cross-examined by defendant at length about his daughter's statement as to the paternity of the child, and about his having stated that she had lied to him, did not make this testimony admissible. It is not stated in the explanation by the judge what she had lied about to him. If she had made controverting statements as to the paternity of the child, this should have been explicitly stated in the bill.

Exception was also reserved to the following paragraph of the court's charge: "A witness may be impeached by showing by another or other witnesses that the witness sought to be impeached has made statements out of court inconsistent with, and contradictory of, the statements testified to by the witness. You are not bound to disbelieve the witness thus sought to be impeached, but the testimony is still before you, to be given by you such weight as you think it is entitled to." In this connection, we are referred to *Crockett v. State* (Tex. Cr. App.) 49 S. W. 392. There is some difference in the verbiage contained in the charge given in the *Crockett* case and that here given. But it is difficult to conceive of a substantial difference between said charges. We do not believe the charge should have been given. It was not necessary to give a charge on this subject at all. The judgment is reversed, and the cause remanded.

GEORGE v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1899.)

PERJURY—MATERIAL EVIDENCE.

On trial of a prosecution for assault, a witness testified that the one who committed the assault was a small man, defendant being a large man; and in answer to a question on cross-examination denied that he had stated to certain persons, shortly after the assault, that the one making it was a large man. *Held*, that the answer was material, and assignable as a predicate for perjury.

On motion for rehearing. Denied.

For former opinion, see 50 S. W. 374.

Parker & Maben, J. W. Crudgington, W. P. Sebastian, and Wm. Veale & Son, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. This case was decided at the Dallas term (50 S. W. 374), and comes before us on motion for rehearing. Appellant contends that the court committed an error in holding that the predicate assigned for the perjury was sufficient, the predicate for the perjury alleged in the indictment being in this wise: That one Dan Jones was on trial for assault to rob, and defendant R. L. George, whom it was claimed was present at the time of the robbery, was then and there introduced as a witness in behalf of the defendant, and the defendant proved by him that the man who committed the assault was a small man; it being in that connection shown that Dan Jones, who was then on trial, was a large man. On cross-examination the state asked the witness if he did not state, at a time and place named, on the morning after the assault, to A. J. Ward and others, that the party who made the assault was a large man, and about the size of Henry Green; to which the witness answered "No." Now, it is claimed by appellant that this answer of the witness, on which the perjury in this case is assigned, was not a material matter in the trial of said Dan Jones; it being insisted that it was not in any wise calculated to influence the tribunal. We cannot agree to this contention. Appellant swore to a very material fact in the Dan Jones case when he testified that the party who made the assault to rob was a small man, and it was competent for the state to impeach him on this testimony. What he may have said to others in contravention of his testimony given on the trial as to the size of the party committing the assault was material. While his testimony remained before the jury unimpeached, it was very material on behalf of the defendant, as it served to influence the tribunal in his favor in that case. If, on the other hand, the state should be enabled to impeach him, the impeaching testimony was material, as it served the purpose of destroying his defense, and so was calculated to influence the tribunal in favor of the state. When the witness answered that he had not made the statement to the parties inquired about that the party committing the assault was a large man, he stated a fact that was material to be inquired about. If it remained uncontradicted, of course his testimony would be unimpaired; but, if the state should contradict him on this matter, it would serve to impair his testimony before the jury; and his testimony before the jury, as stated before, was upon a very material issue in the case. *State v. Mooney*, 63 Mo. 494; *Williams v. State*, 68 Ala. 551. The motion for rehearing is overruled.

BRADFORD v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1899.)

UNLAWFUL ASSEMBLY—INDICTMENT.

Under Pen. Code, art. 309, prohibiting unlawful assembly with intent to interfere with the employment of another, an indictment charging accused with assembling with others to prevent E. from operating a certain farm, by illegally depriving him of the right to employ Mexicans as laborers thereon, was defective in failing to allege that E. then and there had in his employ, or was about to employ, Mexicans as laborers on his farm.

Appeal from Atascosa county court; N. R. Wallace, Judge.

Buel Bradford was convicted of unlawful assembly, and he appeals. Reversed.

John W. Preston and F. H. Burmeister, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted, under article 309, Pen. Code, of being engaged in an unlawful assembly, with other persons, with intent to interfere with the occupation and employment of another, and his punishment assessed at a fine of \$25.

Appellant assigns a number of errors, but it is only necessary to notice one. He made a motion to quash the affidavit and information on the ground that the same failed to charge any offense against the laws of this state; and, particularly, "because the affidavit fails to charge that the alleged injured party was engaged in the occupation of operating and running a farm, and that such was his daily avocation, business, and employment at the time of the alleged unlawful assembly; because the affidavit fails to allege that he had any Mexicans as laborers, or was engaged in the employment of Mexican laborers as a daily avocation or employment at the time of the alleged unlawful assembly," etc.; and because the same is contradictory, in that it alleges an interference with the said Ernst as employer, and then alleges an interference with certain Mexicans being his laborers. In support of his contention, he refers us to *Follis v. State*, 37 Cr. R. 535, 40 S. W. 277. That was a case for interfering with a social gathering and dance by an unlawful assembly, and we there held that the indictment was defective because it failed to allege that Sutton, the party interfered with, had a house, and that he was engaged in giving or about giving a social gathering and dance at his said house. The assistant attorney general, however, contends the information in this case is under another article, with regard to unlawful assembling, and, furthermore, that the information here does sufficiently allege the ownership by said Ernst of a farm. We quote from the charging part of the information as follows: That said appellant, with other persons named, "with the intent to aid each other, by violence and intimidation, to illegally deprive L. H. Ernst from running and operating a cer-

tain farm in the county and state aforesaid, said farm being then and there the property of the said L. H. Ernst, by illegally depriving him, the said L. H. Ernst, of the right to employ and retain in his employ Mexicans as laborers upon his said farm, and to disturb him; the said L. H. Ernst, in the enjoyment of said right to employ and retain in his employ Mexicans as laborers upon his said farm, by violence and intimidation as aforesaid, it being then and there the legal right of the said L. H. Ernst to employ and retain in his employ Mexicans as laborers," etc. If it be conceded that the bare allegation that "said farm being then and there the property of the said L. H. Ernst," in the connection in which the same was used, sufficiently charges that the said Ernst was then and there the owner of a certain farm, and was then and there engaged in running and operating the same,—which is doubtful,—still there is no allegation in the affidavit and information that the said Ernst then and there had in his employ, or was about to employ, certain Mexicans, as laborers upon his said farm. We only gather this by inference. We do not think the affidavit and information are sufficient. There should have been a direct averment that the said Ernst was engaged in running and operating a certain farm, and, also, that he then and there had in his employ certain Mexicans, or that he was about to employ certain Mexicans for the purpose of running and operating his said farm. These matters were essential parts of the offense. The allegation thereof should be by direct averment, and not left to inference or intendment. *Follis v. State*, the case cited, announces the true rule on this subject. Because, in our opinion, the affidavit and information are insufficient, the judgment is reversed, and the prosecution ordered dismissed.

HOLMAN v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1899.)

UNLAWFUL ASSEMBLY—EVIDENCE.

Evidence that the purpose of a meeting was to run Mexican laborers out of the neighborhood, and to post notices on a certain date on certain premises, is not corroborated by proof that the notices were duly posted; it not being shown that they were posted by the persons attending the meeting, or in pursuance of it.

Appeal from Atascosa county court; N. R. Wallace, Judge.

H. L. A. Holman was convicted of unlawful assembly, and he appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted, under article 309 of the Penal Code, for engaging in an unlawful assembly, and prosecutes this appeal.

Motion was made in arrest of judgment, on the ground that the indictment did not

sufficiently charge the offense. We have examined the same carefully, and, in our opinion, it does charge an offense. It is different from the indictment in the Bradford Case (just decided) 51 S. W. 379, which is a companion case to this, in that it does charge that the prosecutor, Louis H. Ernst, was then and there engaged in running a certain farm, and was then and there engaged in employing Mexican laborers on his farm, etc.

The only question that requires to be considered is the sufficiency of the evidence. We have examined the record carefully in this respect, and, in our opinion, it fails to make out a case against appellant, because there is no evidence, outside of the accomplice testimony, tending to connect appellant with the commission of the said offense. The accomplices gave a detailed account of the meeting, and showed that its purpose was illegal, as alleged in the indictment, and that appellant attended said meeting, and there is some testimony, outside of the accomplices', tending to show that appellant was present at said meeting. But we fail to find in the record, outside of the accomplices' testimony, any evidence tending to show the character of the meeting, that it was for the illegal purpose expressed in the indictment. This meeting was on the 30th of April, 1898, and, according to the accomplices, one of the purposes of said meeting was to run the Mexican laborers out of that neighborhood, and to that end to post notices on the premises of certain persons employing such labor on the 15th of May following. It is contended that the fact that such notices were posted on the premises of certain persons, among them that of the prosecutor, on the 15th of May, is corroborative testimony; but we cannot so regard it. No witness testifies to seeing these notices posted, and there is absolutely no testimony tending to show that notices were posted by the parties who attended said meeting, and in pursuance thereof. The bare fact that "White Cap notices" were posted on certain premises, without any testimony as to who posted said notices, we cannot regard as evidence tending to show that said notices were posted by the parties who attended said meeting, and in that respect corroborate the accomplices as to the purposes for which said meeting was held. And, in the absence of some proof, we cannot presume that these notices were posted by said parties, and that this presumption supplements the proof made by the accomplices. Because, in our opinion, the evidence does not sustain the conviction, the judgment is reversed, and the cause remanded.

CHAVANA v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1899.)

ASSAULT WITH INTENT TO KILL—INSTRUCTIONS—AGGRAVATED ASSAULTS.

In a prosecution for assault with intent to kill, where the evidence shows that defendant,

while drunk, stabbed another in the right breast with a knife blade $1\frac{1}{2}$ inches long, inflicting a wound about $\frac{1}{2}$ inch deep, and immediately ran away, and there was no grudge shown between the parties, a charge on aggravated assault should be given; a charge to acquit if the jury found a want of a specific intent to kill being misleading.

Appeal from district court, Webb county; A. L. McLane, Judge.

Mannel Chavana was convicted of an assault with intent to kill, and he appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

The only question presented is an exception taken to the action of the court in failing to give a charge on aggravated assault. The circumstances connected with the assault are very few. They merely show that defendant, prosecutor, and several others were returning home from a dance at night; prosecutor and defendant both being somewhat under the influence of liquor. Defendant lagged behind the parties a short space, and called to prosecutor to come back. He turned around and stepped towards defendant, who immediately stabbed him in the right breast, and then ran. The doctor states that the wound was a half inch to three-fourths of an inch in depth, and that the prosecutor lost a great deal of blood from it; that it would probably have been a fatal wound, if in a different portion of the body; he was in bed some eight days, suffering from the effects of the wound. The witnesses describe the knife as being a pocket-knife, with a narrow blade, about an inch and a half long. The testimony of all the witnesses is about to the same effect. The court instructed the jury that appellant must have entertained the specific intent to take the life of the prosecutor, before they could convict him of an assault with intent to murder, and further charged them, unless they found that he did have the specific intent to kill prosecutor, to acquit him, but failed to give a charge on aggravated assault. Under the circumstances, we believe the court should have given a charge on aggravated assault. There was no grudge shown between the parties, and the assault was not followed up. Defendant appears to have merely stuck the knife in prosecutor to the depth of a half inch, when he might have run it in an inch and a half, and then not only failed to follow it up, but, without interference, run off. As it was, the jury found him guilty of assault with intent to murder, and gave him the lowest punishment. If the court had given a charge on aggravated assault, the jury might have found him guilty only of that offense. We would not be understood, however, as holding that we would not sustain a verdict

for an assault with intent to murder, but we do say that the court should have given an instruction on aggravated assault. The instruction to acquit if the jury found that defendant did not entertain the specific intent to kill was clearly misleading, because there was no question that the assault was unlawful. The judgment is reversed, and the cause remanded.

MALONE v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1899.)

LOCAL OPTION — EVIDENCE — INSTRUCTIONS — EXISTENCE OF LAW — PUBLICATION OF ORDERS — ABSENCE OF ALCOHOL.

1. In a prosecution for selling intoxicating liquor known as "Y's Extract of Lemon and Ginger," on an issue whether the liquor was intoxicating, evidence of a sale five years previously by a person other than defendant of a liquor of a similar name, which was intoxicating, is inadmissible, as being too remote, in the absence of evidence that both liquors were manufactured by the same person.

2. In a prosecution for violating the local option law, it is error to instruct that the law is in effect, where proof of the publication of the result of the election was made by parol.

3. Liquor is not intoxicating, within the local option law, where it does not contain alcohol in such a proportion that it would produce intoxication when taken in such quantities as may be practically drunk.

Appeal from Hamilton county court; J. C. Main, Judge.

Charles Malone was convicted of violating the local option law, and he appeals. Reversed.

J. A. Eldson, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' imprisonment in the county jail.

Appellant was indicted at the December term, 1897, of the district court of Hamilton county for the alleged sale of liquor to Brown Overton on the 9th of December, 1897. On the trial the court permitted the state to prove by the witness Turney, over the objections of defendant, that in 1892 or 1893 he purchased at Lampkin, in Comanche county, from a person not the defendant, Dr. Young's Extract of Lemon and Ginger, and that it was intoxicating. We think this testimony was too remote. This occurred four or five years before this alleged offense; and, although the extract had the same name, it might have been a different compound. If it had been shown that it was manufactured by the same person, the testimony would have been competent. *Petteway v. State* (Tex. Cr. App.) 35 S. W. 646; *Kemp v. State* (Tex. Cr. App.) 38 S. W. 987; *Davis v. State* (Tex. Cr. App.) 37 S. W. 435.

Appellant objected to the court instructing the jury that the orders of the commissioners'

court introduced in evidence, putting local option into effect in precinct No. 3 of Hamilton county. In this connection we would observe that the order of the commissioners' court ordering the election, and the order of the commissioners' court making the count, were introduced in evidence; but the order of the judge putting local option into effect, reciting the publication of the order for four consecutive issues in some newspaper published in the county, was not introduced in evidence. Instead thereof, the state resorted to parol proof on that subject. It was proven by one Hoggard that he was a printer in the office of the Hamilton Journal, and that he had examined for the files of said paper from July, 1896, up to the 1st of January, 1897, but could not find them. They were missing. This, we presume, covered the time when the publication putting local option into effect occurred. The state then introduced J. C. Main, who testified that he was the county judge of Hamilton county, and that the order of the commissioners' court of Hamilton county, declaring the result of the local option election at Hico, had been published four successive weeks in the Hamilton Journal, and that he noticed, looking over the paper, if there were any typographical errors, and knows that said order was published in said newspaper for four successive weeks. When this publication was made he did not state; and this was all the proof offered on the subject. We have heretofore held that, when the order for the election, the order making the count, and the order of the judge showing publication made in some newspaper for the required time were all introduced from the minutes of the county commissioners' court, and that these were all regular, this was sufficient to authorize the judge to instruct the jury that local option was in effect. *Jones v. State* (Tex. Cr. App.) 43 S. W. 981; *Strickland v. State* (Tex. Cr. App.) 47 S. W. 720; *Armstrong v. State* (Tex. Cr. App.) Id. 981; *Aston v. State* (Tex. Cr. App.) 49 S. W. 393. But we have expressly held, where parol proof was resorted to, to show the publication of the result in some newspaper, that the judge was not authorized to instruct the jury that local option was in effect. *Jones v. State* (Tex. Cr. App.) 43 S. W. 981.

Appellant also objected to the following charge of the court, to wit: "It is not necessary, to complete this offense, that the article sold be alcohol or whisky; but, if you believe from the evidence that the article sold, if any, was intoxicating, and was such an article as could be used and drunk as an intoxicating beverage, and if you further believe that the defendant, knowing that such article was intoxicating, and that it could be used as an intoxicating beverage, sold the same as alleged, then the offense would be complete, no difference under what name it was sold,"—and requested the court to give the following charge on the same subject: "A liquor is intoxicating, within the mean-

ing of the law, when it is intended for use as a beverage, or is capable of being so used, which contains alcohol, either obtained by fermentation or by the additional process of distillation, in such a proportion that it would produce intoxication when taken in such quantities as may practically be drunk; and, unless you believe from the evidence beyond a reasonable doubt that the liquor sold by defendant comes within the above definition, you will find the defendant not guilty." Inasmuch as it was a material issue in the case whether or not the liquid sold was intoxicating, we believe the court should have given the requested charge on that subject. As a correct definition of "intoxicating liquor," the charge given was not complete. Appellant assigns other errors, but it is not necessary to discuss them. The judgment is reversed, and the cause remanded.

JOHNSON v. STATE.

(Court of Criminal Appeals of Texas. May 24, 1899.)

FORGERY—DEEDS—ALTERATION—EVIDENCE—HOMESTEAD—ACKNOWLEDGMENT BY WIFE.

1. An unacknowledged deed, executed by defendant, his wife, and a third person, showing on its face an intention to convey a homestead belonging to defendant and his wife, is not shown to be the subject of forgery, where it does not appear that the third person owned any interest in the land, and the indictment contains no explanatory averments as to his interest, and does not set out the acknowledgment of any of the parties signing the deed, in view of Rev. Civ. St. art. 635, making a privy acknowledgment by the wife essential to the conveyance of a homestead.

2. Defendant and T., to whom defendant and wife had executed a deed to a homestead intended as a mortgage, executed and acknowledged the deed purporting to convey the homestead, which was owned by the wife; and the wife refused to sign and acknowledge the deed until after defendant had erased therefrom a recital, inserted by T., providing that the deed was executed in consideration of the grantee's conveying other land to T. Held, that the deed was a nullity before defendant made the erasure, the privy acknowledgment of the wife being essential, under Rev. Civ. St. arts. 635, 4621, and hence a charge of altering a genuine instrument was not sustained.

Appeal from district court, Bandera county; I. L. Martin, Judge.

J. B. Johnson was convicted of forgery, and he appeals. Reversed.

Burney & Garrett, for appellant. John R. Storms, Dist. Atty., and Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for having in his possession, with intent to pass, an instrument signed by G. A. Tutwiler, Fannie Johnson (wife of appellant), and appellant, conveying his homestead. The instrument is a deed in the ordinary form, including warranty clause, but unacknowledged, and purports to have been signed by all the parties on the 15th of July, 1895. The

instrument shows "upon its face" that it was intended to convey the homestead of Johnson and wife to Fannie B. Stirman. The indictment does not set out the acknowledgment of any of the parties signing the instrument, nor is there an averment as to any interest that Tutwiler may have had in the homestead of the Johnsons. As set forth in the indictment, we do not believe this instrument the subject of forgery. If Mrs. Fannie Johnson was conveying title to her homestead, it was a prerequisite to the validity of said conveyance that her privy acknowledgment should have been taken. There can be no conveyance of the homestead, so as to divest the wife of her interest in it, without her privy acknowledgment. There are no explanatory averments in the indictment as to Tutwiler's interest, and, looking upon the face of it, it is not made to appear that Tutwiler had any interest in the homestead of Johnson and wife. As we understand the decisions of our supreme court, the homestead cannot be conveyed without the consent of the wife, and not even then unless her privy acknowledgment has been taken to the deed of conveyance. *Berry v. Donley*, 26 Tex. 745; *Smith v. Elliott*, 39 Tex. 210; *Whetstone v. Coffey*, 48 Tex. 278. See, also, Rev. St. arts. 636, 4621. We are therefore of opinion that the instrument, as declared upon, is not the subject of forgery.

We furthermore find that Tutwiler and appellant signed and acknowledged the instrument, and that, before Tutwiler did so, he inserted the following: "And the other consideration named in this deed is that the said W. A. J. Stirman and wife, Fannie B. Stirman, will convey the Stirman Hotel property, in Ozona, Texas, to G. A. Tutwiler." After this clause was inserted, Tutwiler and appellant signed and acknowledged the deed. Appellant and the notarial officer then carried it to Mrs. Fannie Johnson, to be executed by her; and, when she discovered the above clause inserted, she refused to do so, and the officer left. It was then late at night. The following morning she agreed to sign it, if said clause was eliminated, whereupon appellant erased it. She then signed and acknowledged it. Now, if there is a forgery, it is found in the fact that appellant erased from the deed the clause inserted by Tutwiler, and thus altered the instrument. If Tutwiler had any interest in the homestead, it was by reason of the fact that he and another party had become sureties for appellant for a debt of \$1,200 due by appellant to other parties, and that he secured Tutwiler against loss by joining his wife in executing to Tutwiler what purported on its face to be a deed to this homestead, but which all the testimony shows was to operate as a mortgage to secure Tutwiler in the event he had to pay said security debt. The facts are further undisputed that this homestead property was also the separate property of Mrs. Fannie Johnson. This being true, it was a legal prerequi-

site to the conveyance of the property, whether homestead or separate property, that her privy acknowledgment be taken. Rev. Civ. St. arts. 635, 4621. Now, the facts demonstrate beyond question that Mrs. Johnson did not sign and acknowledge this instrument until after the clause inserted by Tutwiler had been erased. Her rights in this property, either homestead or separate, could not be conveyed, except upon her privy acknowledgment; and, when that privy acknowledgment was obtained, it was only to the instrument which she signed, and terms contained in it. She did not sign the deed executed by Tutwiler and appellant, but expressly refused to sign the same with the clause contained in it as inserted by Tutwiler. It took her signature to give validity to the original instrument. This she refused, and that signed by her was a different instrument from that signed by the others. This was not a completed instrument, and could not be, legally speaking, until after her signature and privy acknowledgment. Her conveyance of title is measured by the deed she executed, and not by one she did not execute; and, being both homestead and separate property, it was doubly necessary that her privy acknowledgment be taken before the instrument could affect either of those rights. So the instrument signed by Tutwiler and appellant was not a legal instrument, and that signed and acknowledged by the wife was not the instrument signed and acknowledged by them. Under the evidence, if there could be forgery shown, it is found in the fact that appellant erased from the deed the clause inserted by Tutwiler. This erasure is the only fact in the case which could have any possible tendency to show forgery. Now, if the instrument altered by appellant was a nullity, for want of the wife's signature and privy acknowledgment, then her subsequent signature and privy acknowledgment did not relate back, and reinsert the erased clause. So, whether or not the deed was void upon its face, the facts upon which the state relied are not set forth in the indictment; and the case made by the evidence, even if the erasure constituted forgery, does not support the allegations in the indictment. In other words, if, under the evidence, Johnson could be charged with forgery, it must be by reason of the alteration; and this alteration should have been set forth in the indictment. But, as before stated, this alteration was that of an instrument which was a nullity. Therefore it could not technically form the basis of forgery, and appellant could not be guilty of having a forged instrument in his possession, etc.

Appellant urges quite a number of other errors, but, under the view we take of the case, we deem it unnecessary to discuss them. However, we note the fact that the whole case was submitted by the court to the jury upon the theory that the forgery was constituted by altering a genuine instrument.

As before stated, there was no allegation of forgery by alteration, and this charge was therefore erroneous. The charge must conform to the allegations of the indictment. The judgment is reversed, and the prosecution ordered dismissed.

ROBERTS v. STATE.

(Court of Criminal Appeals of Texas. May 24, 1890.)

CRIMINAL LAW—CONTINUANCE—ABSENT WITNESSES—TIME TO PREPARE MOTION FOR CONTINUANCE—ABSENCE OF ATTORNEY—REVIEW.

1. A motion for continuance on the ground of the absence of witnesses fails to show diligence on the part of the defendant where it appears as to one of the witnesses that a subpoena was not applied for until over a year after defendant's arrest and one day before the trial, and as to the other that he was served six months before trial by a process commanding him to appear at the former term of court, the record failing to show whether the witness obeyed or disobeyed this process.

2. It is not error to refuse a continuance where the records show it to be the third application, that the testimony of the witnesses was cumulative, and the application fails to state that the witnesses were not absent by the procurement or consent of appellant, and that the application was not made for delay, as required by statute.

3. A refusal to grant defendant time in which to prepare and file a motion for a continuance is not ground for reversal where it appears that a reasonable time had been offered defendant to prepare the motion, and a former motion for postponement could have been so changed as to comply with the statutory grounds for a continuance in a few minutes.

4. It is not error for the court to refuse to postpone a case on account of the absence of an attorney employed to conduct the defense, where it appears that able and experienced counsel represented defendant on his trial, and that ample time was given them to familiarize themselves with the facts.

5. The charge of the court cannot be reviewed where no exception is taken in the bill of exceptions nor in the motion for new trial.

Appeal from district court, Williamson county; R. E. Brooks, Judge.

Add Roberts was convicted of murder in the second degree, and appeals. Affirmed.

W. F. Robertson, for appellant. Warren W. Moore, Dist. Atty., and Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of five years, and he appeals.

The record contains two bills of exception, but there is no complaint made to the charge of the court in said bills, nor in the motion for new trial. We think the court's charge is correct, and in the light of this record the same could not be reviewed. Code Cr. Proc. art. 723 (amended by Acts 25th Leg. p. 17); English v. State (Tex. Cr. App.) 45 S. W. 713.

Appellant's first assignment of error complains of the action of the court overruling the motion to postpone the trial. The motion was made upon the ground of the ab-

sence of George Phillips and Joe Patman. The indictment was filed July 29, 1897. The homicide occurred July 13th. After the homicide, appellant disappeared for two months. About September 13, 1897, defendant was arrested, and was tried on January 27, 1899. In his application he states, as to the witness George Phillips, that he applied for a subpoena January 26, 1899 (over a year after his arrest, and one day before the trial). As to the witness Joe Patman, it appears that process was served upon this witness on July 21, 1898, or six months before the trial. This process commanded the witness to appear at the former term of the court, and the record fails to show whether the witness obeyed or disobeyed this process. We do not think the application shows any diligence. Furthermore, the record showing that this is the third application, and the testimony of the witnesses being cumulative of that introduced upon the trial, and it further appearing that the application is defective, in that the same does not state two of the statutory requirements, to wit, that the witnesses were not absent by the procurement or consent of appellant, and, second, that the application was not made for delay, we do not think the court erred in refusing to grant the same. Pullen v. State, 11 Tex. App. 89; White v. State, 9 Tex. App. 41; Peck v. State, 5 Tex. App. 611; Zumwalt v. State, Id. 521.

Appellant's second bill of exceptions complains of the action of the court in refusing to grant appellant time in which to prepare and file a motion for the continuance of his cause because of the absence of certain witnesses, and because of the absence of his attorney D. W. Odell, whom defendant had just learned was sick in Austin. This bill is qualified by the court, as follows: "That when this case was called at 10 o'clock, January 27, 1899, defendant, by his attorneys, asked time to prepare a motion for continuance, which was granted them. The court waited on them from that time until 1:30 p. m. the same day, when they presented what they called a 'motion for postponement,' which was, by the court, overruled. Defendant's counsel then asked for time to prepare a motion for continuance. The court thereupon stated to them that they would be allowed a reasonable time in which to prepare a motion for continuance, and that they could use so much of the motion for postponement, if they desired, as was applicable. The motion for postponement having set out at length all the facts which they desired to set out in motion for continuance, except some of the statutory grounds, said motion for postponement could have been so changed as to comply with the statutory grounds for continuance in a few minutes, but counsel for defendant refused to do this. They were then asked what time they desired, when they stated they desired the rest of the day. This was 1:30 p. m. The court stated they would not be allowed the rest of the day, but would be allowed a reasonable

time to prepare such motion. Counsel refused to proceed with the preparation of said motion, and stated they would stand on the record as made, and proceeded with said trial, without objection." In view of the explanation of the court to his bill, we are at a loss to understand how any possible injury was done appellant by the action of the court.

Appellant's third assignment complains of the refusal of the court to postpone the case on account of the absence of D. W. Odell, an attorney employed by appellant to conduct his defense in the lower court. The cause of the attorney's absence is alleged to be sickness. It appears that said attorney is not prosecuting appellant's cause in this court. In his motion for new trial, appellant insisted his resources were exhausted in employing D. W. Odell to represent him. However, it appears that different counsel were employed to prosecute this appeal. The controverting affidavits filed by the state show that able and experienced counsel represented appellant on his trial, and that ample time was given them to familiarize themselves with the facts. Appellant further complains that, if the said D. W. Odell had been present, he would have moved for a continuance on account of the absence of Davis and Denman, by whom he expected to prove the following facts, to wit: "That he would have proved by the witness Will Denman that a few days prior to the homicide witness heard deceased make threats to do this defendant serious bodily injury or take his life, and that said witness, before said homicide, communicated said threats to defendant; that defendant would have proved by the witness Perry Davis, had he been present, that he was present at a dance at Will Craft's, on July 13, 1897, and was an eyewitness to the assault and battery made on defendant by Casey (deceased), and he would further testify that defendant was struck a violent blow by deceased; that deceased handed his fiddle to George Phillips, with the remark, 'Hold my fiddle,' and, with an oath, said 'I will fix him;' that some one in the crowd spoke up, saying, 'Yes, fix him now, while you have an opportunity;' that the manner of said Casey, and the party who made the above remark, and the tone of their voices, and the action of said Casey at that time, indicated to said witness an immediate intention on his part to follow up and continue the violence and vicious assault made on defendant." An inspection of this testimony shows that the same is cumulative; and, the application being the third application, and the testimony of other witnesses being, in effect, the same as these, we do not think that this would have entitled appellant to a new trial or postponement. It is further made to appear that able and experienced counsel represented appellant, and that W. F. Ramsey, the senior member of the firm of Ramsey & Odell, employed by appellant, was present, and assisted part of the time in the defense of appellant. We do not

think the application in any respect shows that appellant has been injured by the absence of D. W. Odell, nor did the court err in refusing to grant a new trial on that account. *Mixon v. State*, 36 Tex. Cr. R. 69, 35 S. W. 394; *Ryan v. State* (Tex. Cr. App.) 35 S. W. 288; *Stockholm v. State*, 24 Tex. App. 601, 7 S. W. 338; *Booth v. State*, 4 Tex. App. 216; *Steinhauser v. State* (Tex. Cr. App.) 48 S. W. 506; *Self v. State* (Tex. Cr. App.) 47 S. W. 26. Without reviewing the evidence in detail, we think it amply supports the verdict of the jury. The judgment is in all things affirmed.

ARNETT v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1899.)

RAPE—EVIDENCE—SUFFICIENCY.

Prosecutrix stated: That defendant, in broad daylight, threw her down between corn rows near a path leading from her house. She tried to hollo, and did, when he put dirt in her mouth. He tore her dress nearly off, and when he got through hit her, knocking out some of her teeth. She then went towards home, holloing as loud as she could. She lost her belt and one of her shoes in running away. She had been married 30 years, and had one child before that. She had had 16 children, the youngest being about 4, and she reckoned she was about 65 years old. She had left home several years before, and had been brought back. She did not know what she was doing with her hands when she claimed defendant ravished her. Her husband said he first heard her screaming when she was about 200 yards from home. No witnesses testified to her clothing being torn, but all denied it, and said her teeth were knocked out before. There was no proof that her shoe or belt were found, and the point where she claimed to have been raped was about 75 yards from a house where two witnesses lived. They testified that, if prosecutrix had made an outcry, they would have heard it, and that she passed their house four or five minutes before defendant, and they heard nothing. A witness who immediately examined the place found no signs of a struggle. Her dress was slightly torn, but he saw no scratches or bruises on her face, and it appeared that she was generally ragged. Defendant made no effort to escape, but claimed to have had intercourse with prosecutrix with her consent, and that when he failed to pay her she made the outcry against him. There was also evidence showing her bad reputation. *Held* insufficient to support a conviction.

Henderson, J., dissenting.

Appeal from district court, Robertson county; W. G. Tallafarro, Judge.

Joe Arnett was convicted of rape, and he appeals. Reversed.

J. R. Astin and Simmons & Crawford, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of the offense of rape, and his punishment assessed at five years' confinement in the penitentiary; and he appeals.

The following is, in substance, all the evidence adduced upon the trial:

The prosecutrix, Clara Wiley, testified: That during August, 1898, she was working

on the Astin plantation, in Robertson county, near Mumford, and on that evening defendant came from Hearne, down the railroad, to Mrs. Astin's residence, where she was working. "He told me that he had come by my house, and that Uncle Joe (my husband) was sick, and he gave him a dram. He had some pears for Mrs. Astin, and delivered them. Shortly after that, I left Mrs. Astin's house and started home. I went up through the field by Lucy Scoggin's house, and through the wire fence, and started along the path between the corn and cotton towards my home. Just after I crossed the wire fence, some 15 or 20 steps from the fence, defendant overtook me, and put his hand on my shoulder and asked me for some. I told him to go away and let me alone. He caught me around the neck, and pushed me down between the corn rows, four or five steps from the path, and got on top of me. I tried to hollo, and did hollo some, and he reached down and got a handful of dirt and put in my mouth. I tried to push him off, and he scratched my face, and did what he wanted to with me. He ravished me. I did not consent for defendant to have carnal intercourse with me. He kept me down a long time. I don't know how long, but it seemed to me like it was two or three hours. He tore my dress nearly off. When he got through, I got up, and he hit me in the mouth with his hand, knocked out some of my teeth, and made my mouth bleed. I went on towards home, holloing as loud as I could. When I got nearly home, my husband, Joe Wiley, came out and met me, and I told him that defendant Joe Arnett had ravished me. I started up towards the manager's house, and met John Astin. I told him that Joe Arnett had ravished me. He was on his horse, and he rode back down the path, and I went with him and showed him where Joe Arnett ravished me. I lost my belt at the place where defendant assaulted me; and after I left the place, running towards home, and before I met my husband, I lost one shoe off my foot. After I showed John Astin the place on the ground that defendant assaulted me, I went down past Ruth Wyatt's house to the Astin residence, and then went back home. A day or two after that I walked to Hearne, about twelve miles, and put in the case against defendant before the justice of the peace." On cross-examination she further testified: "I do not know how old I am. I have been married to Joe Wiley twenty-five or thirty years. I had one child when I was married to him. It is not his child, and I had not been married to anybody when I had my first child. I have had sixteen children. My youngest child is about four years old. I reckon I must be about sixty-five years old. Joe Arnett did not offer me a dollar to have intercourse with me. I did not promise him that he might have carnal intercourse with me. He did not offer me a dress. When he overtook me at the place where he assaulted

me, the first I saw of him was when he put his hand on my shoulder. I looked around, and he had his great big thing out of his pants, and it was going this way. (The witness here moved her hand from right to left.) He just rode me nearly to death. Lucy Scoggins and Lottie Brown were at home when I passed their house, just before defendant assaulted me. I ran away from my husband a year or two ago, and went to Bryan, because he drank too much, and John Astin brought me back home. He did get after me sometimes about men giving me dips of snuff. I don't know what I was doing with my hands when defendant was ravishing me."

Joe Wiley, for the state, testified: "I am the husband of Clara Wiley. On the day of the assault, defendant, Joe Arnett, had been up to Hearne, and came home on the Brazos Valley Railroad. He came on from the station down by my house, and came in. He had a sack with something in it. He said, 'Uncle Joe, how are you?' and I replied that I was poorly, and 'you have just come from Hearne, and didn't bring your Uncle Joe something to drink?' He said, 'Yes; I have got something for you to drink,' and pulled out a little flask of whisky from his pocket and handed it to me. I took it, and drank nearly all of it, and handed the bottle back to him. After talking a few minutes, he left, carrying the sack with him. About three-fourths of an hour or an hour afterwards I heard my wife screaming. I ran out, and she was coming down the path from towards Lucy Scoggins' house. I met her about 100 yards from my house, and she told me that Joe Arnett had ravished her. She was howling and crying. She went on past our house, and about 50 yards beyond met John Astin on horseback. She turned around, and went back up the path with John Astin, to show him the place where she said Arnett ravished her." On cross-examination he stated that Clara Wiley and he had been married about 40 years; that she had 1 child when he married her, and that she has had 15 children since their marriage; that she was about 73 years of age, and 3 or 4 years older than he was. Her youngest child is about 3 or 4 years old, and she must have been 69 when it was born. Witness did not know whether she had ever had a change of life or not. "It is about one-fourth of a mile from our house to Lucy Scoggins' house. When I first hear my wife screaming, she was about 200 yards from my house, coming from towards Lucy Scoggins' house."

Joe Arnett, defendant, testified, as follows: "I live on the Astin plantation, near Mumford, and have lived there since I was a small boy. On the day that I was charged with raping Clara Wiley I was in Hearne, and left there and arrived at Mumford in the evening on the railroad. Mr. Ferguson gave me some pears at Hearne, in a sack, and told me to deliver them to Mrs. Astin. When I arrived at Mumford I left the depot, went down by the house

where the manager of the Astin plantation resided, and on down the road towards Mrs. Astin's, that left by Joe Wiley's house. When I got to Joe Wiley's I went in the house, and found Joe Wiley there, complaining of being sick." He then states substantially the conversation between them as did the witness Joe Wiley, and that he gave him the bottle of whisky, and he drank it nearly all up and returned it to him. "I then got up and went home. Went to Mrs. Astin's, and gave her the pears that Ferguson had sent. I saw Clara Wiley there. I went over to my house, a short distance from Mrs. Astin's. When I saw Clara Wiley at Mrs. Astin's house, she asked me if I had come by her house. I told her, 'Yes,' and that Uncle Joe Wiley said he was sick. After I had gone over to my house, pretty soon, Clara Wiley came by there, and said to me, 'You say Joe Wiley was sick?' I said, 'Yes; and I gave him a dram.' A few days before that I had asked her to give me some, and while she was talking to me at my house that evening she made mention of it. When I asked her for it, she had promised to give me some, and, when she made mention of it again, I asked her for some again; and she said that if I would keep my mouth, like Mr. Scott, she would give me some. I told her, if she would, I would give her a new dress. She said, 'No; I don't want a dress, because Joe Wiley would find it out; but you give me a dollar, and I can use it, and he won't find it out.' She said, 'I want to go to the baptizing next Sunday, and want a dollar to buy some things.' I said, 'All right, I'll give you a dollar if you will give me some.' She said, 'All right,' and started on up past Lucy Scoggins' house, towards her home. I wanted to go up to the barn and help feed the stock, so I started on up the same way that Clara went, as that was my best route to the barn. Clara passed Lucy Scoggins' house, and went on out through the wire fence; and I overtook her about the fence, and told her 'to give me some now, and I would give her a dollar.' She said, 'All right.' We went about fifteen steps inside of the fence, and about four or five steps from the path into the high corn, and she laid down, and I got on top of her; and before I got through she said: 'Be in a hurry. Somebody might come along here and catch us.' I said, 'I ain't done.' She began to push me, and said, 'Get up. Somebody might catch us.' I didn't get up, and she said, 'Get up, and give me a dollar.' And I said, 'I haven't got the dollar, but will give it to you some other time.' Then she got mad, and got up and started off down the path towards her home; and when she got nearly halfway home she began to holler and cry, and went on towards home, hollering and crying. That frightened me, and I concluded that I would not go on up to the barn, and I turned and went back down to the big pecan tree near my house; and after awhile John Astin came down there, and asked me what

I had done to Mrs. Willey. I told him, 'Nothing.' He said, 'She says you raped her.' I said I didn't do it; that she gave me some, and I promised her a dollar; and didn't have the dollar to give her, and she got mad. I told him what happened, just like I have told it here." On cross-examination he stated "that he had been indicted in this court once before for this same kind of an offense, and once for assault with intent to murder; that he pleaded guilty to an aggravated assault in the rape case, and was fined \$25 and costs, and paid it. In the assault with intent to murder case, he was acquitted."

John Astin, for defendant, testified: That on the evening of the alleged rape he was sitting on the gallery of the manager's house, north of Clara and Joe Willey's house, and about a mile from the Astin residence, and about 300 or 400 yards from Clara Willey's house. "About three-fourths of an hour or an hour after the train arrived, I heard some one screaming near Joe Willey's house. It sounded like perhaps a couple of hundred yards west of Willey's house. I jumped on my horse, and about 40 or 50 yards from her house met Clara Willey. She was crying, and said that Joe Arnett had raped her, and went with me to show me the place of the alleged rape. When we got within fifteen steps of the wire fence, near Lucy Scoggins' house, she pointed out the place to me, about four or five steps from the path in the high corn, and about fifteen steps from the wire fence. This was about seventy-five yards from Lucy Scoggins' house. I examined the ground, and saw no sign of a struggle. It looked like a person had lain down on the ground between the corn rows, but saw no corn broke down, no deep tracks, no dirt kicked up, and nothing that indicated any struggle between persons on the ground. I found no belt or piece of rope. I did not see any shoe about the place or along the path as we went there. Clara's dress was slightly torn. I saw no scratches or bruises about her face. I saw a little blood in her mouth. I went on down to a pecan tree near defendant's house, and found defendant, Arnett, there. He made no effort to escape. I asked him what he had done to old Clara. He said he had done nothing to her; and I said, 'She says you raped her.' He said: 'Mr. Johnnie, I didn't do it. I asked her for some, and she gave it to me. I first promised her a new dress, and she said, "No;" Joe Willey would find it out if I gave her a dress. And I promised her a dollar, and she said she would give it to me for a dollar; and, after I got it, I didn't have the dollar to give her, and then she went off towards home, hollering.' " Witness also stated that Clara Willey's reputation for virtue and chastity was bad, and that her front teeth had been out for several years before the alleged assault, and that she had run off from her husband, and he had brought her back home.

Ruth Wyatt, a sister of defendant, testified on his behalf: That she lived about 200 yards

from Lucy Scoggins' house, and about the same distance from where the assault is said to have occurred. That she was at home on that evening, and heard no outcry or screams at all, and, if there had been any screaming, she would have heard it. That she saw Clara Willey that evening after the assault is claimed to have occurred, and saw no scratches or bruises about her face, and no blood about her. Her dress was a little torn, but no more than usual. She generally wore ragged and torn clothes on the plantation at that season of the year. She also states that the prosecutrix's reputation for virtue and chastity was bad, and that she lost her front teeth a long time before the time of the alleged assault.

Lucy Scoggins and daughter, Lottie Brown, testified for defendant that they were at home on the evening of the alleged assault, and that prosecutrix passed their house on her way home, and about four or five minutes afterwards defendant came along; that they heard no outcry or screaming, and, if they had, would have gone out there; that their house was the nearest to the place of the alleged assault; that they did not know anything had occurred until John Astin came down.

The above is in substance all the testimony adduced on the trial, both on behalf of the state and the defendant.

In the view we take of the record, it is only necessary to consider appellant's sixth and seventh assignments of error, as follows: "Sixth. The court erred in not granting defendant a new trial, because the truth of the case is that said Clara Willey consented to having intercourse with defendant for the cash consideration of one dollar; that when she learned that defendant did not have the dollar to pay her, that she became enraged and endeavored to throw defendant off; that he resisted and tried to console said Clara, but she finally withdrew herself from defendant before he was ready for her to do so; that the cry and charge of rape is a fabrication. Seventh. The court erred in not granting defendant a new trial for the reason that the preponderance of evidence clearly shows that defendant had intercourse with said Clara with her consent,—that no force whatever was used; that, on account of illegal evidence having been admitted against him, the minds of the jury were influenced against him; that he has not had a fair and impartial trial; that justice has not been done him."

Among other things made apparent by the above statement of the evidence is this: The prosecutrix states: That appellant caught her around the neck, and pushed her down between the corn rows, four or five steps from the path, and got on top of her. That "I tried to hollo, and did hollo some; and he reached down and got a handful of dirt and put in my mouth. He tore my dress nearly off. When he got through he hit me in the mouth with his hand, knocked out some of my teeth, and made my mouth bleed. I went

towards home, hollering as loud as I could. I lost my belt at the place where the defendant assaulted me. I lost one shoe off my foot." She states that she had been married 30 years, had one child when she married, and had not been married to anybody when she had the first child; had had 16 children, the youngest being about four years old. She says "she reckons she must be 65 years old." Lucy Scoggins and Lottie Brown were at home when the prosecutrix passed their house just before appellant assaulted her. Prosecutrix ran away from her husband a year or two ago, and John Astin brought her back,—and that her husband did get after her sometimes about men giving her dips of snuff. Prosecutrix said she did not know what she was doing with her hands when defendant ravished her. The husband of prosecutrix testified that she was about 73 years of age; that it is about one-fourth of a mile from prosecutrix's house to Lucy Scoggins' house. When her husband first heard her screaming, she was about 200 yards from home, coming from towards Lucy Scoggins' house. It will be seen, from an inspection of this summary of prosecutrix's statement, that, if any rape was committed, it was committed four or five steps from the regular path leading by Lucy Scoggins' house to the home of prosecutrix. No witness testifies as to the clothing being torn off of appellant; but all of them state that it is absolutely false, and state that her teeth were knocked out long prior to the date she accused appellant of ravishing her. There is no proof of any shoe of hers being found at the scene, or any belt. In fact, her own testimony refutes her own statement. The rape, if any, occurred in the daytime, about 75 yards from the home of Lucy Scoggins. John Astin testified for defendant that he examined the ground immediately after outcry being made by prosecutrix, and saw no sign of a struggle, but the ground looked like a person had lain on the ground between the corn rows. Saw no corn broken down, no deep tracks, no dirt kicked up, and nothing that indicated a struggle between persons on the ground. Witness found no belt or piece of rope, and did not see any shoe about the place or along the path as they went there. Prosecutrix's dress was slightly torn, and he saw no scratches or bruises about her face. If prosecutrix had made any outcry, Lucy Scoggins and her daughter testified that they would have heard it; that prosecutrix passed their house, and four or five minutes afterwards defendant came along; that they heard no outcry or screaming. It was also proved that the dress of prosecutrix was a little torn, but that she generally wore ragged and torn clothes on the plantation at that season of the year. In the light of this record, we cannot let this verdict stand. If a rape occurred, it was in broad daylight. There was no outcry at the time, and, so far as the record shows, no scuffle, no injury to the prosecutrix; and none of the facts that she states that would

go to corroborate her are proven, but all the facts, save and except the bare fact that when she was near home she was heard hollering and crying, show that her statement is a fabrication. This, together with the further fact that appellant made no effort to escape, but remained upon the plantation and gave an explanation about the matter when first approached in keeping with the probable truth of the matter, all lead irresistibly to the conclusion that appellant is not guilty of rape. The judgment is therefore reversed, and the cause remanded.

HENDERSON, J. (dissenting). By the opinion of a majority of the court this case has been reversed and remanded on the ground that the evidence does not support the verdict. I have examined the record carefully, and cannot agree to this disposition of the case, without consenting to overthrow a well-established doctrine of this court, founded upon a long line of precedents, to the effect that we will not disturb a verdict, where the testimony is sufficient to support it, although to our minds the weight of the testimony may be against the verdict. In such case we concede that the judge below, who heard the testimony and saw the witnesses, is in a far better position to judge of their credibility than this court. The testimony is contained in the opinion of the majority of the court, and it is not necessary here to restate it. There is no controversy as to the act of carnal intercourse; the only question being whether or not the same was accomplished with consent, or by force and without the consent of the prosecutrix. As to this matter there is a clear conflict between the prosecutrix, on one side, and the defendant, on the other; these being the sole witnesses who testified to the act of intercourse, and what occurred immediately thereafter. I do not understand, by the opinion rendered by the majority, that the court do not concede that the testimony of the prosecutrix makes out a complete case of carnal intercourse accomplished by force. It is insisted, however, that her credit is shaken because defendant has contradicted her testimony in certain particulars. For instance, there is some controversy about her giving immediate outcry. She says that while the act was being accomplished she hollered or tried to holler, but defendant prevented her. The proof shows, unquestionably, that immediately afterwards she ran from the place to her home, hollering and screaming; for John Astin, the principal witness for defendant, testified that he heard her screams while he was at his manager's house, some 400 yards from Joe Wiley's, and it sounded as if she was 200 yards west of her house, and went down there on his horse, and met her going to her house. And I consider it an important circumstance of corroboration that he states he saw blood in her mouth,—the prosecutrix having stated that defendant

struck her in the mouth. As to not finding the shoe and belt, the record does not show that any one looked for them. Prosecutrix pointed out the place where she was thrown down; and, while Astin stated he saw no evidence of the ground being torn up, yet there were indications on the ground that some person had lain down there. And I further consider it significant that appellant did not go to his home, which was close by, but was found down near the river, under a pecan tree, by his employer, Astin. It occurs to me that the theory of the defense is extraordinary. It asks us to assume, in the face of the prosecutrix's testimony to the effect that she was raped by force, that she had copulated with defendant voluntarily, and then, because he refused to pay her, that she gave the alarm; that is, having consented to an act of copulation, because he refused to pay her she made outcry and published her own shame. This, to say the least of it, is calculated to tax one's credulity. I cannot regard it as a safe rule to overturn the long-established precedents in favor of the inviolability of verdicts which, though contradicted, are supported by evidence, and which have received the approval of the trial judge. I think the rule on this subject was well stated in *White v. State*, 34 Tex. Cr. R. 153, 29 S. W. 1094. That was a case for assault with intent to murder. There were three eyewitnesses to the assault. The prosecutor alone made a case for the state, and he was directly contradicted by the two other witnesses, who made a complete case of self-defense. The prosecuting witness was also impeached by five witnesses, who stated that his reputation was such that he ought not to be believed on oath. The jury, however, convicted defendant, and the judge below approved the sentence. On appeal this court said: "This court has sometimes interfered, even after the approval of the verdict by the court below, and granted a new trial, where there was not sufficient evidence to sustain the finding of the jury; but the instances are rare where we have interfered, where there was evidence to sustain the verdict, though apparently the record disclosed that the weight or preponderance of testimony was the other way,—this court, in that regard, conceding much to the verdict of the jury, and the approval of the judge below, who saw and heard the witnesses testify, and on this account were better able to judge of their credibility than we, who have to pass upon the case from a bare inspection of the record. And in this case we follow the rule heretofore laid down,—that the jury having solved the issue presented in the testimony under a fair and proper charge of the court, and having found defendant guilty of an assault with intent to murder, and that verdict having been approved by the judge who tried the case, and there being sufficient evidence in the record to sustain that verdict, we will not disturb it." The rule above laid down

has been followed from the early history of our jurisprudence up to the present time. See *White v. State* (decided at the present term) 50 S. W. 1015. Suffice it to say, in this case, the jury had all the testimony, pro and con, before them, and although the prosecutrix contradicted herself in some collateral matters, and her testimony was directly traversed by the evidence of the defendant himself, yet the jury believed her statement; and, no doubt, they felt the more inclined to do this because the testimony of the appellant was discredited by an admission on his part that he had previously been indicted for a similar offense, and entered a plea of guilty on the indictment to an aggravated assault. I do not believe this court is authorized to disturb the finding of the jury, and that the action of the court makes a dangerous precedent in the administration of law.

JACKSON v. STATE.

(Court of Criminal Appeals of Texas. May 24, 1899.)

CRIMINAL LAW—CONTINUANCE—INSTRUCTIONS—HOMICIDE—MOTION FOR NEW TRIAL—FORM.

1. Six months after the indictment, defendant caused an attachment to issue for an absent witness who had failed to obey a subpoena, the date and return to which do not appear. The return to the attachment, the date of which also does not appear, shows that he lived in another county than that to which the attachment issued. For about seven months from the date of the attachment, defendant made no effort to secure the attendance of the witness. Then a subpoena to the county in which the return showed he lived was returned "Not found," and stated that the witness was in still another county. *Held*, that it did not show diligence sufficient for a continuance.

2. An instruction unsupported by evidence was properly refused.

3. There is no error in an instruction if, construed with others given, it is correct.

4. One convicted of murder in the second degree cannot complain of an instruction "that at the time defendant formed the design to take the life of deceased his mind was calm and deliberate," etc.

5. It is improper to make a motion for a new trial in the form of an argument.

Appeal from district court, Tyler county; Stephen P. West, Judge.

Gilford Jackson was convicted of murder in the second degree, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at seven years' confinement in the penitentiary.

Appellant's first bill of exceptions complains of the action of the court in overruling his motion for continuance. An inspection of his application shows that he only states what the witness Frank Stanley would testify. For diligence, the application shows that on December 23, 1897, about six months after

the indictment was returned, he caused an attachment to issue for said witness to Tyler county, which was returned, showing that said witness lived in Angelina county. The date of the return of this attachment is not shown. It further appears that said attachment was preceded by a subpoena to Tyler county. The witness failed to obey. From the date of attachment, December 23, 1897, to July 12, 1898 (about seven months), appellant shows no effort to secure the attendance of the witness Stanley. On July 12th he secured a subpoena to Angelina county, which was returned July 20th, "Not found," stating that the witness was in Jasper county. From the 23d of December to July 12th appellant had nearly seven months to locate said witness, yet no process was issued. If the witness was in Angelina county on December 23, 1897, appellant would have secured the attendance of said witness if he had promptly had process issued. The application does not show the residence of the witness. The date of the subpoena first issued and alleged to be disobeyed by the witness should be given, and the return on the same. We do not think the application shows diligence, or that there was any reasonable expectation of securing the attendance of the witness, or that the testimony of the witness was probably true in the light of the record before us. *Tanner v. State* (Tex. Cr. App.) 44 S. W. 489.

Appellant's second bill is with reference to the refusal of the court to give the following special charge asked by him: "If death was caused by the gross negligence of physicians or attendants," etc., he would not be guilty. There was no error in refusing to give this charge, because the record does not disclose evidence authorizing the court to charge upon that phase of the law. Without reviewing all the evidence on this question, suffice it to say that the only support of appellant's contention of gross negligence is based on the fact that some of the physicians testified that they thought it best to amputate deceased's leg; but other physicians testified that they thought it best not to do so. The whole record shows that deceased received the very best care and attention, and all that could be done, except that the amputation of his leg was done to save his life. Mr. Greenleaf lays down this proposition: "If death ensues from a mortal wound given in malice, but not in its nature mortal, but which being neglected or mismanaged the party died, this will not excuse the prisoner who gave it, but he will be held guilty of murder." 1 Greenl. Ev. § 139. We do not think there is any evidence of gross neglect or manifestly improper treatment and mismanagement on the part of the physicians and nurses who attended deceased. *Powell v. State*, 13 Tex. App. 244; *Morgan v. State*, 16 Tex. App. 621.

Appellant's third bill of exceptions complains of this phrase in the court's charge: "That at the time defendant formed the de-

sign to take the life of deceased his mind was calm and deliberate," etc. This was a part of the court's general charge, and, taken in connection with other portions of the charge, there is certainly no error in it. At all events, appellant was found guilty of murder in the second degree, and it leaves him without a basis for complaint in this respect. *Habel v. State*, 28 Tex. App. 599, 13 S. W. 1001; *Gonzales v. State*, 35 Tex. Cr. R. 338, 33 S. W. 363; *Brown v. State* (Dallas term, 1899) 50 S. W. 354.

Appellant's fourth bill of exceptions is reserved to the action of the court overruling his motion for new trial. The motion is of great length,—in fact it covers 27 pages of this record. However, we have examined all of appellant's complaints as set up in his motion, and do not think there is any merit in the same. The charge of the court has been carefully scrutinized, and we cannot say that there is any error such as was calculated to injure the rights of appellant. We wish to say here that it is not proper to make a motion for new trial in the shape of an argument. There appearing no error in the record calculated to injure the rights of appellant, the judgment is in all things affirmed.

LADWIG v. STATE.

(Court of Criminal Appeals of Texas. May 24, 1899.)

INTOXICATING LIQUORS—MINUTES OF COUNTY COMMISSIONERS' COURT—PUBLICATION OF RESULT OF ELECTION—LOCAL PROHIBITION.

1. In a prosecution for violating a local prohibition law, the minutes of a county commissioners' court are admissible, although not signed by the judge, or attested by the clerk, where the proof is uncontroverted that the books containing the minutes were the record minutes of the county commissioners' court.

2. In a prosecution for violating the local prohibition law it will be presumed that a meeting of county commissioners' court held on the 21st day of November was held pursuant to a call for a special session, although it appears that a regular session was held on the 14th, and an order made for an adjournment to November 21st, which adjournment the court had no authority to make.

3. In a prosecution for a violation of the local prohibition law, where it is alleged that the election determining that the sale should be prohibited in a certain precinct of a county was held in 1892, evidence that local option was in effect in the whole county under a former election is irrelevant.

4. Rev. St. art. 3391, provides that the order of court declaring the result of an election and prohibiting the sale of liquors shall be published for four successive weeks in a newspaper to be selected by the county judge, and, if there is no newspaper published in the county, then the county judge shall cause publication to be made by posting copies of said order in three public places, and that the fact of publication in either mode shall be entered by the county judge on the minutes of the commissioners' court, and such entry shall be held sufficient prima facie evidence of such fact of publication. In a criminal prosecution for violation of a local option law an entry made by a county judge in the following words: "I hereby certify that due proclamation of the result of the election held in justice

precinct No. 7, Bell county, on the 17th day of December, 1892, has been made as the law requires,"—was introduced in evidence. *Held*, that it did not show such publication as will constitute a *prima facie* case under the statute.

5. In a criminal prosecution for violation of a local prohibition law it is error to refuse to submit to the jury a theory of defendant's defense which has some evidence to support it, though such evidence be of slight weight.

6. In a prosecution for an unlawful sale of liquor, the mere fact that defendant did not make any profit out of the transaction will not deprive it of its character as a sale of intoxicating liquors, where the other constituent elements are present.

Appeal from Bell county court; John M. Furman, Judge.

Gus Ladwig was convicted of violating the local option law, and appeals. Reversed.

A. M. Monteith and Hair & Pendleton, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. There was no error in the action of the court admitting proof by Port Polk that the town of Killeen is in precinct No. 7 of Bell county, although this witness stated he had never seen the lines of said justice precinct run. The sale was shown to be in Killeen, and it was shown that the justice court of precinct No. 7 was held in Killeen. Proof on this point of the order of the court making Killeen the place to hold said justice court of precinct No. 7 was properly admitted.

Appellant objected to the minutes of the county commissioners' court being admitted, because the same were not signed by the judge, nor attested by the clerk. It is true, the statute authorizes the minutes to be signed by the judge and attested by the clerk, but this has been held to be directory and not mandatory. The proof was uncontroverted that the books containing the minutes were the record minutes of the county commissioners' court. *Jordan v. State*, 87 Tex. Cr. R. 224, 38 S. W. 780, and 39 S. W. 111.

Appellant also urged as an objection to the introduction of the order for the election that the order was made on the 21st day of November, 1892; that the commissioners' court met in regular session on November 14, 1892, and there was no order authorizing the special session on the 21st, the order being merely for an adjournment to that date; and inasmuch as the commissioners' court was authorized to meet on the second Monday of November, which was the 14th, and to hold session for one week, that the court was not authorized to adjourn to the 21st. Although no order was produced calling the special session of the court for the 21st of November, we will presume, in favor of the jurisdiction of the court, that the meeting of the court on the 21st of November was in pursuance of a call for a special session. Rev. St. arts. 3384, 3386, 3390. It was competent for the judge or any three commissioners to call a special term of said court; and, although the order

may show on its face an adjournment, the subsequent meeting of the court on the 21st will be treated as a special or called session, and the court could then transact such business as might be brought before it, including an order for the local option election.

Appellant offered to introduce the proceedings showing an election for local option in the whole of said Bell county in 1877, and that local option carried in that election. This was objected to by the state on the ground that it was irrelevant, and was sustained by the court. Appellant insists that said proof was admissible for the purpose of showing that under said former election local option was in effect in the whole of Bell county, and that the local option election in precinct No. 7 of Bell county was not authorized. Formerly it was held that, although local option may have been adopted in the entire county, the question could be brought up and voted on in the precinct. *Whisenhunt v. State*, 18 Tex. App. 491. But under the act of 1893, and as construed, such does not seem to be the rule. *Ex parte Field* (Tex. Cr. App.) 46 S. W. 1127. This election, however, was held in 1892, while the rule laid down in *Whisenhunt v. State* was in force; and under that decision it was competent to hold the election in precinct No. 7 while local option was in force in Bell county.

Appellant objected to the following order of the court, offered for the purpose of showing that the result of the election had been duly published: "I hereby certify that due proclamation of the result of the election held in justice precinct No. 7, Bell county, on the 17th day of December, 1892, has been made as the law requires. [Signed] John M. Furman, County Judge of Bell County." Appellant objected to this, because (1) it does not show in which mode the proclamation of said order was made,—whether by posting notices or by publication in a newspaper for four consecutive weeks; (2) the certificate and entry does not show said order to have been published for four successive weeks in any newspaper in Bell county; (3) the certificate and entry does not show that any newspaper was selected by the county judge in which to publish said proclamation of said order; (4) said certificate and entry does not state any fact or facts, but states a conclusion and opinion of the county judge that said order had been duly and legally proclaimed as required by law. These objections were overruled by the court, and the order admitted. In this connection we have searched the record to ascertain if any other proof was made by the state of publication than this certificate or order of the judge from the minutes of the court, but find none. Appellant objected to the court's charge on this subject, and asked the following, which was refused: "You are charged that the order of the county judge of Bell county, Texas, in Book G, page 428, Minutes of the Commissioners' Court, recites that due proclamation had been made of the order by

the commissioners' court declaring that prohibition had carried in justice precinct No. 7, Bell county, Texas, but does not recite how said proclamation had been made, and the same raises no presumption that said proclamation had been duly made, and without said evidence there is no legal showing that local option was in force in said precinct; and, this being the case, you must find the defendant not guilty." Article 3391, Rev. St., is as follows: "The order of court declaring the result and prohibiting the sale of such liquors shall be published for four successive weeks in some newspaper published in the county wherein such election has been held, which newspaper shall be selected by the county judge for that purpose. If there be no newspaper published in the county, then the county judge shall cause publication to be made by posting copies of said order at three public places within the prescribed limits for the aforesaid length of time. The fact of publication in either mode shall be entered by the county judge on the minutes of the commissioners' court. An entry thus made, or a copy thereof certified under the hand and seal of the clerk of the county court, shall be held sufficient prima facie evidence of such fact of publication." Now, we hold that the order adduced in evidence was not in compliance with the above statute. Said order merely certifies a conclusion of the judge, and does not recite how said result was published,—whether by posting or by publication in some newspaper for the required length of time. It does not embody a statement, as required by the statute, and, in the absence of some supplementary proof, did not establish on behalf of the state the prima facie case as contemplated by the statute. We have heretofore held that, where the statute was complied with in regard to the publication putting local option into effect, the burden was then on defendant to show that some of the required preliminary steps had not been taken. *Shields v. State* (Tex. Cr. App.) 42 S. W. 398. We also held that if the entry from the county court minutes showing the order putting local option into effect is not introduced in evidence, but parol evidence is resorted to to show the publication, then it is error to charge the jury that local option had gone into effect. *Jones v. State* (Tex. Cr. App.) 43 S. W. 981. We hold that the order of the county judge must show the character of publication, how published, and the required length of time; and that the order here introduced was not in compliance with the statute, and did not constitute a prima facie case contemplated by the statute; and that the court, in the absence of any other proof on the subject, should have given the requested charge.

Appellant offered some proof that he was requested by one Harkins, in conjunction with others, who claimed to be in a club, to send to Belton for a cask of beer; that he was in the habit of sending for beer, the parties furnishing the money, and sometimes,

where he knew the parties, he would furnish the money himself, and they would repay him, but that he never made any profit on the beer; that on the day in question Harkins did not give him the money, but told him to send for two gallons of beer for him; that subsequently he told him that he would be absent, and to let one Nall have his beer; that in the evening, when the beer came, the prosecutor, Port Polk, applied to him for the beer, and said he wanted Nall's beer, and paid him a dollar; that he then thought it was the same beer for which he had sent for Harkins; that Nall was present, and Harkins came, and helped drink the beer; that he heard Polk tell Harkins it was his beer he was drinking. The theory of defendant was that he did not sell the beer, but merely ordered it for Harkins, and that he understood defendant to apply for Harkins' beer. It is true this evidence is rather shadowy, but we are not prepared to say that the court should not have given a charge presenting this issue of the case on behalf of defendant, as the court gave no charge presenting this view of the case. Of course, if it was a sale to Polk,—and his testimony amply supports this theory,—then it would be a sale, regardless of whether appellant made any profit or not on the beer.

Appellant also complains that the court refused certain evidence offered by him to sustain his theory that it was not a sale by him to Polk of the beer in question, but that he sent for the beer on behalf of Harkins, and that, when Polk received it and paid for it, he believed he was delivering him Harkins' beer, and had no idea of selling it to Polk. In our opinion, this testimony was admissible. The judgment is reversed, and the cause remanded.

DUNLAP v. STATE.

(Court of Criminal Appeals of Texas. May 24, 1899.)

SCHOOL CENSUS—REFUSAL TO ANSWER QUESTIONS—INFORMATION.

An information for refusal to answer to the ages of children, under Rev. St. art. 3964 (Pen. Code, art. 289b), requiring the school trustee to take the census of all children between certain ages in his district, and prescribing a penalty against persons refusing to answer as to the ages of their children, must allege that accused is a parent or guardian of children within the scholastic age.

Appeal from Victoria county court; J. L. Dupree, Judge.

E. L. Dunlap was convicted on an information charging him with refusing to answer to the names and ages of his children, on being examined by the school trustee in taking a scholastic census, and he appeals. Reversed.

Samuel B. Dabney and Proctors, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted on an information charging him with refusing to answer under oath as to the names and ages of his children, under article 3964, Rev. St., and article 289b, Pen. Code. Said article 3964 requires the school trustee to take a census of all the children in his school district between the ages of eight and seventeen years, etc., and return said list to the county superintendent by the first Monday in June of each year. It also empowers said trustee or trustees to administer oaths, and denounces a punishment against any person refusing to answer questions, as to the ages of their children, under oath, and it further requires the county superintendent by the first Monday in July to aggregate the whole number of children in the county, and make an abstract in duplicate, one to be filed with the county clerk, and the other to be forwarded to the state superintendent. Article 289b, Pen. Code, seems to be taken from article 3964, and culls out, among other things, the punishment denounced against a person refusing to answer under oath questions in reference to the ages of his children. By the provisions of article 3964 the census to be taken of the school children applies only to those between the ages of eight and seventeen years, and to secure a proper census of such children the trustees are authorized to administer oaths to parents and guardians. Then it would follow, where a party is indicted or informed against for refusing to answer under oath in regard to the ages of his children, the indictment or information should allege that he had children, or was the guardian of children, of scholastic age,—that is, between eight and seventeen; for this is the oath required, and it is for this purpose the trustee is authorized to take the census. He cannot take the census of children under eight or over seventeen years of age. The punishment against the party failing to answer under oath does not apply when the children are over seventeen and under eight years of age, but applies only to children of the scholastic age. Therefore the fact that he had children of the scholastic age is a necessary constituent element of this offense,—in fact, without it there can be no offense. The information does not allege that the accused was a parent or guardian of children covered by the scholastic age, and it is therefore insufficient. The judgment is reversed, and the prosecution ordered dismissed.

EDMONDS v. STATE.

(Court of Criminal Appeals of Texas. May 24, 1899.)

CRIMINAL LAW—TRIAL—INSTRUCTIONS—REVIEW.

1. On trial for theft, an instruction that no presumptions arise as to the defendant's guilt because the property is found in his possession three days after the alleged theft, and that such possession is not the "recent possession" of stolen property, as that term is understood in law, is

properly refused as being on the weight of evidence.

2. An instruction cannot be reviewed where the record contains no bill of exceptions, and the main charge of the court is not excepted to in the motion for new trial.

Appeal from district court, Ft. Bend county; Wells Thompson, Judge.

Sam Edmonds was convicted of theft, and appeals. Affirmed.

Spencer C. Russell, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of the theft of a horse, and his punishment assessed at five years' confinement in the state penitentiary. The record contains no bill of exceptions, nor is the main charge of the court excepted to in the motion for new trial. Therefore appellant's third assignment, criticizing the charge upon circumstantial evidence, cannot be reviewed. Code Cr. Proc. art. 723; *Stewart v. State* (Tex. Cr. App.) 50 S. W. 459.

Appellant asked the court to charge the jury as follows: "You are instructed that the burden is upon the prosecution to prove beyond a reasonable doubt that the defendant is guilty of stealing the horse in question, and no presumptions arise as to the defendant's guilt because the property was found in his possession three days after the alleged theft, such possession not being the 'recent possession' of stolen property as that term is understood by law." We do not think the court erred in refusing to give this charge. The same is upon the weight of the evidence. *Wheeler v. State*, 34 Tex. Cr. R. 353, 30 S. W. 913. Without reviewing the evidence in detail, we think the same amply supports the verdict of the jury. *Roberts v. State*, 17 Tex. App. 82; *White's Ann. St. § 1509*. Finding no error in the record, the judgment is affirmed.

BRISTOW v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1899.)

ASSAULT—INTENT TO COMMIT BATTERY—ABILITY—INSTRUCTION.

1. Accused had threatened to beat prosecutor to death the first time they met again, and a few days thereafter he approached him on the highway, in an angry and threatening manner, telling him, if he had a knife, to use it, and that prosecutor was afraid to do so, and then ran his hand into his pocket, but suddenly stopped when prosecutor pointed a pistol at him. *Held* to constitute an assault.

2. Where accused approached prosecutor in a threatening manner, with the intent to assault him, challenging him to defend himself with a knife, and was stopped before he got close enough to commit a battery by prosecutor pointing a pistol at him, a request to charge that accused had not committed an assault because there had been no present ability to commit a battery was properly refused.

Appeal from Atascosa county court; N. R. Wallace, Judge.

Lou Bristow was convicted of assault, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of a simple assault. Two errors are assigned: First, the court erred in refusing to give certain requested instructions; and, second, the insufficiency of the evidence to support the conviction.

The evidence shows: That Rielly, the alleged assaulted party, was traveling along in his wagon, when defendant hurriedly approached him on horseback, and, when first seen, was about 40 or 50 yards distant. As he approached nearer, he called out to Rielly, in an angry and threatening manner, at the same time spurring his horse to a more rapid gait: "Have you got your butcher knife? If you have, use it, God damn you;" or "You can't use it;" or, "You are afraid to use it." That at this juncture appellant changed his bridle reins from his right to his left hand, and, while riding rapidly towards witness, ran his right hand in his pocket. That when within five or six feet of witness, witness pointed his pistol at defendant, who suddenly stopped his horse. That appellant had nothing in his hands that could be seen. That witness could not see his right hand, because it was in his pocket. That defendant would have still further advanced on him, if he (witness) had not stopped him with his pistol. A couple of days before this occurrence, appellant cursed Rielly, and said: "God damn you, you can fix yourself, for the first time I meet you I am going to beat you to death." This was the first meeting after the threat had been made. In our judgment, this clearly shows an assault.

The court was requested to charge the jury "that a mere attempt to commit a battery, not coupled with the present ability, is not sufficient to establish an assault, no matter how threatening the gesture, or how furious the words used; that, in order to effect the legal injury indictable as an assault, appellant must have the ability to commit a battery by physical violence on the person charged to have been assaulted with the means used; and in this case, if you believe from the evidence that the defendant was not close enough to J. M. Rielly to have committed a battery by physical violence upon said Rielly, by the means used, you should acquit." We do not believe the facts called for this charge. It is plain from the testimony that defendant intended to commit a battery; that he was approaching his intended victim in a violent and rapid manner, and had made demonstrations to use whatever was in his pocket, and at the time Rielly drew his pistol the accused was still approaching him in the same excited, angry, and threatening manner, indicating by his acts and by his words that he intended to engage him in a serious personal rencoun-

ter, because he had challenged him to use his butcher knife; and, but for the prevention of the assault by Rielly using his pistol, he would have reached him quickly. This, as we understand it, comes within the well-marked line of decisions in this state, and makes it an assault, and there was no error in refusing the charge, because not applicable to the facts adduced upon the trial. The judgment is affirmed.

FRICKIE v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1899.)

LOCAL OPTION — COUNTY COURTS — ORDERS FIXING TERMS — VALIDITY — EVIDENCE — COPIES OF RECORDS — INSTRUCTIONS — PREJUDICE — NEW TRIAL.

1. Under Rev. St. art. 1168, authorizing the commissioners' court to fix the terms of the county court, and providing that when the terms are fixed the court shall not change their number for one year, an order changing the terms within a year after a previous order is not void, where the new terms are to commence after the expiration of the year.

2. Under Rev. St. art. 2306, providing that copies of records of courts certified by the lawful possessor shall be admissible in evidence where the records are admissible, a certified copy of an order of the commissioners' court for a local option election is admissible in evidence.

3. On a trial for violating a local option law, an instruction that that law does not recognize any degrees in intoxication, and any alcoholic liquor which will produce intoxication in any degree is in law intoxicating liquor, is not prejudicial to accused, since, if the liquor was intoxicating, and unlawfully sold, accused was guilty, whether the purchaser was intoxicated in any degree or not.

4. An accused, on a motion for a new trial for newly-discovered evidence, must show that the evidence relied on came to his knowledge after the trial.

Appeal from Bosque county court; W. B. Thompson, Judge.

Louie Frickle was convicted of violating the local option law, and he appeals. Affirmed.

Word, Dillard & Word, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the local option law. The first bill of exceptions questions the jurisdiction of the county court to hear and determine the cause. In this connection it is made to appear that the commissioners' court, on the 16th of May, 1895, entered an order to the effect that the county court should hold four terms each year, beginning, respectively, on the first Monday in March, and the third Mondays in May, July, and October. On the 14th day of May, 1896, said commissioners' court ordered there should be four terms of the county court each year for criminal, civil, and probate business, and one term for criminal and probate business. The four terms referred to were to begin on the third Mondays in March, May, July, and October, and the other term was to begin on the first Monday

in January. The point of contention arises out of the fact that it was not a year from the 16th of May, 1895, when the first order was entered, to May 14, 1896, when the second order was made. Our constitution (article 5, § 29) provides that the county court shall hold at least four terms for civil and criminal business annually, as may be provided by the legislature or the commissioners' court, provided, the commissioners' court of any county, having fixed the time and number of terms of the county court, shall not change the same again until the expiration of one year. Article 1168, Rev. St., authorizes the commissioners' court, by an order entered at a regular term, to provide for more than four terms of the county court each year, and to fix the time at which each of the four terms shall be held, limiting the number to six annually, provided, "that when the commissioners' court shall have fixed the number of terms of the county court by an order entered of record, said court shall not change the number of terms of the county court for one year from the date of the entry of the original order fixing the terms of the county court." Now, under this language it is contended that, because the second order was entered on the 14th day of May, 1896, a full year not having elapsed by two days, the order is void. We do not agree with this contention. As we understand the object of the constitution, as well as the statutes, a change in the terms of the court—that is, the time of holding said terms—shall not occur within the year. If the second order had provided that either of the terms of the county court should take place within 12 months from the date of the entry of the first order, the contention of appellant would be sound; but the statute, in our opinion, does not refer to the date of the entry of the order, but to the time at which the court will be held under said order.

Motion was made to quash the indictment for several reasons. We deem it unnecessary to discuss them. The indictment is in good form, and such as we have universally approved.

Appellant objected to the introduction in evidence of the certified copy of the order of the commissioners' court ordering the election for local option to be held on the 8th of June, 1895, because it was not the best evidence, and because a copy had not been filed among the papers, nor had notice been given to defendant, and because the absence of the original order of the commissioners' court ordering the election for June 8, 1895, had not been accounted for. The same objections were also urged to the copy of the order of the commissioners' court declaring the result of the election. There is no merit in these contentions. See Rev. St. art. 2306.

The county attorney requested, and the court gave, the following charge: "The law does not recognize any degrees in intoxication, and any alcoholic liquor which will pro-

duce intoxication in any degree in law would be intoxicating liquor." This is rather a singular charge. We are of opinion that under the local option law, whether or not the law recognizes such degrees or not would be immaterial. If the liquor was intoxicating, and was sold in violation of the law, the party would be guilty whether the purchaser was intoxicated in any degree. We do not see, however, how this charge could have injured appellant.

Attached to the motion for new trial is the affidavit of one E. J. Wilson, who states that he lived in Clifton, Bosque county, in the spring of 1897, and knows that all kinds of liquids were at that point called "gingerine"; that when wanting water he had often heard parties call for "gingerine" and get water; that the term "gingerine" was a general one, and did not mean anything in particular; that he was a boot and shoe maker by trade, and now resided in Meridian, Bosque county; that he never made this known to defendant or his attorneys until after the trial. This is not shown to be newly-discovered evidence. Appellant, in his motion, alleges as one of the grounds of the same that he is entitled to a new trial "because of the newly-discovered evidence of E. J. Wilson, as per affidavit attached." He does not swear to this, and this is not a statement of the fact that he had no knowledge of this transaction prior to the trial. If Wilson states the truth, it seems to us that it would have been a very easy matter for appellant to have known whether the testimony could be obtained, for Wilson states in his affidavit "that all kinds of liquids at Clifton were called 'gingerine,' and that in calling for water he had often heard parties ask for 'gingerine' and get water." It was at Clifton where this offense was alleged to have been committed, and the liquid bought was "gingerine."

Some special charges were asked by defendant, which we believe were properly refused by the court. If the testimony of Kell, the main state's witness, be true, this judgment should be affirmed. The witness Johnson is also shown to have bought gingerine, and testified to the fact that it would produce intoxication, and that he himself felt the effect of it. The judgment is affirmed.

PIKE v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1899.)

INTOXICATING LIQUORS—VIOLATION OF LOCAL OPTION LAW—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR—ASSIGNMENT OF ERROR—REVIEW.

1. Where, in a prosecution for selling blackberry cordial in violation of the local option law, defendant admitted the sale, but denied that it was intoxicating, evidence that drunken men were seen about his place of business about the time of the sale in question is admissible on the issue as to whether it was intoxicating.

2. In a prosecution for an illegal sale of intoxicating liquor on Sunday, the 7th of a certain

month, testimony of a witness that he saw the prosecuting witness drunk on a Sunday evening in the early part of the month, with a certain other witness, who testified that he was once with the prosecuting witness to whom the liquor was claimed to be sold, and said that they drank liquor bought of defendant, is admissible.

3. The sale of intoxicating liquor in a local option district except on prescription, or for sacramental purposes, as allowed by the statute, is a violation of the law, regardless of the intent or purpose for which it is sold.

4. In a prosecution for illegally selling intoxicating liquor the court charged that, if the liquor in question could be used as a beverage, and when so used in sufficient quantities it would produce intoxication, it was an intoxicating liquor, within the meaning of the statute, etc. *Held*, that if the charge was inaccurate, it was harmless error, as it was unnecessary to define the term "intoxicating liquor," because it is commonly understood.

5. It is unnecessary that an intoxicating liquor be manufactured and sold with intent that it be used as a beverage, to come within the prohibition of the local option law.

6. An assignment of error to a part of a charge defining what is meant by intoxicating liquors will not be considered where there is no bill of exceptions thereto in the record, no exception sufficiently reserved in the motion for a new trial, nor was any special charge requested as to this particular.

7. In a prosecution for selling intoxicating liquor, evidence of other sales of the same compound is admissible on the question of intent.

8. Evidence in a prosecution for an illegal sale of intoxicating liquor showed that the prosecuting witness who bought the liquor was made drunk by it. Another witness who drank it got dizzy, and his head swam. Various others testified that it contained 13 per cent. alcohol, and would intoxicate, and that it had about the same strength as beer. *Held* to show that it was intoxicating.

Henderson, J., dissenting.

Appeal from Bosque county court; H. C. Cooke, Judge.

J. D. Pike was convicted for violating the local option law, and appeals. Affirmed.

W. F. Schenck and Wm. M. Knight, for appellant. H. S. Dillard and Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was indicted and convicted for unlawfully selling intoxicating liquor in violation of the local option law, and his punishment assessed at a fine of \$25 and 20 days' imprisonment in the county jail.

Appellant's first assignment of error is: "The court erred in permitting the witness Conley to testify, over the objections of defendant, that during the months of July and August, 1898, while defendant had blackberry cordial for sale, the witness frequently saw drunken men about his place of business." We think the testimony was relevant and material. Appellant having admitted selling blackberry cordial to the prosecuting witness, Harris, but denied that it was intoxicating, it certainly would be admissible and proper to prove that numerous parties were seen around appellant's drug store drunk about the time that appellant admits having sold the blackberry cordial to the witness Harris. Mr. Wharton says, "Relevancy is that which conduces to the proof of a pertinent hypothesis,

being that which logically affects the issue." Whart. Cr. Ev. § 33. The testimony may be remote, and its probative force weak, but it complies with the simple test of relevancy. Does the fact offered in evidence go to sustain the hypothesis, that is, does it tend to show that appellant sold the intoxicating liquor? Mr. Greenleaf (volume 1, § 50) says that evidence is relevant "if it tends to prove the issue or constitute a link in the chain of proof, although alone it might not justify a verdict in accordance with it." We think the evidence was admissible on the issue as to whether the same was intoxicating. Black, Intox. Liq. § 497; Hartgraves v. State (Tex. Cr. App.) 43 S. W. 331; Com. v. Nally, 151 Mass. 63, 23 N. E. 660; Com. v. Wallace, 143 Mass. 88, 9 N. E. 5.

Appellant's second assignment is "that the court erred in permitting the witness Conley to testify that he saw Bob Harris drunk on one Sunday evening in the early part of the month of August, 1898." The date of the alleged sale was Sunday, August 7, 1898. The testimony recited in the bill and in the statement of facts contradicts appellant's proof, and shows that the witness testified that he saw the prosecuting witness drunk one Sunday evening in the early part of August, 1898, and late in the evening. The witness states that witness Fred Tidwell was with him. The judge, in his explanation to the bill, states that Tidwell testified that he was with Harris, the party to whom the cordial was sold, only once at the stable, and states that they drank the liquor bought of appellant. We think the testimony is not only admissible, but very competent, going to show that the prosecuting witness, Harris, was drunk, and clearly identifies the transaction as one and the same transaction.

Appellant's third assignment is "that the court erred in refusing to permit appellant to testify as to his belief and understanding that the blackberry cordial sold by him was purely a medicinal preparation, the sale of which was not forbidden by the local option law, and that he bought it and sold it as such, without any intention of evading or violating said law, and with the honest belief and understanding that he, or any other person, had a perfect right, as a druggist, to sell it." The gist of this offense is the selling of intoxicating liquor. No other witness testifies, nor does appellant, that he did not know it was intoxicating. No issue of a bona fide mistake of the fact of it being intoxicating is made by him. We think that the sale of intoxicating liquor in a local option district, except upon prescription, or for sacramental purposes, is a violation of the law, regardless of the intent or purpose for which it was sold, and the intent of appellant is irrelevant and immaterial. Black, Intox. Liq. §§ 418, 419; Petway v. State (Tex. Cr. App.) 35 S. W. 646; Phillips v. State, 29 Tex. 226.

Appellant's fourth assignment complains of the court's charge in this particular: "If you

believe from the evidence that said blackberry cordial can be used as a beverage, and that when so used in sufficient quantities it will produce intoxication, it is an intoxicating liquor within the meaning of the statute," etc. In the case of *Decker v. State* (Tex. Cr. App.) 44 S. W. 845, the term "intoxicating liquor" is thus defined: "Any liquor intended for use as a beverage, or capable of being so used, which contains alcohol, either obtained by fermentation or by the additional process of distillation, in such a proportion that it will produce intoxication, when taken in such quantities as may be practically drank, is an intoxicant." The court charged the jury: "By intoxicating liquors, as used herein, is meant any spirituous, vinous, or malt liquors, or medicated bitters, or other medicated liquors, capable of producing intoxication when used in sufficient quantity." Under the facts of this case, we do not think that there is any error in the court's charge, such as was calculated to injure the rights of appellant. We held in *Taylor v. State* (Tex. Cr. App.) 49 S. W. 590, that it was unnecessary to define the term "intoxicating liquor," because it is commonly understood and known what intoxicating liquors are. Therefore, even if the court's charge, as appellant contends, be inaccurate, we do not think it such inaccuracy as would likely injure the rights of appellant. *Black, Intox. Liq. § 2*; *Code Cr. Proc. art. 723* (amended by Acts 1897, p. 17).

Appellant also asked the court to charge the jury as follows: "If the article sold was a medicinal preparation, and was not sold by defendant with the design that it should be used as a beverage, then defendant is not guilty." And, again, appellant requested this charge: "Not every liquor that can by any possibility produce intoxication is an intoxicating liquor, within the meaning of the local option law. But an intoxicating liquor, the sale of which is forbidden by the local option law, is one that is classified as a beverage manufactured and sold with the intent that it shall be sold as such. A liquor that is not manufactured and sold with the intent that it shall be used as a beverage is not an intoxicating liquor, within the meaning of the local option law, although large quantities of it might produce intoxication." And the charge as contained in appellant's seventh assignment of error is, in substance, the same. Suffice it to say that we do not think that any of the charges presented the law of this case. *Petteway v. State* (Tex. Cr. App.) 35 S. W. 646; *Phillips v. State*, 29 Tex. 226.

Appellant's tenth assignment complains of the court's charge in that clause defining what is meant by "intoxicating liquors," because it went beyond the evidence, and advised the jury that several articles mentioned in this paragraph were intoxicating liquors, which had no relevancy to the evidence. This is a misdemeanor, and we find no bill of exception in the record as to this matter, nor do we think the exception to the same

sufficiently reserved in the motion for new trial, nor was a special charge requested in this particular. Furthermore, upon these matters we do not think the court erred. *Code Cr. Proc. art. 723*.

Appellant's twelfth assignment complains of the court permitting Davis Tidwell to testify, over the objections of appellant, that, on another and different occasion than the one charged in the indictment, he and Frank McDonald had together bought from defendant a bottle of blackberry cordial, for which they had paid 20 cents. This testimony was admissible on the question of intent. *Dane v. State* (Tex. Cr. App.) 35 S. W. 661; *Gilmore v. State* (Tex. Cr. App.) 39 S. W. 105; *Pitner v. Same, Id.* 662; *Myers v. Same, Id.* 938. The evidence shows that Harris, who bought the liquor, was made drunk by it. The other witness who drank it got dizzy, and his head swam. He was 14 years old, and, without his parents' permission, he took the precaution to remain away from home on the night following the evening he drank it. Various witnesses, including appellant, testified that the blackberry cordial contained 13 per cent. alcohol, and would intoxicate; that it had about the same strength as beer. We think the evidence discloses that the blackberry cordial appellant is charged with selling was an intoxicant, and comes within the letter and spirit of the law prohibiting the sale of intoxicating liquors in local option districts. The judgment is affirmed.

HENDERSON, J. (dissenting). I cannot agree to that part of the opinion recognizing the action of the court admitting the testimony of the witness Conley, who was introduced by the state. Over the objections of appellant, the state proved by said witness that during the months of July and August, 1898, and during the time defendant had blackberry cordial for sale, he (witness) frequently saw drunken men about the defendant's place of business; that, perhaps, it was more common to see them about Phillips' livery stable, but he had frequently seen drunken parties about town, and part of them about defendant's place of business. Appellant objected to this testimony on the ground that it was irrelevant, and did not tend to prove any issue in the case; that the evidence established the fact that the article sold was a bottle of Hughes' blackberry cordial, and the only issue was whether the cordial was an intoxicating liquor or not. I believe that this testimony should have been excluded. On this subject we are referred to *Black on Intoxicating Liquors*, which cites some Massachusetts cases. The doctrine announced by the text is to the effect that where the prosecution is for illegally selling intoxicating liquors, or keeping a house, denominated a "common nuisance," for the sale of intoxicating liquors, it is admissible to prove the presence of drunken persons in or near the premises of defendant. See *Black, Intox. Liq. §*

497. All the cases referred to, so far as I have examined, are cases where parties were indicted for a common nuisance,—that is, for keeping a house where intoxicating liquors were sold,—and the question was as to the sale, and not as to whether the liquor sold was intoxicating. Here, it seems, the sole question is whether or not the blackberry cordial was an intoxicant. There was no question about its purchase. There is nothing in the bill to show that any of the persons seen about defendant's place of business bought any blackberry cordial from him. For aught we know, these parties may have purchased liquor elsewhere in the town. It cannot be presumed that they purchased it at defendant's place, and then presume that it was blackberry cordial, and that that was what made them drunk. I do not believe the testimony was relevant on the issue as to whether the blackberry cordial purchased was an intoxicating liquor, because the testimony was upon a vital issue, and calculated to injure appellant. I believe the case should be reversed.

SEGARS v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1899.)

INTOXICATING LIQUORS—INFORMATION—VARIANCE.

On a prosecution for violation of the local prohibition law, the information charged that defendant did unlawfully sell liquor after an election prohibiting the "sale or exchange" of intoxicating liquors. The order for the holding of the election and declaring the result thereof showed that the same was held for the purpose of determining whether the sale should be prohibited. *Held*, that the words "or exchange," in the allegation as to the holding of the election, are surplusage, and the information is not defective.

On motion for rehearing. Overruled.

BROOKS, J. This case was affirmed at a previous day of this term (51 S. W. 238), and now comes before us on motion for rehearing. Appellant in his motion for rehearing calls our attention to the fact that in the original opinion we failed to dispose of his motion to quash the information. The information, in substance, alleges that appellant did unlawfully sell to one Harry Scott intoxicating liquor, after the qualified voters, etc., had held an election, in accordance with the laws of said state, "that the sale or exchange of intoxicating liquors" should be prohibited in said subdivision. The motion to quash the information is based upon the authority of *Steele v. State*, 19 Tex. App. 425; *Ex parte Beaty*, 21 Tex. App. 426, 1 S. W. 451; *Ninenger v. State*, 25 Tex. App. 449, 8 S. W. 480; *Croom v. State*, 25 Tex. App. 558, 8 S. W. 661. In those cases the indictment charged that the "sale and exchange of intoxicating liquor" shall be prohibited. As insisted by appellant, the indictments in those cases were held defective. The reason for so holding was that the election in those instances had been

held to prohibit the sale and exchange of intoxicating liquors. We find from an inspection of the orders in this case ordering the local option election, and declaring the result thereof, that the same was held for the purpose of determining whether the sale should be prohibited, and the result was declared in accordance with the election so held. We therefore think that in the allegation in the information which alleges that the election had been held to determine "whether the sale or exchange of intoxicating liquors," etc., the term "or exchange" can and should be treated as surplusage. We therefore hold that the information in this case is not fatally defective, but wherein it attempts to allege anything else, other than the prohibition of a sale, that the allegation can and should be treated as surplusage. See *Jordan v. State*, 37 Tex. Cr. R. 222, 38 S. W. 780, and 39 S. W. 110. The motion for rehearing is overruled.

NATHO v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1899.)

FENCES—PROSECUTION FOR UNLAWFUL REMOVAL—INSTRUCTIONS.

In a prosecution for unlawfully separating and withdrawing a part of a fence owned by defendant, without giving the required six-months written notice of intention to do so, it is error to instruct the jury to disregard the remarks of defendant's counsel that the other part owner is trying to steal defendant's fence, and the county attorney is backing him up; that there is no issue as to whether the county attorney is a party to a theft; and that he is a good citizen, worthy of the jury's respect and confidence, and should not be discredited because of his discharge of an official duty.

Appeal from Karnes county court; F. Theodore Barnes, Judge.

A. Natho was convicted of separating and withdrawing his part of a fence without giving a required notice to the owner of the other part, and appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted under the following information, and his punishment assessed at a fine of two dollars, to wit: "A. Natho, late of said county and state, was a part owner of a certain fence connected with and adjoining certain other fence owned by J. O. Sullivan; and the said A. Natho did then and there unlawfully separate and withdraw his said part of and portion of said fence from the part and portion of fence of J. O. Sullivan, without the consent of J. O. Sullivan, and without first having given six (6) months' prior notice in writing to the said J. O. Sullivan of his intention to separate and withdraw his portion of said fence," etc. Appellant reserved a bill of exceptions to the court's charge in the following particular: "The jury is instructed to disregard the remarks of counsel for defendant to the ef-

fect that J. O. Sullivan is trying to steal the fence of the defendant, and that the county attorney is backing him up in it. There is no issue before the jury as to whether the county attorney is or is not a party to any theft in this case or any other case. The court feels called upon to instruct the jury that the county attorney of Karnes county, Texas, is a good citizen, worthy of your respect and confidence, and should not be discredited in your estimation because of the discharge of an official duty." We think the court erred in giving said charge, and for this error the judgment is reversed, and the cause remanded.

WINNINGHAM v. TRUEBLOOD.

(Supreme Court of Missouri, Division No. 2.
May 23, 1899.)

EJECTMENT — TITLE — CONTRACT — ACTION — RESCISSION — ATTACHMENT — JUDGMENT — JURISDICTION — SERVICE — LIEN — RETURN — FILING ABSTRACT — ORDER OF PUBLICATION.

1. In ejectment the validity of attachment proceedings by which the defendant in ejectment came into possession of the land may be considered.

2. Upon failure of one to keep his part of an agreement to execute a note and mortgage for money loaned to him, a cause of action arises in favor of the lender upon the receipt of the money by the borrower, and no notice of rescission of the contract is necessary.

3. A judgment cannot be collaterally attacked for want of jurisdiction because the petition does not state a cause of action, since, if it states a case belonging to a general class over which the authority of the court extends, jurisdiction is conferred.

4. Rev. St. 1889, § 543, requiring the writ and petition in attachment to be served upon the defendant as an ordinary summons, is sufficiently complied with by service of the petition and an ordinary summons four days after the levy of the writ; the defendant appearing in the action, making no objection, obtaining a change of venue, and filing an answer.

5. The lien of an attachment dates from the filing of the abstract of attachment in the recorder's office.

6. A sheriff's return of a writ of attachment is sufficient, though it fails to state that the levy was made to satisfy "any debt or damages and costs," since Rev. St. 1889, § 543, requires only that the sheriff shall attach a sufficient amount of land, "to satisfy," etc.

7. The abstract of attachment required by Rev. St. 1889, § 543, to be filed in the recorder's office, is sufficient notice, if filed on the date of the levy, though not recorded on that day.

8. An order of publication, in a suit to set aside a deed, which misdescribes the land, is fatally defective.

9. Defendant in an attachment suit, upon whom notice is served only by publication, which notice is fatally defective by reason of a misdescription of the land in suit, may attack the judgment in a subsequent ejectment suit.

10. An order of publication in an attachment suit reciting, "And it appearing to the satisfaction of the court that the defendant is a non-resident of the state of Missouri, and cannot be summoned in this action," etc., is a sufficient compliance with Rev. St. 1889, §§ 2022, 2024, inasmuch as it must be read in connection with the return of the sheriff, reciting, "W. not found in my county," and also as the words referring to nonresidency may be rejected as surplusage.

Appeal from circuit court, Laclede county; C. C. Bland, Judge.

Ejectment by J. R. Winningham against B. F. Trueblood. From a judgment for defendant, plaintiff appeals. Reversed.

L. O. Nelder, for appellant. F. M. Mansfield, for respondent.

SHERWOOD, J. Change of venue to Laclede county of an action of ejectment for the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 8, township 30, range 13, situate in Wright county. Defendant entered a general denial, and also set up matter authorizing equitable relief, which was prayed. The reply tendered the general issue. The plaintiff's abstract of record discloses, in substance, this state of facts: That the plaintiff, John R. Winningham, and C. C. Winningham are brothers. That in the year 1890 C. C. Winningham, after obtaining a loan of \$900 on a farm in Wright county from a loan company, transferred all his property to his son, James O. Winningham, and went to the state of Oregon. While there he arranged with one F. McClain, his brother-in-law, to borrow \$1,000 to aid him in the purchase of a farm; agreeing to secure the payment by mortgage on the farm to be purchased. That after he returned to Missouri he represented to Mr. McClain, by letters, that he had contracted for a farm in Wright county for \$2,400; that he did not want to go in debt, but desired to pay cash; that he had \$1,400, which he would pay the seller the next day, and wanted to borrow \$1,000 to complete the payment, and would give him a note secured by mortgage on the farm. That, upon receipt of this letter, McClain forwarded to C. C. Winningham a draft for \$1,000 on the National Park Bank of New York, together with a note, to be signed, and secured by mortgage on the farm purchased, and to be returned to McClain. That on the 28th day of March, 1891, C. C. Winningham purchased of one J. W. Perry the land in controversy, and paid for the same with the money borrowed from McClain, and caused the deed therefor to be made to and in the name of his son, James O. Winningham, and refused to execute and deliver to the said McClain a note and mortgage to secure the payment of the said sum of \$1,000, as he had agreed to do. That, upon the receipt of the draft for \$1,000 from the said McClain, C. C. Winningham suddenly lost all interest in his "dear brother and sister," and from that time he stopped all correspondence with them, and did not so much as acknowledge the receipt of the money or draft. That in September, 1891, C. C. Winningham caused the arrest of his son, James O. Winningham, on a charge of embezzlement. That on or about the 26th day of September, 1891, the trouble between him and his son was adjusted, and the land conveyed to C. C. Winningham. That on the 20th day of January, 1892, the said McClain commenced suit in the Wright county circuit court by attachment

against C. C. Winningham to recover the said sum of \$1,000. The affidavit for the writ was based in part on the fraudulent contracting of the debt. That a writ of attachment was issued, and was by the sheriff on the 21st day of January, 1892, levied upon the lands in question, and abstract of such levy filed with the recorder of deeds. That at the March term, 1892, of the Wright county circuit court, C. C. Winningham appeared and filed his answer thereto, and also filed his application and affidavit for a change of venue. That a change of venue in said cause was granted to the circuit court of Polk county. That at the April term, 1892, of the Polk county circuit court, upon a trial, judgment was duly rendered in said cause against C. C. Winningham for \$1,093.38. That between the dates of granting the change of venue in the Wright county circuit court and the rendition of the judgment in the Polk county circuit court, to wit, on the 31st day of March, 1892, C. C. Winningham executed a deed to his brother, the plaintiff, John R. Winningham, and filed the same with the recorder of deeds of Wright county for record, and paid the recorder the fee for recording the same. That the deed was left with the recorder subject to the orders of the grantor, C. C. Winningham. That on the 7th day of June, 1892, a general execution was issued on the judgment rendered in the Polk county circuit court, directed to the sheriff of Wright county, which execution was by the sheriff of Wright county on the 21st day of July, 1892, duly levied on the lands in controversy. That at the August term, 1892, of the Wright county circuit court, the land was, by virtue of said execution, sold to satisfy said judgment and execution, and at such sale the said McClain became the purchaser thereof, and the sheriff executed and delivered to him a deed in due form conveying to him the said land. That the said McClain afterwards commenced his action in the Wright county circuit court against the plaintiff, John R. Winningham, and C. C. Winningham, for the purpose of having the deed made by C. C. Winningham to John R. Winningham set aside, and to recover possession of said land. That at the September term, 1893, of the Wright county circuit court, upon a trial of said cause, judgment was duly rendered in favor of the said McClain against C. C. and John R. Winningham, declaring and adjudging the deed made by C. C. Winningham to John R. Winningham on the 31st day of March, 1892, fraudulent and void as against the deed made by the sheriff of Wright county conveying to the said McClain the said land, and for possession of same. That a writ of restitution was issued on said judgment, and the said McClain, by virtue of said writ of restitution, put in the possession of said land. That on the 5th day of June, 1894, the said F. McClain, by general warranty deed, conveyed the lands in question to the defendant, B. F. Trueblood. That the plaintiff, John R. Winningham, commenced in

the circuit court of Wright county this action in ejectment to recover possession of said lands, and on his application a change of venue was awarded to the circuit court of Laclede county. That on a trial of said cause in the latter court the judgment was adverse to the plaintiff, from which judgment plaintiff appeals to this court.

1. The action of ejectment herein, and the equitable defense set forth in the answer, bring in question the validity of the precedent steps which brought about the present suit, and resulted in the judgment from which plaintiff appeals. It is asserted that it appears on the face of the answer to this action that the former action of attachment brought by McClain against C. C. Winningham was prematurely brought, as it had not, at the time the suit was brought, ripened into a cause of action which McClain could enforce in an action at law, inasmuch as "the petition [sic] states an executory contract to convey real estate in Wright county, Mo., and, before McClain could bring suit against Winningham, he must terminate such contract by first giving to him reasonable notice, in writing, that he, at a certain specified time, would terminate the contract; that is, a reasonable time, according to the circumstances of the case, within which he would expect the title to be made as contracted, at the peril of rescinding the agreement. *Mastin v. Grimes*, 88 Mo. 478." In other words it is gravely announced to this court that because C. C. Winningham did not do as he had agreed, to wit, send to McClain a note and deed of trust to secure the payment of the \$1,000, which sum the former received, McClain had no cause of action until he had first notified Winningham that he "would terminate the contract." The only point decided in *Mastin v. Grimes*, above mentioned, so far as concerns the case at bar, was that where a contract in writing is made between two parties for the sale of a certain tract of land, and no time is specified therein in which the conveyance is to be made, there, the vendee, after reasonable notice to the vendor to comply with his contract, and failure to do so, might treat it as canceled. There the contract was executory. Here it was fully performed on McClain's part, and the debt became at once and absolutely due just as soon as Winningham received the money; and that contract of indebtedness Winningham could not avoid merely by failing to keep his plighted word to execute and send the note and deed of trust to McClain when the money was received. McClain's cause of action became complete just so soon as Winningham received the money. Besides, it was competent for McClain to waive the unkept promise about the note, etc., and sue for the money loaned. But, aside from other considerations already mentioned, it was wholly immaterial whether the petition in McClain's attachment suit against Winningham stated a cause of action or not, because: "Whether

a complaint does or does not state a cause of action is, so far as concerns the question of jurisdiction, of no importance; for, if the complaint states a case belonging to a general class over which the authority of the court extends, there is jurisdiction, and the court has power to decide whether the pleading is good or bad." 1 Elliott, Gen. Prac. § 230; *Hunt v. Hunt*, 72 N. Y. 217, and other cases cited in the text-book referred to. In all such cases collateral attack on the judgment rendered is altogether inadmissible. *Van Fleet*, Coll. Attack, § 61, pp. 80, 82, 83; *Id.* § 236. So that in this instance it must be held that the judgment was valid, even should it be conceded that the petition stated no cause of action,—a concession which will not be made.

2. Objection is made to the method of the service of the writ of attachment. The return made by the sheriff on that writ was this: "Executed the within writ in the county of Wright and state of Missouri on the 21st day of January, 1892, by seizing and attaching all the right, title, and interest of the defendant, Curtis C. Winningham, in and to the following described real estate, to wit: East half of the northwest quarter and west half of northeast quarter of section eight, township thirty, range thirteen, of Wright county, Missouri. John Newton, Sheriff." The statute (section 543, Rev. St. 1889) requires the writ and petition to be served upon the defendant as an ordinary summons. This was not done at the time the writ was levied on the litigated land, but on the same day of such levy the clerk issued to the sheriff a copy of the petition and an ordinary summons, which were properly served on Winningham on the 25th day of January, 1892. The writ of attachment contained a clause of summons, but it was not filled out. It may be that the exigency of the case was such that counsel for plaintiff found it necessary to move with dispatch in order to forestall the movements of Winningham, and therefore attached the land before serving, or getting opportunity to serve, process on Winningham; and, if that was counsel's idea, subsequent events certainly seemed to justify it, and to show his apprehensions to be well founded. But, however that may be, the levy of the writ of attachment would not be void by reason of the writ not having been served on Winningham, since he was served as aforesaid, and afterwards appeared to the action, obtained a change of venue to Polk county, filed an ordinary answer to the action, and never, by plea in abatement, even so much as questioned the validity of the grounds of the affidavit for the attachment. But whether he questioned the validity of the attachment or not cut no figure in that case, since Winningham's appearance to the action, and his taking a change of venue, would have given the circuit court full jurisdiction over his person, even if no process had been served upon him. *Baisley v. Bais-*

ley, 118 Mo. 544, 21 S. W. 29. And the service of the process alone was of equal validity, and the judgment, being a general one, bound the land from the date of the levy of the writ, as to which see further in the next paragraph.

3. Nor was there any defect in the return of the sheriff because it failed to state that the levy was made to satisfy "any debt or damages and costs," because section 543, Rev. St. 1889, makes no such requirements. It only requires, in this regard, that the sheriff shall attach a sufficient amount of land "to satisfy," etc.

4. Relative to the filing of the abstract required by section 543, the record shows that it was "filed for record January 21st, 1892, at 4 o'clock 30 minutes p. m. Fred E. Townley, Recorder." The fact that this abstract was not recorded as it should have been, did not rob it of its notice-giving attributes. And, the abstract having been filed on the date of the levy, the lien of the attachment dated from that date, and was good against all the world from that time. So that J. R. Winningham, not having received a conveyance of the land until March 31, 1892, took subject to the pending attachment action; and, when that culminated in a judgment and sale thereunder, that sale necessarily swept away any right or interest which John R. Winningham acquired by reason of the deed made to him by C. C. Winningham. *Meier v. Meier*, 105 Mo. 411, 16 S. W. 223; *Huff v. Morton*, 94 Mo., loc. cit. 410, 7 S. W. 284; *Lackey v. Seibert*, 23 Mo. 85; *Ensworth v. King*, 50 Mo. 477; *Huxley v. Harrold*, 62 Mo. 516. McClain acquired a good title to the land, and this is true whether the deed to J. R. Winningham was fraudulent or not. Prior to the time when section 543 was amended, the date of the levy of the writ was the point from which the lien of the attachment took effect. *Huxley v. Harrold*, 62 Mo. 516; *Hall v. Stephens*, 65 Mo., loc. cit. 682. But now the lien starts with the filing of the abstract. *Stanton v. Boschert*, 104 Mo. 393, 16 S. W. 393.

5. The disposition of the above points brings on for discussion the sufficiency of the proceedings against C. C. Winningham and J. R. Winningham instituted by McClain in the Wright circuit court in 1893; being a suit to set aside the deed aforesaid from C. C. Winningham to J. R. Winningham, and to declare it fraudulent and void, and to divest the title of the land in controversy out of J. R. Winningham, and to vest the same in McClain. Upon the filing of the petition in that cause, summons issued to the sheriff, who made thereon the following return: "Executed the within writ in the county of Wright on the 25th day of January, 1893, by delivering a copy of the within petition and summons to the within-named defendant, C. C. Winningham. John H. Winningham not found in my county. John N. Pryor, Sheriff Wright County, Mo." The order of publication in the

cause, evidently based on the return aforesaid, states, among other things: "And it appearing to the satisfaction of the court that the defendant is a nonresident of the state of Missouri, and cannot be summoned in this action," etc. This portion of the order of publication we deem a sufficient compliance with sections 2022, 2024, Rev. St. 1889, inasmuch as it must be read in connection with the return, and inasmuch, also, as the words referring to non-residency may be rejected as surplusage. Had not the order of publication contained a clause of the purport aforesaid, it would have been invalid, as having no basis on which to rest. These views differ from those expressed in *Cruzen v. Stephens*, 123 Mo. 337, 27 S. W. 557, but that case will not be followed. And the return of the sheriff above quoted is perhaps sufficient as to J. R. Winningham, as the middle letter is not regarded as part of the name; and, besides, this matter of the return can be amended when this cause goes back, as it must, as will more fully appear in the next paragraph.

6. But the order of publication is not valid, because it misdescribes the land in suit, giving it as the "east half of the northwest quarter and the west of the northwest quarter, section 8, township 80, range fourteen." This is a fatal defect, so far as concerns John R. Winningham. On this topic, Fagg, J., aptly remarks: "The true meaning of the statute in such cases is that it [the publication] shall go to the extent of a substantial statement of all the objects of the suit." *Bobb v. Woodward*, 42 Mo. 482. It is impossible that the publication should do this, unless it properly describes the property in litigation. On this point, however, counsel for defendant cites and relies on the case of *Goldsworthy v. Thompson*, 87 Mo. 233, where it was held that as section 3494, Rev. St. 1879 (now section 2022, Rev. St. 1889), provides, "in suits in partition describing the property sought to be partitioned," that, therefore, where a suit is brought to enforce a tax lien, a description of the property was not necessary. This view is indefensibly wrong, and for these reasons: In the first place, the opinion overlooks other provisions of the same section, to wit: "In suits in partition, divorce, attachment, suits for the foreclosure of mortgages and deeds of trust, and for the enforcement of mechanics' liens, and all other liens against either real or personal property, and in all actions at law or in equity, which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against any real or personal property within the jurisdiction of the court, if the plaintiff or other person for him shall allege in his petition, or at the time of filing the same, or at any time thereafter shall file an affidavit stating, that part or all of the defendants are non-residents of the state, or is a corporation of another state, kingdom or country, and cannot be served in this state in the manner prescribed in this chapter, or have absconded or

absented themselves from their usual place of abode in this state, or that they have concealed themselves so that the ordinary process of law cannot be served upon them, the court in which said suit is brought, or in vacation the clerk thereof, shall make an order directed to the non-residents or absentees, notifying them of the commencement of the suit, and stating briefly the object and general nature of the petition. * * *" Now, if you are required to state "the object and general nature of the petition," how is it possible to do this unless you describe the land to be affected by the contemplated judgment or decree? Would it be seriously contended that a decree would be valid which should result from an order of publication "stating briefly the object and general nature of the petition" to be to obtain the enforcement of a vendor's lien on land, without describing the subject-matter of the suit? This question furnishes its own negative answer. In the second place, even if the statute should in terms deny the necessity of notice, or be silent on the subject, the law in the latter case would imply that notice must be given, as has so often been decided by this and other courts. *Brown v. Weatherby*, 71 Mo. 152; *Wickham v. Page*, 49 Mo. 526; *Laughlin v. Fairbanks*, 8 Mo. 370. And what the law will imply is as much part and parcel of the legislative enactment as though set forth therein in terms. *State v. Board of Equalization of Buchanan Co.*, 108 Mo., loc. cit. 241, 242, 18 S. W. 784; *State v. Laclede Gaslight Co.*, 102 Mo., loc. cit. 485, 14 S. W. 980; *Suth. St. Const. § 334*; *State v. Grant*, 79 Mo. 122; *State v. Walbridge*, 119 Mo. 383, 24 S. W. 457. In the third place, provision for notice is part and parcel of "due process of law." *Cooley, Tax'n* (2d Ed.) 363, 364. It is axiomatic that no person can be passed upon in person or estate without opportunity afforded him of being heard. *Russell v. Grant*, 122 Mo., loc. cit. 173, 174, 26 S. W. 960. This subject is pointed out by and illustrated in a somewhat recent decision, thus: In *Hassall v. Wilcox*, 130 U. S. 498, 9 Sup. Ct. 590, a ruling was made quite apropos the point in hand. There the state law made no provision for notice to other lienholders, but provided that such lienholders might intervene and become parties to a suit instituted in the state court, and gave the holder of a mechanic's lien priority over all other liens; and though a suit was brought in the state court, and judgment recovered by the mechanic's lien holder against the railroad property, yet it was held that as to a plaintiff lienor under a mortgage, not made a party to such proceeding, the judgment in the state court could not operate even as prima facie evidence against the mortgage lienor, and might be questioned by him in the federal court in a proceeding in that court to foreclose the mortgage. In that case the former ruling of *Windsor v. McVeigh*, 93 U. S. 274, is cited with approval, where it is held that even in a proceeding in rem some form of notice is as essential and indispensable as

In other cases. In the case under consideration, therefore, the publication, not having complied with statutory requirements, must be regarded as a nullity, "because, wherever service is had or notice given with the view of subsequent adjudication, such service or notice must comply with statutory requirements, in order to possess any legal efficacy. *Allen v. Manufacturing Co.*, 72 Mo. 326, and cases cited. Mere notice of service, not according to law, brings no one into court; nor does mere knowledge on the part of the party notified of the pending proceedings have any more valid effect. *Potwine's Appeal*, 81 Conn. 381; *Smith, Merc. Law*, 322. Whenever proceedings are intended to result in an adjudication, and such proceedings differ from the course of the common law, a strict compliance with all material directions of the statute is essential. *Freem. Judgm. (3d Ed.)* § 127, and cases cited. No such compliance with the statute can be claimed here." *Wilson v. Railway Co.*, 108 Mo., loc. cit. 596, 18 S. W. 202, and cases cited. Moved by these considerations, we overrule the case of *Goldsworthy v. Thompson*, supra.

7. John R. Winningham, in consequence of circumstances already related, did not have his day in court, and consequently was a stranger to the suit of McClain against C. C. Winningham and himself. This being the case, it was entirely competent for him to attack collaterally the decree entered in the cause aforesaid. *Russell v. Grant*, 122 Mo., loc. cit. 180, 26 S. W. 962, and cases cited.

8. In concluding this opinion, it is well enough to say that, so far as concerns the merits, as disclosed by the evidence, they are altogether with defendant; but, because of the error mentioned, the decree must be reversed and the cause remanded. All concur.

GAY v. MISSOURI GUARANTEE SAVINGS & BUILDING ASS'N et al.

(Supreme Court of Missouri, Division No. 1.
May 23, 1899.)

SUPREME COURT—JURISDICTION—SUITS INVOLVING TITLE TO REALTY.

To secure a loan, plaintiff gave defendant a trust deed on lands, which required insurance for the amount of the loan. Defendant procured a policy for the required amount, which prohibited other insurance without the underwriter's consent, and retained possession thereof without informing plaintiff of the provision against other insurance. To secure a further loan, plaintiff afterwards gave defendant a second trust deed, which also required insurance, and defendant, without obtaining the consent of the underwriter to the first policy, procured the policy provided for by the second trust deed. There having been a loss, plaintiff was unable to realize on the first policy because of the second policy, and sued to enjoin a sale under the first trust deed because, had the policy not been invalidated through defendant's failure to obtain the insurer's consent to the second policy, the amount realized thereon would have been sufficient to pay the debt. *Held*, that the suit did not involve the title to real property, and hence the supreme court had no jurisdiction of an appeal therein.

Appeal from circuit court, Daviess county.

Suit by Marion O. Gay against the Missouri Guarantee Savings & Building Association and another. There was a decree for defendants, and plaintiff appeals. Transferred to Kansas City court of appeals.

Ed. E. Yates and Hicklin & Hicklin, for appellant. Alexander, Richardson & Allen, for respondents.

VALLIANT, J. This is a suit in equity to enjoin the defendants from selling plaintiff's land under a deed of trust. The appeal came to this court doubtless on the assumption that title to real estate is involved. A very brief summary of the petition is that the plaintiff, owning a house and lot in the city of Gallatin, borrowed of defendant corporation \$800, and executed his deed of trust on the house and lot to secure the debt. The deed required that plaintiff should take out fire insurance on the house to the amount of \$800, and assign the same to defendant as additional security. Plaintiff accordingly caused a policy to be issued by the Hartford Insurance Company for that amount, and delivered to the defendant; the loss, if any, to be paid to defendant. The policy contained a provision to the effect that it would be void if any other insurance should be taken out without the written consent of the insurer. Plaintiff had no knowledge of the contents of the policy, the same being in the possession of defendant company. Afterwards plaintiff borrowed \$200 more of defendant, and executed another deed of trust on the same property to secure the new loan, and the second deed contained a similar clause as to insurance to the amount of \$200. The additional insurance was taken out in the Royal Insurance Company, and that policy also deposited with the defendant company. No consent of the Hartford Company was obtained to the second insurance. Afterwards the house was destroyed by fire. The defendant company collected of the Royal the \$200 insurance, and, if the Hartford insurance could also have been collected, the plaintiff's debt would have been extinguished; but the Hartford refused to pay because its policy had become void by reason of the second insurance without its knowledge or consent. After applying the \$200 collected on the second policy to the plaintiff's credit, the defendant company advertised the plaintiff's property for sale, under the deeds of trust, to satisfy what it claimed to be the balance of the debt.

The plaintiff's testimony tended to prove that the transactions relating to taking out both the insurance policies were conducted by the agents of defendant company, that neither policy ever came into the hands of plaintiff, and that the premiums were paid by the defendant, and the amount deducted from the money loaned to plaintiff before paying the balance over to him.

The theory of the plaintiff's case is that defendant company, having undertaken to at-

tend to the insurance feature of the business, and managed it so negligently that plaintiff lost the \$800 which, with what he had previously paid, and the \$200 collected from the Royal Company, would have extinguished his debt, it would be inequitable to allow the defendant company to sell his land as by the strict letter of the deeds of trust unrelieved in equity it could do. In other words, the plaintiff's contention is that upon an equitable statement of the account he would be entitled to a credit of \$800, which would extinguish the mortgage debt. How is the title to real estate involved in that controversy? The validity of the deeds is not questioned. If the decree should be in plaintiff's favor, the effect would be that he would have credit on his mortgage debt for \$800, in addition to undisputed credits, and, if that were sufficient to cancel the debt, the decree would be that the mortgage was satisfied; if not sufficient to cancel, then the decree would ascertain the balance of the mortgage debt remaining unpaid, and direct foreclosure for that amount. In any event, it is only a question of the amount of money due on the mortgage debt. Suppose, instead of being a deed of trust, it was simply a mortgage, and defendant had filed a suit to foreclose it, and the plaintiff for defense had pleaded the facts he now pleads, not claiming that the mortgage was invalid, but that these conditions existed that entitled him in equity to a credit of \$800 on the mortgage debt; could it be said that title to real estate was involved? It is not sufficient in order to give this court jurisdiction that title to real estate may be collaterally affected by the judgment, but it is essential that the title be involved in the controversy. *Price v. Blankenship*, 144 Mo. 203, 45 S. W. 1123; *Rothrock v. Lumber Co.*, 146 Mo. 57, 47 S. W. 907; *Edwards v. Ry. Co.* (Mo. Sup.) 50 S. W. 89. The title to the plaintiff's real estate is not involved in this suit, and, no other ground appearing, this court is without jurisdiction. Therefore the cause is transferred to the Kansas City court of appeals. All concur.

THUMMEL v. HOLDEN.

(Supreme Court of Missouri, Division No. 1.
May 23, 1899.)

DEEDS—FILLING BLANKS—EFFECT AS TO
TITLE—EJECTMENT—EQUITABLE RELIEF.

1. Defendant claimed title by a warranty deed made by plaintiff's mother to defendant's grantor. The name of the grantee was left blank in the deed, with authority to L. to fill in the name of such grantee as he might elect. L.'s agent, by mistake, inserted the name of F., instead of the name of defendant's grantor, as intended, but upon discovery of the mistake the name of defendant's grantor was immediately inserted. *Held*, that the momentary insertion of the name of F. by mistake, being without authority either from plaintiff's mother or L., conferred no title upon F., and detracted nothing from the rights of defendant's grantor, but the insertion of the name of defendant's grantor for the first time made the instrument complete.

2. In ejectment, plaintiff claimed title by a quitclaim deed from his mother, made subsequent to a warranty deed made by her to defendant's grantor, both deeds being made subject to the same incumbrances. *Held* that, as the defendant's legal title only was in issue, an answer alleging that he had discharged the incumbrances, that the deed to plaintiff was without consideration, was made for the purpose of defrauding defendant, and was a cloud upon his title, afforded no grounds for equitable relief.

Appeal from St. Louis circuit court; James E. Withrow, Judge.

Ejectment by Walter C. Thummel against Randall L. Holden. There was judgment for defendant, and plaintiff appeals. Reversed.

Eber Peacock, for appellant. Joseph T. Tatum, for respondent.

BRACE, P. J. This is an action in ejectment to recover a certain lot in block 2,293, in the city of St. Louis, described by metes and bounds in the petition. The petition is in common form. Mary L. G. Thummel, the mother of the plaintiff, is the common source of title. Plaintiff claimed title by a quitclaim deed from her dated October 10, 1894, and recorded October 16, 1894. The defendant claimed title under a warranty deed from her to George L. Taylor dated April 24, 1894, and recorded September 17, 1894, by deed from said Taylor to him dated September 12, 1894, and recorded October 30, 1894. The deed of Mrs. Thummel to Taylor was made "subject to a certain deed of trust to Joseph Dormitzer's trustee of \$3,600, together with interest at the rate of 6 per cent. from date hereof, due November 20, 1894, also subject to another deed of trust to the Allemania Building & Loan Association, trustee, dated October 23, 1891, recorded in Book 1,041, page 406," and the quitclaim deed of Mrs. Thummel to the plaintiff was also made subject to the same incumbrances, and contained this further recital, to-wit, "And this conveyance is further made by said grantor with this declaration, that a certain deed purporting to have been executed by said grantor dated April, 1894, to one G. L. Taylor, and recorded in Book 1,230, page 211, of the recorder's office of the city of St. Louis, is absolutely void, and of no effect, as this grantor had no transaction with, or ever did make or deliver any deed to, said Taylor for said property." The deed from Taylor to the defendant was made subject to the same incumbrances. The answer of defendant admitted possession of the premises; denied the other allegations of the petition; gave a history of the deeds from Mrs. Thummel to Taylor and the plaintiff; averred that he had paid off and discharged the incumbrances, that the deed from Mrs. Thummel to the plaintiff was without consideration, made for the purpose of defrauding the defendant, and was a cloud upon his title; and prayed that the same be decreed to be void, that the title to the property be vested in him, and that plaintiff and those claiming under him be forever enjoined from asserting title, and for general relief. Issue

upon the new matter set up in the answer was joined by reply. At the trial a jury was waived, and the whole case submitted to the court. The court found the issues on the petition, and on the cross bill set up in the answer for the defendant granted the relief prayed for, and plaintiff appealed. The undisputed facts disclosed by the evidence are: That in the spring of 1894 one Lee S. Holden was engaged in business as a real-estate agent in the city of St. Louis, having in his office a scrivener by the name of Pritchard, in whose name it was his custom to keep the titles of some of his principals. That on the 24th of April, 1894, a trade between him and Mrs. Thummel having been negotiated, by which she was to exchange the lot in question, called the "Cook Avenue Lot," for a lot in Forest Park Place, the title to which was in the name of Pritchard, the same was on that day consummated by the execution of two deeds,—one by Pritchard conveying the Forest Park Place to Mrs. Thummel; the other, the deed in question, by Mrs. Thummel conveying the Cook avenue lot, in which the place for the name of the grantee was left blank. Both deeds were acknowledged by the parties before a notary at the same time and place, the deed to the Forest Park Place delivered to Mrs. Thummel, and the deed to the Cook avenue lot delivered to the said Lee S. Holden. That Mrs. Thummel, at the time she executed, acknowledged, and delivered the deed in question to Lee S. Holden, knew that the place in the deed for the name of the grantee was left blank is not disputed, and in connection with these uncontroverted facts the evidence tended to prove, and the court found, that she delivered the deed to said Holden without condition, and with authority to him to fill in the name of such grantee as he might elect. The evidence further tended to prove, and the court, in substance, so found, that afterwards, in September, 1894, and before the deed was recorded, Holden handed it, with another deed in the same condition, to Pritchard, with the request that he fill in the blanks with the names of the grantees, at the same time giving him a memorandum of the two names to be filled in, as George L. Taylor for the one, and James A. Foster for the other. Pritchard immediately went to his desk, and filled in the names, but by mistake filled the blank in the deed in question with the name of Foster, instead of Taylor, as was intended; and upon his handing the deed back to Holden the mistake was at once discovered by him, and by his directions Pritchard immediately corrected the mistake by erasing Foster's name and writing Taylor's name in the blank in place of it. And thus it was that Taylor, who then seems to have sustained a like relation to Lee S. Holden as that formerly held by Pritchard, as a depository of Holden's titles, became grantee in the deed and subsequently defendant's grantor of the premises, the incumbrances on which were thereafter paid

off and discharged by the defendant, as found by the court. Afterwards Mrs. Thummel, becoming dissatisfied with her bargain, upon hearing that the blank had been filled with Taylor's name, executed the quitclaim deed to her son, the plaintiff, who accepted it with full knowledge of his mother's conveyance to Taylor, as well as the consideration received therefor.

After a careful examination of the record, we find the conclusions of facts by the court well sustained by the evidence, and, if this were a plain judgment for the defendant in ejectment, it is evident upon the face of the statement that it ought to be sustained; for it is well-settled law in this state that "when a deed is executed and delivered in blank, with the parol authority to fill the blank with the name of the grantee, the grantee whose name is afterwards inserted takes a good title, and this is true though the blank be filled in the absence of the grantor." *Bank v. Worthington*, 145 Mo. 92, 46 S. W. 745; *Field v. Stagg*, 52 Mo. 534; *Burnside v. Wayman*, 49 Mo. 356; *Otis v. Browning*, 59 Mo. App. 326. Of course, if the authority given by Mrs. Thummel to Lee S. Holden had been to fill the blank with the name of any particular person, and he had inserted the name of any other person thereon, the title would not have passed to such person, as against Mrs. Thummel's intended grantee; but as the authority was given to fill the blank with the name of any person he might select, and the person he selected was George L. Taylor, Taylor became her intended grantee, and the authority was not executed until his name was inserted in the blank. The momentary insertion of the name of Foster by the scrivener, in the deed, by mistake, being without authority either from Mrs. Thummel or Lee S. Holden, conferred no title upon him, detracted nothing from the rights of Taylor, and the insertion of Taylor's name after the erasure of Foster's for the first time made the instrument complete, as was intended by the parties, and passed Mrs. Thummel's title to Taylor on delivery to him, and upon the issue of title the judgment was properly for the defendant. But it is not seen how the decree rendered in the case granting defendant the equitable relief prayed for can be sustained under the pleadings. There was no fact pertinent to the case, alleged in the answer, that could not have been given in evidence under the general issue. The issue made by the facts pleaded was purely an issue at law upon the title, each party claiming title under a recorded deed from a common source,—Mrs. Thummel. Her deed to Taylor, under whom the defendant claimed, being the senior, conferred the better title. The plaintiff undertook to defeat it by attempting to show that Taylor was not in fact the grantee in that deed. In this he failed. This was the whole scope of the issue, and a simple judgment in his favor would have covered it. There was no necessity for invoking the power of a court

of equity to protect his legal title, apparent upon the face of the deeds themselves, and of the record thereof, to be superior to that of the plaintiff. The fact that he had discharged the incumbrances, subject to which he had taken his deed in accordance with his covenant therein so to do, gave him no equity against the plaintiff, and the allegation thereof in his answer, together with the allegation that plaintiff's deed was made without consideration and for a fraudulent purpose, afforded no grounds for the interposition of those powers. There was one fact disclosed by the evidence that might perhaps have made some show as a ground for equitable relief, and that was the declaration by Mrs. Thummel in her deed to her son, the plaintiff, that her prior deed to Taylor was void for the reason that she had never made or delivered any deed to him for the property. But, as this fact was not mentioned or counted upon in the answer, it affords no support to the decree, and we are not called upon to decide whether or not it would have afforded any ground for equitable relief, if it had been pleaded. It may be well however to remark, in passing, that as a rule a court of equity has no power to restrain a libel on title. *Flint v. Burner Co.*, 110 Mo. 492, 19 S. W. 804. As the case stands, the decree will have to be reversed, and the cause remanded to the circuit court, with directions to enter up judgment for the defendant as in ejectment. All concur.

SCHELL v. EQUITABLE LOAN & INVESTMENT ASS'N OF SEDALIA.

(Supreme Court of Missouri. March 21, 1899.)
BUILDING AND LOAN ASSOCIATIONS—POWERS—USURY—PLEADING.

1. A building and loan association organized on the mutual plan, under Rev. St. 1879, c. 21, art. 9, has no power to contract that shares of its stock pledged by a borrowing member shall reach their par value within a fixed time; such power not being contemplated by the statute governing such associations, and its exercise being likely to give borrowing members a share of the profits that would be unequal to that of the other members.

2. In an action against a building and loan association for a cancellation of a trust deed executed to secure a loan, a question of usury is not in the case, where the ground for relief is based on an allegation of compliance with the obligations of the deed, and no mention of the usurious nature of the transaction is made.

In banc. Appeal from circuit court, Greene county; James T. Neville, Judge.

Suit by Charles E. Schell against the Equitable Loan & Investment Association of Sedalia. Decree for plaintiff, and defendant appeals. Reversed.

Barnett & Barnett and Sam. H. West, for appellant. Massey & Tatlow, for respondent.

ROBINSON, J. This is a suit in equity, instituted in the Greene circuit court by the plaintiff, a borrowing stockholder, against the

Equitable Loan & Investment Association of Sedalia, a building and loan association organized under article 9, c. 21, Rev. St. 1879, to cancel and declare satisfied two certain deeds of trust on lot 4 in Kelley's addition to Springfield, Mo., given to secure loans obtained by plaintiff from said association. On the hearing in the circuit court, the issues were found for the plaintiff, and a decree rendered that said deeds of trust be canceled and for naught held, and that plaintiff recover of defendant his costs expended therein, from which judgment defendant appealed.

The petition, after stating that defendant is a building and loan association organized under the statutes of this state, in substance alleges that on the 20th day of March, 1889, being the owner of the real estate in question, and desirous of borrowing \$800 with which to build a dwelling house on said premises, and the further sum of \$200 for the purpose of making certain other improvements thereon, the plaintiff was solicited to take five shares of stock in the association, on the assurance that the association would loan him said sums of money upon his securing such loans by a pledge of his shares and a deed of trust upon his Springfield real estate; that thereupon he took and subscribed for five shares of stock in the association; that on April 17, 1889, the defendant loaned the plaintiff from its accumulated assets the sum of \$800, plaintiff giving his note therefor, whereby he obligated himself to pay the sum in 100 monthly payments of \$12 per month; that afterwards, on April 12, 1890, he borrowed of said association the further sum of \$200, and gave his note promising to pay the last-named sum in 100 monthly payments of \$3 per month; and that the loans and obligations assumed in relation thereto were secured by a pledge of plaintiff's five shares of stock and the two deeds of trust in question. It was further alleged that both deeds of trust and the notes secured thereby contained the following provision, to wit: "The payment of said monthly sum of ——— dollars for the full period of said one hundred months, and fines and penalties, shall entitle each of said shares of stock to redemption by said association at the par value of \$200 each, and the said shares so entitled to redemption shall at the end of said one hundred months be taken and canceled by said association in full satisfaction of the obligation, and of the deed of trust to secure the same. In consideration of the said redemption of the said stock and the satisfaction of this obligation and said deed of trust, at said end of one hundred months. I hereby waive and release all further right, interest, and benefit in or to the profits and earnings of said association, and hereby transfer and assign same to said association." The petition further alleged that plaintiff had fully complied with all of the terms and conditions of said deeds of trust and the obligations secured thereby, and paid all monthly dues, installments, and premiums, as therein

required, for the full period of 100 months, and that thereupon plaintiff had requested the defendant company to cancel his pledged shares, and acknowledge satisfaction of said deeds of trust, or to execute and deliver to him a sufficient deed of release therefor, the costs and charges for executing same having been tendered to the defendant therefor, to do which, however, the association has refused, and the plaintiff prays that the defendant be required so to do, and that said deeds of trust be adjudged satisfied, and for general relief. The answer of defendant, after admitting the incorporation of defendant company and the execution of the notes and deeds of trust, in substance averred that, while the face or par value of plaintiff's shares of stock was \$200 each, yet said shares would not be worth their face value until by the payment of dues thereon as provided by the law governing building and loan associations, together with the profits, they would have earned \$200 per share; that under the law governing building and loan associations, and the by-laws of the association, the advancement so made to the plaintiff was upon the full estimated or maturity value of his shares of stock, with the understanding that plaintiff should continue to pay the monthly dues of said shares until they had earned or become worth the sum of \$200 per share, and should also pay the association interest upon the amount so advanced until such time as said shares should mature, together with the sum bid for preference and priority of loan. It was further averred that the provision in the obligations secured by the deeds of trust sought to be released, to the effect that the shares of stock pledged to secure the loans in question should mature and be entitled to redemption at the par value of \$200 at the end of 100 months, and then canceled and satisfied, should be construed as an estimated period at which said stock should reach its par value, and not an absolute guaranty that it would so mature, and that, if such provisions can be construed as a guaranty, and plaintiff's shares should be worth their full par value within the 100-months period, then such stipulation is violative of the principle of mutuality between the shareholders, and beyond the powers of the association. The defendant further averred that all of the shares of stock held by the nonborrowing members of the association contained a provision that such shares should also mature and be redeemed at the expiration of 100 months from the date thereof; that it would be utterly impossible to carry out such provisions as to all of the members of the association, for the reason that such shares would not at the expiration of the 100-months period have earned the full sum of \$200 per share; that, if the provision in the deeds of trust sought to be released, providing that the deeds of trust should be released at the end of 100 months, provided the dues, interest, and penalties on plaintiff's pledged shares should

have been fully paid up to that period, should be enforced, the plaintiff would thus acquire an undue preference and an inequitable advantage over the free shareholders and the other members of the association holding shares with like provisions as to the period of maturity; that the shares of stock so pledged by plaintiff had not matured, but had only earned, and were only worth, the sum of \$141.14 per share; that it was impossible to carry out the agreement to mature plaintiff's stock within 100 months, and also mature the shares of the free shareholders containing a similar agreement touching the time of maturity. The plaintiff replied by a general denial.

It appears from the record in this case that the plaintiff has complied with all the terms and conditions of the obligations entered into by him at the time the loans in question were made, and paid all monthly installments, dues, and premiums as therein required for the full period of 100 months. His pledged shares of stock, however, have not matured, being only worth at the time this suit was instituted \$141.15 per share; and that, if the decree of the court below is sustained and said deeds of trust released, there will be a resulting loss on each share of \$56.83, which will fall upon the free shareholders. The evidence shows that it is impossible to mature the shares of stock so pledged by plaintiff within the 100-months period, and at the same time mature the shares of the free shareholders containing a similar clause as to the time of maturity.

Counsel for plaintiff contends that said deeds of trust should be released at the expiration of the 100-months period, regardless of the fact that plaintiff's shares of pledged stock had not matured. On the other hand, defendant insists that the foregoing clause in the notes in question stipulating for a release of said deeds of trust at the end of 100 months, provided the dues, interest, and penalties on said shares should have been fully paid for that period, regardless of the maturity of said stock and the earnings of the association, is in contravention of the statutes of Missouri governing building and loan associations, and violative of the principles of mutuality between the shareholders, and beyond the powers of the defendant company. The precise point involved in this appeal was before the court in banc in the recent case of *Bertche v. Association*, 48 S. W. 954, where, after a full review of the authorities, the conclusion was reached that the statutes of this state governing building and loan associations must be considered as forming a part of the contract between the borrowing members and the association, and should be so read into their contract as to prevail over their language, and that the provision in the borrowing stockholders' obligations, providing that the pledged shares should reach their par value at the end of 100 months, and their deeds of trust released, regardless of the

earnings of the association, was in contravention of the chartered powers of the association at the time of its organization, and subversive of the legislative scheme governing building and loan associations at that time, and beyond the powers of its officers; and we see no reason for departing from the rule thus announced. The record now under consideration presents just such a case. A careful examination of the records in both cases satisfies us that the facts in this case, with the exceptions already noted, do not substantially differ from those appearing in the record in that case. Consequently the decision in *Bertche v. Association*, supra, dominates this case. There, as here, it was contended that the terms of the obligation entered into by the borrowing stockholders provided that the stock pledged to secure the loans in question should reach its full face or par value at the end of 100 months, and the deed of trust securing such loans satisfied and released, regardless of the earnings of the association and the fact that said shares had not matured. In that case it was explained that the statute of 1889, which was in force at the time this loan was made, did not authorize the fixing of a period of 100 months at which the shares of stock in a building and loan association should reach its par value. Manifestly it was not contemplated by the statute governing building and loan associations that any definite or arbitrary period should be fixed by the association at which its shares of stock should reach their par value. Consequently it was beyond the powers of the association, a mere creature of the statute, to fix an arbitrary period of 100 months in which its shares of stock should reach maturity. It was also pointed out in that case that a building and loan association organized under the mutual plan must treat all its members equally, and any contract whereby one shareholder obtains a greater share of the profits than another would be violative of the principles of mutuality between the shareholders.

As to the point made in the very able and exhaustive brief of counsel for plaintiff, that there was usury in these loans, it suffices to say that this is not a suit for an accounting in which the debtor pleads usury, and asks credit for the amount of usurious interest paid. The plaintiff, on the contrary, by his petition filed herein bases his claim to relief solely upon the provision in said obligations and deeds of trust providing for a release thereof at the expiration of 100 months, and upon the further fact that he has complied with the terms and conditions of said obligations by paying all monthly installments, as therein required, for the period of 100 months, and, having so complied with his obligations, is entitled to the stipulated release of his deeds of trust and the cancellation of his said shares. No mention whatever is made in the pleadings as to the usurious nature of the transaction. Moreover, the circuit court does

not base its decree on the fact that usury has been exacted: but the judgment below, as shown by its recital, is predicated on the fact that plaintiff has paid his monthly dues, installments, and premiums for the period of 100 months. The question of usury was not in this case upon its pleadings, and need not now be discussed on this appeal. Judgment of the circuit court will therefore be reversed, and plaintiff's bill dismissed.

GANTT, C. J., and SHERWOOD and MARSHALL, JJ., concur. BRACE and VALLIANT, JJ., not sitting. BURGESS, J., absent.

ELLIOTT v. BUFFINGTON.

(Supreme Court of Missouri, Division No. 2.
May 9, 1899.)

PUBLIC LANDS—SALE BY COUNTY COURT—QUITCLAIM DEED—INNOCENT PURCHASER—NOTICE—JUDGMENT—REFORMATION.

1. Proof that a person bought the title to swamp land from a county is tantamount to proof of a sale by the county court, since no swamp land can be bought from a county without an order of the court.

2. Under Rev. St. 1879, § 671, authorizing a county court to appoint a commissioner to sell any realty belonging to the county, and section 6205, giving the county court control of swamp lands patented to a county, to dispose of in like manner as is provided for the conveyance of other county lands, a deed executed by a commissioner, under an order of the court, conveying county swamp lands, vests title in the purchaser, though sections 6153 and 6154 provide for a conveyance by the president of the court, countersigned by the clerk.

3. A grantee, for value, without notice, in a quitclaim deed, acquires the same rights against an unrecorded deed as any other innocent purchaser.

4. Where a petition claimed a "part" of lands described therein, lying on a certain side of a river, and the finding was for plaintiff for the lands "sued for and described in the petition," but the clerk, by oversight, entered judgment for the whole of the lands mentioned by government numbers, the mistake should be corrected by the circuit court nunc pro tunc.

Appeal from circuit court, Chariton county; W. H. Brownlee, Special Judge.

Action by George N. Elliott against Benjamin R. Buffington. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Crawley & Son, for appellant. O. F. Smith and A. W. Mullins, for respondent.

GANTT, P. J. Action of ejectment, in ordinary statutory form, in the circuit court of Chariton county. Petition filed February 19, 1894, to recover possession of all that part of the S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 27, and the S. W. $\frac{1}{4}$ of section 27, and E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section 28, and S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 28, and the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 33, and the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 34, all in township No. 53, range 17, lying and being on the north and west sides of the Chariton river, in Chariton county. Defendant, in his answer, admitted posses-

sion, but denied all other allegations in the petition. Plaintiff deduced title as follows: First, the patent from the state of Missouri to Chariton county, dated November 12, 1869, granting to said county all the lands in controversy in this case, and all other swamp and overflowed lands in said Chariton county; second, an order of the county court of said Chariton county, made on May 8, 1883, appointing John A. Lee, clerk of said county court, deed commissioner, to convey, by proper deeds, swamp and overflowed lands, sold under the orders of said court, to the purchasers thereof; third, two deeds executed by John A. Lee, deed commissioner, for and on behalf of said Chariton county, each to A. G. Kennedy, and dated, acknowledged, and recorded on the 29th day of November, 1886, conveying to said Kennedy all the lands in controversy in this case; fourth, two patents from Chariton county to A. G. Kennedy, dated the 9th day of February, 1894, for all the lands in question in this case, and reciting in said patents that said Kennedy made full payment for said lands on the 27th day of November, 1886; fifth, the record of a deed of general warranty from A. G. Kennedy and his wife to Malcolm Bliss, dated November 27, 1886, and recording in the recorder's office of Chariton county on December 3, 1886, which deed conveyed all the lands in question in this case; sixth, two deeds of quitclaim from Malcolm Bliss and wife to Alonzo L. Welch, dated, respectively, on the 8th and 16th of December, 1893, and duly recorded in the recorder's office of Chariton county December 12 and 22, 1893, conveying all the lands in controversy in this case; seventh, two quitclaim deeds from Alonzo L. Welch and wife to George N. Elliott, the plaintiff, dated, respectively, on December 12 and 22, 1893, and acknowledged and recorded on the day of their dates, respectively, which deeds convey all the lands in question in this case. The plaintiff, on the trial, also introduced proof that John A. Lee was the clerk of the county court of said Chariton county from January 1, 1883, to January 1, 1891. The plaintiff also offered and read in evidence a special act of the legislature, entitled "An act to prescribe the manner of conveying swamp lands in Chariton county," approved March 15, 1861 (Sess. Acts 1860-61, p. 394). George N. Elliott testified that the defendant had about 300 acres of the land inclosed, and used it for pasturage.

For the defendant, A. G. Kennedy testified that he purchased of Chariton county the lands that he conveyed to Malcolm Bliss; that when he (Kennedy) purchased the lands he received certificates of purchase, and that he paid for the lands in full, and presented the treasurer's receipts, showing such payments, to John A. Lee, who executed to him (Kennedy) the deeds in evidence; that, after he bought and paid for the lands, he sold and conveyed them by warranty deed to Malcolm Bliss. For the purpose of showing title to

the land in question, the defendant offered in evidence a deed from Malcolm Bliss and wife to "one Gendron," dated October 5, 1887, and filed for record 21st of March, 1894; but, on objections being made to the deed by plaintiff, the defendant withdrew it for the time being, and offered and read in evidence the deposition of L. E. Gendron, taken on the 29th of March, 1894. This witness testified that in 1887 he traded three lots in the city of Independence to Malcolm Bliss, "and he sold me some land in Chariton county, Mo. That land was the only land in Chariton county that Bliss ever made a deed to. At the time of my trade with Bliss, me and my brother owned the lots in Independence. My brother's name is Julius Gendron. * * * Bliss was to pay \$11,600 for the lots, and gave me the land in Chariton county to the amount of \$9,600, and made up the rest by giving me three notes, secured on the lots I traded him. * * * I saw the deed to the Chariton county lands several weeks—three or four weeks—before it was delivered to me. * * * When I first saw the deed, it was made to L. E. Gendron; that is, to myself. * * * When he showed me the deed to L. E. Gendron, I asked him to make it to J. E. instead of L. E. * * * When he delivered it to me, the deed had been changed, as requested, to J. E. Gendron. The 'L' in the deed had been changed to 'J' before it was delivered to me. The 'J' in the deed stands for Julius. That is my brother. Julius and I in company own the land. * * * This deed in question is the only deed Bliss ever made me or my brother for this land. The change was made from L. E. Gendron to J. E. Gendron before the deed was delivered to me,—while it was in Mr. Bliss' possession, before delivery. That deed was not recorded until just a few days ago,—last Tuesday, I think, or Wednesday morning,—at Chariton county, Missouri." The defendant's counsel then again offered in evidence the deed from Malcolm Bliss and wife to J. E. Gendron, dated October 5, 1887, and recorded March 21, 1894; and, against the plaintiff's objections, the court admitted said deed in evidence. Malcolm Bliss, in his deposition taken March 20, 1894, and read in evidence by defendant, testified: That he formerly owned two or three thousand acres of swamp land in Chariton county, which he obtained from Kennedy. That a good many years ago he made a trade with L. E. Gendron, and gave him some wild lands in Chariton or Wayne county, or both, and took in exchange some building lots in Independence. The consideration for the land was the lots in Independence. "I suppose I have some interest there yet. How much, I don't know. Haven't looked it up." That in December, 1893, he made two quitclaim deeds to some Chariton county land, but does not know the grantee's name. That he looked over the deeds to see the number of acres included, and that was all. That he had no correspondence with Alonzo L.

Welch about the matter, but that the correspondence was with George N. Elliott, who sent him (Bliss) the deed to execute. "Forty cents an acre was the consideration I received." The defendant, by his counsel, on October 16, 1895, took the deposition of the plaintiff, George N. Elliott, and on the trial the defendant read the same in evidence "as an admission." In that deposition the plaintiff testified that at his instance the county court issued the two patents in evidence to Kennedy; that he (plaintiff) then owned the lands, and Kennedy had no interest in them; that his (plaintiff's) title was based on the title he acquired through a deed from Kennedy to Bliss, and from Bliss to Welch, and from Welch to plaintiff. "Q. Did you ever know anybody to be in the actual possession of the lands in controversy, other than Mr. Buffington, the defendant? A. No; I never knew of anybody being in possession of it at all. Q. Who was in possession of it when you bought from Mr. Welch? A. I didn't know that anybody had possession of it. I just supposed it was like all or a large part of those bottom lands,—just laying out,—and did not know it was inclosed at all until we went up there. Q. When did you first learn that Mr. Gendron claimed to be the grantee of these lands? A. I think it was some time in March, 1894. Q. Previous to that time, and before you applied to the county court for a patent, hadn't you been informed that Bliss had conveyed his interest in these lands before he conveyed to Welch? A. No, sir; I had not." And in his said deposition the plaintiff further testified: That he was acting for Mr. Welch when he wrote the letters in evidence to Mr. Bliss. Mr. Welch said to plaintiff that, if he could find Mr. Bliss and buy the lands, he (Welch) would pay plaintiff well for his trouble. The actual consideration paid to Bliss is expressed in the deeds, the amount being \$227. Alonzo L. Welch, called by defendant, testified: "I employed George N. Elliott to purchase the lands in question from Mr. Bliss. I knew the N. W. 5-54-17, but had no knowledge of the land in suit here before my purchase from Bliss,—only what the record showed. * * * The land I employed Mr. George N. Elliott to buy for me from Bliss—the piece the first conversation occurred over—was the northwest 5-54-17. * * * That is the piece I got and now own. The second conversation was after he received a letter through the mail. He came into my office and said, 'I have got an answer from Mr. Bliss, stating that, if you will take all the land, that you can have it at 40 cents an acre.' * * * I told him to look up and see how much Mr. Bliss owned,—how much I would have to pay for it; and I forget the number of acres, but I think it came to \$185. I told him I'd agree to take it; told him to make the deed and send it on for signature, and I would have the money ready. After the deed came, I paid him the money for the deed, and put the deed on rec-

ord, and in a day or two he came back, and said he made a mistake of 80 acres of land; that is, he made the trade for me to buy all the land,—he would like for me to pay for the other land. I asked him how much it was, and he said, '80 acres.' * * * They sent on and got the deed, and I paid the money, \$32. The record title to the land I wanted was in Bliss. I had written a letter to Kansas City, asking Mr. Bliss what he would take for the land. I think the letter was returned to me. I asked Mr. Elliott if he could locate Mr. Bliss, and he said he thought he could. I told him I would pay him well if he got me a quitclaim deed from Mr. Bliss for the northwest quarter, 5-54-17. * * * After the land had been deeded to me, I proposed to Mr. Elliott to deed him the land in 56-17, in consideration of his services in getting me the deed to the northwest ¼ of 5-54-17, and the use of his abstracts as long as I stayed here. He accepted my offer, and I made him the deed. * * * Don't think the land worth much. Had a conversation with Mr. Buffington about a year before, and he said it was worth about 40 cents an acre. * * * I knew nothing about Bliss having conveyed this land before, and bought the land in good faith. * * * The taxes on this land in controversy have not been paid for four or five years." The defendant then offered in evidence a sheriff's deed, executed by the sheriff of Chariton county, dated July 13, 1894, purporting to convey the interest of L. E. Gendron in and to the lands in question to the defendant, Buffington. This deed, against plaintiff's objections, was admitted in evidence. This deed recited that two judgments were rendered in the court of G. F. Purcell, a justice of the peace within and for Blue township, Jackson county, Mo., on September 18, 1888, in favor of A. H. Spellman and against L. E. Gendron, each for \$278.83, and transcripts thereof were filed in the office of the clerk of the circuit court of said Jackson county on October 3, 1888, and that alias executions issued thereon April 25, 1894, directed to the sheriff of Chariton county, who levied on the land in controversy on May 8, 1894, as the property of said L. E. Gendron, and advertised and sold the same on the 18th of July, 1894, and Benjamin R. Buffington became the purchaser thereof, and to whom the sheriff executed the deed on said 13th day of July, 1894. The defendant offered no evidence of any other claim of title to the land.

For the plaintiff the court declared the law as follows: "(1) The plaintiff has produced and shown in evidence a complete and connected chain of legal title to the lands in question from the United States down to the plaintiff, and the finding and judgment should be for him, unless his right to recover be defeated by the deed from Malcolm Bliss and wife to L. E. or J. E. Gendron offered in evidence by defendant. (2) The court further declares the law to be that if it appears from

the evidence Alonzo L. Welch purchased the lands in question from Malcolm Bliss, in whom the record title thereto then stood, and paid him a valuable consideration therefor, then the deed in evidence, from said Malcolm Bliss and wife to said Alonzo L. Welch, dated December 8, 1893, and recorded December 12, 1893, and the deed from said Bliss and wife to said Welch, in evidence, dated December 16, 1893, and recorded December 22, 1893, are sufficient to, and did, convey to said Welch the title to the said lands, notwithstanding said Malcolm Bliss and wife had theretofore, on October 8, 1887, executed to one Gendron the deed produced in evidence by the defendant, but which deed was not filed for record until subsequent to the recording of said deeds from said Bliss and wife to said Welch, to wit, on March 21, 1894." And for the defendant the court declared the law as follows: "(1) It is alleged in the petition and admitted by the answer that the defendant, Benjamin Buffington, was in possession of all the lands in controversy at the date of the commencement of this action, and there is no evidence that the plaintiff was ever in the actual possession of any of the lands in controversy. The court therefore declares the law to be that the mere possession of the defendant, Buffington, is sufficient to defeat the plaintiff's recovery, unless the court, from the evidence in the case, shall find that the plaintiff, George N. Elliott, was the owner of said land at the date of the commencement of this action." The court found for the plaintiff, and the defendant appealed to this court.

The principal contention of defendant is that the two deeds from John A. Lee, commissioner appointed by the county court, to Kennedy, were wholly ineffectual to convey the interest of Chariton county in these lands in suit. In the view we take of the case, it is entirely unnecessary to consider the local act of 1861, approved March, 1861 (Laws Mo. 1860-61, p. 394). The county court of Chariton county on the 8th day of May, 1883, appointed John A. Lee deed commissioner, to convey, by proper deeds, swamp and overflowed lands sold under the orders of the said county court. On the 29th day of November, 1886, said Lee, while still commissioner, made, executed, acknowledged, and delivered to A. G. Kennedy the two deeds now contested by defendant. The insistence of counsel that there is not a scintilla of evidence showing that Kennedy bought, or that the court sold him, these lands, is not supported by the record. On the contrary, it most conclusively appears from evidence offered by defendant himself that a part of the land in controversy was purchased of Chariton county by Caswell Courtney, who paid 20 per cent. of the purchase price thereon, and received a certificate of purchase for said land, and subsequently sold his interest therein, and assigned his certificate of purchase to A. G. Kennedy, who paid to said county the balance of the purchase money in full, principal and interest,

and that, as to the remainder of said land, the said Kennedy purchased it of said county, and paid the purchase price in full, and received a certificate of purchase therefor. The distinction between a sale by the court and one by the county is not tenable. No swamp lands of the county could be sold without consent or the order of the county court. Hence, when the evidence showed that Courtney and he had bought the county's title, it was tantamount to proof of a sale by the court. The order appointing Lee authorized the deed to Kennedy.

The further contention that when Lee was appointed commissioner, and when he executed these conveyances, the general laws of this state governing the sale and conveyance of swamp lands restricted the sale to those made by the county court, and prescribed that the conveyance could only be by patent by the president of the court, and countersigned by the county clerk, is also untenable. It has been so recently decided (in *Hall v. Gregg*, 138 Mo. 286, 39 S. W. 804) that sections 6153, 6154, Rev. St. 1879, did not provide the exclusive method of conveying swamp lands, but that the county courts could avail themselves of sections 671, 6205, Id. (being sections 2398, 6515, Rev. St. 1889), that we deem it unnecessary to again repeat the reasons which led to that construction. There is no conflict between the different provisions, and the county courts may resort to either method. It follows that the commissioner's two deeds conveyed the lands in dispute to Kennedy. Kennedy and wife conveyed the lands to Malcolm Bliss by a proper deed, duly recorded, December 3, 1886.

Alonzo Welch having purchased the lands for a present, valuable consideration from Bliss, without any notice or knowledge that Bliss had previously conveyed the same lands to Gendron, the title passed to him, notwithstanding his deed was only a quitclaim deed. It has been repeatedly decided by the court that a grantee for value, and without notice, in a quitclaim deed, acquires the same rights against an unrecorded deed of which he has no actual notice as any other innocent purchaser; that he is protected by our recording acts. *Fox v. Hall*, 74 Mo. 315; *Munson v. Ensor*, 94 Mo. 504, 7 S. W. 108; *Ebersole v. Rankin*, 102 Mo. 488, 15 S. W. 422; *Hope v. Blair*, 105 Mo. 85, 16 S. W. 595; *Hickman v. Green*, 123 Mo. 178, 22 S. W. 455, and 27 S. W. 440. This view of the law renders unnecessary a discussion of what effect would have resulted from the delivery of the patents to plaintiff instead of Kennedy, the original purchaser, if plaintiff's title rested upon said patents. As the commissioner's deeds were valid, the patents were useless.

Finally, it appears that while plaintiff's petition only sought a recovery of "that part of the lands described lying and being on the north and west side of the Chariton river," and the court's finding was "plaintiff is entitled to the possession of the land sued for

and described in plaintiff's petition," the clerk, by oversight, entered the judgment for all of the lands mentioned by government numbers, instead of "that part of said numbers lying north and west of the Chariton river." This is such an evident mistake that the circuit court can correct it by a *nunc pro tunc* entry from the abundant records for that purpose, and does not require the reversal of the judgment. On the contrary, the judgment will be, and is, affirmed, with directions to the circuit court to correct the clerk's entry so as to conform to the petition and the court's finding.

SHERWOOD and BURGESS, JJ., concur.

HANNIBAL & ST. J. R. CO. v. TOTMAN.
(Supreme Court of Missouri, Division No. 1.
May 23, 1899.)

RAILROADS—STATION GROUNDS—PUBLIC USE
—ADVERSE POSSESSION—LIMITATION.

The acquiring of land by a railroad for right of way and station grounds is an appropriation to a public use, within Rev. St. 1889, § 6772, preventing the running of limitations against land so appropriated.

Appeal from circuit court, Clinton county; William S. Herndon, Judge.

Action by the Hannibal & St. Joseph Railroad Company against Edward Totman. There was a judgment for defendant, and plaintiff appeals. Reversed.

This is an action of ejectment, commenced November 30, 1894, to recover a small strip of land in the town of Cameron. The petition is in proper form, and the defense is the statute of limitations. The cause was submitted to the court upon an agreed statement of facts, from which it appears that in 1856 the plaintiff, a railroad company, owning and operating a railroad through that portion of the state, acquired title to a strip of land running through the town of Cameron for its right of way, depot, and station grounds, and has had the same in its possession and in use in its general railroad business ever since that date, except that small part thereof which is the subject of this suit, and which was also in such possession and use of plaintiff until 1881, when one Aldrich went upon it, claiming to be the owner, and sold it to defendant, in 1882, for \$125, when defendant took possession, inclosed it with a fence, erected buildings on it, and has been in possession ever since, claiming it as his own; that from 1859 to 1871 the land in dispute was embraced in a fence by plaintiff, which inclosed other land of the right of way strip, and plaintiff has continually since 1856 claimed title and right to its possession, and in 1882 or 1883 notified defendant of such claim, and demanded possession, which defendant refused, claiming to own it himself; that the rental value for the last seven years before the trial was \$3 per month. The finding and judgment of the

court was for the defendant, and, after due proceedings, the cause is here for review on plaintiff's appeal.

Spencer & Mosman, for appellant. Turney & Goodrich, for respondent.

VALLIANT, J. (after stating the facts). Under this statement of facts the only question presented for our consideration is, does the statute which limits the time in which an action to recover possession of land may be commenced, apply to an action by a railroad company to recover possession of land acquired by it for its right of way, depot, and station grounds? Section 6772, Rev. St. 1889: "Nothing contained in any statute of limitations shall extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable use, or to any lands belonging to this state." This statute reduces the question to this form: Is the acquisition of land by a railroad company for its right of way, depot, and station grounds an appropriation of the land to a public use? There are decisions in this state to the effect that title by adverse possession may be acquired to land appropriated to public use. *Callaway Co. v. Nolley*, 31 Mo. 393; *School Directors v. George*, 50 Mo. 194; *Connecticut Mut. Life Ins. Co. v. City of St. Louis*, 98 Mo. 422, 11 S. W. 969; *Mississippi Co. v. Vowels*, 101 Mo. 225, 14 S. W. 282. But these decisions cited in the brief for respondent were, some of them, rendered before the enactment of the statute above quoted, and the others related to rights acquired before that act went into effect. The only question in those cases was whether or not the common-law maxim, "*Nul-lum tempus occurrat regi*," applied to subdivisions of the state, and it was held that it did not. But we have nothing to do with that maxim here. If the statute of limitations does not apply to the case at bar, it is not because railroad corporations are exempt from its operation, but because the subject of the suit, the land in question, is exempt under the terms of the statute by reason of its being devoted to a public use. In *Welsh v. Railway Co.*, 19 Mo. App. 127, it was held that the plaintiff, by adverse possession for 10 years, barred the railroad company's title to the land in suit, which it had acquired for its right of way. The court in that instance seem to have overlooked the statute above quoted, and to have decided the case on the principle that railroad corporations were not exempt from the operation of the statute of limitations. The statute we are now considering does not appear to have been called to the court's attention in the briefs of counsel, nor referred to in its opinion. The cases cited in the opinion discuss the subject upon common-law theories. In one of those cases—*State v. Culver*, 65 Mo. 607—the proposition that the right of the public to a highway may be lost by nonuser, and a private right acquired by occupation in the land so lost, was recognized,

but it was based on the common-law theory of presumption, not on the statute of limitations, and the period indicated was 20 years. The court there said, referring to this statute, that it was error to have given an instruction to the effect that 10 years' adverse possession gave the defendant a right to the land covered by the highway. We are not called on to decide whether or not a railroad company may lose part of its right of way by nonuser or abandonment. The only question for us is, does the statute of limitations apply? If the use of the land for railroad purposes is a public use, the statute of limitations has no effect; if it is not a public use, the statute bars the action. In *Thompson v. Railway Co.*, 110 Mo. 147, loc. cit. 160, 19 S. W. 81. this court, per Thomas, J., said: "That the use for which this property was sought to be taken was a public use is beyond question. The constitution of our state declares that railroads are public highways, and railroad companies common carriers, and, without any such provision in the organic law, the courts will take judicial notice that the taking of private property for the operation of a railway is for a use that is public." The ground on which is based the right of a railroad company to condemn private property for its use is that the condemnation is for a public use. And much of the control which the state exercises over railroads is based for its authority on the proposition that railroads are public highways. That large private interests are involved in the owning and operating of railroads is true, but that larger public interests are involved is also true. It is the policy of the state to see that these interests are alike protected, and under wise control they are not likely to conflict; but, should an emergency arise in which one or the other must yield, the private interests must give way to those of the public. The acquiring of the land in question by the plaintiff for use in its business as a railroad company was an appropriation of it to a public use, within the meaning of section 6772, Rev. St. 1889, and the plaintiff's right to recover it was not affected by the statute of limitation. Under the agreed statement of facts the judgment of the circuit court should have been for the plaintiff for the possession of the land in dispute, and for damages, estimated at three dollars per month from December 1, 1889, which was five years next before the commencement of the suit, to the date of the judgment, and for accruing rents and profits at that rate until possession is delivered to plaintiff, and for costs of the suit. The cause having been submitted for judgment on an agreed statement of facts which covers all the issues, there is no necessity for a retrial, but the judgment of this court will be that the judgment of the circuit court be reversed, and the cause remanded to that court with directions to enter judgment for the plaintiff as hereinabove indicated. All concur.

STATE ex rel. CROW, Atty. Gen., v. ÆTNA INS. CO. et al. SAME v. AMERICAN CENT. INS. CO.

(Supreme Court of Missouri. Dec. 13, 1898.)

INSURANCE—REGULATING PREMIUMS—STATUTES—CONSTITUTIONALITY.

1. Act March 24, 1897, p. 208, § 1, providing that any corporation doing business in Missouri which shall become a member of any trust or combination with any other corporation to regulate the price or premium to be paid for insuring property against loss or damage by fire shall be guilty of a conspiracy to defraud, and subject to the penalties prescribed, provided that fire insurance companies may regulate the price or premium to be paid for insurance in cities which now have or may hereafter acquire a population of 100,000 inhabitants or more, is not violative of Const. art. 4, § 53, providing that the general assembly shall not pass any local or special law granting any corporation any special privilege, since the proviso excepting fire insurance companies in such cities affects the business of insurance in all cities of that class, and applies alike to all fire insurance companies doing business therein.

2. Insurance companies doing business in Missouri cannot be ousted for organizing a board of underwriters in such a city to fix the rates of insurance therein.

In banc.

Consolidated quo warranto proceedings by the state, on information of Edward C. Crow, attorney general, against the Ætina Insurance Company and others, and same plaintiff against the American Central Insurance Company. Writs denied.

The Attorney General and Sam. B. Jeffries, for the State. Campbell & Ryan and Waddill & Hereford, for respondents.

BURGESS, J. These are quo warranto proceedings by the relator, as attorney general, against respondents, nonresident insurance companies doing business in this state, to oust them, upon the ground, as alleged in the petition, that they are members of a trust and pool at Kansas City, Mo., to regulate and fix the price or premium to be paid for insuring property in said city against loss or damage by fire, lightning, or storm, and to maintain and control the price when so regulated and fixed. The petition alleges that each of the defendants is a nonresident corporation duly organized and carrying on the business of fire insurance in this state, they having been licensed by the insurance commissioner of the state so to do. The petition then proceeds as follows: "That afterwards, to wit, on the — day of July, A. D. 1897, each and all of said defendant corporations unlawfully misused and abused their said franchises, rights, and privileges as fire insurance companies authorized to do business under the laws of the state of Missouri by, within the city of Kansas City, Jackson county, Missouri, creating, entering into, becoming a member of, and a party to a certain pool, trust, agreement, combination, confederation, and understanding with each other and other fire insurance corporations and associations of

persons, to regulate and fix the price of premium to be paid for insuring property in said Kansas City, Jackson county, Missouri, against loss or damage by fire, lightning, and storm, and to maintain and control said price when so regulated and fixed. That each and every one of said defendant corporations is represented in said Kansas City, Jackson county, Missouri, by a local resident fire insurance agent, legally and fully authorized by each of said several corporations to act for their respective corporations in all matters relating to the insuring of property against loss or damage by fire, lightning, and storm in said city, and that heretofore, to wit, on the — day of July, A. D. 1897, each of said defendant corporations, by their respective agents (each of which said several agents are duly and legally licensed and authorized to write said insurance under the laws of the state of Missouri), entered into, and were members of, and are now members of, a certain association and organization composed of said fire insurance agents and the agents of other fire insurance companies, known as the 'Board of Underwriters,' the exact name of which said Board of Underwriters is to this relator unknown. The general nature and object of said Board of Underwriters is: First, to fix and regulate a certain price or premium to be paid for insuring property against loss or damage by fire, lightning, and storm in the said city of Kansas City; and, second, to maintain the said prices or premium, when so regulated or fixed, for insuring property against loss or damage by fire, lightning, and storm in said city. And that the said defendant corporations, through said Board of Underwriters aforesaid, and in pursuance of the object, purpose, and intention of said defendant corporations, have unlawfully agreed, combined, and confederated with each other and with other fire insurance corporations (doing business under the insurance laws of the state of Missouri) to form an insurance trust in Kansas City, Missouri, to regulate, fix, and maintain the price or premium to be charged by each of said corporations for insuring the different designated classes of risks on property against loss or damage by fire, lightning, and storm in Kansas City, Missouri. And the said defendant corporations, and other insurance companies acting with them, in pursuance of the said agreement, combination, confederation, and trust, are each of them, through their respective agents, unlawfully maintaining said agreed price or premium upon the respective classes of risks on property against loss by fire, lightning, and storm in Kansas City, Missouri, and which said rate so fixed by said agreement aforesaid is the minimum rate charged in Kansas City, Missouri, by all said defendant corporations; and that said rate aforesaid, so fixed as aforesaid, is the minimum rate agents of said insurance companies are allowed to charge by said defendant corporations within the city of Kansas City, Missouri.

And relator charges and avers that since the — day of July, A. D. 1897, said defendant corporations in the city of Kansas City, Jackson county, Missouri, have offended against the laws of this state, and have greatly abused and misused their corporate authority, franchises, and privileges, and unlawfully assumed and usurped franchises and privileges not granted to said corporations by the laws of the state of Missouri, by entering into, becoming a member of, and a party to said pool, trust, combination, and confederation, as aforesaid, to regulate, fix, and maintain the price and premiums to be paid for insuring property against loss or damage by fire, lightning, and storm in Kansas City, Missouri. And relator further charges that the action of the defendant corporations hereinbefore set out is a gross perversion of the franchise granted to them by the state of Missouri, and an illegal usurpation of privileges not granted to them, and which said usurpation of privileges and franchises not granted them is of great injury to the public."

Respondents answered jointly, admitting that they are foreign corporations duly organized and respectively engaged in the business of fire insurance; that they have complied with the laws of the state of Missouri with respect to foreign insurance companies desiring to do a fire business therein, they having been duly licensed by the insurance commissioner to so do. The answer then proceeds as follows: "And, further answering, these defendants deny that on the — day of July, 1897, that each and all or any of said defendant corporations unlawfully misused and abused their said franchises, rights, and privileges as fire insurance companies authorized to do business under the laws of the state of Missouri, and they deny that they or either of them, in the city of Kansas City, Jackson county, Missouri, entered into or became a member of the party to any pool, trust, agreement, combination, confederation, or understanding with each other and other fire insurance corporations and associations of persons to regulate and fix the price or premium to be paid for insuring property in said Kansas City against loss or damage by fire, lightning, or storm, and to maintain and control said price. They admit that each and every one of said defendant corporations is represented in said Kansas City by a local resident fire insurance agent, legally and fully authorized by each of said several corporations to act for their respective corporations in all matters relating to the insuring of property against loss or damage by fire, lightning, or storm in said city; and defendants deny that heretofore, to wit, on the — day of July, 1897, that they, or either of them, by their said respective agents, entered into and were members of, and are now members of, a certain association and organization composed of said fire insurance agents and the agents of other fire insurance companies, known as the 'Board of Underwriters'; and

they deny that the general nature and object of said Board of Underwriters is to fix and regulate a certain price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm in said city, or to maintain the said price or premium, when so regulated or fixed, for insuring property against loss or damage by aforesaid risks in said city; and they deny that they, or either of them, through said Board of Underwriters, did, on the — day of July, 1897, or at any date charged in said information, unlawfully agree, combine, and confederate with each other, or with other fire insurance corporations doing business under the insurance laws of the state of Missouri, to form an insurance trust in Kansas City, Missouri, to regulate, fix, and maintain the price or premium to be charged by each of said corporations for insuring the different designated classes of risks on property against loss or damages by fire, lightning, or storm in Kansas City, Missouri; and defendants deny that they, or either of them, at the time mentioned in said information, in pursuance of any agreement, combination, confederation, and trust, were, through their respective agents, unlawfully maintaining any agreed price or premium upon the respective classes of risks on property against loss by fire, lightning, or storm in said Kansas City; and they deny that they, or either of them, ever fixed by any agreement the minimum rate to be charged in Kansas City, Missouri, by said defendant corporation, or that they have established by any agreement any minimum rate that their agents are allowed to charge for said business within the city of Kansas City, Missouri; and they deny that they, or either of them, ever, by any agreement of any kind whatsoever with themselves or any other corporation, fixed any rate of insurance upon property in said city of Kansas City, Missouri. And, further answering, defendants say that the truth and facts are as follows: That at and prior to the time alleged in said information each of these defendants had appointed a local agent in Kansas City, Missouri, each representing his respective company; that said local agents had authority from the respective defendants to make contracts of insurance for and on its behalf, insuring property in said city against loss or damage by fire, lightning, or storm in so far as said respective insurance companies were authorized by their respective charters to effect such different kinds of insurance, and to agree with the assured upon the amount of premium to be charged under the specific contracts effected by them, and that, in order to effectuate their business, these defendants respectively sent their respective policies of insurance in blank, signed by their respective presidents and secretaries, with their respective corporate seals attached, to their respective agents, to be by them respectively countersigned, and delivered to the parties with whom they had effected contracts of insurance aforesaid; that dur-

ing the month of July, 1897, there existed in Kansas City, Missouri, an association known as the 'Kansas City Board of Fire Underwriters,' whose object was the improvement of the business of fire underwriting and of the construction of buildings, and whose membership consisted of the agents of the said companies legally authorized to do aforesaid business in Kansas City, Missouri; that the members of said association, under the constitution of said Board of Fire Underwriters, were required to submit to the secretary of said association all daily and monthly reports made by them to these respective defendants, all indorsements, renewals, certificates, and all policies spoiled, canceled, or not taken, and that the same should not be forwarded to these respective defendants without the stamp of approval thereon of the secretary of said Board of Fire Underwriters. And these defendants allege that said members of said board fully complied with aforesaid requirements of said board. They allege that the members of said board were not allowed to write a risk in Kansas City until the rate had been fixed by the secretary of said board; and they allege that said members were required to adhere strictly to the rates so fixed, and that they were not allowed, by said rules of said board, to cause insurance to be written or placed by any of defendant companies at less than said fixed rate, nor were they allowed to offer, allow, promise, or pay any commission, valuable consideration, or rebate to any person, firm, or corporation not a member of the said board, nor to receive business from any person, firm, or corporation engaged in the insurance business not a member of said board, without a permit from the secretary of said board; and they allege that said members were required to submit their books and papers for inspection to said board, and to undergo personal examination, under oath, when required by said board, and that fines and penalties and expulsions were provided as punishments for any infraction of the rules of said board. And these defendants allege that the only transactions of said Board of Fire Underwriters were the classification of the various subjects of insurance, and the fixing of rates of premium to be charged and maintained by the members of said board; and these defendants say that they had, respectively, information concerning the transactions of aforesaid Board of Fire Underwriters, and information that their respective local agents were members of said board; that said Board of Underwriters classified the subjects of insurance at Kansas City, and fixed and maintained the rates of insurance thereof, but they respectively deny that they, or either of them, were ever members of said board, or in any manner subject to its rules and regulations, except as hereinbefore stated. And, further answering, these defendants say that the constitution, rules, and transactions of said Board of Underwriters did not in any manner constitute it as a pool, or a trust, or

a conspiracy to control prices; nor did they constitute an agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any other person or association of persons to regulate, fix, or maintain the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm. And these defendants, further answering, say that said Board of Fire Underwriters was not at the date mentioned in said information engaged in any business reprobated or forbidden by the laws of this state, and they deny that since the date mentioned in said information, to wit, July —, 1897, that they, or either of them, in the city of Kansas City aforesaid, have offended against the laws of this state, or have abused and misused their respective corporate authority, franchises, and privileges, or that they have unlawfully assumed or usurped franchises and privileges not granted to defendants by the laws of the state of Missouri; and they respectively deny that they have entered into or become a member of or party to any pool, trust, combination, and confederation as aforesaid to regulate, fix, and maintain the prices and premiums to be paid for insuring property against loss or damage by fire, lightning, and storm in Kansas City, Missouri; and that they deny that they, or either of them, have been guilty of a perversion of the franchises granted to them by the state of Missouri, or of any usurpation of privileges not granted to them, or that they, or either of them, have in any manner injured the public, as set forth in said information,—all of which said respective defendants are ready to prove and verify as the court shall award."

W. J. Fetter testified in behalf of relator substantially as follows: "In July, 1897, the respondents were engaged in the fire insurance business in Kansas City, Missouri, and their agents were then members of the Kansas City Board of Underwriters, and that said board was composed of the agents of fire and tornado insurance companies. The board is an unincorporated institution, but have a constitution and rules, by which they are governed, which were adopted February 25, 1897, and have not since been altered or amended. The rates of insurance in Kansas City, Missouri, are fixed by myself, and not by the Board of Underwriters. This was by agreement among the insurance agents in the city. The estimates on dwellings are in card form. When agents want estimates on dwellings, they ask for the card, which has only estimates on dwellings, private barns, and churches. When an agent wants rates in the city on business houses, he calls on me for them. About seventy-five per cent. of the business written in the city during the dates named in the petition was written at the rates fixed by me. My duties as secretary of the board are prescribed by the rules of the board. The board was organized many years ago. My salary as secretary of the board is received

from the insurance companies. The board has two funds, or, rather, there are two funds in connection with it. The board has a fund of their own. They charge a membership fee of \$200 for every member, and accumulate a fund in that way. I am paid by the companies for making rates and attending to the office business of the companies. The companies do not pay the expenses of the board that the agents make; they have to pay that themselves. I act in a double capacity. I have the companies' money, and pay it out according to their order. The companies contribute to these expenses and my salary on the basis of the business that they do, and this amount is determined by the business that goes through my office. All the business of the members of the Board of Underwriters at Kansas City is supposed to go through my office. The daily reports of the insurance agents are sent to my office. These are reports on the policies written, and they contain a statement of the specific insurance, which is called in insurance circles the 'daily reports.' These daily reports contain statements of the location of the property, its occupancy, and the character of the building, whether a store, factory, etc., and also contain the rates at which the risk is written. It is sent to my office for the purpose of having the rate stamped on it. If the rate in the policy or report that comes to my office is not the rate according to my estimate, I return it to the agent, and ask him to correct. If he does not correct it, then I send it to the company, and ask them to correct it. I first try to get the agent to correct it. Generally he does. I suppose there is \$800,000 worth of premiums collected annually in Kansas City outside the board and inside the board. The total premiums in the state of Missouri amount to \$4,600,000 per annum. Premiums in St. Louis last year was \$2,100,000, and, deducting the \$2,100,000 and the \$800,000 in Kansas City from the \$4,600,000, it would leave less than \$2,000,000 for the rest of the state outside of St. Louis and Kansas City." Witness stated that the rate as fixed by him was the rate at which the companies intended the business in Kansas City to be written by their agents. And the rate fixed by him is the rate generally maintained by the agents of the companies as members of the Board of Underwriters of Kansas City, Missouri. "The object of the agreement is to maintain and obtain the rate that I make. The agreement among the agents is for the purpose of maintaining the rates of insurance, and that is the object of fixing the rates by myself. Each agency has one membership in the Board of Underwriters. The companies have knowledge of the existence of this Board of Underwriters, and in a general way they know that I make the rates for the board, and that the board maintains the rates I supply them. That is one of the general objects of the board. This agreement as to rates applies both to fire and tornado insurance." On

cross-examination he testified substantially as follows: "I have been in the fire insurance business 48 or 49 years. For 16 years I have been engaged in preparing rates, and furnishing information to insurance companies. My business during that time has been to gather up information and make rates. Previous to 1893, for a number of years, premiums had been gradually decreasing in Missouri, and losses gradually increasing, until the companies found that they were losing money rapidly; and then it became necessary to increase rates. There was at that time a state board of underwriters that had control of that branch of the business, and they increased the rates in this state in 1893 and 1894 considerably." Witness was permitted to testify, over the objection of counsel for relator, that the rates fixed by witness in Kansas City were reasonable. "The rates are prepared on data that takes into consideration the merits of the building for resisting fire; whether or not they have a shingle roof, or tin roof, and whether or not a skylight is in the building, and the size of the same. Also an elevator shaft is considered if there is one; also any other exposures. These additions to rates or reductions from rates are based upon a general experience in the insurance business, and are arrived at by the losses. The facilities for extinguishing fire, and whether or not a town has a good fire department, are all taken into consideration in fixing the rate. Insurance statistics have been kept, but have not been collated. I fix my rates in this way, for instance: I take any large district, as, for instance, the state of Missouri, and the different companies say, 'We are losing money on a certain class of risks,' say a planing mill, and one company says, 'We are losing money on this class of risks,' and another company says, 'We are losing money on the same class,' and still another company comes in and says the same thing, and so on until it seems a majority of the companies are making a complaint, and the general idea is that there is a loss in that particular class of business, and in that way we add to the rate. There is also a general experience and well-recognized feature in risks called the 'mortality' of a risk. To illustrate what I mean, I would say that some risks have a moral hazard that you cannot apply to the individual. For instance, several years ago there were a great many woolen factories started in this state. These factories were burned one after another until the complaint against them became general among the companies. There was a moral hazard in that. You could not point exactly to some one man, and say he burned his factory, but altogether it was a loss, and it was agreed generally that the business was not profitable, and accordingly the rate was raised. After this came the starch factories, and after awhile the creameries were started in the little towns in Missouri, and they burned with surprising regularity. You could not prove that they had

51 S.W.—27

been willfully destroyed, and yet the business was unprofitable. There was another moral hazard,—you cannot point out a specific case of arson in these instances, but the hazard is there. And these divers and scattered causes all converge to make the rate. The first advantage to the companies in having myself fix the rates is to give the companies an adequate rate; that is, one sufficient to pay the losses and expenses and reasonable profit on the capital invested. Two or three years ago we had some heavy losses in Kansas City, in the West Bottoms, in high buildings, where water pressure was not sufficient. These fires proved what insurance people had claimed for several years, to wit, that the water pressure in that vicinity was not sufficient. The result of these fires was that we increased the rate of insurance in the West Bottoms 25 per cent. The Board of Underwriters at Kansas City has an inspector out looking after hazardous things about buildings, such as rubbish, imperfect shutters and doors, and gasoline, and things of that kind. The object of all this, of course, is to decrease the fire risk. There is also a city inspector of buildings, who is employed by the city government of Kansas City, and he examines the buildings in the course of erection. When Kansas City makes reductions that we deem necessary, there will be a reduction in the rates in the eastern part of the city. There is a salvage corps or underwriters' patrol maintained by the city, to which the insurance agents and companies contribute each \$100 per annum, and which is for the protection of property at fires by covering goods with tarpaulins." Witness testified that this Board of Fire Underwriters, however, while the effect of such board in other parts of the country might be to reduce rates, had not reduced rates in Kansas City, Mo., because, as witness said, of lack of proper water facilities along the Southwest Boulevard, caused by insufficient supply pipe. "I have no special rate book for Kansas City, but I have in my office a copy of the rates for Kansas City, and the companies pay me for my work in fixing and getting up these rates. There is nobody interested in my work in getting up rates in insurance except the insurance companies whose agents are members of the Board of Underwriters. I have really a dual capacity. I am secretary of the Board of Underwriters, organized by the agents, and then I have other work,—the making of rates, examining daily reports,—but the examination of the daily reports is another branch of the business. This business is all business of the companies." Redirect examination: "The basis of my rates in Kansas City is not in my own information alone, but is a rather general consensus of opinion and experience of the companies and agents; not written opinions, but collected by means of a general knowledge and information. This data I do not find anywhere collated. In making a rate I am governed very frequently by the gen-

eral ideas of all the companies as I get it. The rates were increased two or three years ago, but were reduced in the West Bottoms where waterworks improvements were made; but the rates have not been reduced to what they were before in the eastern, or residence, portion of the city, nor in a portion of the business part of the city. I do not absolutely fix them. Some years ago we adopted what is called the 'St. Louis Schedule,' with a reduction of 5 per cent. from said schedule on the buildings and a reduction of 10 per cent. on the business stocks. This schedule applies only to business property; it does not apply to dwellings. Since that time I have made increases or reductions in the various risks in Kansas City straight along, as it seemed to me to be proper or necessary; and I determined the rate in July, 1897, and through 1897, at which business would be written. My efforts were to make a rate that would enable companies to pay expenses and make a profit on the capital invested, and I was moderately successful in the year of 1897 in doing this. The companies made some money in Kansas City in 1897. If it was not for this Board of Underwriters, the rates of insurance would not be uniform in Kansas City. That nonuniformity in rates would result from a competition for business. The salvage corps that I have mentioned is a part of the city government of Kansas City, Missouri. The chief of the fire department of Kansas City nominates the members of the salvage corps, and they are confirmed by a city council. In the work the salvage corps does in a fire they are under the control of the chief of the fire department. No one other than myself has a right to change a rate in Kansas City. As a rule, when I raise or lower rates, my action is not subject to review. Sometimes, of course, the agents think the rates as fixed by me are unreasonable, and they appeal to the companies, and then the companies and myself adjust the matter. I am really the agent of the companies. The companies would simply, if they thought a rate was wrong, express an opinion about it, but would enter no protest. And to require me to change a rate it would take a consensus of opinion of all the companies interested. The object of the Board of Underwriters at Kansas City is the uniformity of rates. The companies that were represented in the Board of Underwriters, and that contribute to my salary as secretary, expect their business to be written at the rate I fix. The Board of Underwriters was organized exclusively for the purpose of dealing with the insurance business. The insurance business is confined exclusively to fire and tornado insurance. The companies, I suppose, expect the business to be written at the rate I fix. It was understood by the companies that they were to obtain these rates that were made by me, and which they paid me for making. These companies are engaged in a general way in writing the same class of

risks. I place a stamp on the policies of the representatives or agents of the companies, and then forward the policies to the companies. The policies go direct from my office to the companies. I was not entitled to any compensation from the Board of Underwriters. I keep the official records of the board though. I presume I was the medium between the companies and the board by which the business was carried forward."

James A. Waterworth testified as follows: "Been president Board of Fire Underwriters of St. Louis fifteen years. Board of Fire Underwriters has been engaged in obtaining the adoption of what is called 'slow-burning' methods of construction here in the city of St. Louis. That pertains to buildings of large size. And then another method was adopted,—that of obtaining the erection of fireproof buildings, such as are built of indestructible material, with the elevators and staircases inclosed by brick, so that no communications of fire or heat will proceed from one floor to the other. These are the chief modern improvements of construction. Accompanying these are other improvements. One was an external opening for air, made fireproof, so they would be protected from the outside. Standard slow-burning buildings get a reduction in St. Louis of 40 per cent. from the regular rate. This is 40 per cent. from the regular rate made for the smaller buildings constructed, as ordinary buildings are, with lath and plaster. A fireproof building gets a reduction of 50 per cent. from this rate, and in some instances, where it is a fireproof building used exclusively for offices, it gets as much as 60 per cent. reduction. Each local point has the liberty to make its own estimate of what the construction is worth. These fireproof buildings act as a fire wall to prevent the spread of fire. Then, after the construction of buildings, there is another class of improvements; for instance, the automatic sprinkler, which is an arrangement by which at every 10 feet square in some places and 8 feet square in others, according as they require it, is put on the water pipes what is called a 'sprinkler head,' which opens by the heat. The solder, which keeps it together, being usually fusible, melts at a temperature of 160 degrees. Whenever the heat of a room goes to 160 degrees under one of these sprinkler heads, the sprinkler head opens, and discharges water over 100 square feet immediately below it, and is looked on by insurance men as an effective means of stopping fire in its incipency, and therefore we make an allowance, where it is constructed properly, according to the character of the building and the goods, from 35 per cent. up to 60 per cent. Whenever insurance companies have caused an expression of their views on these questions, if it is a place where there is a local organization, then the Board of Underwriters make its estimate, and, if there is no local organization, the individual company makes its own estimates of what deductions should be made

for this class of improvements. Then there is the automatic alarm, which is a contrivance by which, when the temperature over any point rises above the normal, say to 130 degrees, an electric current communicates with a gong, and the fire alarm is rung. These automatic appliances are attached to the ceiling at the same interval as I have stated for automatic sprinklers. For these automatic alarms a reduction is also made in the rate. Then there are automatic clocks for the night watchman. In some of these buildings there are signal stations at a certain distance on each floor of the building, where the watchman, as he approaches, touches a button, which records his presence at the central station down town. For them we make an allowance in rates. All these things have tended to reduce the fire risk. The Chicago fire cost about \$200,000,000; the Boston fire about \$70,000,000." Witness then proceeded to give a detailed statement of his efforts, as a member of the Board of Fire Underwriters of St. Louis, to improve the fire pressure in the city of St. Louis. The testimony of the witness, however, tended to show that although, in 1893, these improvements were not all used,—in fact, hardly any of them,—yet premiums were several hundred thousand dollars greater in St. Louis than they were in 1897, although the valuation of the city of St. Louis had gone up \$60,000,000 and the actual insured values had gone up \$100,000,000. On cross-examination the witness stated that "the premiums paid by insurance companies in St. Louis were larger than they were in 1896 and 1897, although the volume of business in 1897 was larger than it was in 1892, and the assessable wealth of St. Louis was greater than it was in 1892; that the companies did not make as much money in 1897 as they did in 1892, although these improvements had been made. The general improvements—automatic sprinklers, electrical appliances, and improvements in the water service of cities—certainly benefits insurance. This class of improvements I have been speaking of applies only to what is known as 'mercantile risks,' and does not apply to dwelling-house risks. Taking the whole state of Missouri, the insurance rates have been remarkably steady for the last ten years."

Section 19 of the rules of order adopted by the Board of Underwriters of Kansas City, Mo., reads as follows: "Members shall submit to the secretary all daily and monthly reports, indorsements, renewals, certificates, and all policies spoiled, canceled, or not taken, and shall not forward the same to the companies without the secretary's stamp of approval thereon. They shall not write a risk until the rate has been fixed by the secretary, and shall adhere strictly to the rate so fixed; nor shall they issue a policy or policies, or cause insurance to be written or placed, by any company, at less than said fixed rates."

Section 1 of an act of the general assembly of the state of Missouri against pools, trusts,

and conspiracies, approved March 24, 1897 (page 208, Acts 1897), reads as follows: "Section 1. Any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state, or which does transact or conduct any kind of business in this state, or any partnership or individual, or other association of persons whatsoever, who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price when so regulated or fixed, or shall enter into, become a member of or a party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price, or premium to be paid for insuring property against loss or damage by fire, lightning or storm, shall be deemed and adjudged guilty of a conspiracy to defraud; and be subject to penalties as provided in this act: provided, however, that the provisions of this section shall not apply to agreements of fire insurance companies, or their agents, or boards of fire underwriters, to regulate the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm in cities in this state which now have or which may hereafter acquire a population of one hundred thousand inhabitants or more; and, provided further, that if such insurance companies, or their agents, or the board of fire underwriters doing business in any such city, shall combine in such city, either directly or indirectly, or agree or attempt to agree, directly or indirectly, to fix or regulate the price or premium to be paid for insuring property located wholly outside of such city against loss or damage by fire, lightning or storm, such company so violating the provisions of this act, either by itself, its agents, or by any such board of underwriters, shall be taken and deemed to have forfeited its right to do business in this state, and shall become liable to all the penalties and forfeitures provided for by the provisions of this act." It is manifest from the evidence in this case that respondents were at the time of and before the institution of these proceedings, unless exempted therefrom by the proviso in said section, acting in violation of that provision of the section of the act quoted which prohibits any corporation doing business in this state from entering into any agreement, combination, or understanding with any other

corporation to regulate or fix the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm, or to maintain said price when so regulated or fixed (*State v. Phipps*, 50 Kan. 609, 31 Pac. 1097); and it makes no difference that an agreement to that effect was entered into by the agents of respondents instead of themselves, for it is perfectly clear that the rates on insurance were fixed by their agent, whose salary they paid, and that they received premiums upon all policies issued by their agents in accordance with the rate fixed by him, thereby making the acts of their agents their own. The secretary of the Board of Underwriters, of which he and other agents of respondents were members, was empowered to fix the rates, and no member of the board could write a risk until the rate was fixed by him as —; nor could they issue a policy, or cause insurance to be written or placed, by any company, at less than the rates thus fixed.

The question, then, is, are the respondents, with respect to fire insurance in Kansas City, Mo., exempted from the penalties imposed by said act by the proviso in said section by which it is provided that its provisions shall not apply to agreements of fire insurance companies, or their agents, or boards of fire underwriters, to regulate the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm in cities in this state which now have, or which may hereafter acquire, a population of 100,000 inhabitants or more? The attorney general insists that this proviso is unconstitutional upon the ground that it divides a natural class, to wit, fire insurance companies, into two portions, making two classes out of one, and thus, in effect, arbitrarily enacts different rules for the government of each. We are unable to see the force of this contention. The act, as we understand it, does not divide insurance companies into two classes, but by the proviso such companies are simply exempted from the provisions of the act prohibiting them, their agents, and boards of fire underwriters, from regulating the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm in cities in this state which now have, or which may hereafter acquire, a population of 100,000 inhabitants or more. This is but saying, by implication at least, that insurance companies may, by agreement, fix the rate of insurance to be charged by them for fire insurance in such cities. Section 53, art. 4, of the constitution of this state, provides that "the general assembly shall not pass any local or special law * * * granting to any corporation, association or individual any special or exclusive right, privilege or immunity," and it is argued by relator that the proviso in the act in question is in conflict with that provision of the constitution, because it imposes upon a combination of certain wholesale dealers in St. Louis

and Kansas City special obligations or burdens from which insurance companies in said cities are exempt. The cardinal rule in this state is "that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special." *State v. Herrmann*, 75 Mo. 354; *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774. In *State v. Bronson*, 115 Mo. 271, 21 S. W. 1125, a section of an act of the general assembly, was under consideration, which provided that "from and after the first day of September, 1891, no text book upon the subject named in section 5 of this act, except those contracted for by said commission, shall be sold for use in the public schools of Missouri; and, from and after the first day of September, 1892, no text book upon the aforesaid subjects, except those contracted for by said commission, shall be used or taught in any public school within this state: provided, that this act shall not apply to any city or district which now contains or may hereafter contain more than one hundred thousand inhabitants" (*Laws* 1891, p. 27, § 11); and it was held that the proviso did not make the law unconstitutional. The proviso relates to fire insurance in cities of a class,—that is, cities in this state which now have, or which may hereafter acquire, a population of 100,000 inhabitants or more; and, while there are but two of such cities in this state at this time,—St. Louis and Kansas City,—it has been repeatedly held by this court that such a law is general, and not special. *Ewing v. Hoblitzelle*, 85 Mo. 64; *Rutherford v. Heddens*, 82 Mo. 388; *State v. Herrmann*, 75 Mo. 340; *Kelly v. Meeks*, 87 Mo. 396; *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249; *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774. In *State v. Miller*, 100 Mo. 439, 13 S. W. 677, an act of the general assembly which fixed the number of school directors in cities of over 300,000 inhabitants, prescribing their qualifications, and determining the manner of their election and terms of office, was not obnoxious to the constitution, as being a special or local law. Whether or not an act of the legislature be a local or general law must be determined by the way in which it affects the people as a whole, rather than the extent of the territory over which it operates; and, if it affects equally all persons who come within its range, it is not a local or special law. In this case the proviso affects the business of insurance in all cities of a certain class. It does not grant to any corporation, association, or individual any special exclusive right, privilege, or immunity, but applies alike to all fire insurance companies doing business in a certain class of cities. Nor is it class legislation. It relates to fire insurance companies as a class, and is therefore a general law. In *Phillips v. Railway Co.*, 86 Mo. 540, it is said: "In the determination of a question involving the constitutionality of a law it is a settled rule for the guidance of courts

that the acts of the legislature are presumed to be constitutional, and it is only where they manifestly infringe on some provision of the constitution that they can be declared void for that reason. In case of doubt every possible presumption not directly inconsistent with the language and subject-matter is to be made in favor of the constitutionality of the act." See, also, *State v. Able*, 65 Mo. 357.

We can reach no other conclusion than that the act in question is valid. If it be impolitic or unwise in its operation, the remedy lies in the legislative branch of the state government; but the evidence adduced tends to show that through the organization of boards of underwriters in large cities, and the acts and advice of their members, a very large proportion of all modern buildings erected therein are made almost fireproof, in consequence of which the rates of insurance on such buildings and their contents are much less than they would otherwise be. Besides, by the organization of their salvage corps, vast amounts of property are saved from destruction by fires. From these considerations it follows that the writs should be denied, and it is so ordered. All concur.

STATE ex rel. HERRIFORD v. McKEE,
Judge.

(Supreme Court of Missouri. May 30, 1899.)

**CHANGE OF VENUE — REVIEW — MANDAMUS —
CORRECTION OF ERRONEOUS ORDER — ADE-
QUATE LEGAL REMEDY — PETITION.**

1. Error in awarding a change of venue cannot be corrected unless excepted to in the court which ordered the change, since the erroneous order, being within the court's jurisdiction, is not a nullity.

2. Under Rev. St. 1889, § 2262, as amended by Laws 1895, p. 93, providing that a change of venue to another county because of disqualification of the judge shall not be awarded if the parties agree on a special judge, or request the election of one, a change of venue may be ordered because of the disqualification of the judge without asking the parties whether they will agree on a special judge or consent to the election of one, it being incumbent on them to make the agreement or consent to the election on their own motion.

3. On an application for a writ of mandamus to the judge of a circuit court to compel him to reinstate a cause on the docket after he has granted a change of venue therein to another county, because the granting of the change was erroneous, it will be presumed that the order granting the change was correct until the contrary appears.

4. Mandamus will not lie to compel the circuit court to take jurisdiction of a cause after it has erroneously granted a change of venue therein, the granting of a change of venue being within its jurisdiction.

5. An order granting a change of venue being reviewable on appeal or error, mandamus will not issue to correct it, though the aggrieved party, by failing to except, lost his right to have it reviewed.

6. A petition for mandamus to the circuit court to compel it to take jurisdiction of a suit because its order granting a change of venue therein was erroneous in that it was made without asking the parties whether they would agree on a special judge, or consent to the election of one, must

show that at the time the change was ordered there was present or available a person competent to act as special judge, or that the requisite number of lawyers were present, from whom and by whom a special judge could be elected.

In banc.

Application by the state, on the relation of Esther Herriford, for a writ of mandate to Edwin R. McKee, circuit judge of Knox county. Denied.

D. A. Rouner and O. D. Jones, for relator.
J. M. Payne and C. A. Stewart, for respondent.

SHERWOOD, J. This proceeding questions the correctness of the action of Judge McKee in awarding a change of venue from the circuit court of Knox county to that of Schuyler county. The petition for the alternative writ, among other things, in substance and form alleges the presentation of the application upon due notice given, "based alone on the ground of the prejudice and disqualification of the judge," etc., whereupon the respondent judge "immediately awarded the venue to the circuit court of Schuyler county, Missouri, without asking the parties whether they could or would agree on a special judge to try the cause, or whether both parties would consent to the election of attorney at the bar present, at an election to be held by the clerk, as provided by law; and failed and refused to enter on the record preceding the awarding of the change of the venue to Schuyler county the truth and the fact as to said agreement or failure of the parties to agree as aforesaid." The petition then alleges the sending by the clerk of the Knox circuit court of the transcript, etc., to the clerk of the Schuyler circuit court; that when the cause came on to be heard at the next term of the latter court it was then and there held by that court that no jurisdiction had been acquired by that court, "because of the failure of the judge of the Knox circuit court to afford the parties an opportunity to choose a special judge, or to agree to choose an attorney of the bar, to be elected according to law, and as provided by law; and because of the silence of the record on those facts and subjects it failed to appear and show that the Schuyler circuit court had jurisdiction of the cause." Thereupon the judge of the court last mentioned directed the clerk of his court to certify the cause back to the court from whence it came, and this was done. When the Knox circuit court convened at its next term, the defendant in the cause moved the court by written motion to strike the same from the docket. Plaintiff thereupon (relator herein) called the attention of the judge of the Knox circuit court to the ruling of the Schuyler circuit court, and also moved the court by written motion to proceed and ascertain whether the parties could or would agree on a special judge, etc.; but the judge denied the motion of plaintiff, and then and there made an order striking the cause from the docket, and would not reinstate the same.

The respondent judge, waiving the issuance of the alternative writ, appeared, and filed answer, in which he admits most of the allegations of the petition, and then specifically states: "Admits that he granted a change of venue without asking the parties whether they could or would agree on a special judge to try the cause, or whether both parties would consent to the election of an attorney of the bar, present, at an election to be held by the clerk. Admits that the clerk of the Knox circuit court, as commanded, made out and sent to the office of the clerk of the circuit court of Schuyler county a complete transcript of the record, and the original papers in the cause, and the ten dollars filing fee required by law, and sent the same to said clerk of said Schuyler county. Admits that at the May term, 1898, of the Schuyler county circuit court, then and there held, that the circuit judge thereof held that he did not have jurisdiction of said cause; but for what cause said court did not have jurisdiction of said cause this respondent does not know nor can he state, nor does he know the reason or reasons said court assigned for it not having jurisdiction of said cause, and for it directing the clerk of said court to certify said cause back to the circuit court of Knox county. Admits that the defendant in said cause, at the June term of the Knox circuit court, 1898, filed a motion in said court before the Honorable Ed. R. McKee, judge, moving and asking him to strike said cause from the docket of said court. A copy of said motion so filed, and duly certified to by the clerk, is hereto attached, and marked 'Exhibit D.' Admits that thereupon the plaintiff called this respondent's attention to the ruling of the circuit court of Schuyler county in this action, and claiming that the Knox circuit court should proceed, and ascertain whether the parties could or would agree on a special judge, or whether they would consent to the election of a lawyer by the members of the bar present to try the cause. Admits that he sustained defendant's motion, and struck said cause from the docket. Admits that during the said last-mentioned term of said Knox circuit court the plaintiff filed her motion to reinstate said cause on the docket of said court, and that this motion the court refused to sustain. Respondent, for further answer to said petition, denies each and every allegation therein contained not hereinbefore admitted to be true. Respondent, for further answer, states that at the time the said plaintiff in said suit as aforesaid filed her application for a change of venue as aforesaid, and at the time respondent, as such judge, passed upon and granted said change of venue, the parties to said suit did not thereupon agree upon a special judge, nor did both parties request the election of a special judge to try said cause."

1. Ever since *Potter v. Adams' Ex'rs*, 24 Mo. 161, it has been the settled doctrine of this court that the only way to remedy the improper awarding of a change of venue is

by saving exceptions at the time the change is ordered, and in the court in which ordered. *State v. Knight*, 61 Mo. 373; *State v. Dodson*, 72 Mo. 283; *Squires v. City of Chillicothe*, 89 Mo. 226, 1 S. W. 23; *Keen v. Schnedler*, 92 Mo. 516, 2 S. W. 312; *Stearns v. Railway Co.*, 94 Mo. 317, 7 S. W. 270. There is no pretense that exceptions were saved in the manner aforesaid when the change was ordered. In the case last cited it was sought by plaintiffs by bill in equity to have declared null and void a decree entered in favor of the railroad company and against Stearns for the recovery of a large sum of money and the foreclosure of his equity of redemption in some 8,000 acres of land. Stearns appeared, and filed an answer, and the plaintiff moved to strike out a part thereof. Thereafter, and at the August term, 1878, the Newton circuit court made an order changing the venue of the cause to the Greene county circuit court. This order, it is alleged, "was made without, and not founded upon, or pretended to be founded upon, any disability or disqualification of the judge of said Newton circuit court on account of his being interested in or related to either party, or by having been of counsel in said case, and without any application having been made therefor by either party to said cause, and without any consent of the parties in writing being filed in said Newton circuit court, as provided and required by law." The Greene circuit court, upon the filing of the transcript therein, took cognizance of the cause, and sustained the motion to strike out part of the answer. Stearns appeared in that court for the special purpose of making a motion to strike the cause from the docket for want of jurisdiction of that court. This motion being overruled, he made no further appearance, and thereafter the court rendered a judgment and decree in conformity to the prayer of the petition. To a petition filed in the Greene circuit court, alleging the foregoing facts, as placed in quotations, the defendant successfully demurred, and final judgment went on the demurrer. After discussing the case thus stated, and commenting on the authorities already cited, it is said: "The Newton county circuit court had full and complete jurisdiction of the subject-matter of that suit and of the parties thereto. It is a court of general jurisdiction, proceeding according to the course of the common law. It had power to award a change of venue of the cause, and the logical result of the authorities cited is that the order had the effect to transfer the cause to the Greene circuit court. If made without any cause existing therefor, or upon an insufficient affidavit, or on no affidavit at all, still the order is not a nullity. These are but errors and irregularities, available only to the opposing party by writ of error or appeal sued out from the final judgment in the cause in which the errors were made. They are of no avail whatever to the party against whom they were made in a collateral proceeding like

this. It follows that the Greene county circuit court had jurisdiction of the suit and of the parties thereto, and the judgment is not void or voidable in a suit like this one, there being no charge of fraud." The case just quoted from seems decisive of the one at bar.

2. But the case of *State v. Bacon*, 107 Mo. 627, 18 S. W. 19, has been pressed upon our attention as opposed in effect to the decision of that case, and this by reason of a change in the statute having occurred since the rulings heretofore noted. The change referred to consists of the addition of the following proviso to section 3733, Rev. St. 1879, as the same now appears in section 2262, Rev. St. 1889, to wit: "Provided, that where the application for a change of venue is founded on the interest, prejudice or other objection to the judge, a change of venue shall not be awarded to another county without a reasonable opportunity having first been allowed the parties to agree upon a special judge, or for the election of a special judge as provided by law." Section 2262 aforesaid has since been amended, and a proviso substituted in lieu of the one just quoted, and it is the following: "And provided further, that where the application is founded on the interest, prejudice or other objections to the judge, a change of venue shall not be awarded to another county if the parties shall thereupon agree upon a special judge, or if both parties request the election of a special judge; and in the latter case a special judge shall be elected as provided by law." Laws 1895, p. 93. So that the words "reasonable opportunity" have been entirely eliminated from the statute and from consideration, and it was upon those words that the case of *State v. Bacon* turned and was decided. The statute, as it now stands amended, does not any longer require the judge who is charged with prejudice, etc., to give the parties "a reasonable opportunity," etc., but casts upon their shoulders the duty of acting when the application is presented, to wit, by agreeing upon a special judge, or by both parties requesting the election of a special judge. The return of the respondent judge shows that no such agreement on a special judge was made, nor a request by both parties for the election of a special judge. This allegation, not being controverted, stands admitted of record, and shows the action of the judge of the Knox circuit court to have been entirely correct, and in entire conformity to the present statute. But, apart from such return, the presumption would be that the Knox circuit court acted correctly in awarding the change of venue. Such favorable presumptions invariably attend the acts and doings of courts of general jurisdiction unless countervailed in an appropriate way. *Huxley v. Harrold*, 62 Mo. 516, and numerous other cases.

3. The case of *State v. Bacon*, supra, was incorrectly decided, however, even if Judge Bacon did fail to give the parties "a reasonable opportunity," etc.; and for these rea-

sons: Under the authorities heretofore quoted, the only remedy recognized by this court for the unauthorized changing of the venue is by exception properly preserved at the time; in other words, the erroneous granting of a change of venue is a matter purely of exception, and such matter cannot be preserved save in the only repository known to the law, to wit, a bill of exceptions, something which the record recitals cannot supply. *Nichols v. Stevens*, 123 Mo. 96, 25 S. W. 578, and 27 S. W. 613, and cases cited. These former rulings of this court on the absolute necessity of preserving exceptions in order subsequently to take advantage of an erroneous ruling respecting a change of venue were wholly overlooked, or else ignored, in *Bacon's Case*, and therein and thereby error was committed; error which we refuse to sanction.

4. The circuit court of Knox county was a court of general jurisdiction. It had jurisdiction over the general class of cases of which plaintiff's case was a member, and the jurisdiction of that court had attached to the particular subject-matter which constituted plaintiff's cause of action, and this by reason of suit brought and process served on the defendant in the cause, as well as by his personal appearance to the action. This being the case, the exercise of the complete jurisdiction thus possessed by the Knox circuit court was not ousted by reason of the fact that such jurisdiction was erroneously exercised, if, indeed, it was thus exercised. The distinction lies between the existence of jurisdiction and its erroneous exercise, because "the power to decide correctly, and to enforce a decision when correctly made, necessarily implies the same power to decide incorrectly, and to enforce a decision when incorrectly made" (*Davis v. Packard*, 10 Wend. 74); and there is no more divestiture of jurisdiction in the latter case than in the former. Jurisdiction still survives despite of error committed. This is the result of all the authorities. And the jurisdiction of the Knox circuit court was not at all affected by reason of the fact, if it was a fact, that that court acted in contravention of a proviso to a statute, rather than any other portion thereof. Nor was the order for the change of venue in relator's case any more a special jurisdictional act than a hundred other similar orders made by the circuit courts in the customary course of their daily duties,—as, for instance, the issuance of a writ of garnishment, or the ordering of a venire; hence no manner of necessity existed to cause the record to make recital about the failure of the parties to agree upon a special judge, or to request the election of such a judge. And, even had there been such necessity, its existence being ignored would not destroy the existence of the jurisdiction of the trial court to do the act now challenged. Recurring to the subject just intermitted, of the proviso to the statute, it is in line with previous remarks to state that the disobedience of a positive statute, or even of a prohibitory

statute, does not abate by one jot or one tittle the power of the disobedient court to make and enforce the improper and lawbreaking order. This principle is illustrated and exemplified by numerous cases, and denied by none. Thus, in *Martin v. State*, 12 Mo. 475, the effect of the disobedience by a trial court of a prohibitory statute was discussed by Judge Ryland, who, speaking for the court, said: "The St. Louis circuit court, and the judge thereof in vacation, had the power to grant and issue the writ. This gives to such court or judge jurisdiction over the subject-matter; and, though the statute expressly declares that 'no person imprisoned on an indictment found in any court of competent jurisdiction, or by virtue of any process or commitment to enforce such indictment, can be discharged under the provisions of this act, but may be let to bail if the offense be bailable, and, if the offense be not bailable, he shall be remanded forthwith' [Rev. St. 1889, § 5381]; yet this section does not take away the jurisdiction, but orders and directs what shall be done. A circuit judge, therefore, discharging, against this provision of the statute, may be considered as acting indiscreetly, even erroneously. Yet having jurisdiction over the subject, his order discharging must be considered a justification to the jailer in turning out the prisoner. * * * The circuit judge having authority to issue the writ of habeas corpus (and this point the attorney for the state in his brief admits, but contends that all the subsequent acts of the judge are not only against but beyond his jurisdiction, and are utterly void), his act afterwards, in discharging Jackson, the prisoner, although it may have been erroneous, and contrary to law, yet it could not be said to be an act *coram non iudice*. There is a broad and obvious distinction between the illegal judgment of a court having jurisdiction and the act of a court without jurisdiction." In *Ex parte Jitz*, 64 Mo. 206, *Martin's Case*, as well as *Yates v. People*, 6 Johns. 337, were approvingly followed, and the same thing occurred in *State v. Wear*, 145 Mo. 162, 46 S. W. 1099, in a most elaborate and exhaustive opinion delivered by Judge Burgess, in which the principle now being discussed was illustrated and enforced by a wealth of argument and authority. The true rule in cases like the present is the one announced by the supreme court of Wisconsin in a case where a statute of that state prohibited strict foreclosures of mortgages except by consent of parties in open court, but such a decree without consent was held not to be void; the court saying: "The only question in such case is, had the court or tribunal power, 'under any circumstances,' to make the order or perform the act?" *Salisbury v. Chadbourne*, 45 Wis. 74; *Van Fleet, Coll. Attack*, §§ 61, 670.

5. Furthermore, the writ of mandamus cannot be made to perform or to usurp the functions of an appeal or writ of error. Where the matter is reviewable by appeal or writ of

error, and where the party may obtain redress in the ordinary course of judicial proceedings, mandamus will be refused. 2 *Spell. Extr. Relief*, § 1390; *State v. Lubke*, 85 Mo. 338; *Blecker v. Law Com'rs*, 80 Mo. 111. "It does not lie to correct the errors of inferior tribunals by annulling what they have done erroneously, nor to guide their discretion, nor to restrain them from exercising power not delegated to them." *Dunklin Co. v. District County Court*, 28 Mo. 449. The granting or the refusal of a change of venue may be erroneous, but the party in such case has his remedy by appeal or writ of error, and mandamus does not lie in such case. The action of the trial courts in refusing or granting a change of venue is constantly reviewed on appeal or error. *State v. Alexander*, 66 Mo. 148; *Corpenney v. City*, 57 Mo. 88; *Woodrow v. Younger*, 61 Mo. 395; *State v. Burnes*, 54 Mo. 274; and other cases. "And the fact that the person aggrieved has, by neglecting to preserve his statutory remedy, placed himself in such a position that he can no longer avail himself of its benefit, does not remove the case from the application of the rule, and constitutes no ground for interference by mandamus." *High, Extr. Rem.* (3d Ed.) § 16. And the same rule would doubtless hold where a person, by failing to except at the proper time, has put it out of his power to review by appeal or error the improper granting of a change of venue.

6. Moreover, even if relator were entitled to the writ on other grounds, still it must be denied to her on this one alone, regardless of all other considerations: There is no allegation in the petition that when Judge McKee awarded the change of venue there was any person present or available competent to act as special judge, or that the requisite number of lawyers were present from whom and by whom to elect a special judge. This, of itself, is fatal to relator's success.

7. Finally, our conclusion from the premises is that jurisdiction of this cause is now in the Schuyler circuit court, and we deny the peremptory writ. All concur.

BAILEY et al. v. FIGELEY.¹

(Court of Appeals of Kentucky. June 1, 1899.)

GRADED SCHOOLS—VALIDITY OF ELECTION TO IMPOSE TAX.

1. Under Ky. St. § 1495, there must be a registration of the qualified voters of a city of the fourth class before an election can be held therein to establish a graded school and levy a tax therefor.

2. Under Ky. St. §§ 4464, 4489, a city of the fourth class cannot be included with outlying territory for the purpose of establishing a graded school.

3. The county court has no jurisdiction to direct the holding of an election to establish a graded school in a city of the fourth class.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Appeal from circuit court, Hopkins county.
"To be officially reported."

Action by G. W. Figeley against I. Bailey and others to enjoin defendants from collecting a tax. Judgment for plaintiff, and defendants appeal. Affirmed.

Gordon & Gordon, for appellants. Edward W. Hines, William J. Cox, Maurice K. Gordon, and Clifton J. Waddill, for appellee.

BURNAM, J. In November, 1898, a petition was filed in the county court of Hopkins county, pursuant to the provisions of section 4464 of the Kentucky Statute, seeking to have a graded school established in common school district No. 4, the boundary of which embraced the city of Madisonville, which is a city of the fourth class, and a large contiguous territory outside of the limits of the city. At the following December term an order was made by the county court requiring an election to be held on the 17th day of January to determine whether the school should be established and the proposed tax levied. Subsequently, at the January term, and before the day fixed for the election, the court entered another order, setting aside the order made at the January term, and directing that the election be held on the 14th day of February thereafter. An election was held on the last day named, which resulted in 225 votes being cast for the graded common school tax, and 158 against it, and the election of appellants as trustees of the district, who thereafter, assuming to act as such trustees, levied a tax of 50 cents on the property of all white persons and corporations in the aforesaid boundary, and a poll tax of \$1.50 on each white male residing therein over 21 years of age, for the purpose of maintaining a graded common school in the district, and to pay for the erection of suitable school buildings. Thereupon this action was instituted by appellee, a resident and taxpayer of the city of Madisonville, to enjoin the collection of the tax so levied by the trustees, upon the ground that the election of appellants was illegal and void, because the district boundary in which the vote was taken includes the city of Madisonville, a city of the fourth class, and large contiguous territory outside of the limits of said city, and for this reason the county court had no jurisdiction to make an order to hold such election.

By section 4464 of the Kentucky Statutes, the county court is given jurisdiction of all proceedings for the establishment of graded schools in rural districts and cities of the fifth and sixth classes. It reads as follows: "It shall be the duty of the county judge in each county of this commonwealth, upon a written petition signed by at least ten legal voters who are tax-payers in the justice's district, town or city of the fifth or sixth classes in his county, to make an order in his order book, at the next regular term of his court after he receives said petition, fixing the boundary of

any proposed graded common school district, as agreed on by the county judge and the petitioners," directing an election to be held in said proposed graded common school district, "not earlier than forty days from the date of said order, for the purpose of taking the sense of the legal white voters in said proposed graded common school district upon the proposition as to whether or not they will vote an annual tax, in any sum named in said order, not exceeding fifty cents on each one hundred dollars of property assessed in said proposed graded common school district, town or city, belonging to said white voters or corporations, or a poll tax not exceeding one dollar and fifty cents per capita on each white male inhabitant over twenty-one years of age residing in said proposed graded common school district, for the purpose of maintaining a graded school therein, and purchasing suitable buildings therefor." The statute further provides "that the proposition to establish a graded common school district as provided for in this section, must be approved in writing on the petition to the county judge by a majority of the trustees of the common school district, and approved in writing on said petition by the county superintendent of common schools," etc. This section limits the jurisdiction of county-courts to proceedings to establish graded schools to cities of the fifth and sixth classes and rural districts. This is made very clear by section 4489, which forms a part of the same article, which regulates the manner in which schools may be established in cities of the first, second, third, and fourth classes. It provides that any city of this class may accept the provision of the common school law, and establish graded common schools, subject to all the provisions thereof, except as specially provided therein, at an election in the manner prescribed in section 4464. But the steps provided are radically different. The order for the holding of an election in one of these cities may be made by the mayor, who shall in such case perform all of the duties required of the county judge. The number of petitioners is required to be 100, instead of 10. The approval of the county superintendent is not required. The location and site of the school house are not required to be set out. The maximum limit of the cost of such school building is fixed at \$100,000, instead of \$15,000. The number, name, and style of the board of trustees shall be determined by themselves, instead of the number being limited to six, but the number of trustees shall not exceed the number of wards in the city. Principals and teachers are not required to hold county certificates. The superintendent of public instruction is directed to pay directly to the treasurer of the graded school the pro rata proportion of the school fund due said city from the state. And the aggregate amount of outstanding bonds issued by the board of trustees cannot exceed 2 per cent. of the taxable property of the city, in-

stead of the bonds being limited in amount to \$15,000, as provided for in cities of the fifth and sixth classes, and for rural districts. In the case at bar, all steps looking to the establishment of the proposed graded common school district, which embraced the city of Madisonville, were had under the provision of section 4464 of the Kentucky Statutes. We think it was the purpose of the statute to draw a sharp distinction between graded schools located in the country and small villages and towns of the state, and the larger cities, and that it was intended that these larger communities should have schools confined to their own limits, and that their control should be vested in officials selected by the voters of their city. In cities of the first, second, third, and fourth classes, the statute requires that there shall be a registration of the qualified voters of the respective cities before an election can be held (section 1495 of the Kentucky Statutes), while in the rural districts and cities of the fifth and sixth classes there is no such requirement. Under these provisions of the statute, it is clear that a city of the fourth class cannot be included with outlying territory for the purpose of establishing a graded school, and that the county court had no jurisdiction to direct that an election should be held for this purpose; and all steps and orders for this purpose, and the election held pursuant thereto are void.

A number of other errors are relied on, but, in view of our conclusions as to this one, it will be unnecessary for us to consider them. For the reasons given, the judgment is affirmed.

LOUISVILLE & N. R. CO. v. HAWKINS.¹
(Court of Appeals of Kentucky. June 1, 1899.)
MASTER AND SERVANT—INJURY TO LABORER ON RAILROAD—NEGLIGENCE OF SECTION BOSS—PLEADING.

1. Defendant railroad company is liable to plaintiff, a laborer on one of its gravel trains, for an injury resulting from the falling upon him of a board used to hold the gravel on the car, the section boss being negligent in starting the train when the board was insufficiently fastened, and plaintiff having no notice of the danger.

2. The negligence of the section boss in starting the train when the board was insufficiently secured was sufficiently indicated by the averment that the injury was caused by the negligence of defendant's servants in running and operating the train.

Appeal from circuit court, Warren county.
"Not to be officially reported."

Action by Charles Hawkins against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

J. A. Mitchell, H. W. Bruce, and Wm. Lindsay, for appellant. Proctor & Herdman, for appellee.

HOBSON, J. Appellee was a laborer in the service of appellant on one of its gravel trains. While he was shoveling the gravel off one of the cars, a side board which had been set up by the foreman at the end of the car was thrown down when the train was moved, it not being sufficiently fastened, striking appellee on the back, and inflicting painful bruises, for which the jury, by their verdict, fixed his damages at \$260. The proof tends to show that the gravel was held on the car by these side boards, which were heavy timbers, about two inches thick; that the train was standing still when they began unloading the car, and the section boss turned this board up on an end, so that the gravel could be shoveled out, putting a rock under it to hold it up. This would probably have been all right had the train remained standing, but soon thereafter another train came up, and the gravel train had to get out of the way. When this train approached, the hands stopped work, as was their custom, expecting the gravel train to be moved; but the boss, being in a hurry to get these cars unloaded, directed appellee and the other hands on this car to keep at work, and while they were at work signaled the engineer to go ahead, and, when the car moved, the insufficiently secured timber fell across plaintiff's back while he was stooping, shoveling away, with his back to the boss. Under this evidence we think the jury were warranted in finding that his injury was due to the negligence of the appellant. The instructions of the court fairly and properly presented the issue to the jury, and, while the evidence is conflicting, we cannot say that their verdict is not supported by the weight of the testimony, much less that it is palpably against the evidence. The charge in the petition that "the defendant's agents and servants in charge of said train did, by their gross negligence in running and operating same, greatly and permanently injure this plaintiff by causing a heavy piece of timber to fall upon him," sufficiently set out the negligence charged. The action of the boss in starting the train when the heavy timber, insufficiently secured, stood at the back of appellee, and ready to fall on him from the motion of the train, was sufficiently indicated by the charge of gross negligence in running and operating the train. After the boss directed appellee to continue his work, it was negligence in him to start the train when appellee had his back to the danger, and no notice of it. The other instructions given by the court were all that appellant was entitled to on the trial, and instruction No. 7 was, for the reasons indicated, properly refused. Judgment affirmed.

GOODMAN et al. v. CONNELLY.¹

(Court of Appeals of Kentucky. May 27, 1899.)

VACATION OF JUDGMENT—CONFIRMATION OF SALE—MISTAKE.

Where plaintiff, having a judgment for the sale of a tract of land to pay a certain debt, and a separate judgment for the sale of a part of the same tract to pay another debt, became the purchaser at the sale made under the latter judgment, and subsequently purchased the entire tract at the sale made under the former judgment, he cannot, after judgments confirming both sales, have the first sale set aside on the ground that he supposed that the bid made for the entire tract covered the whole amount he was to pay, and that the bonds for the price bid at the first sale were executed by mistake, there being no allegation that the mistake was mutual, or that there was any casualty or misfortune preventing him from filing exceptions to the commissioner's report of sale.

Appeal from circuit court, Nicholas county. "Not to be officially reported."

Action by John R. Connelly against John Goodman and others to set aside an order confirming report of sale of land. Judgment for plaintiff, and defendants appeal. Reversed.

Winfield Buckler, James H. Minogue, and Webb & Farrell, for appellants. Hanson Kennedy and B. H. Robinson, for appellee.

WHITE, J. In January, 1896, Elizabeth Burnaw instituted an action against appellant Goodman to recover a balance of purchase money for 17 acres of land. In February, 1896, she recovered a judgment and decree of sale of the 17 acres to satisfy her debt. In April, 1896, appellee, Connelly, brought an action against appellant seeking to foreclose a mortgage on 44 acres of land, this 44 acres including the 17 acres decreed to be sold under the Burnaw decree. At the May term, 1896, judgment and decree of sale for foreclosure was rendered in appellee's favor directing a sale of the 44 acres. At the same term of the court the master commissioner reported in the Burnaw case that the judgment in that case had been assigned to appellee, Connelly. There were then two judgments of sale of appellant's property, both in favor of appellee, Connelly, one for land embraced by the other. There was no order of consolidation. The master commissioner advertised under the two judgments, the sales to be made the same day in September, 1896. At the September term, 1896, the commissioner reported that he had sold the 17 acres under the Burnaw judgment to appellee for \$875.50, and took two bonds, as the judgment directed. At the same term he reported a sale of the 44 acres under the Connelly judgment to appellee for \$1,725 taking three bonds, as the judgment directed. No exceptions having been filed to these reports, there was an order and judgment of confirmation in each case of the sales, and writs of possession awarded, as each sale showed

there was no right of redemption. In January, 1897, the appellee filed this action seeking to have the court set aside the order of confirmation of the sale of the 17-acre tract reported as sold to appellee, and to cancel the two bonds executed by him therefor. In this action Goodman and wife, defendants in the two actions where judgments had been rendered, and Elizabeth Burnaw, a plaintiff in one of those actions, were made parties, although it is admitted that Burnaw has no interest whatever in the case, as before the sale appellee became the owner of her judgment. The master commissioner to whom the bonds were payable was not made a party, and was never brought before the court. The appellee alleges as cause for the cancellation of the two bonds and for setting aside the order and judgment of confirmation that he did not know and did not understand that he had bought the 17 acres at the sum of \$875.50, or any part thereof, but believed and understood that when he bid \$1,725 for the 44 acres he was to get the whole 44 acres at that price, and that he executed the two bonds for \$875.50 through mistake. By amended petition appellee states that he did not buy the 17 acres at all for \$875.50, but only bought it as a part of the 44 acres in his bid for \$1,725, and that he did not discover or know that the commissioner had reported the sale of the 17 acres to him till some time after the term of court confirming the sale had passed. The appellant filed answer, after his demurrer had been overruled, in which he denied that the bonds were executed by mistake, but alleged that the report of the commissioner as to the sale of the 17 acres to appellee for \$875.50 was true; that it was sold by the commissioner at public outcry; that appellee bought it at that price, and the sale was reported and confirmed in accordance with the facts, and that appellee was in possession under a writ of possession issued under the judgment of confirmation. On this issue proof was taken, although the master commissioner was not called as a witness by either party. The court, on trial, granted the relief sought, canceled all the bonds,—the two for the 17 acres, and also the three for the 44 acres,—set aside the orders of confirmation of both sales, or, rather, in both cases, and ordered a new sale to be made to satisfy the two judgments as a whole, appellee being the owner of both. From that judgment this appeal is prosecuted.

Counsel for appellee, in brief, urge that this action comes within subsection 7 of section 518 of the Civil Code of Practice, which provides: "The court in which a judgment has been rendered shall have power, after the expiration of the term, to vacate or modify it [judgment] * * * (7) for unavoidable casualty or misfortune, preventing the party from appearing or defending." It is nowhere alleged that there was any casualty or misfortune that prevented appellee from

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

appearing and filing exceptions to the report of the commissioner. There is likewise no allegation of fraud on the part of appellant nor of the commissioner. Nor is there an allegation of mistake in the execution of the bonds, nor in making the report of sale, except by appellee, Connelly, himself. Judgments of confirmation of a report of sale are final and appealable judgments. The power of the court over judgments ceases after the term of their rendition, except as a remedy is prescribed by law. There are eight different states of case where a remedy is given. Neither of these are presented by the pleadings or proof here. There is no fraud of any person alleged or proved, and no mistake of any person save appellee alleged. This mistake, if there be one, could, by the exercise of the slightest care, have been avoided. It was not sought to annul the judgment of confirmation of the sale of the 44 acres, although appellee consented that such might be done. The only relief asked was the cancellation of the two sale bonds for the 17-acre tract, and a judgment annulling the order confirming the sale in that case. Appellee was the owner of the Burnaw judgment, and was a party to that case, and had evidently sought the sale under the judgment. He was in court as plaintiff, and executed bonds as purchaser. He was bound, at his peril, to know the action and judgment of the court in that action. There is no proof that the value of the land was materially less than the bonds executed by appellee. Outside of the report of the commissioner, the proof is conflicting. This report is an official act, performed by an arm of the court; and on the faith of that record, without exception or objection from appellee or his attorney, a judgment of confirmation is entered, a deed is made, and a writ of possession issued, and appellee is put in possession of the land. In view of these facts, we are of the opinion that the appellee failed to make out a case to justify or authorize the court to impeach its solemn records, cancel the bonds, or annul or vacate the judgment of confirmation of the two sales, or of either one of them. For the reasons given, the judgment appealed from is reversed, and cause remanded, with directions to set aside the order and judgment annulling the judgment of confirmation of the sales, and canceling the bonds, and to dismiss the petition herein.

CREECH et al. v. DAVIS. HURST v. INGRAM. KIRBY v. WOOLLUM.
RENFRO v. GREEN.¹

(Court of Appeals of Kentucky. May 31, 1899.)
ELECTIONS—IRREGULARITIES IN ARRANGEMENT OF BALLOT—FRAUD OF CLERK.

It was the duty of the county clerk or his deputy to group in one column on the ballot the names of the candidates on a ticket designated as the "Citizens' Ticket," which was nom-

inated by petition, under a device selected by them, heading the column with the device, followed by the words "Citizens' Party," as requested in the petition; and where the deputy clerk, instead of doing this, divided the names into groups, and repeated the device at the head of each group, in different parts of the column,—the several groups being separated from each other by the names of candidates under other party devices,—and also placed on the ballot the names of candidates nominated by bogus petitions, which should have been rejected, the election was void as to the county clerk, who was a successful candidate for re-election on another ticket, but was valid as to the other successful candidates on that ticket, as they were not responsible for these irregularities.

Appeals from circuit court, Bell county.
"Not to be officially reported."

Contests by R. W. Creech and others of the election of W. T. Davis and others to various county offices. Judgments for contestees, and the contestants appeal. Judgment in favor of W. T. Davis reversed, and the other judgments affirmed.

Weller & Hays, Wm. Low, Wm. H. Holt, and J. R. Thompson, for appellants. A. H. Cook, for appellees.

HAZELRIGG, C. J. The appellees were by the canvassing board, the contest board, and the circuit court of Bell county declared elected to the various county offices for which they were candidates at the November election, 1897. Their opponents, the appellants, contested the election on various grounds, which will be sufficiently indicated. The appellees were the regular nominees of the Republican party,—the overwhelmingly dominant party in that county,—and their names were therefore placed on the official ballot under that party device. The appellants, except Hurst, were also Republicans, and appear to have been named as candidates, as was Hurst, also, by a meeting or convention of Republicans who were dissatisfied with the action of their party. Democratic party managers declined to make any nominations. The plan of getting their names on the ballot was by petition, and a separate petition was filed for each, properly signed, as provided by the statute. These petitions were alike, that for Creech being as follows: "To the Clerk of the Bell County Court: The undersigned electors and qualified voters, with residence and post-office address as written opposite our names hereto, petition that the name of R. W. Creech, a citizen of Bell county, Ky., be placed upon the ballot to be voted for at the next coming election to be held in Bell county, on the 2d day November, 1897, for the office of clerk of the Bell county court. They state that said Creech is legally qualified to hold said office; that they (the subscribers) desire and are legally qualified to vote for said R. W. Creech for said office; that said R. W. Creech represents the Citizens' party, and we petition that his name be placed upon said ballots under the name and title of said party, and that said party be designated upon the ballot by and under the

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

following device, viz.: the picture of an open book, with the word 'Law' printed on the left-hand page, and the word 'Order' on the right-hand page, thereof, as the figure and device by which said Citizens' party is to be designated on said ballot." It appears further that one William Hall was a candidate for the legislature at this election, his petition stating that the name and title of the party which he represented was the Republican party, and the device by which he was to be designated on the ballot was to be the head of Abraham Lincoln. The names of other candidates appear on the ticket for certain minor offices,—one for constable being under the picture of a pair of scales, etc. It further appears that, in addition to the two names of the regular Republican and Citizens' party nominees for sheriff, there were filed with the appellee Davis, the county court clerk, and who was a candidate for re-election as the regular Republican nominee, two petitions, known as "bogus petitions," and substantially conceded to be such, in behalf of one Allison and one Bailey, alleged candidates for sheriff; Bailey's name being placed under the regular Democratic device, and Allison's name under the open book—law and order device—of the Citizens' ticket. These respective positions on the official ballot were designated in the alleged petitions.

That these petitions were gotten up to deceive the voters is conceded, and it is also apparent from their face that they were not signed and presented in good faith, nor were they so received in the county court clerk's office. They appear to have been written in the clerk's office by the deputy clerk under Davis, and were signed in blank, and before the names of any candidate had been inserted; the so-called petitioners not knowing,—so far as the writings indicated,—when they were signed, whose names would be inserted in the blank spaces left for the alleged candidates. In one of them a blank space was also left for the device, and was filled on the evening of the last day for filing petitions, by the deputy clerk, by the insertion of the device already selected by the candidates on the Citizens' ticket, and whose petitions had that day been filed together or in a group. It is hardly necessary to say that this deputy was not a political friend, but an active opponent, of the candidates on the Citizens' ticket. It appears further that, when duplicate names are taken off, the requisite number would not be left on either petition. Moreover, the arrangement by appellee Davis of the official ballot was most peculiar, and clearly calculated to confuse and mislead the voter, especially in the Middlesboro precinct. After arranging in proper form the names of the various candidates under the devices, respectively, of the Republican, Democratic, People's, National Democratic, and Prohibition parties, a single column—the sixth—was assigned to the other candidates. This column was headed by the words "In-

dependent Ticket." Immediately under these words was the picture of Abraham Lincoln; then follow the words "For Representative Ninety-Third Representative District"; and then the words "Wm. Hall." Under these, in a square, was an open book, marked as indicated in the petition of the Citizens' party. The words, however, "Citizens' Party," or "Citizens' Ticket," nowhere appeared. Under this device followed the names of a number of candidates on the Citizens' ticket, including the names of the appellants, and including, also, the name of John Allison for sheriff, whose name had been presented in one of the bogus petitions. Then followed in this column a square containing a pair of scales, with the word "Justice" written between the dishes; and underneath were the words "For Constable," followed by the name of J. H. Branham. Then we have a second time a square containing the open book, the device of the Citizens' party or ticket, under which are the words "For Councilmen," followed by the names of six candidates properly on the Citizens' ticket, as well as the other names not properly belonging thereon. Then we have the Lincoln picture again, with the name of Thomas Jones under it, and lastly, and for the third time, the square and open book, followed by the words "For School Trustees," and the names of a number of candidates. A glance at the ballot discloses the fact that, unless great care was exercised by the voter, he would likely not correctly express his choice among the candidates, unless he desired to vote the straight Republican ticket, as under the devices of the Democratic, People's, Prohibition, or National Democratic parties there was to be found but a single name, to wit, the name of the party's candidate for clerk of the court of appeals, except that under the Democratic device was to be found the name of Bailey, the alleged candidate for sheriff. It was clearly the duty of the clerk or his deputy to group in one column the names of the candidates on the Citizens' ticket, under a device selected by them, heading the column with the device, and putting under it the words "Citizens' Party," as requested in the petition. No such duty, however, devolved on the other appellees, and while there is testimony conducing to show a knowledge on their part, or on the part of their active workers, of this plan to adopt the device selected by the Citizens' party and give it to others, and thus confuse and mislead the voters, we are not disposed to distrust the finding of the trial judge that as to them the election was a valid one. Nor can we say that had the bogus petitions been rejected by the clerk, as they should have been, when inspected by him, and the official ballot arranged as the law provides, the appellant Creech would have been elected. There was a difference of only some 70 votes between them, out of a total of 2,200 votes; but the most that can be said is that there has not been in this case a fair and free elec-

tion, within the meaning of our law, and therefore there has been no election at all, as to the office in question. Therefore the judgments in the cases of *Hurst v. Ingram*, *Kirby v. Woollum*, and *Renfro v. Green* are affirmed, and the judgment in the case of *Creech v. Davis* is reversed, and the causes remanded for judgment in conformity to this opinion.

COMMONWEALTH v. HALY et al.¹

(Court of Appeals of Kentucky. June 1, 1899.)
STATES—VALIDITY OF SPECIAL ACT AUTHORIZING SUIT AGAINST.

1. Const. Ky. § 59, providing that the general assembly shall not pass local or special acts in any case "when a general law can be made applicable," does not prohibit the commonwealth from giving its consent, by joint resolution of the general assembly, to the bringing of a particular suit against it in the Franklin circuit court, though Const. Ky. § 231, empowers the general assembly to direct, by a general law, "in what manner and in what courts suits may be brought against the commonwealth."

2. Limitation does not begin to run against the commonwealth until it has consented to be sued.

3. Though a claim was payable out of the military fund for a particular year, yet, as that fund has been exhausted, the payment of a judgment upon the claim must be made out of the general funds in the treasury.

Du Relle and Guffy, JJ., dissenting.

Appeal from circuit court, Franklin county.
"To be officially reported."

Action by D. L. Haly and others against the commonwealth on accounts for supplies furnished. Judgment for plaintiffs, and the commonwealth appeals. Affirmed.

W. S. Taylor and M. H. Thatcher, for the Commonwealth. Ira Julian and Wm. H. Julian, for appellees.

HAZELRIGG, C. J. Upon the requisition of the quartermaster of the 2d regiment of the Kentucky state guard, appellees, who are merchants and supply people, furnished the state encampment with sundry and divers articles of food, camp furniture, etc., during the encampment, held pursuant to law, near Frankfort, in August and September, 1891. For some reason not apparent in the record, these claims were not paid, although approved by the proper military authorities. Finally, in 1898, a joint resolution of the general assembly was in due form adopted and approved by the governor, authorizing appellees to institute suit on their claims against the commonwealth in the Franklin circuit court. In the suit brought under this authority, the justness of the claims was fully established, and the articles as ordered by the quartermaster were shown to have been necessary for the use of the encampment. Judgments were accordingly rendered for the amount of the various demands sued on, without interest. The learned attorney general interposed in the lower court, and urges here,

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

certain provisions of the constitution as precluding a recovery on these demands. Section 231 of the instrument provides as follows: "The general assembly may, by law, direct in what manner and in what courts suits may be brought against the commonwealth." And it is contended that the joint resolution on which appellees base their right to sue is not a direction by law, within the meaning of the section quoted. We are not disposed to controvert this proposition. A joint resolution may not be "a law," within the meaning of the section. But we do not understand that the legislature, in consenting to subject the commonwealth to the jurisdiction of her courts in the matter at hand, was attempting to enact a law in conformity with the provisions of section 231. That such a law might be enacted general in its terms, and applicable to every controversy between the sovereign and the subject, may be conceded. We understand such a law does exist in some of the states. But the general assembly has never exercised its right to pass such a law. Although clothed by express constitutional authority to do so, it has persistently declined to exercise the authority, and enact such a law. This provision is not a new one to our organic law. It is found in our first constitution, adopted in 1792, and has been in each of the constitutions since then. In speaking of this section, it was said by this court, in 1828 (*Dvine v. Harvie*, 7 T. B. Mon. 440): "Although the constitution has declared that 'the general assembly shall direct, by law, in what manner and in what courts suits may be brought against the commonwealth,' yet that body has never complied with this direction, but has hitherto kept in its own power the granting of justice to creditors of the state on petition. This voluntary grant of the state to individuals is the only judgment and execution to which the state is subject." While therefore the voluntary grant to these appellees by joint resolution is not an attempted compliance with the provisions of section 231, and is not therefore a law, within the meaning of that section, it is nevertheless an effective consent of the sovereign to subject itself to the jurisdiction of the Franklin circuit court in the particular matter involved, unless, indeed, this consent is prohibited by section 59 of the constitution, which provides that the general assembly shall not pass local or special acts (paragraph 29) in any case "when a general law can be made applicable." If this prohibition applies to the state of case at hand, then, before individual wrongs may be righted or supposed just demands be put to legal test in the courts, the legislature must reverse the policy of a century, and enact a general law giving to all alleged creditors authority to sue the state.

The only question, at last, is, how may the creditor obtain the consent of the state to be sued? The suggestion is not to be tolerated that he is without remedy. Surely he may petition his sovereign as in former times the

subject might petition his prince. So the question is, shall the state enact a general law, through which "unnumbered woes may come," or, choosing the lesser evil, shall it continue to keep "in its own power the granting of justice to its creditors?" We do not believe that this joint resolution, although confessedly special, in that it is for the sole benefit of certain individuals, can be regarded as covering a case where a general law can be made applicable, within the meaning and spirit of the constitution. There is certainly no constitutional or statutory inhibition of suit against the state, and there is not a term of the Franklin circuit court at which the state at the will of its officials does not submit its rights to the jurisdiction of that court either as plaintiff or defendant. It may, and does often, intervene in suits pending in the various courts of the state. We cannot believe that the action of the general assembly, as expressed in the resolution, is to be held less effective in subjecting the state to the jurisdiction of its courts than the action of these state officials in the various suits in which it often appears at their instance as a litigant. Its immunity from suit is a mere personal privilege, and it may waive it by the action of its legislature. It may certainly pay a just demand, and it may as certainly refer the question to the courts. As the state was not suable until it adopted the resolution in question, the plea of limitation cannot defeat recovery. It is proper to say that, as the military fund for the year in which the encampment in question was held has been exhausted, the payment of the judgment obtained is of necessity to be made out of the general funds in the treasury not otherwise appropriated. Judgment is affirmed.

DU RELLE and GUFFY, JJ., dissenting.

COMMONWEALTH v. BELT et al.¹

(Court of Appeals of Kentucky. June 1, 1899.)

BAIL—SIGNING OF SURETY'S NAME BY AGENT WITHOUT WRITTEN AUTHORITY.

1. Ky. St. § 482, providing that no person shall be bound as surety of another by the act of an agent unless the authority of the agent is in writing, applies to bail bonds.

2. Where one of two sureties in a bail bond is not bound because his name was signed by another without written authority, the other surety is not bound, though he knew the name of his co-surety was signed without written authority, as he had the right to rely upon the officer taking the bond to see that his co-surety's name was signed in such a way as to bind him.

Appeal from circuit court, Livingston county.

"Not to be officially reported."

Proceeding by the commonwealth against Alonzo Belt and W. C. Watson on a forfeited bail bond. Judgment for defendants, and plaintiff appeals. Affirmed.

John L. Grayot and C. J. Waddle, for the Commonwealth. C. H. Wilson, W. S. Taylor, J. W. Bush, and C. C. Grasshaw, for appellee Belt.

BURNAM, J. John Watson, being in custody charged with the offense of shooting and wounding with intent to kill, was admitted to bail in the sum of \$200, with Alonzo Belt and W. C. Watson as sureties for his appearance before the court of a justice of the peace to answer said charge. On the failure of the accused to appear, the bond was forfeited, and this proceeding was instituted, seeking judgment thereon.

The defendant W. C. Watson answered that he did not sign his name to the bond, or authorize any one else to do so in writing, and denies liability. The defendant Alonzo Belt admitted that he signed the bond, but says that when he did so it was understood and agreed that W. C. Watson would sign same as co-surety; that his name was inserted in the body of the bond; and he relied upon the justice of the peace to take the bond as agreed and understood; and pleads that W. C. Watson never executed same; and asks that the case be dismissed as to him. The testimony shows that the name of appellee W. C. Watson was signed to the bond by his son, the accused, John Watson; that at the time his name was signed the magistrate taking the bond and the county attorney both said that they did not regard such signature as valid, or believe that W. C. Watson would be bound thereby; and that these remarks could have been heard by Belt, but that they could not say that he heard them. Belt testifies that he heard W. C. Watson verbally authorize his son to sign the bond, and, supposing that this was sufficient authority, he signed his name as co-security; that he did not hear any intimation from either the magistrate or county attorney that the signature so made would not be binding and enforceable.

It is insisted for appellant that section 482 of the Kentucky Statutes, which provides that "no person shall be bound as surety of another by the act of an agent unless the authority of the agent is in writing signed by the principal," has no application to bail bonds taken pursuant to section 82 of the Criminal Code; that in this class of obligations they are bound as principals, and it is not necessary that the authority to sign should be in writing. This question was considered by this court in the case of Billington v. Com., 79 Ky. 400, and it was held that, as no exceptions were made, the commonwealth was bound by the statute as well as individuals. The undertaking on the part of the appellees is that of sureties, and not of principals.

Appellant also contends that, even if W. C. Watson is not bound upon the obligation, this should not affect the liability of appellee Belt, because he signed the bond with the knowledge that the signature of his co-security was signed by accused without written authority.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

The circumstances connected with the execution of the bond by Belt show that he did not intend to assume the obligation alone, but supposed that his co-security was equally bound thereon. Belt is evidently an uneducated person, as he executed his signature to the bond by making his mark, and he had the right to assume that the officer whose duty it was to take this bond would see that it was signed so as to be binding upon the parties thereto. Both the magistrate, who took the bond, and the county attorney, who was present, testify that they did not regard the signature of W. C. Watson as a valid one, or that the bond was enforceable against him, at the time they took it, and that they so remarked, but there is no evidence at all to support the contention that appellee Belt was aware of this fact. It was said, by this court in the case of *Wilson v. Linville*, 96 Ky. 50, 27 S. W. 837, that "one whose name was signed as surety to a sheriff's county levy bond by another for him by his verbal authority is not bound, although the signing was done in his presence in open court; and that, one of several sureties not being bound because his name was signed by another without written authority, the other sureties are released, as they had the right to rely upon the county judge, who took the bond, to see that the name of each surety was signed in such a way as to bind him; that, although the other sureties could have heard the verbal authority given by their co-surety to sign his name, they had the right to presume that whatever additional authority the law required had been procured, and was in the custody of the officer taking the bond." So, in this case, Belt had the right to believe that the magistrate, assisted by the county attorney, would see that his co-surety's (Watson's) name was signed to the bond in such a way as to bind him. For reasons indicated, the judgment is affirmed.

COLLIVER et al. v. TAYLOR et al.¹

(Court of Appeals of Kentucky. May 31, 1899.)

CONSTRUCTION OF WILL—RIGHT OF LIFE TENANT TO POSSESSION.

Under a devise to testator's infant grandson for life, with remainder to the legal heirs of his body, but providing that, if he should have no bodily heirs, then that portion of the estate devised to them "which is remaining" should go to other persons, the grandson is entitled, upon reaching 21 years of age, to the possession of the estate devised; the remainder-men being entitled only to the estate remaining at his death.

Appeal from circuit court, Nicholas county.
"Not to be officially reported."

Action by Horace M. Taylor and others against Ora Brown and others for a construction of the will of F. E. Congleton. Judgment construing will, and T. C. Colliver and others appeal. Affirmed.

W. P. Ross & Son, for appellants. Hanson Kennedy, for appellees.

GUFFY, J. Horace M. Taylor and others instituted suit in the Nicholas circuit court against Ora Brown and others for the purpose of obtaining a construction of the will of F. E. Congleton, and especially a construction of the seventh and eleventh clauses of said will. After the pleadings were fully made up, the court rendered a judgment construing the said will, and defining the duties and powers of the executors of the will, and also the duties of the guardian of Frank C. Taylor. We deem it unnecessary to copy the will in question. The seventh clause of said will reads as follows: "I will, bequeath, and devise to my grandson, Frank Congleton Taylor, all the remainder of my estate for and during his natural life, with remainder at his death to the legal heirs of his body, subject to the limitations and conditions hereinafter expressed." The eleventh clause, in part, reads as follows: "If my grandson shall at his death leave no legal heirs of his body, I direct that said Norton farm, or the real estate in which the proceeds of its sale may have been invested as herein authorized, shall be sold, and the proceeds thereof, together with the portion of the estate herein devised to the bodily heirs of my grandson in remainder, which is remaining, I direct shall be disposed of; and I apportion and bequeath the same as follows, to wit. * * *". Then he proceeded to name certain residuary devisees. The judgment of the court below is as follows: "The executors under the will of the late F. E. Congleton are directed to make a settlement of their accounts as such, and after said settlement to turn over to Horace M. Taylor, guardian of Frank C. Taylor, all money, notes, choses in action, and lands now in their possession, remaining after the payment of costs of administration, and the payment of the specific legacies as directed under the will of said Congleton, including the costs of this action; and said Horace M. Taylor, as guardian aforesaid, will receipt to said executors for all the property that comes into his hands under this judgment. Said Horace M. Taylor, as the guardian of Frank C. Taylor, will control and manage the estate that comes to his hands under this judgment until Frank C. Taylor arrives at the age of twenty-one years, at which time he will turn over said entire estate in his hands to said Frank C. Taylor, who will at said time be entitled to take charge of and manage the estate devised to him, without the intervention of any trustee. The said guardian is authorized and directed to expend whatever money may be necessary for the maintenance and education of said Frank C. Taylor out of the income from said estate, while he is under twenty-one years of age. When said Frank C. Taylor arrives at the age of twenty-one years, he will then be entitled absolutely to all the profits arising from the estate bequeathed to him,—

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that is, all the profits arising from the estate bequeathed to him for and during his natural life; and at his death whatever of said estate is remaining the legal heirs of his body will take, should he have any legal heirs of his body. If said Frank C. Taylor should at the time of his death have no legal heirs of his body, then whatever of said estate is remaining, including the Norton farm, or the real estate in which the proceeds of its sale may have been invested, shall be sold, and all said estate, except the profits therefrom, will then go to the various devisees as provided in the eleventh clause of the will of the said F. E. Congleton. It is ordered that the directions contained in the sixth clause of the will of F. E. Congleton be especially carried out, and Horace M. Taylor, as guardian of Frank C. Taylor, is directed to expend as much as fifteen dollars (\$15) a year, or as much as is necessary to properly look after and attend to the lot of F. E. Congleton in the Carlisle Cemetery, and properly adorn the same, and the graves therein, with flowers during their appropriate season; and, after the estate hereinabove mentioned shall have come into the hands of Frank C. Taylor, he is directed to see that the provisions of the will under the sixth clause be specially carried out for the length of time therein mentioned." From that judgment this appeal is prosecuted.

We have carefully considered the pleadings and the will under consideration, and we are of the opinion that the court below properly construed said will; and the judgment appealed from is therefore affirmed.

CITY OF NEWPORT v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. June 3, 1899.)

"Not to be officially reported."

Separate opinion. For former opinion, see 50 S. W. 845.

DURELLE, J. The original opinion in this case, prepared by direction of the court, correctly set forth the views of the majority of the court. It did not fully state the views of the minority upon the question of *res judicata*. When the petition for rehearing was filed, the minority took the position that the opinion should be so extended as to rest the decision upon a doctrine in which all could unite, and not decide, or appear to decide, a question not necessarily raised by the record, and upon which the members of the court are not in harmony. The majority, however, have decided to adhere to the opinion as originally delivered, and the views of the minority upon this question are here presented.

The plea of *res judicata* in this case avers that the subject-matter of the former suit was identical with that involved in this action; that the facts were the same in both actions, except that the former action at-

tempted to collect a tax for the year 1893, and the present action was attempting to collect a tax for the year 1894; that the former action was tried upon its merits, and a judgment rendered by the circuit court dismissing the plaintiff's petition, a copy of the judgment being filed as a part of the answer. It was further averred that the judgment had never been reversed or modified, and no appeal had ever been taken, but that it had become final and conclusive. It will be observed that this plea does not show upon what ground the court based the judgment relied upon as *res judicata*, nor does the judgment itself show on what ground it was based. Giving the fullest effect to the pleading, and assuming, as we must, under the averment that the subject-matter of the former suit was identical with the subject-matter of this, that the same defenses were pleaded in that case as in this, and that the court decided that case upon the merits, and dismissed the petition, it still does not appear whether the petition in that case was dismissed because the court held that there was a contract exemption from taxation in favor of appellant, because it held that a municipality could not be subjected to a franchise tax with respect to its use of any of its property, or because it held valid some one of the other defenses pleaded in this action, and presumably pleaded in that. It therefore becomes necessary for us to consider whether the doctrine of *res adjudicata* is applicable to all of the defenses pleaded; for, if inapplicable to one, as that defense may, for all that appears in the answer, have been the one upon which the former case was decided, we must apply the maxim "*Fortius contra proferentem*," conclude that that was the defense upon which the case was decided, and hold the pleading insufficient.

This brings us to consider the question whether *res adjudicata* as to the validity of a tax for one year can apply in a suit for a tax for another year. The authorities, in general, are to the effect that when, in a court of competent jurisdiction, upon a proper issue, a contract out of which several distinct promises to pay money arose has been adjudged invalid in a suit upon one of those promises, the judgment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of the contract. They are imposed *in invitum*. The taxpayer does not agree to pay, but is forced to do so; and the question is whether the judgment of a court fastening one such burden upon the citizen estops him to contest the validity of a similar burden thereafter sought to be imposed upon him, and, on the other hand, whether the refusal of the court to impose such a burden estops the government from thereafter asserting a similar right against that citizen. And, in considering this question, we shall consider it on the theory that there is no question of contract involved, but that the question arises solely upon the legality of the tax, as in a case where the ques-

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.
51 S. W.--28

tion is upon the constitutionality of the law, or as to whether the property sought to be taxed is embraced by the law.

In *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 314, 14 Sup. Ct. 597, the supreme court held: "A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit, upon the principle stated in *Cromwell v. Sac Co.*, 94 U. S. 357. But, as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. * * *

The same principle was affirmed in *Nesbit v. Independent Dist.*, 144 U. S. 610, 12 Sup. Ct. 746, and in *Railroad Co. v. Alsbrook*, 146 U. S. 279, 302, 13 Sup. Ct. 72. In the case of *City of Davenport v. Chicago, R. I. & P. R. Co.*, 38 Iowa, 633, 640, the supreme court of Iowa held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the state from collecting the taxes for a subsequent year, each year's taxes constituting a distinct and separate cause of action. 'The cases' said the court, 'are unlike those where two causes of action (as two promissory notes) forming the subject-matter of successive actions between the same parties, both growing out of the same transaction, in which a defense set up in the first suit, and held good, will conclude the parties in the second. * * *

Taxes of separate years do not, in any just sense, grow out of the same transaction. They are like distinct claims on two promissory notes, made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties.' It could never be tolerated that the state should be forever barred in the collection of taxes by an erroneous decision." 152 U. S. 314-316, 14 Sup. Ct. 597. But in *City of New Orleans v. Citizens' Bank*, 167 U. S. 396, 17 Sup. Ct. 905 et seq., in an elaborate opinion, the supreme court, while admitting that in the *Keokuk Case* the opinion, arguendo, discussed the question of whether a judgment against the validity of a tax for one year would be a bar to a suit for taxes for a subsequent year, held the expressions of the court used in argument in that case to be dictum, and distinctly decided that "the estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment be-

tween the parties or their privies." And again, on page 398, 167 U. S., and page 914, 17 Sup. Ct.: "It follows, then, that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior case, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

The language used in the case of *City of Davenport v. Chicago, R. I. & P. R. Co.*, 38 Iowa, 633, has been greatly qualified, if not repudiated, by the same court, in *Goodenow v. Litchfield*, 59 Iowa, 226, 9 N. W. 107, and 13 N. W. 86, where the court said: "The question whether the estoppel is effectual will depend upon the issues in the two actions. If the right to recover and the defense thereto are based upon precisely the same ground, why litigate again a question that has been determined? In such case the very right of the matter has been determined by a court of competent jurisdiction."

Upon the other hand, in *Lake Shore & M. S. Ry. Co. v. People*, 46 Mich. 208, 9 N. W. 250, a suit for taxes, there had been a decision adverse to the validity of the taxes for certain previous years, but the court held that the result of a suit for the taxes of particular years is not res adjudicata in subsequent suits between the same parties for taxes of other years, and the decisions upon the legal questions arising in the first case are important only as precedents. Said Chief Justice Marston, delivering the opinion: "The decree in the Wayne circuit court would not prevent the state from claiming and seeking to recover taxes accruing subsequent to the years or taxes then passed upon. This is a new controversy, for a new cause of action, and in which some of the legal questions then passed upon are again raised, and the decision of the court thereon is of no importance except as precedent. In this case it is not conclusive. Such was the view of Mr. Justice Campbell upon a similar question in the case in 9 Mich. [*Railroad Co. v. Auditor General*, 9 Mich. 448], already referred to, and, as that case is reported, there does not seem to have been any diversity of opinion on this point. The parties are bound in so far as regards the subject-matter then involved, but are at liberty to raise anew the same legal questions in a case arising subsequently, even although the facts may be substantially alike in other respects. The principle is that a party shall not be twice vexed for the same cause; but this is not the same cause, but one arising since then, and the state is not, in this case, seeking to recover any portion of the taxes the collection of which was restrained in that case." In *State v. Bank of Commerce*, 95 Tenn. 222, 31 S. W. 993, it was held that a judgment adverse to a claim for taxes for one year constituted no bar to a suit for taxes

of a subsequent year; and in the recent case of *Union & Planters' Bank v. City of Memphis*, 46 S. W. 557 (decided April 2, 1898), the same court, through Judge McAlister, said: "Again, we think the plea of res adjudicata in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years. Since this is not a federal question, we decline to follow the ruling in *City of New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. 905, in which it was held, by a majority opinion, that a judgment in a tax case is as conclusive of the taxes of other years as it is of the taxes for the years actually involved. In *State v. Bank of Commerce*, 95 Tenn. 231, 31 S. W. 996, we said: 'These suits being for other years than those sued for in the *Farrington Case* [*Farrington v. Tennessee*, 95 U. S. 686], that decision is not, as an adjudication, conclusive of the present case.'"

We do not think that the plea of res adjudicata avails in this case. The power to tax is a high governmental power, exercised against the will of the person taxed, and, in our opinion, a decision as to one cause of action arising under a tax statute is no more binding upon the government or the citizen than the construction of a penal statute would be in a second prosecution against the same person for an offense exactly similar. The former adjudication would, in such case, have weight as a precedent, but would not bind the parties by way of estoppel. The rulings of the court upon the legal questions involved are authority here to the extent, and no further, that like decisions would be in a suit between different parties. As matter of public policy, and upon grounds of public necessity, we think the principle of res adjudicata ought not to be applied to questions of taxation, where the state is exercising its sovereign power. We concur, therefore, in the conclusion reached by the majority, that this court cannot follow the doctrine held by the supreme court in *City of New Orleans v. Citizens' Bank* to its full extent. But whether the state is bound by a former adjudication that there exists a contract exemption from taxation, or as to the construction of such contract, is a question not necessarily involved here, and to the decision of which it may be that different principles apply. There would seem to be an essential difference between the commonwealth exercising the highest of its sovereign powers,—a power necessary to its very existence,—and the same commonwealth, its sovereignty laid aside, binding itself as a mere corporate entity by a sealed instrument. But it is not, in our judgment, necessary to go into this question, nor even to decide that there is a difference. We think the opinion should be extended upon the lines here indicated.

HAZELRIGG, C. J., and BURNAM, J., concur in this separate opinion.

JOYES et al. v. JEFFERSON COUNTY
FISCAL COURT et al.¹

(Court of Appeals of Kentucky. May 18, 1899.)

COUNTIES—FISCAL COURT OF JEFFERSON
COUNTY—REPEAL OF STATUTE.

1. The act of 1888, creating a board of county commissioners for Jefferson county, to manage the fiscal affairs of the county, was repealed by Const. § 144, providing for a fiscal court for each county, and Ky. St. § 1833, providing that, "where the fiscal court of any county is now composed of commissioners under a special act, said special act shall continue in force until the first Monday in January, 1895, after which the fiscal court of said county or counties shall be constituted and composed of the judge of the county court and the justices of the peace and their successors in office," and therefore the fiscal court of Jefferson county now consists of the county judge and the eight justices of the peace of the county.

2. The provision of Const. § 144, that "where, for county governmental purposes, a city is by law separated from the remainder of the county," the commissioners composing the fiscal court "may be elected from the part of the county outside of said city," applies only to counties in which a city was at the time of the adoption of the constitution separated from the county for county governmental purposes, and therefore does not apply to Jefferson county, as the mere fact that at that time there was a statute, applying to that county, providing for the levy and collection of a portion of the county taxes by city authority, and another portion by the county authorities outside the city, did not constitute a separation of the city from the county for county governmental purposes.

Appeal from circuit court, Jefferson county, chancery division.

"To be officially reported."

Action by Patrick Joyes and others against the Jefferson county fiscal court and others to enjoin the levy of a tax. Judgment for defendants, and plaintiffs appeal. Affirmed.

Morton V. Joyes, for appellant Joyes. H. L. Stone and Jacob Solenger, for appellant city of Louisville. Humphrey & Davie and Edward J. McDermott, for appellees.

GUFFY, J. This is an appeal from a judgment of the Jefferson circuit court, chancery division, adjudging that the county judge and all the justices of the peace in Jefferson county constitute the fiscal court of said county. The opinion of the trial judge contains such a clear statement of the matters involved and the reasons for the conclusions reached that we copy from said opinion as follows:

"The question to be determined, therefore, is, what persons constitute the fiscal court of Jefferson county? In tracing the history of the legislation concerning the county in this respect, it is unnecessary to go back of the act of April 6, 1888, as amended by the act of April 9, 1890. By the act as amended there was erected a board of county commissioners for Jefferson county, which consisted of the two justices of the peace elected as such commissioners by their associates in Jefferson county outside of the city of Louisville, of

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

two aldermen of the city of Louisville elected as such commissioners by the board of aldermen of the city of Louisville, and of three councilmen of the city of Louisville elected as such commissioners by the board of council of said city, presided over by the county judge. This board, consisting of seven members besides the county judge, transacted the affairs of the county up to within a short time ago. It is now claimed by the plaintiff that this board of commissioners is still in existence. The defendants claim that the act of 1888 is repealed, and that the fiscal affairs of the county are now in the hands of the fiscal court, consisting of the judge of the county court and the justices of the peace of the county, as provided by section 144 of the constitution. The city of Louisville has also filed its answer in this case, in which it has joined in the prayer of the petition. It is hardly necessary to go into the different claims of the parties in detail, as I deem it sufficient to treat the question as a single question, without stating more particularly the claim of the different parties. Section 144 of the constitution provides as follows: 'Counties shall have a fiscal court, which may consist of the judge of the county court and the justices of the peace, in which court the judge of the county court shall preside, if present; or a county may have three commissioners, to be elected from the county at large, who, together with the judge of the county court, shall constitute the fiscal court. A majority of the members of said court shall constitute a court for the transaction of business. But where, for county governmental purposes, a city is by law separated from the remainder of the county, such commissioners may be elected from the part of the county outside of such city.' The county of Jefferson has never adopted the alternative plan of commissioners provided by section 144. The fiscal court, as contemplated by the constitution, consists of a body of men elected in the first place by the people, but who are not selected as commissioners by the people. If the act of 1888 is in force, the question is at once settled. If, however, it is not in force, there are other questions to be determined.

"I do not see how it can be reasonably contended, however, that the act of 1888 is now in force. In the first place, I deem it inconsistent with section 144 of the constitution, which is paramount upon all subjects therein treated. That section expressly says that the county shall have a fiscal court, and goes further by saying what persons shall constitute that court. It will be noticed that the constitution takes up the questions of courts in detail. Beginning with section 100, we have the general heading relating to the judicial department; section 110 takes up the subject of the court of appeals; section 125, that of the circuit courts; section 139, that of quarterly courts; section 140, that of county courts; section 142, that of justices' courts;

section 143, that of police courts; and section 144 treats of fiscal courts. By Act Oct. 17, 1892 (Ky. St. § 1833), the legislature passed a comprehensive act relating to fiscal courts. That section expressly provides that each county in the commonwealth shall have a fiscal court, which shall consist of the judge of the county court and the justices of peace of said county and their successors in office, in which court the judge of the county shall preside, if present. That act contains this provision: 'That where the fiscal court of any county is composed of commissioners under a special act, said special act shall continue in force until the first Monday in January, one thousand eight hundred and ninety-five, after which the fiscal court of said county or counties shall be constituted and composed of the judge of the county court and the justices of the peace and their successors in office.' It is a well-settled rule of construction in Kentucky that, where there has been a revision of a statute law upon a given subject, it will be regarded as containing all the statute law upon that subject, and as repealing any of the statutory provisions on the subject omitted from the new revision. *Broaddus v. Broaddus' Heirs*, 10 Bush, 109; *Long v. Stone* (Ky.) 39 S. W. 836. Now the legislature has here taken up the regulation of the county fiscal management, and has enacted a complete chapter on the subject, which is now the chapter on fiscal courts in the Kentucky Statutes; and under the principles laid down in the foregoing authorities I do not see how the conclusion can be avoided that this new statute must be construed and intended to supersede the previous statutes in regard to the fiscal management of the county affairs. This belief is strengthened when we consider section 144 of the constitution in connection with the act of 1892, and the concluding provision of said act, which limits the existence of the old fiscal courts of the county then existing under special acts. Furthermore, under section 1 of the schedule of the present constitution it is expressly provided that the provisions of all laws which are inconsistent with this constitution shall cease upon its adoption, except that such laws as are inconsistent with the provisions of the constitution and require legislation to enforce them shall remain in full force until such legislation is had, but in no event for a longer period than six years after the adoption of the constitution, unless sooner amended or repealed in general assembly. The constitution was adopted September 28, 1891. The limitation, therefore, expires September 28, 1897. So that the conclusion seems inevitable that in any event the board of county commissioners, as it existed under the act of 1888, stands repealed, because it is inconsistent with the constitutional idea of a fiscal court, and the legislature has passed the act of 1892, reiterating that idea, and carrying out the provisions of the schedule above referred to.

"Referring again to the act of 1892 (section

1834 of the Kentucky Statutes), it is expressly provided that, 'unless otherwise provided by law, the corporate powers of the several counties in this state shall be exercised by the fiscal courts thereof respectively.' Now, it has been contended that the board of commissioners, under the act of 1888, is a fiscal court, within the meaning of the act of 1892; but that contention does not seem sound to me, for the reason that section 1833, the opening section of the act of 1892, practically defines the fiscal court as being a body consisting of the judge of the county court and the justices of the peace of the county. Section 927 of the Kentucky Statutes expressly provides that the fiscal courts of the several counties are empowered to buy land, when the same is necessary, for the purpose of erecting thereon public buildings, such as court houses, clerks' offices, jails, and work houses. Here is a special authorization of the purchase of property to build a court house, and to do the very things which, before the new constitution, would have to be done by the board of county commissioners under the act of 1888. Section 1840 provides that 'this fiscal court shall have jurisdiction to appropriate county funds authorized by law to be appropriated; to erect and keep in repair public buildings; to secure a sufficient jail, and a convenient and comfortable place for holding court at a county seat; to erect and keep in repair bridges and other public structures; to regulate and control the fiscal affairs of the property of the county; to make provisions for maintenance of the poor; to provide a poor house and farm; to execute all of its orders consistent with law and within its jurisdiction, and to have jurisdiction of all such matters relating to the levying of taxes as is, by a special act, now conferred on the county court and courts of levy and claims.' It certainly was the intention of the legislature, in making these broad provisions, to make a change in the condition of affairs that existed under the act of 1888. The only question really to be considered is, what persons constitute this fiscal court contemplated by the statute? I have no doubt that the constitution and the act of 1892 both contemplated, certainly after September 28, 1897, a change in the management of the county fiscal affairs. *Louisville & N. R. Co. v. Pendleton Co.*, 96 Ky. 491, 29 S. W. 324. Substantially all the powers that were vested in the board of commissioners under the act of 1888 are now vested in the statutory fiscal court, and that is necessarily implied, if implication, however, is necessary, as the provision in section 1833 of the Kentucky Statutes expressly limits the life of all such special bodies to the first Monday in January, 1895.

"It is contended, however, on behalf of the city, that under section 144 of the constitution, and other sections of the Kentucky Statutes, if there is a fiscal court, it is to consist of the county judge and the four justices of the peace who live in Jefferson county outside

of the city of Louisville. This argument is based upon the final clause of said section 144, which provides as follows: 'Where, for county governmental purposes, a city is by law separated from the remainder of the county, such commissioners may be elected from the part of the county outside of said city.' Section 1851, Ky. St., provides as follows: 'Where, for county governmental purposes, a city is separated from the remainder of the county, that portion of the county outside of the limits of said city shall be deemed the county, within the meaning of this act.' It is argued on behalf of the city that, under this section of the constitution and the Kentucky Statutes, we would have a fiscal court composed of the county judge and the four justices of the peace located in the county, who would be authorized to levy tax upon the property within the city of Louisville, and that the city would thus be subjected to a tax which it had not the power to control or levy, and that it would not be represented in such levy. The difficulty in this contention, however, is that it implies the power of the legislature to change by construction the possible meaning of the constitution. The constitution nowhere limits the meaning of the term 'county' as the statute attempts to limit it. Under the contention of the city, there is no common board, composed of a representative of the city and county, which can levy a tax for the common benefit of the city and county. The trouble seems to arise from the last clause of section 144 of the constitution, above quoted. As originally reported, section 144, *supra*, did not contain the last clause above quoted. The history of the insertion of that clause is found on page 5748 of the Constitutional Debates. When the section was read as altered, the question was raised as to what it meant. Whereupon Senator Goebel, of Kenton county, said: 'That was presented by me in the committee, and was adopted for this reason: In the county of Kenton, the city of Covington is wholly separated by law from the remainder of the county with reference to the county government. We have two county seats, and the part of the county outside of the city is as separate from the city as if we were two counties. The city of Covington pays for maintaining its court house and jail, and the part of the county outside of Covington is conducted by three commissioners, elected on the part of the county outside of Covington. If the section is adopted as originally presented, the city of Covington would vote in the election for the county commissioners to control the affairs of the county outside of Covington, in which the city has no interest whatever, and to which it pays not one cent.' Mr. Miller, of Lincoln county, thereupon took exception to the proposed change, and its possible effect, in the following language: 'They may be willing to tolerate it in Covington, but I am not willing to tolerate it. There may be reasons for

it in Kenton, but there is no reason for it in the balance of the state. If the amendment prevails, there is recognition of the principle and power to separate counties into divisions for the purpose of managing the fiscal affairs of the county. In other words, instead of having the whole fiscal affairs of the county managed under one head, you may separate them, and have that portion of the county which lies in the limits of the city managed in a way different from the outlying districts. That is a material change in the constitution, and I do not see any reason why every portion of the fiscal affairs of the county should not come under the same management. * * * I do not want it to even be permissive. I do not want the legislature authorized to do this. If this amendment is adopted, I hope it will be made applicable to Kenton county alone.' Whereupon Mr. Goebel answered: 'If you have not a separation of your county now, it will not apply to your county.' Thereupon the controversy ended, and, although Mr. Miller had aptly stated what he conceived to be the effect of the amendment, which is substantially the argument made in this case, still the convention seems to have adopted Mr. Goebel's explanation as the true meaning of the section as amended, and that it would not apply to any county except Kenton, or a county organized as Kenton county was organized."

It is earnestly insisted for appellants that section 2744, Ky. St., which reads as follows: "For county governmental purposes a city of the first class is hereby separated from the remainder of the county in which such city is situated. The general council shall provide by ordinance suitable appropriations for the purpose of paying such city's portion of all expenses common to both such city and county,"—separated the city of Louisville from the balance of Jefferson county, for governmental purposes, and devolved upon the city council the power and duty to provide for paying the city's portion of all expenses common to both city and county; and it is also insisted that such separation is authorized by the latter clause of section 144 of the constitution, quoted in the opinion, *supra*. We do not think that said section can have the effect contended for, even if such separation was authorized by the latter clause of section 144, *supra*. We have read with care the very able briefs discussing the true meaning of section 144, and we are of the opinion that the latter clause of said section was intended by the framers of the constitution to apply to such counties only as had two county seats, and in which the city was in reality separated from the balance of the county for county governmental purposes. If at the time any county had in fact two county seats, and the city was separated from the balance of the county, as indicated in said section, the clause under consideration would apply to such counties. We, however, deem it unnecessary to now determine whether or not there was in

reality any county in the condition described in the latter clause of the section, *supra*. But, be that as it may, we are clearly of the opinion that the city of Louisville was not so separated from the residue of Jefferson county. We are further of the opinion that the section relied on does not authorize the legislature to so separate any city from the residue of the county. The mere fact that at the time of the adoption of the constitution there was a statute providing for the levy and collection of a portion of the county taxes by city authority, and another portion by the county authorities outside of the city, did not constitute a separation of the city from the county for county governmental purposes. It results, from the foregoing, that we are of the opinion that the fiscal court of Jefferson county is composed of the county judge and the eight justices of the peace of Jefferson county. The judgment appealed from is therefore affirmed.

BALDWIN et al. v. OWENS et al.¹

(Court of Appeals of Kentucky. June 2, 1899.)

CHATTEL MORTGAGES—PRIORITY OF LIENS.

1. A writing purporting to be a bill of sale, but reserving to the seller the right to take possession of and sell the property in case the purchaser shall make default as to payments, will be enforced as a chattel mortgage.

2. Where personal property was conveyed to a trustee for creditors, with power to sell same, and pay certain debts, the purchaser from the trustee acquired a perfect title as against a prior mortgage which was not recorded until after the deed of trust was executed and recorded, the purchaser having no actual notice of the mortgage at the time of his purchase.

Appeal from circuit court, Warren county.
"Not to be officially reported."

Action by D. H. Baldwin & Co. against James B. Owens and others to enforce a chattel mortgage. Judgment for defendants, and plaintiffs appeal. Affirmed.

Grider & Moss and Finlay F. Bush, for appellants. Wilkins & Bradburn and Edward W. Hines, for appellees.

GUFFY, J. The appellants instituted this action against James B. Owens and others, seeking to recover judgment against Owens for the sum of \$290, and asserted and sought the enforcement of a mortgage lien upon one piano. The alleged mortgage is in reality, by its terms, a bill of sale, with the reserved right upon the part of plaintiffs, in case the purchaser should make a default as to payments, to take possession of and sell the piano. Such writings, however, have been by this court held heretofore to amount to a lien, subject, of course, if not recorded, to the rights of an innocent purchaser. The writing in question is dated 13th of June, 1895, and purports to be witnessed by M. E. Wilcox and C. A. Wilcox. It appears from the certificate of F. V. Nelson, clerk of the Mercer county

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

court, that the execution of the writing was, on the 11th of March, 1896, proved by M. E. Wilcox, one of the witnesses, and that the mortgagor, Owens, signed in his presence, and in the presence of the other attesting witness, C. A. Wilcox; and the said writing, together with the certificate aforesaid, seems to have been recorded in the Warren county court clerk's office the 17th of March, 1896. John Neasom, J. E. Potter, and Conrad Schray, were made parties defendants to plaintiffs' petition. The substance of the defense is that prior to the 24th of December, 1895, the defendant Owens and his wife, Mary B. Owens, were proprietors in occupancy of and running a hotel in the city of Bowling Green, and they had become indebted for necessities and supplies to various parties, and that on the 24th of December, 1895, said Owens and wife, by instrument of writing, sold to defendant J. E. Potter, trustee for said creditors, the piano in question, which writing or mortgage was duly acknowledged and filed for record on the 25th day of said month, and recorded in the Warren county court clerk's office; that afterwards, on the 3d of March, 1896, the said Owens and wife, by an instrument of writing, duly signed, acknowledged, and recorded, transferred and assigned the property mentioned to the said Potter, with power and authority to sell same for the purpose of paying the debts aforesaid; and that on the 3d of March, 1896, possession of said piano was delivered, and said Potter held and controlled same until it was sold to said Neasom. The knowledge of any lien or claim of plaintiffs is also denied. It is further averred that, after the sale to Neasom, Neasom sold and delivered the piano to Conrad Schray; and it is denied that plaintiffs have any lien, claim, or interest upon or to said piano. Copies of the mortgage or bills of sale of said piano are filed with the answer. The indebtedness of Owens to the various parties also appears from the said papers. The plaintiffs filed a demurrer to the answer, which demurrer was overruled, and, plaintiffs failing to plead further, their action was dismissed so far as a lien upon the piano was sought to be enforced, and from that judgment plaintiffs have appealed.

It is insisted, among other things, for appellants, that the answer failed to allege that the sale to Potter, and the purchase by Neasom from Potter, or the purchase by Schray from Neasom was for valuable consideration, and therefore it presented no defense as against plaintiffs' mortgage lien. Various other objections are raised as to the sufficiency of the answer, which we deem unnecessary to discuss. We think, however, that, inasmuch as the copies of the various so-called "mortgages" or "bills of sale" relied on by the parties are filed, and the purchases by Neasom and Schray are alleged, and it appearing from the pleadings that both the mortgages relied on by defendants were acknowledged and recorded before the acknowl-

edgment or proving or recording of appellants' claim, the answer showed a lien upon the piano superior to that of the plaintiffs; and as the last paper authorized Potter, as trustee, to sell the same, and he did sell it, it results that the purchaser acquired a complete title to the piano in controversy; all these mortgages and sales having been made without any notice of plaintiffs' alleged lien. Judgment affirmed.

H. B. CLAFLIN CO. v. GIBSON et al.¹

(Court of Appeals of Kentucky. June 1, 1899.)

RECEIVERS—SALE UNDER AGREED ORDER—LIABILITY OF SURETIES—FAILURE TO SIGN ORDER OF SALE—VARIANCE—ACCEPTANCE OF PRO RATA FROM ASSIGNEE FOR CREDITORS—ESTOPPEL—ACTION BY CREDITOR FOR HIMSELF AND OTHERS—PRESUMPTIONS.

1. The fact that the parties consented to the order under which a receiver sold attached property does not relieve his sureties from liability for the proceeds of sale.

2. The fact that the order under which a sale was made was not signed until after the sale does not render the sale void.

3. In an action on a receiver's bond, in which it was alleged that the order under which the sale for the proceeds of which defendants were sought to be made liable was made in October, the order under which the sale was made was admissible in evidence, though made in November; the action being on the bond, and not on the order.

4. Where a bank in which the receiver of attached property had deposited the proceeds of sale made an assignment for creditors, the fact that the creditors accepted their pro rata of the assigned estate does not estop them from holding the receiver's sureties liable for the balance of their claim.

5. A receiver having refused to sue the sureties of his predecessor, the court was authorized, under Civ. Code Prac. § 25, to empower one of the creditors to sue for himself and the other creditors, who were numerous.

6. The presumption is that the county judge would not have made an order appointing a receiver of attached property and orders of sale, unless the judge of the circuit court in which the action was pending had been absent from the county.

Appeal from circuit court, Bell county.

"Not to be officially reported."

Action by the H. B. Claflin Company against J. J. Gibson and others on a receiver's bond. Judgment for defendants, and plaintiff appeals. Reversed.

Weller & Hays, for appellant. Wm. Ayres, for appellees.

PAYNTER, J. R. Miller & Co. were merchants in the city of Pineville, and in the early part of October, 1892, some 20-odd of their creditors (H. B. Claflin Co. being one of them) instituted suit against them, obtained orders of attachment, and had them levied upon a certain stock of goods. While the goods were being held under the attachments, the attaching creditors, on October 10th, procured from the judge of the Bell county court the appointment of J. M. Pursifull as receiver in the cases, and, as such, he executed bond,

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

with J. J. Jordan and H. C. Pursifull as his sureties; and they also procured, on October 11th, an order from the judge of the Bell county court, directing the property thus held to be sold. It was sold for \$12,607.54, and the proceeds of the sale went into the hands of J. M. Pursifull as receiver. By the order the receiver was directed to sell the property at auction to the highest and best bidder on a credit of 30 days, and the order further provided that he might sell the property or any part of it for cash in hand. It purports to be an agreed order between the attaching creditors and R. Miller & Co. On November 11, 1892, the attaching creditors and other parties to the actions agreed that the former order might be modified to the extent that the stock of merchandise should be sold at public auction to the highest and best bidder on a credit of five months, and the judge of the Bell county court made an order accordingly. This order, according to the avowals, was not signed by the county judge until after the sale was made, but as a matter of fact the order was made before the sale.

The principal ground relied upon for defense by the sureties in the receiver's bond is that the parties, by the foregoing orders, made the receiver their agent,—that is to say, that the first order authorized the sale of the property on a credit of 30 days, or if he thought best to sell for cash,—when the law, as claimed by counsel for appellees, did not authorize the county judge to direct the sale of the personal property on a credit of less than three months, and that the order of November 11th was also made by consent of the parties. Under section 218 of the Civil Code of Practice, the circuit or county judge in vacation in certain cases, in the absence of the judge of the court, can appoint a receiver and order the sale of personal property which is held under attachment. It is sufficient to say that in this case the attaching creditors and the debtors consented to the order of sale. Subsequently, and before the sale took place, the same interested parties amended the order by fixing the credit of the sale at five months. Even if the first order had been violative of the provision of the Code in question, the subsequent order, fixing the credit of the sale at five months, cured any defect in the first order, and it was so intended by the parties, as they were laboring under the impression that the first order was invalid to the extent of directing the property to be sold on a credit of 30 days or for cash. It was sold upon a credit of five months, and the proceeds of the sale properly went into the hands of the receiver. It is assumed that the order of November 11th is invalid because the county judge never in fact signed it until after the sale took place. If the order was in fact made, but not formerly signed, the signature subsequent to the sale would perfect the order, and a sale under it would be valid. Besides, the court subsequently (in which the actions were pending)

approved the report of sale which was made under the order of the county court. As we have said, the principal defense relied upon in this case is that the parties by these consent orders made the receiver of the court the agent of the parties to the action by reason of these agreed orders. The only difference between an agreed order and one which is made in the due course of the proceedings in the action is that in the one case it is agreed to, and in the other it is made as authorized by law. A receiver who acts under an agreed order is acting as an officer of the court, as much as he would be in acting under an order made without agreement, in the due course of proceedings in the case, and his sureties on the official bond which he gives are as much bound in the one case as in the other, because he is acting under an order of the court. There has been no case cited, and we presume none could be, holding to the contrary. The case of *Leathers v. Keeling's Trustee* (Super. Ct.) 12 Ky. Law Rep. 92, is relied upon as sustaining the contention of appellees. In that case the receiver did not act in accordance with the order of the court, but acted in disregard of it. He was directed to sell the property on credit, and he sold it for cash. The court refused to allow the order of November 11th to be read to the jury, presumably because in the pleadings of the plaintiff it was alleged that the order under which the sale was made was in October. The action was not based upon the orders of the court ordering the sale of the property, but the basis of it was the bond executed by the receiver, and the order was evidential, simply showing the proceedings that were had before the county judge for the sale of the property. We think the court erred in refusing to allow this order to be read to the jury.

Counsel for appellees urge that because the petition avers that the receiver placed the money in bank, and it remained there until the following year, when the bank assigned for the benefit of creditors, causing a loss of the principal part of the fund, therefore the receiver and his sureties are not liable for the loss occasioned thereby, and further that as Asher, who succeeded Pursifull as receiver, collected the pro rata share due him, and paid it to the creditors of R. Miller & Co., they are not estopped to claim that the sureties in Pursifull's bond as receiver are liable for the money lost by reason of the failure of the bank. We cannot agree with counsel in this regard. The receiver of the court was entitled to collect the fund arising from the sale of the goods, and whatever the assignee of the bank paid him operated as a credit only upon the claim which he held. It was their money that was lost, and they were entitled to get from the assignee of the bank any part of it that they could. This does not prevent them asserting the claim against the sureties of Pursifull for any sum which they failed to thus collect. As to whether it was

a prudent and proper thing for Pursfull to do to place the money in that bank is not raised by these pleadings. His sureties do not seek to prevent a recovery against them because Pursfull acted as a prudent man would have acted under the circumstances in depositing the money in the bank, so there is no question here for us to determine in this regard. This statement must not be taken as a suggestion that the facts of this case indicate that such a defense exists. It is not made, and we simply state the fact. J. M. Pursfull died, and T. J. Asher was appointed receiver in his stead; and, he having failed and refused to proceed against Pursfull's sureties to collect the money, the court made an order authorizing the appellant to institute this action for its benefit, and for that of 111 other creditors of R. Miller & Co., to whom the fund belongs. The parties were numerous, and we think the court was authorized, under section 25 of the Civil Code of Practice, to empower the appellant to sue for itself and the other creditors. The court, however, provided that the money recovered should be paid to the receiver of the court, so it could not take judgment in its own name for the debts due. The presumption is that the county judge would not have made the order appointing a receiver and orders of sale, unless the judge of the court had been absent from the county. The judgment is reversed for proceedings consistent with this opinion.

RICE et al. v. PEOPLE'S BANK OF ADAIRVILLE.¹

(Court of Appeals of Kentucky. May 26, 1899.)

ATTACHMENTS—SUBMISSION—WAIVER OF RIGHT TO TRIAL UPON ORAL EVIDENCE.

1. An order submitting a cause for judgment upon exceptions to a master commissioner's report and upon the whole case will be regarded as submitting the grounds for an attachment, there being nothing to indicate an intention to except the attachment from the order of submission.

2. While defendant might have demanded that the attachment be tried by oral evidence, he waived this right by failing to reserve the question when the order of submission was made.

Appeal from circuit court, Logan county.

"Not to be officially reported."

Action by the People's Bank of Adairville against B. F. Rice and others on a promissory note. Judgment for plaintiff for the amount of the debt sued on, and sustaining an attachment, and defendants appeal. Affirmed.

J. H. Bowden and S. R. Crewdson, for appellants. W. S. Pryor and W. F. Browder, for appellee.

BURNAM, J. This suit was instituted February 6, 1895, by appellee against B. F. Rice to recover a balance of \$4,507.50 alleged to be due on a note for \$5,018.55, dated the

15th day of May, 1894, and due in 60 days after date; and an attachment was sued out on the ground that the defendant had sold and disposed of his property with intent to cheat, hinder, and delay his creditors. On the day after the institution of the suit, Rice made a voluntary deed of assignment for the benefit of his creditors; and subsequently he and his assignees filed separate answers, in which they denied the grounds of attachment, their liability for the debt sued on, and recited at great length the history of the transaction out of which the obligation sued on arose, claiming a number of additional credits. The issues being made up, and the case prepared on the equity side of the docket, upon final submission judgment was rendered for the plaintiff's debt, interest, and costs. Appellants complain here that that judgment was prejudicial to their rights, in that it failed to give them credit for an item of \$500 which they claim was collected by appellee from one Campbell Cooke on a note executed by Cooke to appellant Rice, which had been deposited by Rice with appellee as collateral security. They also claim that they are entitled to a credit of \$2,150 on account of the failure of appellee to protest (and give notice thereof) a draft drawn by appellant Rice on Kendrick, Pettus & Co., on which he was bound only as an accommodation indorser, and which they allege was incorporated, without consideration, in the original obligation out of which the debt sued on grew. It is also contended that the court erred in sustaining the attachment sued out in the case.

The testimony shows that Kendrick, Pettus & Co. were conducting a tobacco warehouse commission business in Clarksville, Tenn., and that appellant Rice was acting as their agent in making advances upon, and shipping to the firm, divers crops of tobacco raised in the neighborhood; that some time prior to December 6, 1890, appellant Rice drew a draft in his own favor on Kendrick, Pettus & Co., payable to appellee, which was accepted by the drawees, discounted by the bank, and the proceeds placed to the credit of Rice on the books of the bank, who subsequently gave a check for this money, payable to Kendrick, Pettus & Co.; that, at the maturity of this obligation, it was taken up by a new bill of exchange, in the same way, and by the same parties, for \$2,150, dated December 6, 1890, and due in four months, which is the obligation out of which the controversy over the alleged credit arises. As the acceptors, Kendrick, Pettus & Co., became insolvent, and failed to pay, it is insisted by appellants that on the original draft, and every renewal thereof, Rice was only bound as accommodation indorser of Kendrick, Pettus & Co., and that, when this draft matured, it was not presented for payment and protested, and notice thereof given him, and by reason thereof he is released from all liability thereon. Appellee alleges that it was

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

not protested because Rice so requested. This is denied by Rice, but is testified to by Fugate, the cashier of the bank; and his statement is corroborated by that of M. E. Orndorff, an employé of the bank. After the failure of Kendrick, Pettus & Co. to pay the bill, the bank demanded payment of Rice; and subsequently, by agreement between them, the bank loaned him \$6,000, \$2,000 of which was, by agreement, applied as a credit on the draft, leaving a balance due thereon of \$150, and \$2,000 was paid to the executor of Carroll Huey, and the balance of the proceeds of the \$6,000 loan was, by direction, placed to the credit of his father-in-law, Traugher, in the bank, and was subsequently checked out by appellant to John T. Hite. At the date of the execution of this \$6,000 note, Rice deposited with the bank, as collateral to secure its payment, and other indebtedness due by him to the bank, one note for \$1,000, eight others for \$500 each, and one for \$400, which had been executed by Campbell Cooke to Rice in payment of a tract of land. Fugate, the cashier of the bank, testifies that Rice informed him, at the time he delivered the note for \$1,000, that it was entitled to be credited with \$500, although such credit was not indorsed thereon, and, when the note was paid off, Cooke only paid same less the credit of \$500. This statement of the cashier is corroborated by Orndorff, who testified that appellant was credited with \$1,683.20 on the 1st day of January, 1893, which was the proceeds of the balance due on the \$1,000 note and two \$500 notes, with interest to payment. Rice, on the contrary, testifies that Cooke was not entitled to the credit of \$500, as he had paid nothing on the note; and Cooke also testifies that he was not entitled to the credit, and that he paid the whole of the \$1,000 note to the bank, who claimed to be the owners of the same. The cashier is also corroborated in some degree by the statements of both Mackey and Burrs. While the proof is very conflicting, we do not feel that we would be justified in saying that the chancellor erred in holding that the weight of the evidence was with the contention of appellee on this point; and so of the contention that Rice requested the cashier not to have the \$2,150 draft protested, as this is shown, not only by the testimony of Fugate and Orndorff, but more strongly by the fact that Rice recognized his liability thereon by the execution of a new obligation, and the payment of \$2,000, arising from the proceeds thereof, on the draft in question.

It is very earnestly contended by appellants that the grounds for the suing out of the attachment were not submitted to the judgment of the chancellor, and that the judgment should be reversed because the only evidence bearing upon this question, considered by him, was in the form of depositions; that, under section 264 of the Civil Code, appellant was entitled, upon the trial of the

attachment, to have had the witnesses examined orally. The order of submission and the judgment show that the case was submitted for judgment both upon the exceptions to the master commissioner's report and upon the whole case. There is nothing in the record to indicate that appellant desired to except the attachment from the order of submission; and while appellant might have demanded that the attachment should be tried by oral evidence, and reserved the question, we think he waived this right by failing to reserve the question at the time the order of submission was made, and that it cannot be raised for the first time on appeal to this court. Besides, we are of the opinion that there was ample evidence to support the finding of the court on this issue.

Appellee held, as collateral security, two notes executed by Traugher, the father-in-law of appellant, aggregating \$1,200, which were secured by a lien on land sold him by Rice. Appellant Rice repurchased this property from his father-in-law, and, without the knowledge of the bank, released the lien on the land so reconveyed, and subsequently mortgaged this property to the trust company; thus effectually cheating the bank out of \$1,200 of its collateral. This was only a short time before the suing out of the attachment, and this act alone was sufficient evidence of the fraudulent purpose of appellant to cheat, hinder, and delay appellee in the collection of its demand to have sustained the attachment; but it seems to us that the whole conduct of appellant indicated a disposition to delay and interfere with the collection of plaintiff's demand. For the reasons indicated, the judgment is affirmed.

BRIGHT¹ et al. v. FIRST NAT. BANK.¹

(Court of Appeals of Kentucky. May 27, 1899.)

BILLS AND NOTES—VOID RENEWAL—RIGHT TO RECOVER ON ORIGINAL NOTE.

1. Where persons whose names were signed as sureties to a renewal note without their authority pleaded non est factum, whereupon plaintiff filed an amended petition setting up the original note, and asking judgment thereon in the event the renewal should be adjudged invalid, an answer pleading payment of the original note was not good; it appearing that the execution of the renewal note was relied on as a payment.

2. Where defendant pleads non est factum to a renewal note sued on, the plaintiff may, without admitting the truth of that plea, set up the original note by amended petition, and ask judgment thereon in the event it shall be adjudged that the renewal note is void.

Appeal from circuit court, Graves county.

"To be officially reported."

Action by the First National Bank against W. J. Bright and others upon a promissory note. Judgment for plaintiff, and certain of the defendants appeal. Affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Robbins & Thomas, for appellants. Webb & Coulter, for appellee.

GUFFY, J. Appellee instituted this action in the Graves circuit court against W. J., V. E., C. A., and B. F. Bright to recover judgment upon a note for \$574.20 of date March 28, 1896, due in four months, credited by \$30 paid July 31, 1896. The defendants V. E., C. A., and B. F. Bright, by answer, denied that they ever signed or delivered the note sued on, or ever promised to pay \$574.20, or any part thereof. In the second paragraph of the answer it is alleged, in substance, that the note sued on was given by defendant W. J. Bright for money which it loaned to him, and these defendants never received any part of the money loaned on said note, and their names were signed to said note as sureties by W. J. Bright for him, but the said W. J. Bright never had any authority in writing from either of them to sign the name of either of said defendants as surety on said note. To this appellant replied, denying that the said answering defendants never received any part of the money loaned on the note, and denies that their names were signed to said note as sureties by W. J. Bright, or that he did not have written authority to sign their names. In the second paragraph of the reply it is alleged that the note sued on is one of several renewals of a debt created September 26, 1894, for \$500, for which all of the defendants executed, signed, and delivered to plaintiff their joint note, which is herewith filed. Plaintiff says that this original note was signed by all these defendants in person, and in their own handwriting, and, if their names were signed to this last note as they allege, it was without plaintiff's knowledge or consent, and is invalid, and they are entitled to recover on said original obligation. This reply was filed November 30, 1896, and on the 8th of December, 1896, the appellants filed an amended petition, over the objection of these defendants, upon which summons was issued and executed. The substance of the amended petition is that neither the appellee nor any of its officers were present when the note sued on was signed, and it does not know whether it was signed by C. A., V. E., and B. F. Bright in person or not, but it avers that it was signed both in person and in their own handwriting; that the note was one of several renewals of a debt of date September 26, 1894, for the sum of \$500, for which defendants executed to plaintiff their joint note for said sum, due six months after date, and it says and charges that all of the defendants signed said note in person, and same is their handwriting; and that the note filed with plaintiff's petition was a renewal of said debt, with accumulated interest. Plaintiff says that, if said renewal was signed as claimed by defendants in their answer, it was without plaintiff's knowledge or consent, and same is invalid, and in that event they are entitled to recover

on said original obligation. Said original note is herewith filed. Wherefore it prays to file this amended petition, and that they be permitted to recover on said original note if defendants did not sign said renewal, and prays for all proper relief. The answer of the defendants to the amended petition reads as follows: "The defendants herein, by way of answer to the amended petition filed December 8, 1896, and rejoining to the reply filed in November 30, 1896, say that the note for \$500 declared on in the amended petition and in the reply, and filed with said reply, was paid March 26, 1895, to plaintiff, together with all interest thereon, and they deny that plaintiff is entitled to recover anything thereon. Wherefore they pray to be dismissed," etc. To this answer the plaintiff filed a demurrer, and on motion of defendants plaintiff's general demurrer to the answer of defendants to the amended petition of plaintiff was asked to be carried back to said amended petition; and the court, being advised, overruled said demurrer to the amended petition, to which the defendants excepted; and the court, being advised, sustained said demurrer to said answer, to which defendants excepted; and, defendants failing to plead further, judgment was rendered against all of them for the amount claimed in the amended petition. To which all the defendants, except W. J. Bright, excepted, and have appealed to this court.

It is the contention of the appellants that the court erred in sustaining the demurrer to the answer, and they insist that a plea of payment is always a good defense to a suit upon a note. As a general proposition of law it may be conceded that a demurrer cannot be sustained to an answer pleading payment; but, taking the entire pleadings into consideration in this case, it is manifest that the plea of payment, in effect, presents the question whether the execution of a note or notes by the same parties subsequent to the execution of the note set up in the amended petition constituted a payment of such note, being merely a renewal of the obligation incurred by the execution of the note mentioned in the amended petition; and, this being true, we think the demurrer was properly sustained, for the reason that a renewal by the principal in the note with the same parties as apparent sureties, though not legally bound as such, does not and cannot operate as a payment of the original debt.

We cannot concur in the contention of appellants that the amended petition was defective because it did not clearly admit that the note first sued on was invalid as to the appellants; but the amended petition is an alternative pleading, which is allowed by the Code of Practice. Nor do we think that the appellee was bound to sue upon the last valid renewal of the obligation named in the amended petition. We are unable to see how appellants could be prejudiced by the plaintiff relying upon the first obligation executed, if he was entitled to rely upon any obligation,

except the note first sued on. We think the proceedings taken by the appellee in this case and the judgment rendered are fully sustained by former decisions of this court. See *Stratton v. McMakin*, 84 Ky. 641; *Bank v. Gaines*, 87 Ky. 597, 9 S. W. 396; *Kibbey v. Jones*, 7 Bush, 243; *Marsh v. Alford*, 5 Bush, 392; *Lowry v. Fisher*, 2 Bush, 72. Judgment affirmed, with damages.

BOLI et al. v. IRWIN et al.¹

(Court of Appeals of Kentucky. June 1, 1899.)

FRAUDULENT CONVEYANCES—DECLARATIONS OF GRANTOR AS EVIDENCE—BILL OF SALE ENFORCED AS MORTGAGE—WEIGHT GIVEN JUDGMENT OF CHANCELLOR ON APPEAL.

1. Declarations of the grantor are not admissible against the grantee to show that a conveyance was executed with intent to defraud creditors.

2. A writing purporting to be a bill of sale should be treated as a chattel mortgage, where it appears that such was the intention.

3. While the court, in cases of serious doubt, is not inclined to disturb the judgment of a chancellor on appeal, yet the rule, applicable to the verdict of a jury, that the finding will not be disturbed unless palpably against the evidence, does not apply in equity cases.

Appeal from circuit court, Lyon county.

"Not to be officially reported."

Action by Irwin & Son against L. A. Boli, Sr., and others, to enforce a judgment to set aside a mortgage as fraudulent. Judgment for plaintiffs, and defendants appeal. Reversed.

W. G. Bullitt, for appellants. L. W. McKee and T. J. Watkins, for appellees.

PAYNTER, J. Irwin & Son sought and obtained a judgment subjecting certain property of Boli, Sr., to the payment of their judgment debt. To do this, it involved the necessity of having declared fraudulent a mortgage of \$15,000 which Boli, Sr., executed to Jacob Buckle and Jacob Boli, and also a writing purporting to be a bill of sale from Boli, Sr., to Charles H. Zwick. The mortgage was intended to secure Jacob Buckle and Jacob Boli in such sums as might be raised through the First and Second National Banks of Hamilton, Ohio, for the benefit of Boli, Sr. The testimony of bank officers and lawyers familiar with the transaction clearly establishes the fact that the money was actually raised by Jacob Buckle and Jacob Boli, and received by Boli, Sr., as contemplated by the parties in the execution of the mortgage. The testimony does not even create a suspicion—much less, a conviction—that the transaction between Boli, Sr., and the mortgagees was for a fraudulent purpose. The uncontradicted testimony shows that Jacob Buckle mortgaged his property in Hamilton, Ohio, to secure the payment of money which was received by Boli, Sr., and that he was compelled to sell it in order to pay the debt. Since the execution of the mortgage, Jacob Boli has

departed this life; and the uncontradicted testimony shows that over \$4,000 of the money which he raised for Boli, Sr., has been paid by his personal representative, and the estate is obligated for the balance of the debt. The testimony is entirely satisfactory that the indorsement of cancellation which was made upon the mortgage was done conditionally, and was to go into effect upon Boli, Sr., borrowing money from certain banks in Kentucky with the view of paying it on the debts which he owed Jacob Buckle and Jacob Boli, and, in the event he failed to borrow the money, the indorsement of cancellation was not to be operative. This cancellation was never placed upon the record. The statements of Boli, Sr. (not in the presence of the mortgagees), to certain persons from whom he was endeavoring to borrow money, that the mortgage was not a valid one, and was executed for a certain purpose, is not competent evidence against the mortgagees. If the rights of a mortgagee can be destroyed by that character of testimony, all that would be necessary for the mortgagor to do would be to execute a mortgage, and then tell his neighbors it was of no value. To admit such testimony as competent and of weight would render insecure the rights of all mortgagees.

The testimony in this case shows that Zwick advanced large sums of money to Boli, Sr. Before any considerable part of the money was advanced, Boli, Sr., executed and delivered to Zwick a writing purporting to be a bill of sale of certain personal property and the Woodstock Company plant at Kattawa. It is insisted by Boli, Sr., and Zwick that this was an actual sale of the property. We think, from the facts as developed in this case, that, while the paper purports to be a bill of sale, yet it simply operates as a security to Zwick for such money as he might advance to carry on the business. If, however, subsequent to that contract, property was purchased and paid for by Zwick with the understanding between Boli, Sr., and himself that it was to belong to him, then he acquired title to it. On any property which was embraced in the so-called bill of sale, Zwick has a lien superior to the claim of Irwin & Son. The record fails to show what part of the property embraced in the bill of sale was seized under the attachment, or what part of the property so seized was purchased after the bill of sale. Hence we cannot do more than state, as we have, the principle upon which the right shall be adjudicated as between Zwick and Irwin & Son.

It is insisted that the judgment ought not be disturbed because it is palpably against the weight of the evidence. We think the judgment is palpably against the weight of the evidence. In fact, there is no evidence to support the judgment in so far as it declared fraudulent the mortgage of Jacob Buckle and Jacob Boli. This suit is a suit in equity, and properly so. The rule should not and does not prevail in this court that

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

judgments of the court below in such cases should be sustained unless they are palpably against the weight of the evidence. This court weighs the testimony, and determines for itself whether or not the judgment is correct, in view of the law and evidence of the case. Frequently counsel for appellees urge that the rule of the court is that the judgment should not be reversed unless it is palpably against the evidence. Other attorneys for appellees urge that the rule is that the judgments in chancery suits must be treated as a verdict of a properly instructed jury. Neither one of these rules obtains in this court in equity causes. Where it is a question of fact, and the court is in serious doubt whether the judgment is right, its inclination is to allow the judgment of the court below to prevail. It is only in this regard and to this extent that the opinion of the court below controls here. The judgment is reversed for proceedings consistent with this opinion.

WORLAND v. SECREST.¹

(Court of Appeals of Kentucky. June 1, 1899.)

SALES—WRITTEN CONTRACT—BREACH OF VERBAL REPRESENTATIONS.

The buyer cannot have an abatement of the price on account of a breach of verbal representations made at the time of the sale, or because the thing bought was less valuable than the parties supposed, where the contract is in writing, and there is no fraud.

Appeal from circuit court, Nicholas county.

"To be officially reported."

Action by George H. Worland against George R. Secrest on a promissory note. Judgment for defendant, and plaintiff appeals. Reversed.

W. H. Holt and W. P. Ross & Son, for appellant. Kennedy & Williamson, for appellee.

HOBSON, J. R. H. & C. G. Moreman owned a patent cistern cleaner and water purifier which cleaned cisterns without taking the water out, and purified the water by means of a cylinder filled with air, let down to the bottom of the cistern, the pressure of the water when a valve was opened in the bottom of the cylinder scouring the bottom of the cistern, and forcing the mud up into the cylinder as the air escaped. R. H. Moreman, going about using his cleaner and selling the right, stopped with appellee, George R. Secrest, a hotel keeper at Carlisle, Ky., and while there had several talks with him about the value of his patent, and what the cleaner would do. Secrest proposed to buy the right for the state of Illinois, and after Moreman left Carlisle for Richmond, Ky., Secrest went to Richmond, and there they made the following written contract: "Articles of agreement between R. H. & C. G. Moreman, of the county of Meade

and state of Kentucky, party of the first part, and George R. Secrest, of the county of Nicholas and state of Kentucky, of the second part, witnesseth that, for and in consideration of one dollar cash in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of five hundred dollars (less 20 per cent.), do hereby agree to convey to the party of the second part their right, title, and interest in and to the state of Illinois in their patent cistern cleaner and water purifier, known as 'Moreman's Cistern Cleaner.' The party of the second part hereby agrees to pay to the party of the first part the five hundred dollars aforementioned (less 20 per cent.) when said party shall have made to said second party a deed of patent in full. The party of the first part further agrees to grant to the party of the second part an option on the states of Indiana, Ohio, and Iowa for a period of eight months from this date, and it is further agreed between said parties that the party of the second part may sell to whom he pleases the aforementioned states, receiving from the said first party 20 per cent. on all sales made of said territory, but that the sale of no state shall be under five hundred dollars. Witness our hands, this 25th day of September, 1894. R. H. & C. G. Moreman. George R. Secrest. Witness: J. S. Kennedy." It appears from the evidence that Moreman used the machine quite successfully, cleaning out quite a number of cisterns, and created considerable interest in his invention at Carlisle and in the vicinity. It also appears that he sold county rights to other persons, and they did some work which was then thought very successful. On January 17th following, Moreman duly conveyed by deed the patent right for the state of Illinois to Secrest, who paid him \$150 cash, and executed to him his note for \$250, due in four months. The deed and note are in the usual form. Secrest failed to pay the note at maturity, and when sued upon it by appellant, to whom it had been assigned, alleged that as an inducement for him to make the purchase of the patent right Moreman represented to him that he was the inventor of a new and useful invention for cleaning wells and cisterns, which would clean all wells and cisterns perfectly and purify the water; that there was no other patent in existence covering the same ground that his invention covered, or that would do what his invention would do; that he relied upon these representations, and was induced by them to make the trade; but he alleged that they were all false and fraudulent, and were known by Moreman to be false and fraudulent at the time, and that they were made for the fraudulent purpose of inducing him to make the purchase. He also alleged that there was another patent covering substantially the same ground, which was better than Moreman's, and that his patent was worthless. He prayed a cancellation of the deed and note, and judgment for the amount that he had paid. Issue being joined, and the case trans-

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ferred to equity, the court below on final hearing dismissed both the petition and counterclaim. This was, in effect, a finding by the court below that there was no fraud in the transaction; for, if the charges of fraud had been deemed maintained, the deed should have been canceled, and the consideration paid should have been restored to appellee. The evidence very clearly sustains this conclusion. It shows that there is another patent, somewhat similar to Moreman's, which cleans the cistern very well, but does not aerate or purify the water, as it is claimed Moreman's invention does. So this patent does not cover the same ground as Moreman's. It had only been obtained a short time before, and its existence was unknown to him. The proof as to Moreman's representations of what his cleaner would do does not show that he said anything more than he was justified in believing from his experience. The testimony is persuasive that appellee's purchase was induced more by what the cleaner did and the interest created in the community than by Moreman's statements. We think it, therefore, clear that the transaction cannot be set aside for fraud. The court below evidently reached this conclusion; but the evidence showing that the other patent did better work than Moreman's, and that his was not valuable, the chancellor was of opinion that Moreman's representations, which, under the rule in this state, are regarded as warranties, had not been made good, and so the patent right was worth much less than was supposed. He therefore made an abatement of the price as for a breach of warranty in the sale. The question therefore arises, admitting that the evidence would sustain the conclusion of the chancellor, can the court allow an abatement of the price for a breach of verbal representations made at the time of the sale, where the parties have put their contract in writing, and there is no fraud in the transaction?

It is a well-settled rule that where parties have deliberately put their contract in writing it is conclusively presumed that their whole engagement was reduced to writing, unless from the form of the instrument this does not appear to have been the intention of the parties. Parol evidence of previous or contemporaneous negotiation will not be admitted to vary the terms of the written agreement, in the absence of fraud on the face, for the previous, verbal negotiations are merged in the writing. The written contract in this case, above quoted, and the formal deed which was afterwards made, must be presumed to have been intended by the parties to embrace the contract between them, and, as neither of these contains a warranty, none can be implied, and proof of verbal representations previously made not amounting to fraud cannot be received. In a note to *Hobart v. Young* (Vt. 12 Lawy. Rep. Ann. 694 (s. c. 21 Atl. 612)), the learned editor says, citing many authorities: "If the article is sold by a formal written contract, or a regular bill of sale, and that

is silent on the subject of warranty, no oral warranty made at the same time, or previously even, can be shown, since the writing is supposed to embody the whole contract. For the same reason no additional oral warranty can be ingrafted on or added to one that is written." This rule has received the indorsement of the supreme court of the United States in *De Witt v. Berry*, 134 U. S. 306, 10 Sup. Ct. 536, and *Seitz v. Machine Co.*, 141 U. S. 510, 12 Sup. Ct. 46; the latter case being not unlike this. In *Reed v. Van Ostrand*, 1 Wend. 424, the facts were substantially the same as in this case, and it was held that the purchaser was without remedy. See, also, 28 Am. & Eng. Enc. Law, 794, and cases cited. There was no plea of mistake in the written contract, and, as the charge of fraud was not sustained by the proof, the court was not warranted in allowing an abatement of the price because the patent right was less valuable than supposed by the parties when the trade was made. The judgment is therefore reversed, and cause remanded for judgment for plaintiff for the amount of the note.

BECKER v. NEASOM et al.¹

(Court of Appeals of Kentucky. June 1, 1899.)
PLEADING—DEFECT OF PARTIES—SPECIAL DEMURRER.

Objection to a pleading because of a defect of parties is waived unless made by special demurrer.

Appeal from circuit court, Logan county.
"Not to be officially reported."

Action by T. H. Becker against John Neasom and others to enforce a vendors' lien. Judgment for defendants, and plaintiff appeals. Affirmed.

Sam Hooker and James H. Bowden, for appellant. Edward W. Hines and W. F. Browder, for appellees.

PAYNTER, J. We are of the opinion that the facts in this case warranted the court in adjudging a rescission of the contract, and that it did not err in fixing the rights of the parties as to rents and improvements.

It is insisted that there is a defect of parties in the cross action of John Neasom against the appellant, Becker. The plaintiff made John Neasom and the unknown heirs of Mary Neasom defendants. The answer and counterclaim purport to be that of John Neasom and the unknown heirs of Mary Neasom. Whether the presumption should be indulged that the unknown heirs of Mary Neasom authorized the answer to be filed is not necessary for us to decide. If there was a defect in the pleading, in failing to bring before the court all necessary parties, it is too late to make the question in this court, because it should have been made by a special demurrer in the court below. Section 92, Civ. Code Prac. The judgment is affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

CITY OF LOUISVILLE v. SELVAGE.¹
SELVAGE v. LUCAS.

(Court of Appeals of Kentucky. June 2, 1899.)

MUNICIPAL CORPORATIONS — ASSESSMENTS FOR STREET IMPROVEMENTS — PASSAGE OF ORDINANCE — CORRECTION OF ERRORS — GUARANTY TO KEEP STREET IN REPAIR — PRAYER FOR RELIEF — INTEREST.

1. Under Ky. St. § 2834, providing that at least two weeks shall elapse between the passage from one board of the general council to another of an ordinance of a city of the first class for an original street improvement, such an ordinance passed by the board of councilmen March 17th and by the board of aldermen March 31st is valid.

2. Where property on one side of an improved street is not divided into squares, gross inequality in apportioning the cost of the improvement cannot be permitted.

3. To authorize such inequality, the petition must aver that the streets alleged to constitute the boundary of the contiguous square or squares existed as such at the time of the passage of the ordinance for the improvement.

4. The fact that the ordinance required from the contractor a guaranty to keep the street in repair for five years does not render it void; but the contractor cannot recover to the extent that the assessment has been increased by reason of the guaranty, which is conclusively presumed to be to the extent of the 10 per cent. of the contract price retained to secure the repairs.

5. Ky. St. § 2834, providing that no error in the proceedings of the council shall exempt from payment for the original improvement of public ways, but the council or courts "shall make all corrections, rules and orders to do justice to all parties concerned," applies to an assessment of the cost of footway crossings, so as to make it the duty of the court to correct an inequality in the apportionment of the cost as between the territory on the two sides of the improvement, and to render judgment for the amounts which should have been assessed.

6. It is the duty of the court to make such correction under a prayer for all general relief.

7. Neither the city nor the property owner is liable for costs or interest until the apportionment is corrected.

Appeals from circuit court, Jefferson county, chancery division.

"To be officially reported."

Action by C. P. Selvage, for use of the Western Bank, against H. V. Lucas and others, upon street-apportionment warrants. Judgment for plaintiff against the city of Louisville, and judgment dismissing the petition as to the other defendants, and the city of Louisville and plaintiff appeal. Reversed.

H. L. Stone, for appellant city of Louisville. William Krieger and R. T. Colston, for appellant Selvage. Lane & Burnett, for appellee Lucas.

DU RELLE, J. Selvage brought suit, for the use of the Western Bank, against appellees Lucas and others, upon apportionment warrants for the improvement of Hill street from the center line of Fifth street and St. James court to the east line of Sixth street, under an ordinance providing for the improvement of the carriageway of the part of

Hill street mentioned with vitrified brick pavement, and for making footway crossings across intersecting streets and alleys. The ordinance provided that the cost of the improvement should be apportioned against the land contiguous thereto on the south included in the quarter squares abutting upon the improvement, and upon the contiguous territory on the north as far as a line 522.29 feet north of and parallel with Hill street. A demurrer to the petition was sustained, an amended petition was filed, and to the petition as amended a demurrer was filed and sustained. The plaintiff declined to plead further, and judgment was rendered dismissing the petition, but giving judgment over against the city of Louisville under the alternative prayer in the petition. Both the city and the contractor have appealed from this judgment.

One of the grounds urged in support of the demurrer was that two weeks had not elapsed between the passage of the ordinance by the two boards, it being passed by the board of councilmen on March 17th and by the board of aldermen on March 31st. This question has been settled in the case of *Fehler v. Gosnell*, 99 Ky. 385, 35 S. W. 1125.

The trial court, in a brief opinion, sustaining the demurrer, referred to the opinion in *Zable v. Orphans' Home*, 92 Ky. 89, 17 S. W. 212, with regard to the fixing of the grade of the street improved. In that case the petition was held defective, as failing to aver that the city council had fixed the grade of the street; but the court evidently overlooked the averment in the original petition in this case fixing the grade of Hill street within the limits improved.

The main contention on behalf of appellees in support of the proposition that the petition was fatally defective is based upon the provision of the ordinance fixing the limits of the territory to be assessed, and the averments of the original and amended petitions with respect thereto. The original petition alleged specifically that the territory on the south of Hill street was divided into squares by principal streets, which were named, and their situation stated. But it was averred that on the north of the improvement the territory was not divided into squares by principal streets, but that at the time of the passage of the ordinance it was expected and believed that Magnolia avenue would be opened and dedicated as a public street, and extend parallel with Hill street at a distance of 1,104.59 feet north, and that no other street would be opened or dedicated between Hill street and Magnolia avenue between the eastern and western limits of the improvement. This would make the center line between Hill street and Magnolia avenue coincide with the northern limit of the assessment district as fixed by the ordinance. The rulings of this court in *Preston v. Roberts*, 12 Bush, 570, that, where property was not divided into squares, gross inequality in apportioning the

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cost of an improvement upon the two sides could not be permitted, would seem to be applicable to this apportionment under the averments of the original petition, though in a number of cases such inequality has been held unobjectionable where the property was divided into squares by principal streets. *Nevin v. Roach*, 86 Ky. 499, 5 S. W. 546; *Cooper v. Nevin*, 90 Ky. 85, 13 S. W. 841; *Baker v. Selvage*, 7 Ky. Law Rep. 838. But in the amended petition all the averments as to the contiguous territory upon the north of Hill street not being divided into squares by principal streets were withdrawn, as having been made by mistake, and it was averred "that the territory on the north side of Hill street, * * * contiguous to the improvement, * * * is a square bounded on all sides by principal streets, * * * on the north by Victoria Place, which latter street is parallel to and 1,104.58 feet north of and parallel with Hill street"; with a further averment that it was not intended or probable that the city would ever open another principal street through said square. This averment is relied upon by appellant Selvage and by the city to sustain the legality of the apportionment alleged in the petition, upon the theory that, though it was unnecessary to allege how far distant the assessment limit upon the north was from Hill street, the limit which was alleged coincided with the center line of the square described in the amended petition. But there is no averment that at the time the ordinance was passed providing for the improvement any such street existed as Victoria Place; and this, it seems to us, is fatal to the contention of appellants, Selvage and the city, upon this point. Under the pleadings in this case, appellant Selvage was not entitled to recover according to the apportionment approved by the general council.

A further ground relied on by appellees Lucas and others is that the general ordinance concerning the improvement of streets required from the contractor a guaranty to keep the pavement in repair for five years, and to deposit bonds equal in amount to 10 per cent. of the contract price as security for such repair, it having been held in *Fehler v. Gosnell*, 35 S. W. 1125, that the amount which such an assessment had been increased on account of that guaranty could not be recovered by the contractor against the property holder, but was properly chargeable against the city at large. A further objection by appellees was that the ordinance provided for the assessment of the cost of the footway crossings against the contiguous property, and that this cost under "An act to amend the charter of the city of Louisville" (Burnett's Code, p.

515), provided that the cost of such crossings should be paid by the city of Louisville out of a tax authorized to be imposed by the city, and therefore cannot be assessed against the property holder. But, while these objections are ample to prevent the recovery of the amounts apportioned and claimed in the petition, they do not, in our opinion, render the ordinance void, or the petition fatally defective. The question as to the 10 per cent. guaranty has already been passed upon in the case of *Fehler v. Gosnell*, supra, and it was there held that the contractor was still entitled to recover, except to the extent the property holder's assessment had been increased on account of the guaranty. It was also there held that under the provisions of the act for the government of cities of the first class that "no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract, but the general council, or the courts in which suits may be pending, shall make all corrections, rules, and orders to do justice to all parties concerned [Ky. St. § 2834]," the court should correct the apportionment, and render judgment for the amounts which should have been assessed against the property. We see no valid reason why the rule so laid down does not apply equally to the attempted assessment of the cost of footway crossings, and to the inequality of the apportionment as between the two sides of the street, if the facts be as stated in the original opinion. The averments of the petition showed the cost, under the contract, of each part of the improvement made, and in the late case of *Gosnell v. City of Louisville*, 46 S. W. 722, we held that 10 per cent. of the contract price was a fixed and liquidated proportion thereof for the repairs contemplated by the guaranty, and that that amount was the proportion of the contract price from the payment of which the property holders were exempted. There would seem, therefore, to be little difficulty in the court making a correction of the apportionment upon the averments of the petition in this case. It is true that this relief is not expressly prayed in the petition, but section 2834, Ky. St., would seem to require the court to make such correction under the prayer for all general relief. Of course, under the doctrine in *Gosnell v. City of Louisville*, supra, neither the city nor the property holder is liable for the costs or interest until the apportionment is corrected. For the reasons stated, the judgment is reversed, with directions for further proceedings in conformity with this opinion, all parties being allowed to amend if desired.

SMITH v. SULZER MACH. CO.'S ASSIGNEE.¹

(Court of Appeals of Kentucky. June 3, 1898.)

**ASSIGNMENTS FOR BENEFIT OF CREDITORS—
POWER OF COUNTY COURT TO AC-
CEPT BID FOR PROPERTY.**

1. Under Ky. St. § 88, an appeal lies to the circuit court from an order of the county court overruling a motion by an assignee for creditors to set aside an order of the court accepting a bid for property belonging to the assigned estate.

2. Under Ky. St. § 82, providing that an assignee for the benefit of creditors shall be subject to the orders and supervision of the county court, or the judge thereof in vacation, where an assignee reported to the court his failure to receive a bid for certain property equal to the upset price fixed by the court in the order of sale, whereupon one who had made a smaller bid for the property which the assignee had failed to report appeared and renewed his offer, the court had no power to accept the bid, but should have ordered the property to be again offered for sale.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Appeal to the circuit court by F. W. Sulzer, assignee of the Sulzer Machine Company, from an order of the county court overruling a motion to set aside an order accepting a bid for certain property. Judgment sustaining motion, and J. Lithgow Smith, the purchaser, appeals. Affirmed.

Bodley, Baskin & Morancy, for appellant. P. B. & Upton Muir, for appellee.

PAYNTER, J. O. R. Sulzer, doing business as the Sulzer Machine Company, made an assignment to F. W. Sulzer for the benefit of his creditors, and the assignee duly qualified as such. Part of the assigned estate was a plant consisting of tools, patterns, machinery, etc. The judge of the Jefferson county court ordered a sale of this plant, fixing the upset price at \$3,500. The assignee offered it for sale, and the highest bid received was \$2,600, which was made by the appellant, Smith. This bid was not accepted, and the assignee reported to the county court his failure to receive a bid of \$3,500, and reported a bid of \$2,000 by J. R. Gathright subsequent to the date when the property was offered for sale. No mention was made in the report of the assignee that he had received a bid of \$2,600 for the property. After this report had been made, the appellant, Smith, appeared, and made an offer to the county court of \$2,600, and, without the consent of the assignee, the judge of the county court accepted it, and directed the assignee to turn the property over to him. The assignee appeared in court, and moved to set aside the order of the court accepting Smith's bid, and directing the property to be turned over to him. In the meantime, J. R. Gathright had offered to bid \$2,700 if another sale of the property was ordered. The court overruled the motion,

from which action of the court an appeal was prosecuted to the circuit court, which decided that the county court should not have accepted Smith's bid, but should have again offered the property for sale. Gathright appeared in the circuit court, and renewed his proposition to bid \$2,700 if the property was again offered for sale. Section 88, Ky. St., authorized an appeal from the judgment of the county court to the circuit court.

The question involved is, did the county court, in disregard of the wishes of the assignee, have the authority under the law to accept the bid of the appellant, Smith? As authority for the action of the county court, section 82, Ky. St., is relied upon, and which reads as follows: "The assignee shall, at all times, except as hereinafter provided, be subject to the orders and supervision of the county court, or the judge thereof in vacation, and may be required, at any time upon reasonable notice, to file such reports as may be ordered; and may, when the court so directs, be examined in open court touching the condition of the estate and the management thereof." An assignee has charge of the estate, and gives bond for the protection of its creditors. To a large extent his judgment must control in the management of the estate, but the section quoted makes him subject to the orders and supervision of the judgment of the county court, or the judge thereof in vacation. This provision of the statute was not intended to confer upon the county courts the power to make contracts for the sale of assigned estates. The judgment ordering the sale of the property is a judicial act, and must be executed by an officer of the court. It is not one of the functions of a judge to act as commissioner of the court, and to perform the duties which the law imposes on one of its officers. The sale which the commissioner was required, by the order of the court, to make, necessarily had to be approved by the court. The commissioner had performed his duty in offering the property for sale, and was unable to sell it, because no one would bid the upset price for it. In the first place, the court should not have made the order selling the property to Smith; and when Gathright appeared on the scene, and offered to bid \$2,700, it seems to us that the best interest of the creditors required that the property should be again offered for sale. The conditions indicated that there would be competitive bidding at the sale, which would probably result in the property bringing an increased price. If the county judge could lawfully make the sale of the property in this case, then there is no reason why he could not take charge of the property of any assigned estate, and sell it at either private or public sale, and thus completely ignore the assignee in the disposition of the property. There are many things which the county court, and its judge in vacation, may require of an assignee for the protection of an assigned estate and its creditors; but as, in our

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

opinion, section 82, Ky. St., was not intended to confer upon the county court, or its judge in vacation, the power to sell the property of an assigned estate, it is unnecessary for us to enumerate the various acts which the county court is authorized to do with reference to the control of the assignee. The judgment is affirmed.

THOMAS v. PAYNE et al.¹

(Court of Appeals of Kentucky. June 6, 1899.)

WITNESSES—TRANSACTIONS WITH PERSONS SINCE DECEASED—FRAUDULENT CONVEYANCE OF HOMESTEAD.

1. A debtor is not a competent witness for his creditor, who seeks to be substituted to his rights, as to a transaction with a person since deceased.

2. Where a debtor, at the time he sold and conveyed his interest in a tract of land owned jointly by him with others, resided on the land with his family, he was entitled to a homestead therein; and, his interest being worth less than \$1,000, his conveyance was not fraudulent as to creditors, though in the subsequent division of the land the dwelling house was not allotted to the purchaser of his interest.

Appeal from circuit court, Barren county.

"Not to be officially reported."

Action by E. F. Thomas against J. R. Payne and others to set aside a conveyance as fraudulent. Judgment for defendants, and plaintiff appeals. Affirmed.

W. L. Porter, for appellant. V. H. Baird and Geo. T. Duff, for appellees.

GUFFY, J. It appears from this record that J. R. Payne was one of 10 heirs of Ben Payne, who departed this life in Barren county in 1893, the owner of a certain amount of real estate in Barren county. It further appears that J. R. Payne, who was then living upon the tract theretofore owned by his father, conveyed to William F. Payne his entire interest in the land descended to him from his father, Ben Payne, and soon thereafter moved from said tract of land to Allen county. It further appears that proceedings were instituted in the Barren county court by the children of said Ben Payne for a partition and division of the lands of their father, and that the interests of J. R. Payne and William F. Payne were assigned in said division to William F. Payne, and commissioner's deed made to him for the same, both of which deeds were duly recorded in the county court clerk's office. It further appears that the land so allotted to William F. Payne did not include any portion of the land occupied by J. R. Payne theretofore. After the death of W. F. Payne this action was instituted by the appellant, E. F. Thomas. His petition shows that he held a debt on J. R. Payne prior to the conveyance aforesaid, upon which he had obtained judgment and execution, and return of "No property found." It is substantially alleged in the petition that the conveyance from J. R. Payne

to W. F. Payne was without consideration, and for the fraudulent purpose of hindering and delaying plaintiff in the collection of his debt; and he asks that the same be set aside, and the land be held subject to his debt. Afterwards, by an amended petition, he alleged that W. F. Payne owed \$600 purchase money on the land, and that a lien existed thereon for the payment of the same, and that he be substituted to the rights of J. R. Payne to the same. The answer of the defendants denied the averments as to the fraudulent conveyance; and afterwards, by an amended answer, the defendants claimed that J. R. Payne was entitled to the land conveyed as a homestead, and therefore it was immaterial whether the conveyance was made to defraud creditors or not,—that his deed passed to them a perfect title. After the issues were fully made up, and proof taken, the court adjudged that plaintiff was not entitled to the relief sued for in his petition, and it was adjudged that plaintiff's petition be dismissed, and that defendants recover of the plaintiff their costs herein expended; and from that judgment this appeal is taken.

We do not think that the proof establishes the fact that J. R. Payne had any lien upon the land in controversy for the payment of any sum of money. His testimony in that respect was incompetent, as against W. F. Payne, who is now dead. Such other testimony as may be held to be competent in that respect fails to establish such fact. It may be that the deed was made to prevent the collection of plaintiff's debt. It is clear from the testimony in this case that J. R. Payne had a homestead right in the land, and that the same was not worth as much as \$1,000, and that he therefore had a legal right to convey the same and pass the title thereto to any person, with or without consideration, or for any purpose which seemed to him proper.

The fact that the land assigned in the division to W. F. Payne did not include the land upon which J. R. Payne resided does not, to any extent, tend to defeat the homestead right of J. R. Payne. It is clear that he was then a housekeeper with a family, and resided upon the land which he inherited from his father. If he did so hold his land, the same would have been assigned to him in the division, provided the same could have been done without detriment to the other interests. Inasmuch as he sold to his brother, it was proper, in the division, to allot the two shares adjacent to each other, if the same could be done without detriment to the other heirs. It may be further remarked that the interest so conveyed to W. F. Payne was subject to a lien for the costs incident to the division, which it may be presumed was paid by W. F. Payne.

It seems to us that the plaintiff has failed to show any right to the relief asked. Judgment affirmed.

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

SMITH v. FARMERS' BANK OF VINE GROVE.¹

(Court of Appeals of Kentucky. June 2, 1899.)
JUDGMENT—EFFECT OF APPEAL—AMENDMENT OF PLEADINGS.

1. A judgment which has been superseded, and from which an appeal is presumed to be pending, cannot be pleaded as a defense.

2. The offer to file an amended answer after the rendition of judgment came too late.

Appeal from circuit court, Hardin county.
 "Not to be officially reported."

Action by Farmers' Bank of Vine Grove against H. H. Smith on a promissory note. Judgment for plaintiff, and defendant appeals. **Affirmed.**

H. H. Smith, in pro. per. D. C. Haycraft, for appellee.

GUFFY, J. Appellee instituted this action against the appellant seeking to recover judgment upon a note amounting to \$433.50. The answer of defendant contains a plea of usury to the amount of \$13.64, which \$13.64 was excluded from the judgment rendered in favor of H. H. Smith against appellee. The court, as we think, properly sustained a demurrer to so much of the answer as attempted to plead the judgment. It is evident that the judgment sought to be pleaded had at that time been superseded, and was presumably pending in this court upon an appeal. The offer to file an amended answer after the rendition of the judgment came too late, even if the answer constituted a defense. We fail to perceive any error in the judgment or proceedings, and the judgment appealed from is affirmed, with damages.

MILSTEAD v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. June 1, 1899.)

FALSE SWEARING—MATERIALITY OF TESTIMONY—EVIDENCE.

1. To constitute the offense of false swearing, under Ky. St. § 1174, it is not essential that the alleged false testimony should have been material.

2. Where a stenographer's report of evidence is relied on in a prosecution for false swearing, evidence that a stenographer, in making notes, sometimes makes mistakes, is not admissible.

3. A judgment of conviction cannot be reversed on the ground that the verdict was made by lot.

Appeal from circuit court, Livingston county.
 "Not to be officially reported."

J. M. Milstead was convicted of false swearing, and he appeals. **Affirmed.**

J. C. Hodge and J. W. Bush, for appellant.
 W. S. Taylor and M. H. Thatcher, for the Commonwealth.

PAYNTER, J. This appeal is from a judgment of conviction for false swearing. The indictment charges that, in the prosecution of the commonwealth against Reuben and Tom

Ross on a motion for bail before the Livingston circuit court, the appellant testified that he "heard a conversation in Grand Rivers, after the examining trial of Reuben and Tom Ross, between W. C. Bell and George [Cooney] Howell, and that George [Cooney] Howell said that he [Howell] had done all he could in the examining trial for the Millers, and that he [Howell] was going to do his best in the circuit court, and that he [Howell] did not see how the Ross boys got bail, and that he [Howell] had done all he could against them, and would do so again." It is averred in the indictment that this testimony was willfully and knowingly false. It is claimed that the indictment is not good, because it fails to allege that Howell was a witness on the trial of the motion for bail. We do not think it was necessary to make that averment. The indictment is for false swearing, based on section 1174, Ky. St., which reads as follows: "If any person, in any matter which is or may be judicially pending, or which is being investigated by a grand jury, or on any subject in which he can legally be sworn, or on which he is required to be sworn, when sworn by a person authorized by law to administer an oath, shall willfully and knowingly swear, depose or give in evidence that which is false, he shall be confined in the penitentiary not less than one nor more than five years." It was unnecessary to allege in the indictment that the testimony was material, as under this statute it is not necessary that the matter to which a witness testifies falsely should have been material, in order that he might be guilty under it. It is sufficient if he is required to, and does, testify. *Com. v. Powell*, 2 Metc. (Ky.) 10; *Com. v. Turner*, 98 Ky. 526, 33 S. W. 88; *Kerfoot v. Com.*, 89 Ky. 174, 12 S. W. 189; *Com. v. Maynard*, 91 Ky. 131, 15 S. W. 52. False swearing is made an offense under the statute, and it does not require the same averments to make the indictment good as in one charging perjury.

On the trial of this case it was shown that Howell was a witness for the commonwealth on the motion for bail in the case of the commonwealth against the Rosses; and the purpose of the testimony of the appellant was to show that he was a partisan in the prosecution, or was corrupt, and thus affect his credibility as a witness. The testimony of the appellant was material to the question then before the court. At former terms of the court the case had been continued. When the case was called for trial he filed an affidavit asking for a continuance of the case upon the ground of the absence of a certain witness; the commonwealth attorney admitting that it should be read as the deposition of Hendrick, one of the witnesses named. The case proceeded to trial, and Hendrick and all of the witnesses named in the affidavit, with the exception of one, appeared in court, and all except one of those who appeared were introduced as witnesses for the appellant. Presumably the one who appeared and was not

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introduced as a witness would not prove anything for him. One of the witnesses named in the affidavit did not appear. The fact proposed to be proven by that witness was that a stenographer, in making notes, sometimes makes mistakes. This was done with the view of affecting the testimony of the lady who acted as stenographer and recorded the testimony of the appellant on the trial of the motion for bail. That testimony was not competent. Besides, a jury is composed of men who are supposed to have common sense, and know that any one in any business is likely to make mistakes. In this case John K. Hendrick, who was introduced by the defense, proves substantially the same facts as were proven by the witnesses of the commonwealth as to the testimony of the appellant on the motion for bail. The defendant, in his testimony, does not contradict in any material degree the testimony of the witnesses of the commonwealth in detailing what he testified to on the motion for bail.

This court has no revisory power to act upon an alleged error that the verdict was made by lot. *Redmon v. Com.*, 82 Ky. 333. The judgment is affirmed.

JONES v. TODD.¹

(Court of Appeals of Kentucky. June 3, 1899.)

SLANDER—MALICE—INSTRUCTIONS TO JURY.

Where the words are actionable per se, defendant is not entitled to an instruction directing the jury to find for him unless they believe the words were spoken maliciously, as the law imputes malice.

Appeal from circuit court, Barren county.

"Not to be officially reported."

Action by Lou Ellen Todd against Annie Jones for slander. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. T. Duff, for appellant. C. T. Dickey, for appellee.

HOBSON, J. Appellee sued appellant for slander for uttering the following words, in speaking of her husband's store being broken into: "He [B. C. Todd] did it, and his wife, or him and his boy, with his wife's shoes on." Appellee denied speaking the words. The jury found a verdict against appellant for \$300 damages. The principal ground of complaint is that the court instructed the jury that if they believed, from the evidence, that appellant spoke the words charged, or their substance, they should find for appellee, and refused to instruct the jury that they must find for the appellant, unless they believed the words were spoken maliciously. In this there was no error. In *Bish. Noncont. Law*, § 257, the rule is thus stated: "Where the words are actionable per se, a sort of imputed malice, called 'malice in law,' is all that is required in the proof. There need be no ill will to the

person slandered, or purpose to injure him; but in the law of slander and libel the term 'malice,' when not qualified by any such words as 'express,' or 'in fact,' denotes simply that the act was voluntary and without legal excuse." The objections made to the testimony given for appellee can none of them be considered, because the bill of exceptions does not show that any exception was taken to this testimony on the trial. Judgment affirmed.

BARDEMAKER et al. v. JOHNSON et al.¹

(Court of Appeals of Kentucky. June 2, 1899.)

APPEAL AND ERROR—WEIGHT GIVEN JUDGMENT OF CHANCELLOR.

While some weight will be given on appeal to the finding of the chancellor on a question of fact, yet the court will consider the evidence, and adjudge for itself the correctness of the judgment appealed from.

Appeal from circuit court, Warren county.

"Not to be officially reported."

Action in attachment by Johnson & Garvin against Bardmaker & Bros. Judgment sustaining attachment, and defendants appeal. Affirmed.

J. T. Beauchamp, for appellants. John B. Rodes, for appellees.

GUFFY, J. Appellees, Johnson & Garvin, instituted suit against the appellants in the Warren circuit court upon a claim of \$158.50, and also obtained a general attachment against the property of the appellants. No defense was made as to the validity of the debt, but the grounds of the attachment were denied by the defendants. The grounds relied on by plaintiffs were: First, that defendants had sold, etc., their property, with the fraudulent intent to cheat, etc.; secondly, that they were about to do so; and, thirdly, that they had not property in the state sufficient to pay plaintiffs' claim, etc. The court upon final hearing sustained the attachment, and to reverse that judgment this appeal is prosecuted. The sole question presented for decision is whether the proof authorized the judgment. It is contended for appellee that the judgment of the circuit judge must be clearly and palpably against the evidence before this court will reverse. It has been repeatedly held by this court that it will give some weight to the finding of the chancellor upon a question of fact, yet in all cases this court will consider the evidence, and adjudge for itself as to the correctness of the judgment appealed from. Taking all the testimony together, and recognizing the difficulty of establishing beyond question the grounds relied on for an attachment, and considering that the court had the witnesses before him and was presumably well acquainted with them, we are not disposed to disturb the judgment rendered. Judgment affirmed.

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LYDDANE v. OWENSBORO BANKING CO.¹

(Court of Appeals of Kentucky. May 31, 1899.)

BILLS AND NOTES—PLEADING—LIABILITY OF INDORSER—FAILURE TO GIVE NOTICE OF DISHONOR TO PRIOR INDORSER.

1. It is sufficient to allege that the payee indorsed the bill sued on by writing their names across the back, and that plaintiff is the owner and holder thereof, without alleging that the indorsement was to plaintiff.

2. Such averments, coupled with the averment of a promise by the acceptor to pay, are sufficient to hold the indorser liable.

3. Under the law merchant, notice to prior indorsers of the dishonor of a bill is not necessary in order to hold the last indorser liable; and that rule is not changed by Ky. St. § 3725, providing that it shall be the duty of notaries "to give or send notice of the dishonor of such paper to such of the parties thereto as are required by law to be notified, to fix their liability on such paper."

Appeal from circuit court, Daviess county.
"To be officially reported."

Action by the Owensboro Banking Company against J. A. Lyddane on a bill of exchange. Judgment for plaintiff, and defendant appeals. Affirmed.

Walker & Slack, for appellant. Birkhead & Clements, for appellee.

DURELLE, J. Appellee bank brought suit on a bill of exchange drawn by Clark on Boyd, accepted by Boyd, payable to the order of Slack and appellant Lyddane, indorsed by payee, and purchased and discounted by the bank. A demurrer to the petition was properly overruled, it being alleged that the payee indorsed the bill by writing their names across the back, and that the plaintiff was the owner and holder thereof. It is unnecessary to allege, in addition, that the indorsement was to plaintiff. *Osborne v. Stevens*, 15 Wash. 478, 46 Pac. 1027; 14 Enc. Pl. & Prac. 524. A promise by the acceptor to pay is alleged, and that appellant indorsed the bill to the bank, or the equivalent of that allegation. It is a sufficient averment. In the case of *Huffaker v. Bank*, 12 Bush, 287, no promise at all was alleged. But in this case the averment is that the acceptor promised to pay, and, in substance, that appellant indorsed the bill to appellee, which is sufficient to make appellant liable. A promise by the acceptor to pay being alleged, a proper averment of an indorsement by payee to plaintiff is equivalent to an averment of facts which, under the law merchant, make the indorser liable.

The answer of appellant pleads that he is a mere accommodation indorser, and had no interest in the proceeds of the bill; that neither the notary who protested nor appellee gave the prior indorser, Slack, any notice of non-payment, dishonor, or protest; that Slack was thereby released, and his release operated to release Lyddane, the failure to give Slack notice being without Lyddane's knowledge or

consent. A demurrer to this answer was sustained. Appellant claims that the answer was sufficient, upon the ground that the law merchant is changed by the statute (Ky. St. § 3725) providing that: "It shall hereafter be the duty of notaries public, upon protesting any of the instruments mentioned in section three thousand seven hundred and twenty-three, to give or send notice of the dishonor of such paper to such of the parties thereto as are required by law to be notified, to fix their liability on such paper; and when the residence of the parties is unknown to the notaries public he shall send the notices to the holders of such paper, and he shall state in his protest the names of the parties to whom he sent or gave such notices, and the time and the manner of giving the same, and such statement in such protest shall be prima facie evidence that such notices were sent or given as therein stated by such notary." It is contended that this statute requires the notary to give notices to all the parties who can be found thereby, and not merely to those who are by the holder desired to be held; that the liability of indorser is that of surety, and that he is released by the discharge in any manner of a prior indorser, who, as to him, holds the relation of a principal. It is earnestly insisted that though, at common law, the holder of a dishonored bill was required to notify the last indorser only, if he desired to hold such indorser alone, the common law was in this behalf abrogated by the statute. The notary was required to give notice to every one who could be held, to give such notice as the agent of the holder, and the holder was therefore bound by the notary's default in notifying any prior indorser, and, if such prior indorser was released by failure to give notice, that released the last indorser. Such is not the true intent of the statute. It is made the duty of the notary to notify those whom the holder desired to hold bound. Granting that in the discharge of this duty the officer acted as agent of the holder, the holder's responsibility for the action of his agent was not made greater than at common law it was for his own acts. Counsel for appellant, with commendable candor, quote as follows from 2 Daniel, Neg. Inst. § 1303: "But though all the parties to such a bill are sureties of the acceptor, they are not, as between themselves, co-sureties, liable for contribution to each other in the event that any one should pay the amount for the acceptor; but each prior party is a principal as between himself and each subsequent party." From this it follows that Lyddane was not, by the law merchant, a surety as to the bank, but was a principal. His relation in this behalf is not changed by the statute. In *Todd v. Edwards*, 7 Bush, 89, a case arising under a statute identical with the existing statute, the court, through Judge Peters, said: "But if a bill be drawn for the accommodation of the drawer or acceptor, and indorsed by the payee and subsequent indorsers, if the holder intends to hold any or all of

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said indorsers responsible to him, as many as he intends to make responsible are entitled to notice of the dishonor of the paper, because the indorser who pays it has a right to hold the prior parties on the bill responsible to him; and he should be notified, so that he may take the necessary steps to secure himself." The law merchant was not, in our opinion, abrogated by the statute, except in so far as a change was made as to the method of giving a notice of protest. The judgment is affirmed, with damages.

RICE et al. v. CITIZENS' NAT. BANK.¹

(Court of Appeals of Kentucky. June 2, 1899.)
BANKS AND BANKING—PAYMENT OF CHECK
ON FORGED INDORSEMENT.

Where plaintiff made a deposit, with direction to the bank to pay it out on checks drawn by J., payable to certain persons, payment of the checks named on J.'s forged indorsement constitutes no defense to plaintiff's action against the bank to recover the deposit.

Appeal from circuit court, Garrard county.
"Not to be officially reported."

Action by Rice & Givens against the Citizens' National Bank to recover a deposit. Judgment for defendant, and plaintiffs appeal. Reversed.

D. B. Baker, for appellants. Wm. M. Johnston and R. P. Jacobs, for appellee.

WHITE, J. In October, 1896, appellants wrote to appellee as follows: "Louisville, Ky., Oct. 10, 1896. Mr. B. F. Hudson, Cashier, Lancaster, Ky.—Dear Sir: We have your letter of yesterday in answer to ours in regard to the standing of certain parties, which is explicit and satisfactory, and would have been glad if you had written us so plainly in your first letter. We thank you, however, very much for the pains you have taken in answering our last letter. We now inclose you check for seven hundred dollars, for which you will please honor Mr. M. W. Johnson's checks to the following parties, and for the following amounts. He writes us that he gave parties checks payable at your bank on Monday, the 12th, P. A. Spainhour, \$100; J. K. Royce, \$150; J. T. Dawson, \$100; Isaiah S. Conley, \$150; A. J. Bennett, \$150; Willis Turner, \$50,—as M. Johnson has forwarded to us notes of the above parties as stated, and writes that he had given checks on your bank for the above amounts. Yours, truly, Rice & Givens." On the receipt of this check the \$700 was placed to the credit of Johnson. Afterwards the several checks drawn by Johnson to these named parties were presented by Johnson with the parties' names indorsed on the back of each, and the money was paid by the appellee to Johnson on the statement that he had been requested by these parties to draw the money for them, and bring it to them, as they were busy at work. It finally

developed that the checks drawn by Johnson were never indorsed by or delivered to these parties, and that they had never signed the notes sent by Johnson to appellants. Johnson himself had signed each one of the notes as surety. The signatures of the principals were forgeries. This action was brought by the appellants to collect from appellee the deposit of \$700 upon the allegation that that sum had been deposited with appellee, and had not been paid to them, or upon their order. The defense presented is the letter and the payment, as above, to Johnson. It is clearly shown by the parties that they were ignorant of the signature of their names to the notes or indorsement of the checks, and that those signatures were forgeries. Johnson is dead. The law and facts were submitted to the court, and judgment was rendered for appellee bank, and, after reasons and motion for new trial had been overruled, this appeal is prosecuted.

The court found as facts that the only authority the appellee had to pay the checks of Johnson was the letter above; that the checks were presented by Johnson and paid to him by appellee; that at the time of presentation they were indorsed by the proper signatures, but that the signatures were not written by the several parties to whom the checks were payable, or with their knowledge or consent, and was never authorized or ratified by either of them, and that neither of said payees ever received any of the proceeds of said checks. In short, the court found that the checks were drawn by Johnson for the proper sums as the letter of instruction directed, and the checks were presented and paid by the bank on forged indorsements, and that the parties to whom the bank was authorized to pay the \$700 on checks never received any part thereof. The court then concluded, as a matter of law, that the bank was not liable, and again, that it had a remedy in the notes signed by Johnson as surety of these various persons, and until that remedy was exhausted it could not hold the bank liable. A deposit in bank of an ordinary deposit creates the relation of debtor and creditor. If the deposit be for a special purpose, under instructions, these instructions must be complied with by the bank. There may be a special deposit, so as to create a bailment, but that can have no application here. It is immaterial whether this deposit of \$700 be treated as a general deposit or as a deposit for a special purpose other than bailment. The money was paid out precisely as the special instructions with the deposit provided, except that the signatures of the payees of the checks were forged. The principle seems to be well settled that a payment by a bank of a check to any person save the payee himself, except it be payable to bearer, is a payment at its peril. If the signature of indorsement is genuine, it is a payment out of the depositor's funds; if it is forged, it is a payment out of the bank's funds, and the depositor cannot be charged with it. Shipman v.

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Bank (N. Y. App.) 27 N. E. 371; *Hatton v. Holmes* (Cal.) 31 Pac. 1131; *Bank v. Whitman*, 94 U. S. 347; *Bank v. Morgan*, 117 U. S. 112, 6 Sup. Ct. 637; *Bank v. Burke* (Ga.) 7 S. E. 739, and many other cases. We are of opinion that under the facts found by the court his conclusions of law are error. We conclude that the bank is liable to appellants for this deposit. The payment on a forged check was a payment by appellee at its peril. It was not a payment of appellants' funds, however great the care used by the appellee. It is not a question of care or negligence. The payment was not to the payee of checks, but a payment upon what purported to be his order. The order (indorsement on the check) was a forgery. For this payment appellants are in no way liable. There was no relation of principal and agent between the appellants and appellee. It was pure debtor and creditor. Wherefore, for the reasons indicated, the judgment is reversed, and cause remanded for a new trial, and for proceedings consistent herewith.

ELAM et al. v. HADEN.¹

(Court of Appeals of Kentucky. June 2, 1899.)

LIMITATION OF ACTIONS—MISTAKE IN DEED—RIGHT OF GRANTOR TO RELIEF—ESTOPPEL.

1. Under Ky. St. § 2519, providing that no action for relief for fraud or mistake shall be brought 10 years after the making of the contract or the perpetration of the fraud, the court should have sustained a demurrer to an answer seeking relief on the ground of mistake in a deed executed more than 10 years before the answer was filed.

2. Where a mortgage remained of record for more than 20 years without any complaint on the part of the grantors of the mortgagor, they were then estopped to have their deed reformed or to assert any interest on the ground that the deed by mistake conveyed the fee to the mortgagor, instead of a life estate, with remainder to her children; no relief being asked either by the mortgagor or her children.

Appeal from circuit court, Muhlenburg county.

"Not to be officially reported."

Action by George W. Haden against Mary S. Elam and others to enforce a mortgage lien. Judgment for plaintiff, and defendants appeal. Affirmed.

Wm. H. Holt and W. H. Yost, for appellants. Charles Eaves and Edward W. Hines, for appellee.

HAZELRIGG, C. J. One O. C. Valandingham, Sr., died about the year 1858, intestate, and owning considerable real property, including the land in controversy. He left surviving him, as his only children and heirs at law, O. C. Valandingham, Jr., Ezekiel Valandingham, Elizabeth Weir, Mary S. Elam, and Cordelia Cheatham. Pursuant to a family agreement, Elizabeth Weir, Mary S. Elam, Cordelia Cheatham, and their several husbands on the

19th day of December, 1867, entered into a written contract by which they conveyed all their right and interest in the land in controversy to Margaret Valandingham, the wife of O. C. Valandingham, Jr., one of the heirs; the consideration being, as therein recited, that said O. C. Valandingham had renounced and released all his interest in the remainder of his father's estate to the other heirs. And it appears that said O. C. Valandingham and his wife, Margaret J. Valandingham, did, by deed dated December 20, 1867, convey to the said Elizabeth Weir, Mary S. Elam, and Cordelia Cheatham all their said interest in the estate of O. C. Valandingham, deceased. After these writings had been signed, it appears that Margaret J. Valandingham and her husband took possession of the 200-acre tract of land in controversy; and the other children seem to have taken possession of the remainder of the estate of O. C. Valandingham, deceased, and occupied and used it as their own. Being indebted to the appellee, G. W. Haden, in the sum of \$862, O. C. Valandingham and his wife, Margaret J. Valandingham, on the 12th day of August, 1872, executed and delivered to Haden a mortgage on the land in controversy, to secure the payment of said indebtedness. On the 31st day of August, 1885, the appellee instituted this action in the Muhlenburg circuit court against O. C. Valandingham and his wife, Margaret J., to foreclose his mortgage and made parties defendant thereto the nonresidents, Elizabeth Weir, Ezekiel P. Valandingham, Mary S. Elam, and Cordelia Cheatham; these latter being made parties on the ground that the deed of Elizabeth Weir and others to Margaret J. Valandingham of date December, 19, 1867, misdescribed the land intended to be conveyed. To this action Margaret J. Valandingham and her husband made defense, but finally, at the October term, 1890, of the Muhlenburg circuit court, a judgment was rendered in favor of Haden, and a sale of the land in controversy was ordered, and later the sale was made and confirmed. From this judgment there was no appeal, but on May 3, 1893, the nonresident defendants, Ezekiel Valandingham, Mary S. Elam, and Cordelia Cheatham, and her husband, E. D. Cheatham, filed their answer in this action, seeking to have the judgment and order of sale set aside because, as they say, the writing dated December 19, 1867, conveyed the fee to Margaret J. Valandingham in the land in controversy, when the true intention of the grantors in that conveyance was that the land should go to Margaret J. for life, with remainder to her children. Hence they say that O. C. Valandingham and his wife, Margaret J., did not, at the time of the judgment and sale, own the interest ordered to be sold. They further say, and it appears to be true, that this writing conveying the fee to Margaret J. was never recorded. To this answer Haden filed a demurrer, which the court overruled. In this, it would seem, the lower court erred, because, from the answer.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

It appears that the pleaders were seeking relief on the ground of mistake alleged to have been made in the execution of the writing of 1867, some 26 years before this action for relief was instituted. Section 2519 of the Kentucky Statutes provides that no action for relief for fraud or mistake shall be brought 10 years after the making of the contract or the perpetration of the fraud. However, the appellee, Haden, failed to plead the statute of limitation in his reply, but controverted the allegations of the answer, and set up the fact that O. C. Valandingham and his wife, Margaret J., had been in the actual adverse possession of the land in controversy for more than 15 years, on which allegation issue was joined. It is proper to state here that the children of Margaret J. Valandingham (all of full age) were made parties to the action, and were called upon by appellants Mary S. Elam, Ezekiel Valandingham, Cordella Cheatham, and E. D. Cheatham to defend their rights herein; but it appears that they failed to come into the action, or make any defense whatever. Much proof was taken on the issue of adverse possession and ownership, and on other issues not necessary to detail, and on final hearing the lower court declined to disturb the judgment in favor of Haden.

The material evidence tends to show that after the execution of the writing of December 19, 1867, Valandingham and his wife, Margaret J., took possession of the land in controversy, and used and controlled it as their own from that time up to the time the judgment and order of sale were rendered herein. It appears that in 1872 the land in controversy was assessed for taxation to Mrs. Margaret J. Valandingham as containing 200 acres, and was so assessed each year thereafter until the year 1882, at which time it appears that Margaret J. Valandingham and her husband sold some 25 acres of the land; and thereafter it was assessed to Margaret J. Valandingham as 175 acres, and was so assessed to her until the year 1891. It is true that the children of Valandingham and his wife did considerable work on the farm, and made some improvements thereon; but they were at that time residing with their father and mother, and their acts, as shown by the evidence, cannot be taken as indicating adverse possession and ownership to their father and mother. Considering the evidence as a whole, and lending some weight to the finding of the chancellor, we think the judgment appealed from is fully sustained.

It appears from the record that the appellants, Mary S. Elam, Cordella Cheatham, and others, executed a deed on May 16, 1887, conveying the land in controversy to Margaret J. Valandingham and her children; and it is contended that this deed manifests the true intention of the grantors in the conveyance of 1867. However, there is sufficient proof to convince us that the writing of 1867 was thoroughly understood by the grantors, and complied fully with their wishes and intentions

at the time. Indeed, it is in proof, and not denied, that in 1894 the witness Charles Eaves visited the appellants Mrs. Elam, Mrs. Cheatham, and E. D. Cheatham, in the state of Louisiana, and they stated to him that the deed of 1867 manifested their true intentions; and, when the nature of this litigation was explained to them, they stated that it was being prosecuted without their knowledge or consent. It will be noticed from the record that Ezekiel P. Valandingham did not join in any of the conveyances mentioned, whereby he released his interest in the land to Margaret J.; but it is alleged in Haden's reply that, while Ezekiel P. did not so release his interest, yet, as a matter of fact, he had so released it in a deed of conveyance made by him in 1882 to one Roll, wherein he acknowledged that he had so released and conveyed his interest. This allegation of the reply was not denied by Ezekiel P. Valandingham, and must be taken as true. This release by Ezekiel P. is further indicated by the fact that, during all the time Margaret J. and her husband were exercising ownership and possession over the land, no complaint was made by him; and nowhere in the record do we find him asserting any right to the land until the answer of the nonresidents was filed herein on the 3d of May, 1893. It appears that the mortgage of Haden on the land in controversy was duly signed and acknowledged by Margaret J. Valandingham and her husband in 1872, and was duly recorded in the clerk's office of the Muhlenburg county court, and so remained of record without any complaint on the part of the appellants until 1893, when their answer was filed. The appellants are in the peculiar attitude of admitting that they had many years ago parted with all their right, title, and interest in and to the land in controversy to Margaret J. Valandingham and her children, and at the same time are the only ones asking any relief; there being no appeal prosecuted by Margaret J., her husband, or any of their children. They are estopped, therefore, from asserting an interest, either on behalf of themselves or on behalf of the grantees, as against appellee, an innocent purchaser. Perceiving no error prejudicial to the rights of the appellants, the judgment is affirmed.

BLACK et al. v. BLACK et al.¹

(Court of Appeals of Kentucky. June 6, 1899.)

PARTITION—CONCLUSIVENESS OF JUDGMENT—ADVERSE POSSESSION BY HUSBAND OF WIFE'S LAND.

1. The wife is not bound by a judgment of the county court allotting to the husband her share of her deceased father's real estate, where she was not a party to the proceeding.

2. Though the husband, for 30 years after the execution to him of a deed by commissioners pursuant to such a judgment, was in possession of the land, yet as it does not clearly appear that he did not during the lifetime of his wife claim

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the land by virtue of his marital right, and after her death by virtue of his title by curtesy, his possession cannot be regarded as adverse.

Appeal from circuit court, Bracken county. "Not to be officially reported."

Action by Mary Susan Black and others against John Black and others for a division of real estate. Judgment for plaintiffs, and defendants appeal. Affirmed.

J. B. Clarke and George Doniphan, for appellants. R. K. Smith, for appellees.

GUFFY, J. This action was instituted by Mary Susan Black et al. against John Black et al. in the Bracken circuit court, the chief object of which was to procure a division of certain real estate alleged to have been the property of Susan Black. Certain creditors of Cassim Black were made parties to the suit, and claimed an execution lien upon the land in controversy. The devisee of Cassim Black also claimed the land in controversy under the will of said Black. It is claimed by the defendants that Cassim Black obtained a deed from the commissioners of the Bracken county court in 1833 or 1834, and that he held the same land by adverse possession, claiming the same from that time up to his death, in 1891; all of which was denied by the plaintiffs except the execution of the deed. After the issues were fully made up, and proof taken, and cause submitted, the court below found as follows: "The court finds: That the land in controversy was originally owned by the father of Mrs. Cassim Black, Mr. Wearthington; descended to her from her father's estate. The said land was conveyed to Cassim Black, then the husband of Susan W. Black, born Wearthington, by the commissioners of the Bracken county court. That Cassim Black held possession of and enjoyed said land until his death, in 1891, his wife having died in 1867. That there never was at any time any sale, relinquishment, or transfer of any kind made by Mrs. Black to her husband, or to any one else. The only evidence upon which defendants may base a claim of ownership in said property by Cassim Black as separated from his wife's title inherited from her father is the statement of B. F. Orr that he heard her say to Cassim Black: 'You cannot mortgage my land. Mortgage your own over there' [pointing to the side of the road on which this tract of land lay]. With these facts the court is of the opinion that Cassim Black held this land during the life of his wife by virtue of his marital right, that after her death he held said land by virtue of his title by curtesy up to his death, and that upon his death the said land descended to the heirs of Susan Black, plaintiffs herein; and counsel for plaintiff will draw judgment accordingly." Thereupon a judgment was rendered in accordance with the prayer of the petition, and from that judgment this appeal is taken.

It may be conceded that, if Cassim Black

had claimed the land as his own, and exercised ownership over the same as his own, from the time of the death of his wife up to his own death, his title by possession would have been perfected, provided the infancy of some of the heirs of Susan Black had not prevented the statute of limitations from barring their right; or it might be conceded that if, from the time of the commissioners' deed to himself, he did so claim the land, that the 30-years statute would have been a bar to plaintiffs' claim. But the evidence introduced in this case is not of such satisfactory and convincing character as to establish the fact that he did so claim the land in contest. Moreover, it does not appear that Mrs. Susan Black was a party to the county court proceedings, and, if she was not a party, she would not be bound by any order or judgment of the county court of Bracken county. It may be further remarked that the order of the county court of Bracken county appointed four commissioners to make the division, etc., with the proviso that three of said commissioners might act; and it may well be doubted whether the commissioner who failed to act had any right to name a person to act in his place; and, if he did not have such authority, it results that three of the four commissioners appointed by court failed to act or make the division and conveyance. Taking all the facts into consideration, we are of the opinion that the judgment of the court below is fully sustained by the law and facts, and the same is affirmed.

PERRY et al. v. BROWN.¹

(Court of Appeals of Kentucky. June 2, 1899.)
SCHOOLS AND SCHOOL DISTRICTS—LIMITATION OF INDEBTEDNESS—PLEADING—GUARANTY BY SCHOOL TRUSTEES.

1. The provision of Const. Ky. § 157, that no taxing district shall be authorized to become indebted to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof, applies to common-school districts.

2. The averment that a common-school district was, at the time of the execution of the obligation sued on, indebted in excess of the constitutional limit, is not good, it being necessary to allege the amount of the indebtedness, and the amount of taxable property in the district, so that the court may determine whether the limit has been exceeded.

3. School trustees are estopped to plead non-liability on their personal guaranty of a debt created by them on behalf of the district on the ground that the district had no power to create the debt because its indebtedness already exceeded the constitutional limit, as they are conclusively presumed to have known that fact.

4. A guarantor of a debt created by a common-school district is estopped to plead his non-liability on the ground that the district had not power to create the debt because its indebtedness already exceeded the constitutional limit, unless he affirmatively shows that he was ignorant of that fact.

Appeal from circuit court, Hardin county. "Not to be officially reported."

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Action by John Y. Brown against W. R. Perry and others on a contract of guaranty. Judgment for plaintiff, and defendants appeal. Affirmed.

Marriott & Faurest and J. H. Vanmeter, for appellants. S. H. Bush and J. P. Hobson, for appellee.

WHITE, J. This action was brought upon the following writing:

"\$367.00. Nov. 9, 1894. Two years after date, we, trustees of common school No. 11, Hardin county, Ky., promise to pay to John Y. Brown \$367.00, for value received of him, it being in gold dollars, which, if required, is to be repaid in like coin. This note is to draw six per cent. interest from date, and to be paid annually. W. R. Perry, Chairman. M. E. Bogue, B. C. Spurrier, Trustees.

"We agree and bind ourselves to see the above contract promptly complied with, and we guaranty the payment of the above \$367.00 and the interest thereon. This Nov. 9th, 1894. W. R. Perry. M. E. Bogue. B. C. Spurrier. W. H. Bland."

The corporation, trustees common-school district No. 11, Hardin county, is not a party, and was not sued. The action is against the four guarantors individually. The appellants filed answer, which admitted the signing of the obligation, and pleaded it was to guaranty that the corporation, trustees of school district, would perform the contract to repay the sum borrowed. They pleaded that at the time of the execution of the note or obligation the corporation, trustees school district, had, by the erection of a school house, created indebtedness in excess of the amount it could, under the constitution, do without a vote of the district, and that such vote was not had or taken, and they therefore pleaded that the contract sued on was ultra vires and void as to the principal, the trustees of the school district, and, being so, was not enforceable as to these appellants, guarantors or sureties. The court sustained a demurrer to this answer, and rendered judgment for appellee for the full amount, and from that judgment this appeal is taken.

We are of opinion that the answer filed by appellants presents no defense to the petition. Conceding that the facts stated in the answer are true,—as we must on demurrer,—and recognizing that the provisions of section 157 of the constitution apply to common-school districts, as was held in the case of *Com. v. Louisville & N. R. Co.* (Ky.) 48 S. W. 1092, yet the facts stated constitute no defense. The answer pleads and the obligation itself shows it to be that of the corporation, trustees of common-school district No. 11, Hardin county. The answer, however, falls to allege the amount of the indebtedness of the school district, or what the amount of the taxable property therein. With these facts omitted, the plea that the district is in debt exceeding the constitutional limit or exceeding the amount of its annual income is but

the conclusion of the pleader. These facts should be pleaded, so that the court may know whether the obligation is void because in excess of the constitutional limit. This direct question was passed on in the case of *Turnpike Road Co. v. Wiggins* (Ky.) 47 S. W. 434. In the answer here it is pleaded that the district was indebted some \$1,500, and that this sum was borrowed of appellee, and paid on that sum; but there is no statement of the amount of taxable property, nor of the income for the year. Again, the three trustees of the school district personally undertook to guaranty the payment of this note. If they acted ultra vires in trying to bind the corporation by the obligation, they cannot now be permitted to deny their knowledge of that fact, and they would be estopped to plead the nonliability of the corporation for this debt. They must have known it was not liable when they signed the obligation of guaranty. If Bland knew of these facts at the time he signed the obligation as guarantor, he would likewise be estopped to plead them as a defense. The contract of guaranty is necessarily that the principal has ability to pay as well as capacity to contract to pay, and, if the principal does not pay when due, these appellants will themselves pay. In this case the evident purpose was to guaranty the capacity to contract. There could be no doubt of the ability of the district to ultimately pay. We are of the opinion that the appellants Perry, Bogue, and Spurrier, the three trustees, are estopped from denying their liability by reason of the nonliability of the school district, because they knew all of the facts at the time they signed the obligation. We are also of opinion that, if appellant Bland is to be released at all by reason of the nonliability of the district, it is because he signed the obligation in ignorance of the true facts; and to make out his defense he should affirmatively plead all facts necessary thereto. This he failed to do. The demurrer was properly sustained. Finding no error, the judgment is affirmed, with damages.

BURKE v. ST. LOUIS, I. M. & S. RY. CO.
et al.

(Supreme Court of Arkansas. May 20, 1899.)

BILL TO QUIET TITLE—DISMISSAL—DEFENDANTS IN ADVERSE POSSESSION—FAILURE TO TRANSFER CAUSE TO LAW DOCKET—RIGHT TO COMPLAIN.

1. Where a bill to quiet title against defendants in adverse possession averred that plaintiff could get adequate relief only in equity, and a demurrer thereto for want of jurisdiction was sustained, the chancellor properly dismissed the bill without prejudice to bringing a suit in the proper court, though he might have transferred the cause to law docket, in accordance with Sand. & H. Dig. § 6121.

2. It is too late, on a motion for a rehearing of the appeal from the dismissal of a bill to quiet title against defendants in adverse possession, to complain that the chancellor did not order the cause transferred to the circuit court, in accordance with Sand. & H. Dig. § 6121.

On rehearing. Denied.

For former opinion, see 50 S. W. 275.

BUNN, C. J. As the ground for this motion, it is stated that "this court erred in holding that the demurrer of the defendants to the jurisdiction of the lower court was properly sustained, and in affirming the judgment appealed from, whereas this court should have reversed the cause, and directed the lower court to transfer the cause to the Pulaski circuit court, in accordance with Sand. & H. Dig. § 6121." The appellant contends that this cause went off in the court below on the ground of demurrer that an equity court was without jurisdiction, and that under section 6121, Sand. & H. Dig., the bill should not have been dismissed, but the court should have transferred the cause to the Pulaski circuit court. This theory does not appear to have been presented or even suggested to the court below; nor was it contended for on appeal until the decree was affirmed, and then only by way of motion for new trial. It would have been but fair to the chancellor to suggest that, instead of an order of dismissal on sustaining the demurrer to the complaint, he should order the proper transfer of the case to be made; for the clause of said section 6121 peculiarly applicable to this case, as between the appellant and the two appellee companies, is in these words: "If any defendant in a cause in equity be in actual possession claiming adverse title, the cause as to him shall be transferred to the law docket," or to the law court, as plaintiff and appellant now contends for the first time in his motion for new trial. The complaint in this case was to quiet title, or, rather, as expressed in the prayer of the complaint, "that the pretended title of the defendant Little Rock Traction Railway Company be annulled, that it be required to surrender its pretended deed for cancellation, that defendant be enjoined from hereafter asserting title to it [the lot]," and other relief. One paragraph of the complaint is in these words: "Complainant avers that possession of said property by him is inadequate relief; that, if he should be restored to complete possession, the defendant would continue to publicly assert and claim title to said property by means of said colorable deed, and to prevent complainant from selling or disposing of it and make such other use of it as he has a right to do." Here he was laying his grounds for equitable relief, and claiming that he could get adequate relief only in equity. It is a little strange that at this late day he should recant, and now ask us to compel the chancellor to do just what he (the plaintiff) would not permit him to do when before him.

To the original complaint a demurrer containing several causes was interposed (among them, nonjoinder of parties), and was sustained, with leave to plaintiff to amend, which he did by making the unknown heirs

of John Burke parties defendant. This was done to establish title in himself, without which he had none. This amended complaint was also demurred to on several grounds. In the meantime the plaintiff had voluntarily dismissed his complaint as to the unknown heirs of John Burke, and thus placed himself just where he started. The court sustained the last demurrer, as he did the first, and dismissed the bill for want of equity, but without prejudice, so that plaintiff might bring his suit in the proper court, should he so desire. What else the chancellor could have done, in harmony with plaintiff's prayer, is not seen. The chancellor might well have ordered the transfer, but as the plaintiff made no complaint, nor suggested any to us on appeal, he cannot complain at this time.

ALKIRE GROCERY CO. v. JACKSON.

(Supreme Court of Arkansas. May 13, 1899.)

FRAUDULENT CONVEYANCES—INTEREST OF GRANTOR.

A husband conveyed his homestead to defendant in 1888, but the wife did not join in the deed, so that it conveyed nothing, under Act March 18, 1887 (Sand. & H. Dig. § 3713), relative to homestead deeds. In 1892 defendant conveyed the land to a third person to defraud plaintiff, who had sued him. Before final judgment in the suit, Act April 13, 1893 (Sand. & H. Dig. § 743), was passed, which validated all conveyances that were ineffectual by reason of the 1887 act, as though such act had never been passed. *Held*, that defendant had title to the land, subject to the right of dower in the wife of the original grantor, so that his interest in the land could be subjected to execution under plaintiff's judgment.

Appeal from circuit court, Benton county; Edward S. McDaniel, Judge.

Bill in equity by the Alkire Grocery Company against John T. Jackson to set aside a conveyance as in fraud of creditors. From a decree dismissing the bill, complainant appeals. Reversed.

W. L. Stuckey and L. H. McGill, for appellant. T. M. Gunter, for appellee.

BUNN, C. J. The plaintiff and appellant company, a Missouri corporation, recovered a judgment against the defendant (the appellee), John T. Jackson, in the sum of \$640 and costs, in the Benton circuit court, on the 8th October, 1894, and on the 24th November, 1894, filed its bill, with proper allegations, to set aside a certain conveyance made by said defendant to his mother, and to subject the lands so conveyed to the satisfaction of its said judgment. The defendant, John T. Jackson, and his mother, Elizabeth Jackson (made also a party defendant in the bill), filed their answer, and the cause was heard upon the pleadings and testimony in the case, and the chancellor found that the conveyance from John T. Jackson to his mother was fraudulent and void as to his creditors, and that his deed from his father, made some years previously, was void, and that, there-

fore, he conveyed nothing to his mother, and so dismissed the bill for want of equity, and the plaintiff company appealed.

The history of the case, in brief, is as follows: Andrew Jackson, the husband of Elizabeth Jackson, and the father of John T. Jackson and N. S. Jackson, was the owner of the lands in controversy, and occupied the same as his homestead, being married, and the head of family, as aforesaid; and that the same was a rural homestead containing one hundred and twenty acres, and valued at a sum less than \$2,500; and that on the 27th of September, 1888, subsequent to the passage of the homestead act of 1887, he conveyed to his two sons, the said N. S. and John T. Jackson, for a nominal consideration, his said homestead, and his wife did not join therein as required by said act, in order to make the deed valid. In the years 1890 and 1891, at Maysville, in Benton county, the said N. S. Jackson and John T. Jackson composed a mercantile firm and partnership, and carried on business as such, and failed, being indebted to the appellant company as stated, and perhaps other creditors, and were insolvent. The plaintiff first brought suit in the Benton circuit court on the 4th December, 1891, for this debt, against N. S. Jackson and Andrew Jackson as partners. N. S. Jackson made default, and judgment was rendered against him, but Andrew Jackson, the father, having made showing that he was not a member of the partnership, and was not, therefore, responsible, and John T. Jackson, having informed plaintiff's counsel that he, and not his father, was a member of the firm, or had been during the period of its existence, the cause was dismissed as to Andrew Jackson without prejudice; and on the 9th day of March, 1893, plaintiff brought its suit against said Andrew and John T. Jackson for said debt, in said circuit court, and on the trial by jury verdict and judgment was for Andrew Jackson, upon his defense that he was not a partner in said partnership, and final judgment was taken by default against the said John T. Jackson, and still remains unsatisfied and unreversed. John T. Jackson, in this cause, shows that he was a minor during the life of this partnership, which ended the 10th March, 1891, and that he was born in July, 1870, and did not reach his majority until July, 1891, after the close of the partnership; but the judgment was against him upon suit filed after his arrival at his majority, and upon due personal service, and no defense of any kind was made thereto. There is therefore nothing in this plea of infancy. On the 27th of September, 1892, the suit against Andrew and N. S. Jackson was dismissed without prejudice, as to Andrew Jackson, on it being suggested that John T. Jackson had been a member of the firm of N. S. Jackson & Co., and on the 9th of March, 1893, the suit was instituted against Andrew and John T. Jackson, and judgment afterwards taken by default against the latter.

Between the dismissal of the one suit and the institution of the other, John T. Jackson conveyed his half interest in the homestead to his mother, to wit, the 27th day of September, 1892, the very day upon which the first suit was dismissed as to Andrew Jackson, as aforesaid. The court found that this deed was without consideration, and was executed in fraud of the creditors of John T. Jackson. On the other hand, the appellee contends that John T. Jackson had nothing to convey by his deed to his mother, his deed from father to his sons was void under the act of 1887, under which only he held; and the circuit court in chancery sustained this view of it. While it is true that the deed of 1888 from father to the sons was void under the act of 1887, the wife not having joined in the execution of it, the same was validated as a conveyance from the father alone by the subsequent act approved April 18, 1893. Therefore, subject to his mother's dower, yet inchoate (for she had never signed her relinquishment of it), John T. Jackson was the owner of an undivided one-half interest in this homestead—a half interest of all that the father had therein—at the time he undertook to and did convey to his mother. Being in debt and insolvent at the time, his voluntary conveyance of his interest in this property was, as found by the circuit court, fraudulent as to his creditors, and therefore void as to them. But the circuit court erred in holding that he had nothing to convey when he conveyed to his mother, for, while his title was at first void, it was subsequently (and before the rendition of the judgment against him) made valid by removal of the legal obstacle to its validity, and in this shape was conveyed to his mother,—a valuable, subsisting right in the lands. His interest in said lands should have been made subject to sale under execution upon appellant's judgment by the court below, and, falling to so decree, there was error in the decree rendered. The decree is therefore reversed, and the cause remanded, with directions to order a sale of John T. Jackson's one-half interest in said lands, subject to the dower interest of the mother, and for such other proceedings as may not be inconsistent herewith.

SPARKS v. ROBINSON.

(Supreme Court of Arkansas. May 13, 1899.)

USURY—BILL OF SALE—CHATTEL MORTGAGE
—APPEAL—REVIEW—JUSTICES OF
THE PEACE—PLEADING.

1. Plaintiff received \$8 of defendant, and turned over to him a \$45 sewing machine. A bill of sale was executed, reciting \$8 as the consideration, and reserving to the seller the right to redeem in one month, on presenting the ticket of sale, which provided that the holder might, within 30 days, have "the option of purchasing any one article," in the buyer's place "that is for sale, at a price not to exceed 10 per cent. above its actual cost, including one sewing machine, \$8, if preferred." Like tickets were issued each month. Plaintiff testified she put up the machine

as collateral for the loan, agreeing to pay 80 cents a month for the use of the money, and that defendant stated he would not give up the machine unless the interest was paid. Defendant testified that he told plaintiff he was not allowed to charge interest, and that he accepted 80 cents a month with the distinct understanding that it was not interest. *Held*, that the alleged bill of sale was a mortgage, and that the transaction was in reality a loan at 10 per cent. a month, so as to be usurious and void.

2. The objection that the damages are excessive cannot be urged on appeal, where not made a ground of the motion for a new trial.

3. In replevin proceedings in a justice's court, where written pleadings are not required, it is not necessary to specifically plead usury.

Appeal from circuit court, Pulaski county; Joseph W. Martin, Judge.

Replevin by Mrs. R. J. Robinson against W. A. Sparks. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellee received of appellant the sum of \$8, and turned over to him a sewing machine valued at \$45. Appellee claims that she let appellant have the machine as surety for the sum of \$8 borrowed of appellant. Appellant contends that he bought the machine of appellee. At the time of the transaction the following instrument was signed by appellant and appellee: "No. 1865. Price, \$8.00. Absolute Bill of Sale to Capital Loan Office, 105 East Markham St. Little Rock, Nov. 16, 1895. Sold, with the right of redemption, by R. J. Robinson, of 1528 North street, to W. A. Sparks, one Singer sewing machine, for the sum of eight dollars. The vendor, undersigned, reserves the right to redeem said article by the 16th day of December, 1895, and to reimburse the price for said article. After that date, if said article is not redeemed as aforesaid, I, W. A. Sparks, become the absolute owner of same, without default to vendor. W. A. Sparks is not responsible for the loss or damage of said article by fire, robbery, or deterioration of any kind. It is further agreed and understood that no article will be shown or returned without this ticket of sale. This done and passed upon at Little Rock, Ark., on date aforesaid. Mrs. R. J. Robinson, Vendor. W. A. Sparks, Buyer." The form of the ticket of sale which the proof shows was issued monthly was as follows: "This is to certify that if the holder of this certificate presents the same at my office, at 105 East Markham street, not later than thirty days from date, he has the option of purchasing any one article of merchandise in my place of business that is for sale at a price not to exceed ten per cent. above its actual cost, including one sewing machine, \$8.00, if preferred. This offer will be void after thirty days from date. All goods bought and sold for cash. [Signed] W. A. Sparks." One of these tickets, as indicated by the purported bill of sale, *supra*, was issued to appellee when she signed the alleged bill of sale. The testimony of appellee was to the effect that she borrowed of Sparks \$8, and that she understood at the time that she was to pay 80 cents per month for the use of it. She stated that she

left the machine with Sparks for the sole purpose of borrowing money on it. "There was nothing said," quoting the witness, "about interest, when I pawned the machine, but I knew I would have to pay ten per cent. a month, and when I went back next month he (Sparks) said the interest was 80 cents. I asked him if I could get the machine with \$8, and he (Sparks) said not unless I paid the interest." The testimony on behalf of appellant is, in substance, as follows: Sparks testified "that she [Mrs. Robinson] said she could get along on \$8. I let her have \$8 on the machine; that is, I bought it from her, and took a bill of sale for it." Nothing whatever was said about interest. She returned in about a month to pay interest, and to get him to keep the machine a month longer. He said he could not, and did not accept interest. He told her that if she took the machine then it would cost her \$8 and whatever she might be disposed to give in addition. She said she was going to move, and would like for him to keep it, as she didn't need it, and didn't want to be bothered with it. She then wanted to pay him a dollar per month storage on it. She offered 80 cents per month, saying it was the same amount other pawnbrokers would charge her interest. He (Sparks) accepted 80 cents per month, with the distinct understanding that it was not interest. Sparks further stated that he made no contract whatever for interest on any of his loans; that he trusted to a man's honor as to what he should pay him (Sparks) for the use of his money. He expected something for the use of the \$8. Sparks was corroborated by another witness as to the conversation between himself and Mrs. Robinson about storing the machine, and her offering \$1 per month, and his refusing, and accepting 80 cents, and telling her, at the time, that he could not charge interest; that the law did not allow that. The action was replevin. The court rendered judgment for appellee for the return of the machine, or its value, \$45, and \$25 damages.

Fulk, Fulk & Fulk, for appellant. W. C. Adamson, for appellee.

WOOD, J. (after stating the facts). There was evidence to support the finding that the transaction reflected by the above facts was a loan of money at the rate of 10 per cent. per month, and that it was usurious and void. The court was clearly justified in concluding that the instrument purporting to be a bill of sale, although absolute on its face, was intended by the parties as nothing more than a security for the money advanced. The right of redemption was reserved to the grantor in the face of the instrument, and the extraneous proof warranted the conclusion that the instrument was intended as a mortgage. *Stryker v. Hershy*, 38 Ark. 261. In case of a mortgage, the mortgagee becomes the absolute owner, where there is a failure to pay and no redemption.

The instrument itself, and the sales ticket given with it, show that the grantor had the privilege of redeeming in 80 days, by paying the principal and not exceeding 10 per cent., and the proof shows that, at the end of each month, the 80 cents, or 10 per cent. per month, was collected, and another sales ticket was issued granting the same privilege. And this might be continued ad infinitum. The law shells the covering and extracts the kernel. Names amount to nothing, when they fail to designate the facts. We are of the opinion that the court was justified in concluding that the papers called bill of sale and sales tickets were nothing more nor less than a shift for a usurious loan of money. *Tillar v. Cleveland*, 47 Ark. 287, 1 S. W. 516; *Ellenbogen v. Griffey*, 55 Ark. 270, 18 S. W. 128, and cases there cited.

The damages may be excessive, but this was not made a ground of the motion for new trial. No written pleadings were necessary, and the proof raises the issue of usury. Affirm the judgment.

FLOWERS v. JACKSON.

(Supreme Court of Arkansas. May 13, 1890.)

APPEARANCE—WAIVER OF SERVICE.

1. The entry of an order that the cause "is hereby continued by consent" does not show such an appearance and waiver of service as will support a judgment by default.

2. Where a judgment by default had been reversed on defendant's voluntary appearance and appeal, because the writ was not served, the cause will be remanded to the lower court, to proceed as if the writ had been served.

Appeal from circuit court, Ashley county; Marcus L. Hawkins, Judge.

Action for unlawful detainer by T. A. Jackson against W. J. Flowers. There was judgment for plaintiff by default, and defendant appeals. Reversed.

R. E. Craig, for appellant. G. W. Norman, for appellee.

BATTLE, J. T. A. Jackson brought an action of forcible entry and detainer against W. J. Flowers in the Ashley circuit court for the possession of a certain tract of land. He sued out a writ of possession, directed to the sheriff of Ashley county, and commanding him to deliver the possession of the land to the plaintiff, and to summon the defendant to appear in court on the 1st day of August (1895) term, and answer the plaintiff in the action. It does not appear that any part of the writ was served. No return showing service was made by the sheriff. A judgment by default was, however, rendered against the defendant for the possession of the land, and for \$47 for rent and damages, and for the costs of the action. From this judgment the defendant has appealed.

The court erred in rendering judgment without legal service of the writ upon the defendant. But appellee insists that service

was waived, at a term previous to the term at which the judgment was rendered, by the appellant appearing and consenting that the action be continued. The only evidence in the record of the truth of this statement is an order in the words following: "It is ordered that this cause be, and the same is hereby, continued by consent." This contention is sufficiently answered in *Higgins v. Beckwith*, 102 Mo. 463, 14 S. W. 933, as follows: "Nor was any jurisdiction acquired over the defendant by reason of the entry of record, * * * whereby the court ordered that the 'cause be continued by consent.' The appearance of the defendant had never been entered, so far as the record shows, nor that he was present in court, and so it would require a record entry of more affirmative character to show jurisdiction acquired over him. Non constat, but that the cause was continued by agreement of the plaintiff, or upon correspondence with the defendant."

The judgment of the circuit court is therefore reversed, but, as the defendant has voluntarily appeared and prosecuted an appeal, the cause will be remanded, with instructions to the court to proceed as it could if he had been duly and in due time served with process.

STATE v. MOLLINEAUX.

(Supreme Court of Missouri, Division No. 2.
May 23, 1899.)

HOMICIDE—EVIDENCE—CONTINUANCE—DISCHARGE.

1. Accused, while drunk, or pretending so to be, went into the store of deceased, made himself offensive by his obscene and vulgar language, obtained a knife on pretense of purchase, and started off without paying for it. He continued his boisterous conduct, until deceased was forced to put him out. He then cursed deceased, and denounced him as a coward, and, as deceased stepped off the platform in front of the store towards him, he shot him. *Held*, that a verdict of murder in the second degree was justified.

2. Where there is only one continuance by the state, accused is not entitled to a discharge, under Rev. St. 1899, § 4222, requiring a discharge if accused be not brought to trial during the second term, unless the delay was caused by his fault.

Appeal from circuit court, Bollinger county; James D. Fox, Judge.

William Mollineaux was convicted of murder in the second degree, and he appeals. Affirmed.

Wm. M. Morgan, for appellant. Edward C. Crow, Atty. Gen., and Sam. B. Jeffries, Asst. Atty. Gen., for the State.

GANTT, P. J. The defendant was indicted for the murder of William C. Yount, in Bollinger county, on the 7th day of February, 1896. He was duly arraigned, and entered his plea of not guilty. He was tried, and convicted of murder in the second degree, and sentenced to the penitentiary for 35

years. He has filed no brief, and we have been compelled to read the record in search for the cause of this appeal. The evidence established that deceased was a merchant at Patton, in Bollinger county. On the afternoon of February 7, 1896, the defendant came into the store, and was either intoxicated, or simulated that he was. He said he desired to purchase a dirkknife. Deceased told him he did not have any, but proffered to sell him an ordinary pocketknife. Defendant, after much obscene language, finally took one, and started out without paying for it. Deceased requested him to return the knife or pay for it. Finally, a brother of defendant took the knife, and returned it to deceased. Defendant then jumped on the counter, and began to swear he could beat any man at a game of euchre. Deceased told him he did not keep a saloon or gambling house, and that he must stop swearing in the store; that his wife was in another portion, and he did not want her subjected to such conduct. Defendant continued his boisterous conduct, until deceased took hold of him, and pushed him along to the door, and out. At this defendant began to curse, and denounce deceased as a coward. Deceased remonstrated with him, but he continued until deceased stepped down off of the little platform in front of the store, and as he did defendant shot him, and thus inflicted the wound which resulted in the death of deceased. Deceased grasped defendant, and undertook to take the revolver from him, and, by the aid of others, finally succeeded in doing so. Defendant went to his horse, mounted, and fled. He was pursued and captured. In talking with his captor, he stated that he had aimed to kill when he shot deceased.

The record discloses that defendant went into the store of deceased, and made himself offensive by his obscene and vulgar language; that he obtained a knife on pretense of purchase, and started off without paying for it; that his conduct became so offensive that the proprietor was compelled to put him out; that he then cursed and challenged the proprietor, until he induced him to step down from his porch, and thereupon shot him with a revolver; that the difficulty was altogether unsought by deceased; that he endeavored to placate defendant, but was finally betrayed into starting in the direction of defendant by the most insulting epithets. There was ample evidence from which the jury might well have found that defendant deliberately and premeditatedly sought to engage deceased in the difficulty with the design of slaying him. The jury found him guilty of murder in the second degree, and the evidence would have justified a finding of murder in the first degree.

Taking the motion for a new trial as an assignment of errors, we will discuss the several grounds.

1. The motion for a discharge was properly overruled. The record discloses only one

application by the state for a continuance. It is only when the state is in fault that the defendant can claim the statutory discharge provided in section 4222, Rev. St. 1889.

2. We find no incompetent evidence admitted over the objections and exceptions of defendant.

3. The instructions were full, meeting every phase of the evidence, and such as have been often fully approved by this court. It is entirely unnecessary to reproduce them. Something is said about the refusal of certain instructions prayed by defendant, but they are not incorporated in the record, and the clerk certifies no such instructions are on file in his office; and the same may be remarked as to the remarks of counsel. The motion for new trial does not contain the alleged improper remarks, and hence they cannot be reviewed by this court. The verdict, being amply supported by the evidence, must stand. The judgment is accordingly affirmed.

SHERWOOD and BURGESS, JJ., concur.

CROSSLAND v. ADMIRE.

(Supreme Court of Missouri, Division No. 1.
May 23, 1899.)

BILL OF EXCEPTIONS—MINUTES OF COURT—SERVICE BY PUBLICATION—JUDGMENT.

1. Matters which are certified by the judge in the minutes of the court need not be incorporated into a bill of exceptions, and certified by him, in order to receive the consideration of the appellate court.

2. Defendant was a resident of the state, and a petition was filed and a summons issued against him as such, without any affidavit of nonresidence. On a non est return of the summons, an order of publication was issued against him as a nonresident, and on proof of publication the judgment was rendered. *Held*, that the court had no jurisdiction to enter such judgment.

Appeal from circuit court, Lincoln county; E. M. Hughes, Judge.

Action of ejectment brought by Washington Crossland against James C. Admire. From a judgment in favor of defendant, plaintiff appealed. Reversed.

Jas. M. Lewis and Chas. M. Napton, for appellant. Norton & Avery, for respondent.

BRACE, P. J. This is an action in ejectment to recover an 80-acre tract of land in Lincoln county. The petition is in common form. The defendant, though duly summoned, did not answer or otherwise plead, and final judgment was entered against him. Afterwards, upon the same day, on motion of defendant, the judgment was set aside, and from the order setting aside the judgment the plaintiff appealed to this court, where the appeal was dismissed on the 21st of November, 1893. 118 Mo. 87, 24 S. W. 154. The record entries of the proceedings thereafter had in the case, as shown by the transcript filed herein, are as follows, omitting caption and immaterial matters: Mandate of supreme

court "filed in vacation December 11, 1893." "April 4, 1894," "ninth day of spring term," "continued." "Oct. 9, 1894," "second day of fall term," "plaintiff, by leave of court, withdraws his application for a change of venue in this cause," and on the same day "plaintiff presents his bond for costs, * * * which said bond is by the court approved and ordered filed." "And afterwards, on the 19th day of December, 1895, it being the 10th day of the fall adjourned term, 1895, the following further proceedings were had in said cause, to wit: Now here, on this day, come the parties to this suit, by their attorneys, and, all matters and things herein contained being submitted to the court of the following described lands, to wit, west half of the northeast quarter of section 15, township 49, range 2 east, containing 80 acres; the court, after hearing all the evidence in the cause, and argument of counsel, renders a verdict in favor of defendant for the possession of the following described premises, situated in Lincoln county, Missouri, to wit, the west half of the northeast quarter of section 15, containing 80 acres. It is ordered and adjudged by the court that defendant have and recover of plaintiff, and George Crossland and James M. Lewis, as his sureties, his costs and charges herein incurred, and that he have execution issued therefor." Afterwards, on the same day, plaintiff, by his attorneys, "file motion for new trial in words and figures as follows, to wit" (setting out motion), and on the same day: "Now here, on this day, come the parties to this suit, by their attorneys, and, the motion heretofore filed for a new trial being taken up, and submitted to the court, is by the court continued." "And afterwards, to wit, on the 23d of March, 1896, the following further proceedings were had in said cause, to wit: Now here, on this day, come the parties to this suit, by their respective attorneys, and, the motion for a new trial heretofore filed being taken up, and submitted to the court, is by the court overruled. Affidavit for appeal filed. Appeal granted. Bond approved. Bill of exceptions to be filed in 30 days after end of term." "Afterwards, to wit, on the 2d day of April, 1896, 9th day of spring term, the plaintiff filed with the clerk of the circuit court of Lincoln county his affidavit for appeal, in words and figures as follows, to wit" (then follows a copy of the entry of the filing of the affidavit, and appeal bond, a copy thereof, and its approval in open court on the same day). The next entry is as follows: "And afterwards, to wit, on the 5th day of May, 1896, in vacation, the plaintiff filed his bill of exceptions, in words and figures as follows, to wit," and then follows the bill of exceptions, duly authenticated by the judge on the 4th of May, 1896, with the following subscription: "We agree to the foregoing bill of exceptions. April 20, 1896," signed by the attorneys for both sides.

1. The foregoing complete abstract of the

record entries has been made and set out in view of the contention of counsel for respondent that the bill of exceptions is insufficient, in that it fails to show that the motion for a new trial was filed during the term at which the case was tried, and continued to the next term, that leave was given plaintiff to file the bill in vacation, and that the appeal was taken during the term at which the case was determined. It is not contended that these matters were not shown by the record entries, but that they must be shown by the bill, and, not having been so shown, the bill constitutes no part of the record, and there is nothing before this court for review except "the record proper," which, it is contended, under our decisions consists only of the "petition, summons, and all subsequent pleadings, including the verdict and judgment." If this contention could be sustained, the defendant would then have to be put in the same short harness with the plaintiff, with a result anything but beneficial to him, since "the record proper," which shows a judgment in his favor, shows also a good petition for the plaintiff, and no defense thereto by demurrer, answer, or otherwise; and the judgment thereon should have been for the plaintiff, instead of for the defendant, who had nothing to rest a judgment upon in his favor, and the consequence would be a reversal. But the position is untenable. Surely, there can be no sound rule of law requiring a bill of exceptions to be reviewed in order to determine whether or not the matters therein contained may be reviewed. The contention seems to receive support, however, from the opinion of the majority of the court in *Holt v. Simmons*, 14 Mo. App. 451, in which a number of decisions of this court are cited. The fallacy of the position, however, is well exposed in the dissenting opinion of Thompson, J., in that case, who failed to find any support for it in the cases cited by the majority, and in which he well says: "The only person who can certify the rulings of the court made in the progress of the cause so that they can be noticed in an appellate court is the judge himself. It therefore follows that matters of exception must be certified by him in a bill of exceptions, for the reason that such matters are not already certified by him on the minutes. But matters which are certified by him on the minutes need not be again certified by him in a bill of exceptions, because this would be a work of supererogation." The cases cited are some of those in which it was determined what is matter of exception, and what belongs to the record proper, but they are far from holding that the rulings and proceedings of the court in the case not excepted to must be evidenced by and certified to the appellate court in the bill of exceptions. The filing of the motion for a new trial, its continuance, the leave given to file a bill of exceptions in vacation, and the granting of the appeal, were not matters excepted to, and had no place in the bill of exceptions. They

were a part of the proceedings of the court in the case, properly manifested by the record thereof, and properly certified to this court in the transcript of that record.

2. Although the record fails to show that any answer was ever filed, it appears from the bill of exceptions that the case was tried in the court below as if there had been, and we shall so treat the case here, as we have heretofore done in other cases where the record failed to show that issue was joined by reply to answer. It was admitted on the trial that the title to the premises was in the plaintiff, unless his title was divested by a sheriff's deed made in pursuance of a sale, under an execution on a judgment for delinquent taxes against him. He was a resident of the state. The petition was filed and summons issued against him as such, without any affidavit of nonresidence. Upon a non est return of the summons, an order of publication was issued against him as a nonresident, and upon proof of publication of the order the judgment was rendered. The only question in the case is whether the circuit court, by such publication, acquired jurisdiction to render the judgment. This question was carefully considered in the recent case of *Tooker v. Leake* (Mo. Sup.; decided Dec. 8, 1898) 48 S. W. 638, in which it was held that service by such a publication under such circumstances conferred no jurisdiction upon the circuit court to render the judgment. That case is decisive of the question, and the judgment of the circuit court must be reversed. It is accordingly so ordered, and that the cause be remanded to the circuit court, with directions to enter up judgment for plaintiff for possession of the premises, and for rents and profits, after due inquiry as to the value thereof. All concur.

BETHUNE et al. v. CLEVELAND, ST. L. & K. C. RY. CO. et al.

(Supreme Court of Missouri, Division No. 1.
May 23, 1899.)

REVIEW—WRIT OF ERROR—RAILROADS—STATUTORY LIEN FOR LABOR—EXTENT—ENFORCEMENT—JUDGMENT—EXECUTION.

1. Where there was no exception on the trial, no motion for a new trial or in arrest of judgment, and no exception to overruling a motion to recall an execution and appoint a receiver, none of these proceedings can be reviewed on a writ of error sued out over three years afterwards.

2. The lien for labor and material expended in constructing a railroad, conferred by Rev. St. 1889, c. 102, art. 4, on "the road bed, station houses, depots, bridges, rolling stock, real estate and in improvements of such railroad," covers the company's railroad within the state, whatever the stage of its construction, the length of its route, or the number of counties through which it is located, and includes its right of way.

3. Rev. St. 1889, c. 102, art. 4, provides that, in the action to enforce the lien on a railroad conferred by it for labor done thereon, no personal judgment shall be rendered except as against such defendants as might be sued thereon in an ordinary action at law; and hence it was proper not to render personal judgment

against the railroad company in an action by a subcontractor to enforce such a lien.

4. A description in the judgment in an action to enforce a lien on a railroad for labor done thereon, which complies with the requirement of Rev. St. 1889, c. 102, art. 4, that the particular property to which the lien is to apply shall be described by the name of the railroad, is sufficient.

5. That no provision is made for a lien on the franchise of a railroad company for labor done on its road and for its enforcement affords no ground for a refusal to enforce the lien against its tangible property on which, by Rev. St. 1889, c. 102, art. 4, such a lien is imposed, and provision made for its enforcement.

6. The requirement of Rev. St. 1889, c. 102, art. 4, that, under the special fl. fa. authorized thereby to satisfy a lien against a railroad for labor, "the writ shall be returnable as in ordinary executions, and the advertisement, sale and conveyance of real estate under the same shall be made as under ordinary executions," does not preclude the sale of a railroad as a whole on which a lien exists, because it is not within the limits of a single county, since the method thus adopted is not adopted beyond the purpose of the fl. fa. to satisfy the lien from a sale of the road as a whole.

Error to circuit court, St. Charles county; W. W. Edwards, Judge.

Action by James H. Bethune and others against the Cleveland, St. Louis & Kansas City Railway Company and others to enforce a subcontractor's lien. A lien was established, and property sold under an execution issued to satisfy the same. A motion to recall the execution and appoint a receiver and a motion to set aside the sale and to quash the execution, levy and return, and to grant a rehearing were overruled, and defendant the Farmers' Loan & Trust Company of New York brings error. Affirmed.

John H. Overall and Hough & Hough, for plaintiff in error. H. J. Cantwell and Geo. P. B. Jackson, for defendants in error.

BRACE, P. J. This case was brought here by writ of error sued out by the Farmers' Loan & Trust Company of New York, one of the defendants, on the 29th day of August, 1893, whose counsel state the case as follows: "The defendant the Cleveland, St. Louis & Kansas City Railway Company was incorporated, under the laws of the state of Missouri, on March 26, 1888, for the purpose of building a railroad from a point on the bank of the Mississippi river in St. Charles county, opposite the city of Alton, in the state of Illinois, through the counties of St. Charles and St. Louis to the city of St. Louis, and of securing such lines of railroad as would constitute a line over which it might do business through the various counties of Missouri, between its terminus in St. Charles county to the city of Kansas City, in Jackson county, Missouri. On June 1, 1887, the Central Missouri Railroad Company, a corporation organized under the laws of Missouri for the purpose of constructing a railroad from a point opposite the city of Alton, in the state of Illinois, through various counties in the state of Missouri, to the city of Kansas City, in Jackson county, Missouri, con-

vayed all its property and franchises then owned or thereafter to be acquired to the Farmers' Loan & Trust Company, to secure its eight hundred thousand dollars of bonds. On March 28, 1888, the Cleveland, St. Louis & Kansas City Railway Company purchased of the Central Missouri Railway Company all that portion of the railway of the last-named company, constructed and to be constructed, beginning at Kansas City and running eastwardly through various counties in the state of Missouri to the city of Alton, Illinois, together with all the real estate and other property of the Central Missouri, consisting or connected with any part of said portion of its railroad in the various counties of Missouri through which the route of its railroad ran. Of the bonds secured by the deed of trust of the Central Missouri Railway Company to the Farmers' Loan & Trust Company only two hundred and fifty were ever issued. On July 30, 1889, plaintiffs brought suit in St. Charles county against the defendant the Cleveland, St. Louis & Kansas City Railway Company for work and labor performed and materials furnished in construction of part of the defendant's railroad in St. Charles county, under a contract with William Baird & Co., original contractors, and sought to establish a paramount lien therefor against the roadbed, bridges, culverts, station houses, depots, real estate, rolling stock, and improvements of the company from a point on the Mississippi river opposite Alton to Kansas City, under article 4, c. 47, Rev. St. 1879, now article 4, c. 102, Rev. St. 1889. The Farmers' Loan & Trust Company, mortgagee of the Cleveland, St. Louis & Kansas City Railway Company, the Central Trust Company, junior mortgagee of the defendant railroad, and the Holland Trust Company, mortgagee of its bridges, were made defendants; but the original contractors were not made parties. It is alleged in plaintiffs' petition that that part of the railroad between the city of St. Charles and the town of Hamburg, both in St. Charles county, a distance of about twenty miles, is completed, and trains running thereon; that the railroad is graded east from St. Charles to a point on the west bank of the Mississippi river opposite Alton; that the railroad is graded from Hamburg to a point in Warren county about thirty miles west of Hamburg; that the projected line extends and is intended to be constructed through Warren and the various counties west thereof to Kansas City; that the company is the owner of a projected railroad from the point opposite Alton to the city of St. Louis; and that the said company is the owner of real estate and improvements in said counties through which said projected lines are to run. On March 22, 1890, upon a trial of the cause, a jury being waived, the court assessed damages in behalf of plaintiffs for the sum of eighty-eight thousand five hundred thirty-five and 76/100 dollars, and further found the same to be a

first and paramount lien upon the property mentioned in the petition, and ordered, adjudged, and decreed that the plaintiffs' lien therefor be enforced, and that the damages aforesaid, together with the costs of suit, be levied out of the property mentioned in the petition, and on March 28, 1890, execution was issued upon said judgment, directing the sheriff of St. Charles county to seize, levy upon, and expose to sale at the courthouse door in St. Charles, Missouri, during the session of the circuit court of St. Charles county, Missouri, on Saturday, May 10, 1890, the roadbed, depots, bridges, station houses, rolling stock, real estate, and improvements of the defendant railway company within the state of Missouri, including that acquired from the Central Missouri Railway Company, and to have the same before said court on the first Monday of September, 1890, to render to said plaintiffs their damages, interest, and costs, and certify how said writ was executed. On May 8, 1890, this defendant and others filed their application and motion as creditors of the defendant railway company to recall the execution, and for the appointment of a receiver. This application and motion was on May 10, 1890, denied and overruled by the court. The return of the sheriff shows that he levied upon the property described in the execution, and sold the same at the courthouse door in the city of St. Charles, Missouri, during the session of the circuit court of St. Charles county, to James H. Bethune for \$142,700. On the day of the return, the defendant the Farmers' Loan & Trust Company filed its motion amended September 6, 1890, to set aside the sale, and to quash the execution, the levy thereunder, and the return thereof, on the grounds that the real estate and other property seized under the execution lies in the counties of St. Charles, St. Louis, Warren, Montgomery, Callaway, Boone, Howard, Cooper, Saline, Lafayette, Johnson, and Jackson, and that the sheriff of St. Charles county has no warrant or authority in law to sell real estate and other property lying, situate, and being in other counties of the state of Missouri than the county of St. Charles, nor had the authority or warrant of law to levy upon the same. This motion the court overruled, and the motion of defendant the Farmers' Loan & Trust Company to set aside the judgment and order of the court overruling the motion to set aside the sale and quash the levy and return, and to grant this defendant a rehearing, having been overruled, this defendant brought the case here by writ of error."

While this statement is substantially correct and satisfactory as far as it goes, it may be well to supplement it as follows: The decree of March 22, 1890, omitting the finding, is as follows: "It is therefore considered, ordered, adjudged, and decreed by the court that the plaintiffs' lien be enforced, and that the plaintiffs have and recover the sum of

eighty-eight thousand five hundred and thirty-five and seventy-six one-hundredths dollars (\$88,535.76), being the damages heretofore assessed, together with interest from this date at the rate of six per cent. per annum, and the costs of this suit, same to be levied out of the property heretofore charged with a lien, and now adjudged and decreed to be a first and paramount lien upon said property, which said property is described as follows, to wit: The roadbed, depots, bridges, station houses, rolling stock, real estate, and improvements of the Cleveland, St. Louis & Kansas City Railway Company within the state of Missouri, including therein all of the roadbed, bridges, depots, station houses, rolling stock, real estate, and improvements on that portion of the road acquired by the Cleveland, St. Louis & Kansas City Railway Company of the Central Missouri Railway Company under the contract of sale executed by and between said companies on March 28, 1888, and filed in the office of the secretary of state of the state of Missouri on March 31, 1888, which said railroad as constructed and in process of construction and to be constructed begins at Kansas City, Missouri, and runs eastward, crossing the Missouri river at Arrow Rock at a point in the county of St. Charles, Mo., opposite Alton, Ill., and to the city of St. Louis, Mo., passing through the counties of Jackson, Johnson, Lafayette, Saline, Cooper, Howard, Boone, Callaway, Montgomery, Warren, and St. Charles, and also through the county of St. Louis and city of St. Louis, Mo. It is further ordered that a special execution issue upon this judgment and in conformity therewith." Afterwards, on the 27th of March, 1890, execution thereon was ordered as follows: "On motion of plaintiffs it is ordered by the court that the sheriff of St. Charles county, Missouri, proceed to seize and levy upon and advertise said property in said decree and hereinafter described for sale, and that he expose the same for sale for the satisfaction of said lien on the 10th day of May, 1890, during the session of the circuit court of St. Charles county, Missouri, at the courthouse door in St. Charles, Missouri." The mandate of the execution, following a recital of the judgment, is as follows: "These are therefore to command you that of the property in said decree and hereinafter described and charged with a lien by said decree of judgment, as follows, to wit: The roadbed, depots, bridges, station houses, rolling stock, real estate, and improvements of the Cleveland, St. Louis & Kansas City Railway Company within the state of Missouri, including therein all of the roadbed, bridges, depots, station houses, rolling stock, real estate, and improvements on that portion of the road acquired by the Cleveland, St. Louis & Kansas City Railway Company of the Central Missouri Railway Company under the contract of sale executed by and between said companies on March 28, 1888, and filed in the office of the secretary of state of the state of Missouri on

March 31, 1888, which said railroad as constructed, to be constructed, and in process of construction begins at Kansas City, Missouri, and runs eastward, crossing the Missouri river at or near Arrow Rock, Mo., to a point in the county of St. Charles, Missouri, opposite Alton, Illinois, and to the city of St. Louis, Missouri, passing through the counties of Jackson, Johnson, Lafayette, Saline, Cooper, Howard, Boone, Callaway, Montgomery, Warren, and St. Charles, and also through the county of St. Louis and city of St. Louis, Missouri, and that you cause to be made the damages, interest, and costs aforesaid by seizing and levying upon said property and exposing the same for sale at the courthouse door in St. Charles, Missouri, and during the session of the circuit court of St. Charles county, Missouri, on Saturday, May 10, 1890, and that you have the same before our said court on the first Monday in September, 1890, to render to said plaintiffs the said damages, interest, and costs, and that you certify to our said court how you execute this writ. Hereof fail not, and have you then and there this writ." The return of the sheriff shows that the sale was made in conformity with the execution, and that 20 days' notice had been previously given of the time, place of sale, and of the property to be sold by advertisement in a newspaper printed in each of the counties of St. Charles, Jackson, Johnson, Lafayette, Saline, Cooper, Howard, Boone, Callaway, Montgomery, Warren, and St. Louis, and in one printed in the city of St. Louis. It also appears from the record that on the 12th day of June, 1890, John F. Schneider, sheriff of St. Charles county, acknowledged the execution of a deed by him to James H. Bethune to the Cleveland, St. Louis & Kansas City Railway and appurtenances, and that on the same day a motion for a rule on the sheriff to pay out of the proceeds of the sale certain lien judgments rendered in the United States circuit court for the Eastern division of the Eastern judicial district of Missouri was overruled.

1. The act giving a lien on railroads to contractors, material men, and laborers for work done and materials furnished in the construction thereof was first enacted March 21, 1873 (Sess. Acts 1873, p. 58), and since has continued in force through the Revisions of 1879 and 1889 without material change (Rev. St. 1879, c. 47, art. 4; Rev. St. 1889, c. 102, art. 4). The original title of the act was "An act to protect contractors, subcontractors, and laborers in their claims against railroad companies or corporations, contractors or subcontractors." Prior to its passage the only special protection that any of these parties had by law was a statute giving to a laborer a right of action against a railroad company for 30 days' wages due from the contractor (Gen. St. 1865, c. 63, § 10), and the general mechanic's lien law. The right given by the former extended only to ordinary day laborers (Groves v. Railway Co., 57 Mo. 304;

Mooney v. Railroad Co., 28 Mo. 570), and the right given by the latter was a lien only on the building, erection, or improvements on or for which the work was done, or the materials furnished, and upon the land on which the same was situated to the extent of one acre, or to the extent of a lot, if in a town, city, or village (Gen. St. 1865, c. 195). As the enforcement of such a lien against a railroad by execution and sale of such part thereof as was in terms subject to the lien would have the effect of disintegrating the property, and thereby destroying its usefulness as a public highway, it had been held on grounds of public policy that no lien could be enforced under that law for work done or materials furnished for the construction of a railroad. *Dunn v. Railroad Co.*, 24 Mo. 493; *McPheeters v. Bridge Co.*, 28 Mo. 465; *Schulenburg v. Railway Co.*, 67 Mo. 442. It had also been held that the franchise of a corporation could not be sold under a general execution upon a personal judgment. *Stewart v. Jones*, 40 Mo. 141. It was in view of this condition of the law on the subject that the statute under consideration was enacted, providing that "all persons who shall do any work or labor in constructing or improving the road-bed, rolling stock, station-houses, depots, bridges or culverts of any railroad company, incorporated under the laws of this state, or owning or operating a railroad within this state, and all persons who shall furnish ties, fuel, bridges or material to such railroad company, shall have for the work done and labor performed, and for the materials furnished, a lien upon the road-bed, station-houses, depots, bridges, rolling stock, real estate and improvements of such railroad, upon complying with the provisions hereinafter mentioned. * * *". The lien given was made paramount to all mortgages or incumbrances placed upon the property subsequent to the passage of the act. In order to secure it, persons claiming the benefit thereof were required within 90 days after the completion of the work or after the materials were furnished to file "in the office of the circuit clerk of any county through which said railroad is located" a just and true account thereof, with the name of the contractor, and "of the railroad against which said lien was intended to apply," and within the same time serve a copy of such account upon the company, and the clerk was thereupon required to indorse upon every such account the date of its filing, and make an abstract thereof in a book by him kept for that purpose. It was then made the duty "of circuit clerks in whose office such accounts and liens may be filed, within five days thereafter, to forward to the secretary of state a true copy of said accounts and liens and judgments rendered thereon by the circuit courts in which the case has been tried," and of the secretary of state "to file in his office such accounts and liens when received, and to prepare and keep in his office a book in which shall be entered an abstract

of all accounts and liens filed as aforesaid, which abstract shall be so arranged and indexed as to show, in a convenient form, the names of all parties claiming liens, the amount claimed by each, the railroad to which the same applies, the date of filing, and, if discharged, when the same was done." In order to enforce this lien, the law requires that action thereon shall be commenced within 90 days, that the person "owning or operating the railroad to which said liens may apply shall, in each instance, be made a party defendant," and that the contractor for whom the work was done or the materials furnished need not be made a party defendant, but may be so made at the option of the lienor. It then provides that such actions shall be prosecuted to final judgment as in ordinary civil actions, but that "no personal judgment shall be rendered thereon except as against such defendants as might be sued thereon in an ordinary action at law"; that the judgment, "if for the plaintiff, shall be that he recover the amount of the indebtedness found to be due and costs of suit, to be levied out of the property charged with the lien therefor"; that the execution "shall be a special fieri facias," in conformity with the judgment, returnable "as in ordinary executions, and the advertisement, sale and conveyance of real estate under the same shall be made as under ordinary executions"; and that "in all cases where judgments have been rendered and a sale has been ordered, and the property sold to which said liens attach, the proceeds arising from such sale, if not sufficient to discharge all the liens on which judgments have been rendered before such sale shall be made, shall be distributed pro rata upon such judgments as if the filing of the said liens had been all of the same date; and when such judgments have been by such sales or otherwise wholly or partially paid, and satisfied, the clerks shall enter upon the records the amount or amounts so paid, with a correct description of the real property sold, and within the time and in like manner certify the same to the secretary of state, as heretofore provided." The record brought here by the writ of error in this case shows a substantial compliance with all the requirements of the statute, of which the foregoing is a summary. The sufficiency of the pleadings and the evidence was not questioned in the court below. No exceptions were taken to any action or ruling of the court on the trial. No motion for a new trial or in arrest of judgment was afterwards made, and no exception was taken to the action of the court in overruling the motion to recall the execution and appoint a receiver on the 10th of May, 1890, and more than three years had elapsed after all these proceedings were had, before the writ of error was sued out. So that the only thing before us for review herein is the action of the court on the 13th of September, 1890, overruling the motion to set aside the sale and quash the execution

and levy under which it was made, to which ruling exception was duly taken and saved. While the only ground predicated in the motion for its support was that the sheriff of St. Charles county had no warrant or authority of law to levy upon or sell the property not wholly situate in that county, it is now here urged that the motion ought to have been sustained, not only for that, but for the following additional reasons, viz.: Because there was no personal judgment against the railway company, the property was not sufficiently described in the judgment, and the judgment included property not subject to the lien, i. e. the right of way and the franchise of the company.

2. Without stopping to consider the question whether the plaintiff in error is in a position to urge any ground in support of its motion other than that therein assigned, it seems to us that in a proper consideration of the text of the statute its nature and purposes will be found a ready answer to all these objections, and a vindication of the action of the trial court in overruling the motion. In fact, the attack made by counsel for the plaintiff in error, in the main, is rather upon the law itself, than upon this proceeding under the law, and in making it they seem to lose sight of the fact that the single purpose of its enactment was to protect the persons whose labor and material had been expended in constructing a certain thing by giving them a paramount lien on that thing, and a simple and speedy process for its enforcement by action against that thing. To this action incumbances are not necessary parties, and their protection is not within the scope and purpose of the act. By discharging the lien they can always bring themselves within the ample folds of a court of equity, and secure such protection as they may be entitled to; but no place is made for them in this proceeding, and, until this paramount lien is discharged by them, they are in no position to invoke the aid of a court of equity. In contemplation of this statute the thing upon which the lien is given is a unit made up of "a road bed, station houses, depots, bridges, rolling stock, real estate and improvements," in situ, located within the limits of the state, and denominated a "railroad," whatever the stage of its construction, the length of its route, or the number of counties through which it is located. This is apparent upon the face of the statute, and has in effect been so held by this court. *Knapp v. Railway Co.*, 74 Mo. 374; *St. Louis Bridge & Construction Co. v. Memphis, C. & N. W. Ry. Co.*, 72 Mo. 664; *Cranston v. Trust Co.*, 75 Mo. 29; *Ireland v. Railroad Co.*, 79 Mo. 572. As the right of way is one of the inherent and necessary constituents of a railroad, and within the terms of the statutory description of those constituents, the lien included the right of way, and that objection is answered.

3. The action given for the enforcement of the lien is so purely in re that the contractor

who incurs the liability for the work done and materials furnished is not a necessary party defendant to the action, and, while the railroad company is a necessary defendant to the suit, it is not liable to a personal judgment therein, unless it could "be sued thereon in an ordinary action at law"; and, as the defendant in this instance could not be so sued, the objection to the form of the judgment is answered.

4. The statute requires that the particular property to which the lien is to apply is to be described by the name of the railroad. This is the property against which judgment is to be rendered and execution is to issue, and a description of it therein by that name is sufficient; and this is a sufficient answer to the objection on that score.

5. This statute does not undertake to give a lien upon the company's franchise, and in this case no attempt was made to charge the lien upon the franchise. It was neither levied upon nor sold. The judgment, execution, levy, and sale were confined to the visible, physical, tangible property of the company, made subject to the lien by the statute, i. e. its railroad, nothing more and nothing less. Whatever rights inhered in that property, and those only, went with the sale, and with them went, also, whatever burdens were imposed upon the property by law. The determination and adjustment of those rights and burdens were not contemplated or provided for in the proceeding under this statute; and for the protection of any right the plaintiff in error may have by reason of its relation to the company, its franchise, or its tangible property, a remedy for its protection and enforcement must be sought in some proceeding outside of this statute. The fact that the legislature did not provide for a lien and its enforcement against the franchise of the company affords no ground for a refusal to enforce the lien against the tangible property on which it did impose a lien, and for the enforcement of which against that property it did provide. That the legislature had power to subject the franchise as well as the tangible property to the lien is beyond question; but, as it saw proper to impose the lien upon the latter only, against it only must the lien be enforced, and the consequential rights flowing therefrom must be declared in some proceeding other than this, in which the discussion of those rights has no place.

6. The only remaining ground for quashing the execution and setting aside the sale is that originally assigned in the motion in the lower court, which, in substance, is that the sheriff of St. Charles county had no authority to sell the railroad as a whole, because a part of it was not within the limits of that county. This contention is based upon that provision of the act which requires that the "writ shall be returnable as in ordinary executions, and the advertisement, sale and conveyance of real estate under the same shall be made as under ordinary executions." Rev. St. 1889, § 6753,

and the general provision referred to, which is as follows: "When real estate shall be taken in execution by any officer, it shall be his duty to expose the same to sale at the court house door, on some day during the term of the circuit court of the county where the same is situated, having previously given twenty days' notice of the time and place of sale, and what real estate is to be sold and where situated by advertisement in some newspaper printed in the county. * * * Id. § 4941. This contention is no more tenable than the others. The sheriff in making sale under the special fieri facias authorized by this act derives his authority from, and executes the power given to the circuit court by, the act, and not by virtue of his power as sheriff under the general law. The power is given by the former, the manner of its exercise is governed by the latter, and should be conformed to as nearly as possible, as was done in this case; but it does not follow because the mode prescribed cannot be literally followed in every particular that the power is paralyzed and the whole purpose of the law defeated. Under such circumstances, the letter of the law must give way to its spirit and intention, the method must be subordinated to the purpose, and the situation is relieved by the application of the familiar rules "that, where an act is incorporated into a special one, the provisions of the latter will prevail over any of the former," and "that an act adopting an act by reference does not adopt it beyond the purpose of the new act." *Endl. Interp. St. §§ 233, 101.* The circuit court committed no error in overruling the motion to set aside the sale and quash the execution, and its action in so doing is affirmed. All concur.

STATE v. BYBEE.

(Supreme Court of Missouri, Division No. 2.
May 23, 1899.)

HOMICIDE—NEWLY-DISCOVERED EVIDENCE— NEW TRIAL.

Accused, charged with assault with intent to kill, testified that E., the person assaulted, came up to him in an angry and threatening manner, "with a rock in his hand"; that he asked him if he came to make a fuss, and E. cursed him, and kicked up a rock, and, as he stooped to pick it up, accused shot him. E. testified he was wholly unarmed. An unprejudiced witness testified he saw no rock in E.'s hand until after the shooting, when E. tried to pick up a rock. *Held*, that alleged newly-discovered evidence as to a statement made by E., shortly after the shooting, that he approached deceased with the intention of "doing him up," that he had picked up a rock, and held it in his hand, developed no new fact, and was not ground for new trial.

Appeal from circuit court, Benton county; James H. Lay, Judge.

Levi Bybee was convicted of assault with intent to kill, and he appeals. Affirmed.

W. S. Jackson, for appellant. The Attorney General, for the State.

GANTT, P. J. Defendant was indicted at the April term, 1897, of the Benton county circuit court for a felonious assault with intent to kill George England. The defendant was duly arraigned, and the cause continued until April term, 1898, when he was tried and convicted, and sentenced to the penitentiary for two years, from which he appeals.

The defendant and George England are farmers, living not far from each other in the south part of Benton county. On the morning of March 6th the difficulty occurred which resulted in defendant shooting at England three times with a revolver, and hitting him twice, one shot striking him in the left hip, and the other in the arm. The wound in the hip joint was about two inches above and one inch back of the left hip joint. This wound proved to be very serious. England was confined to his bed for eight months from the effect of it. The wound in the arm was slight. The shooting occurred in the public road, very near to England's house. On that morning a neighbor by the name of McKie came to England's to buy a load of corn belonging to England's stepson, McFarland, a boy not yet of age. There was evidence tending to show that some months previous to this Bybee, the defendant, had been on the premises of England, and the latter had called to him, and inquired if he had a dollar which England claimed Bybee owed England's wife for services rendered. Bybee said he had not, and England ordered him off. Bybee says that England pursued him with a pitchfork, but England denies this. On the morning of the shooting Bybee passed England, chopping wood, and says the latter made an insulting gesture as he rode by. Bybee met McKie, who had come after the corn, and stopped, he says, to fix his saddle; and while they stood there England came to them. Defendant testified that England came up in an angry and threatening manner, with a rock in his hand, and, after some words, Bybee shot him; whereas England testifies he was wholly unarmed, and came to aid in loading the corn for McKie. Several witnesses testified to remarks made by England during his illness after the shooting. As often happens, the evidence was very conflicting. The court fully instructed the jury, and no error, either in the admission or exclusion of evidence, is assigned. The instructions are not challenged. The evidence was ample to sustain the verdict. The only ground now urged for a new trial is the refusal of the circuit court to give a new trial on account of the newly-discovered evidence of one Calvin Roberts. Roberts made affidavit that about one month after the shooting England stated to him that on the day of the trouble between himself and defendant he (England) was west of his house chopping wood, when defendant rode by, and, as defendant rode by, he (England) patted his rump at defendant; that he followed defendant to where he stopped to talk with McKie, for the purpose of doing him up, and would have done so if de-

fendant had not had his gun; that he picked up a rock, and put it in his pocket, but took it out before he got to defendant, and held it in his hand, and did not attempt to climb back into his field until after defendant shot the third time. McKie, who was certainly not a prejudiced witness for the state, testified he was present at the whole difficulty, and saw no rock in England's hands. He says, after all the shots were fired, and England was wounded, England got over the fence into his own field, and undertook to pick up a rock, but it proved to be a stump, and he let it alone. Bybee testified that when England came up to McKie and himself he had a rock in his hand. Bybee asked him if he came out there to make a fuss, and England cursed him, and said, "I will kill you," and kicked up a rock, and stooped to pick it up, "and then I shot, and then he raised up, and threwed at me, and I shot again twice, as quick as I could." The affidavit discloses a statement whose sole purpose is merely to corroborate defendant on the one hand and to impeach the prosecuting witness on the other hand. No new facts whatever are developed, and it is utterly improbable that this testimony would produce a different result in a new trial. It is utterly at variance with the theory of the defense. Defendant testified England was stooping down to pick up a rock when he shot him. This new evidence would establish that England came armed with a rock, and already had it in his hand. The circuit court refused to grant a new trial on this showing, and, we think, it was right in so doing. The courts very properly do not favor new trials on the ground of newly-discovered evidence, and there is nothing in the evidence offered or the diligence used to take this out of the general rule. *Cook v. Railroad Co.*, 56 Mo. 380; *State v. Woodward*, 95 Mo. 127, 8 S. W. 220. The judgment is affirmed. All concur.

SLAUGHTER v. DAVENPORT.

(Supreme Court of Missouri, Division No. 2.
May 23, 1899.)

PARTIES—PERSONS WHO MUST SUE.

1. A contract to pay B., S., or G. a sum of money, in trust, for the purpose of macadamizing a public road, is joint, and all the obligees must join in an action thereon, where there is nothing in the contract authorizing a less number to sue.
2. Where plaintiffs are joint obligees in the contract sued on, an amendment of the petition striking out the names of all plaintiffs except one changes the cause of action from a joint to a several one, and is not permissible.

Appeal from circuit court, Jackson county; John W. Henry, Judge.

Action by O. V. Slaughter against Joseph Davenport. There was a judgment granting new trial, and on plaintiff's motion for rehearing the cause was certified to supreme court. Judgment granting new trial affirmed.

Cook & Gossett, for appellant. Ed. G. Taylor, for respondent.

BURGESS, J. This case was begun before a justice of the peace in Jackson county in the name of T. W. Green, O. V. Slaughter, and H. C. Brooking, plaintiffs, who recovered judgment for the sum of \$58.48. From this judgment defendant appealed to the circuit court of said county, and when the case was called for trial at the October term, 1895, of said circuit court, and on the 31st day of said month, plaintiff amended his petition by leave of court, striking out the names of T. W. Green and H. C. Brooking. Thereupon the trial of the cause was proceeded with before the court and jury, which resulted in a verdict and judgment in favor of plaintiff in the sum of \$66.75. Within four days thereafter defendant filed his motion for a new trial, assigning as grounds therefor: First, because the court erred in allowing plaintiffs to amend the statement by dismissing and striking out all names of plaintiffs except Slaughter; second, because the action tried in this court is not the action sued on in the justice court, and tried there; third, because the contract testified to by plaintiff, and on which he recovered, is not the contract pleaded in the statement; fourth, because the court erred in permitting plaintiff to introduce improper evidence against the objections of defendant; fifth, because the court erred in giving improper instructions asked for by plaintiff, to wit, Nos. 1, 2, 3, and 4; sixth, because the court erred in refusing to give proper instructions asked for by defendant, to wit, all of the defendant's instructions which the court refused; seventh, because the verdict is against the evidence; eighth, because the court erred in refusing to sustain defendant's demurrer to the evidence; ninth, because the verdict and judgment are against the law; tenth, because there was a fatal variance between the contract given in evidence by plaintiff and the contract pleaded by him. The motion was sustained, and a new trial granted. From the order and judgment of the court sustaining the motion and granting a new trial plaintiff appealed to the Kansas City court of appeals, where the judgment of the circuit court granting the new trial was affirmed, but upon a motion for rehearing the cause was certified to the supreme court upon the ground that the opinion is in conflict with *Davis v. Ritchie*, 85 Mo. 501. The facts, in addition to those stated, are about as follows: The statement filed with the justice alleges that the defendant, by a written contract, promised to pay the plaintiffs the sum of \$50, March 1, 1892, in trust for the purpose of macadamizing what is known as the "Raytown Road" in Jackson county, Missouri, from Leeds to Raytown. It does not allege whether the money was to be paid severally or jointly. On the trial in the circuit court the evidence for plaintiff tended to show that the contract was to pay Brooking, Slaughter, or T. W. Green, and that the only condition therein was that the necessary funds subscribed should be equal to one-fourth the cost of macadamizing the road.

The evidence also showed that the amount subscribed was one-fourth of the cost as estimated by the county surveyor in accordance with the statute under which the macadamizing was done. Plaintiff testified that he had signed defendant's name to a subscription paper by his (defendant's) consent, and that the subscription was for building a road from near Leeds to Raytown, or beyond towards Lee's Summit; that Davenport made it a condition of his subscription that his money was not to be used unless the road was macadamized beyond Raytown; that he declined to sign his name to the paper, but stood by in silence when Slaughter told him they must have something to show who subscribed to the fund, and that he would write Davenport's name to the paper; that Davenport gave him (Slaughter) a check for the \$50, but upon the express condition that it was not to be used unless the road went beyond Raytown; that Davenport never authorized him to sign his name to a subscription to build a road to Raytown only; that, after the fund was all made up, the county court, in the fall of 1892, let the contract to build the road to Raytown only, whereupon he (Slaughter) returned Davenport's check to him, with the understanding that, if the road was afterwards built beyond Raytown, Davenport would pay the \$50; that the subscribed fund was paid over to the county court in August or 1st of September, 1892; the contract for the road was let September 29, 1892; that he never made demand on Davenport for this money until after the road was built beyond Raytown, in the summer of 1893. The defendant testified that he never authorized his name to be signed to any subscription paper; never knew that it was so signed; that he never agreed to pay anything for a road to Raytown, but did agree to pay \$50 for a road to be built beyond Raytown, and gave his check for that amount to Slaughter, to be used upon that condition only; that after the fund was made up, and the contract let to Raytown, Slaughter stated to him that his condition could not be complied with, and returned his check. Defendant put in evidence the contract for the road and the estimates, showing that the county court only estimated and contracted for a road to Raytown, and that the fund subscribed was more than consumed in building that road.

The first question with which we are confronted is as to the nature of the obligation sued on,—whether, as to the obligees T. W. Green, H. C. Brooking, and Orlando Slaughter it is a joint or several contract. In determining this question we are not to be governed by the terms of the contract, but by what is the real interest of the parties. "If the interests of the obligees is joint, it matters not that the contract in its terms is several. It is a joint contract, in the enforcement of which all must join." 7 Am. & Eng. Enc. Law (2d Ed.) 172. The complaint alleges that defendant promised to pay plain-

tiffs the sum of \$50, in trust for the purpose of macadamizing a certain road, which the evidence showed was a public road, for the use and benefit of the public generally. The obligees are simply trustees in the contract, which is joint, and there is nothing in it which authorizes them to prosecute separate suits thereon. In *Thieman v. Goodnight*, 17 Mo. App. 429, there is quoted with approval the following from 1 Pars. Cont. (7th Ed.) 13: "A contract with several persons, for the payment to them of a sum of money, is a joint contract with all, and all the payees therein have a joint interest, so that no one can sue alone for his proportion." Bliss, Code Pl. § 63; *Rainey v. Smizer*, 28 Mo. 310. So, in *Capen v. Barrows*, 1 Gray, 376, it is said: "When all the legal interest in a covenant and in the cause of action thereon is joint, the covenant is joint, although the covenant, in its terms, be several, or joint and several." The case of *Hayden v. Snell*, 9 Gray, 365, was a suit upon an obligation by which the obligor promised to pay Charles Hayden or his wife, Anna Hayden, annually during their natural lives a specific sum; and it was held that the contract was, in legal effect, an agreement to pay the sum named in the contract to both the persons named as promisees; and, so long as they survived, the promise being to pay either, an action might be maintained in their names jointly. See, also, *Osgood v. Pearsons*, 4 Gray, 455. *Willoughby v. Willoughby*, 5 N. H. 244, was a suit upon a promissory note made payable to Washington or Joseph Willoughby, and it was held to be a contract with them jointly, and that neither could maintain an action upon it separately. It follows that the cause of action alleged was on a joint contract, and that the suit was properly brought in the names of the joint obligees. The amendment changed it to an action on a several contract. If the contract was several, we see no reason why this might not be done, for if a party plaintiff to a suit is an unnecessary party, it is difficult to see how the dismissal of it as to him could in any way change the cause of action. But it is not so when the suit is by joint obligees on a joint contract, and the amendment changes it to an action on a several contract, for in that case there is an entire change in the cause of action from a joint to a several cause of action upon a joint contract, which is not permissible. While it is true that by section 6347, Rev. St. 1889, amendments on appeals from justices to the circuit courts are liberally allowed, by section 6345 it is provided "that the same cause of action, and no other, that was tried before the justice, shall be tried before the appellate court upon the appeal," so that the statute is no authority for the amendment made in this case. This was the view taken by the court of appeals in an opinion presented in that court, which is in accordance with the rulings in *Thieman v. Goodnight*, supra; *Faulkner v. Faulkner*, 73 Mo. 327; *Baker v.*

Raley, 18 Mo. App. 562; Gregory v. Railway Co., 20 Mo. App. 448. It is, however, insisted by plaintiff that the ruling of the court of appeals is in conflict with Davis v. Ritchie, 85 Mo. 501. That was an action commenced before a justice of the peace by William Davis and David Davis against Ritchie & Davis on what was alleged to be a joint promise by defendants to them for rent in the sum of \$100. On appeal to the circuit court, plaintiff David Davis filed an amended statement, differing from the original only in that the name of William Davis was dropped from the complaint. Defendants filed their motion to strike out the amended complaint upon the ground that it changed the cause of action. The motion was overruled, and upon appeal to the supreme court it was held, in a per curiam opinion, that under section 3060, Rev. St. 1879 (section 6347, supra), an amendment by striking out the name of a co-plaintiff does not change the original cause of action. That it does not always do so may be conceded, but in that case, as in the one at bar, our conclusion is that it did. In the contract which formed the basis of that action the obligees were joint promisees, one of whom could not have maintained a separate suit upon the contract. Then to amend the complaint by omitting one of them therefrom was to change a joint cause of action into a severable one. Davis v. Ritchie, supra, is out of line with the great weight of authority, and should be overruled. Plaintiff contends that the new trial was granted upon the grounds assigned in the first, second, third, fourth, and tenth assignments, and as we are of opinion, for reasons already given, that no error was committed in so doing, we affirm the judgment.

GANTT, P. J., and SHERWOOD, J., concur.

HOGAN et al. v. CITIZENS' RY. CO.

(Supreme Court of Missouri, Division No. 1.
May 23, 1899.)

STREET RAILROADS — HARMLESS ERROR — SPEED OF CAR — RINGING BELL — NEGLIGENCE OF PARENTS — INSTRUCTIONS.

1. Failure of a street-car company to equip its car with a fender, which would have prevented the injury complained of, is not, in the absence of an ordinance or statute requiring it, negligence.

2. Where, on cross-examination, a witness for defendant says that he testified in a certain way before the coroner, and his testimony on the trial is substantially the same, it is harmless error to allow counsel for defendant to read his testimony before the coroner; Rev. St. 1889, § 2303, providing that the supreme or appellate court shall not revise a judgment unless it believes that the alleged error materially affected the merits.

3. In an action to recover for injuries alleged to have been caused by the negligence of defendant's motorman and conductor, it is competent for the motorman (who has been shown to be experienced), after testifying to what was done, to testify that there was nothing else that

he could have done, under the circumstances, to prevent the injury, as such testimony does not preclude the jury from finding from the other testimony that he could have done something which he failed to do.

4. In an action to recover for personal injuries, plaintiff alleged that defendant was negligent in running its cars at a greater rate of speed than was permitted by an ordinance. The evidence disproved this allegation. Held, that the court properly took the question of negligence on account of the speed of the car from the jury, as plaintiff was not entitled to rely on common-law negligence as to its speed.

5. A complaint alleged that defendant was guilty of negligence in failing to ring the bell on its grip-car as it approached the crossing where the injury occurred. Plaintiff's witnesses testified that they did not hear the bell, but admitted they were not paying attention, while defendant's witnesses testified that the bell was rung twice, which was the usual signal at a crossing. Held, that an instruction, at defendant's request (plaintiff making none), that, if the jury found from the evidence that the gripman rang the bell as the train approached the crossing, it must find for defendant on that issue, is not erroneous.

6. It is not error to refuse to give an instruction, though it states the law correctly, where there is no evidence in the case on which to predicate it.

7. An instruction that defendant is liable, even though the parents of the child killed were negligent in permitting it to be on the street unattended, if the person operating defendant's car which killed it was negligent, and his negligence was the immediate cause of the injury, and by the exercise of ordinary care and precaution the injury might have been avoided, is properly refused because it excludes the principle that defendant would be liable if, after the discovery of the danger in which the child was, the exercise of ordinary care would have averted the injury, and it failed to exercise such care, or if it failed to discover the danger through its own recklessness, when by the exercise of ordinary care it could have discovered the danger and averted it, and because it makes defendant liable, if negligent, though the negligence of plaintiff contributed to the injury.

Appeal from St. Louis circuit court.

Action by Cornelia Hogan and another against the Citizens' Railway Company. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Damages for death of plaintiffs' child. The plaintiffs, as the father and mother of Floyd B. Hogan, sue the defendant, a corporation operating a cable street railway in St. Louis, under section 4426, Rev. St. 1889, to recover \$5,000 for the death of their child, a minor seven years of age, which occurred on the 5th of June, 1893, at the corner of Twelfth and Morgan streets, by being run over by one of defendant's train of cars, which was composed of a grip car and a trailer. The petition charges four acts of negligence by defendant: (1) Running the cars at a greater rate of speed than is allowed under the city ordinances; (2) failure of the conductor and motorman to keep a vigilant watch for all persons on foot, especially children, either on the track or moving towards it, and, after the gripman and conductor saw, or by keeping a vigilant watch for children might have seen, their child, failure to stop the train of cars in the shortest time and space possible, as the city ordi-

nance requires; (3) failure "to ring the bell or give any signal or sufficient warning of the approach of the cars," although running in a thickly-settled part of the city, where the street was being constantly crossed by women and children and the public generally; and (4) failure "to use ordinary care in providing said gripcar with a fender to prevent its running over the children it had run down and upon." On motion the court struck out the fourth act of negligence pleaded, and the plaintiffs saved an exception to the ruling. The answer admitted the incorporation and business of the defendant, and that the deceased came to his death from injuries received "by one of defendant's cars," but denied generally the other allegations of the petition. Contributory negligence by the deceased and by his parents, the plaintiffs, was affirmatively averred by the defendant. A proper reply was filed.

The trial developed the facts following: Plaintiffs offered in evidence Ordinance No. 13,896, which ordinance gives the defendant the right to operate its line of railroad by cable, and providing, by section 6, as follows: "The city of St. Louis reserves the right to regulate the running of cars, and the rate of speed at which cars shall be run on said railroad." Ordinance No. 14,600, offered in evidence by plaintiffs, provides that defendant may run its cars on Morgan street, from Garri-son avenue to Fourth street, at a rate of speed not exceeding $8\frac{1}{2}$ miles an hour. Plaintiffs also offered in evidence Ordinance No. 17,188, which ordinance, so far as material to this case, is as follows: "An ordinance in revision of the ordinances of the city of St. Louis, and to establish new ordinance provisions for the government of said city." "Sec. 1274. Every person, corporation, company, or co-partnership engaged in the business of transporting passengers from any one point to any other point within this city, for hire, on street railways, shall be subject to all of the conditions, stipulations, and requirements of this article. Sec. 1275. The following rules and regulations concerning the running of street-railway cars shall be binding upon every person, corporation, company, or co-partnership taking out license under the provisions of this article." Paragraph 4: "The conductor, motorman, gripman, or driver, or any other person in charge of each car, shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving towards it, and, on the first appearance of danger to such persons or vehicles, the cars shall be stopped in the shortest time and space possible." Plaintiffs also offered in evidence an acceptance by the defendant of Ordinance No. 13,896, dated May 9, 1887, but no express acceptance of Ordinance No. 17,188 was shown. Defendant's train was proceeding eastwardly on Morgan street. The day was clear and bright. A crowd of from 50 to 1,000 people, according to the estimate of different wit-

nesses, had gathered on the northeast corner of Twelfth and Morgan streets, in consequence of an arrest of a man and woman. There was a police signal box on the east side of Twelfth street, about 12 to 25 feet north of the building line of Morgan street, to which the policeman had carried the persons arrested, to signal for a police patrol wagon to take the prisoners to the lockup: and the crowd had followed the policeman and his prisoners, and were crowding around and upon them. There were only 4 or 5 persons on the sidewalk on the north side of Morgan street, but there was no one on the roadway of the street. There were no persons on the railroad track or approaching it. As the train approached the west side of Twelfth street, the gripman rang the bell twice (the usual signal on approaching a crossing); and then, holding the brake lever in his right hand and the grip lever with his left hand, he slowed the train down from a speed of $8\frac{1}{2}$ miles an hour (its authorized speed, under the ordinance, at that point) to about half that speed. There is a conflict in the testimony as to whether he was looking ahead of the train, or was leaning towards the left, looking up Twelfth street, at the policeman, with his prisoners, and the assembled crowd. In this way and at that speed he crossed Twelfth street, and when the train was within a few feet of the east side of Twelfth street the policeman suddenly brandished his club; the crowd as suddenly rushed back into Morgan street, "all around the car"; the gripman dropped the rope entirely, and with both hands applied the brake, and stopped the train as quickly as he could. But the deceased child had in the meantime run out into the roadway of Morgan street, with the surging crowd, and was struck by the front of the gripcar and knocked down; and when the car was stopped he was found under the forward end of the gripcar, resting against the lifeguard, a contrivance or V-shaped guard which was placed under the car, in front of the fore wheels, to keep them from running over any one that might be caught under the car. The wheels of the gripcar did not, in consequence of this lifeguard, run over the child. The gripman never saw the child at any time before the injury, and did not know the child was under the car until the crowd hallooed and the train was stopped. The plaintiffs objected to certain testimony introduced by the defendant and admitted by the court, which will be considered hereinafter.

At the request of the plaintiffs the court instructed the jury as follows: "The jurors are instructed that if they believe and find from the evidence that plaintiffs are the parents of Floyd B. Hogan, deceased; that said deceased at the time of his death was a minor, unmarried, and of the age of seven years; and that defendant on and prior to about the 5th day of June, 1893, was engaged in the business of transporting passengers, for hire,

from one point to another within the city of St. Louis, by street railway, and for that purpose used and operated its railway, and a certain gripcar and trailer composing the train; and if the jurors further believe and find from the evidence that Morgan street at said time was an open public street of the city of St. Louis at the place hereinafter mentioned; and if the jurors further believe and find from the evidence that on the 5th day of June, 1893, that said child was in said Morgan street, at a point at or near the crossing on the east side of Twelfth street, and whilst on said street at said place he was run over by defendant's said gripcar, and thereby injured, and died from the effect thereof; and if the jurors further believe and find from the evidence that defendant's gripman in charge of said gripcar just before and at the time of so running over and injuring said child was not keeping a vigilant watch for all persons on foot, especially children, either on its said track or moving towards it, or that said gripman did not stop said gripcar in the shortest time and space possible, under the circumstances, upon the first appearance of danger to said child; and if the jurors further believe and find from the evidence that said gripman, by the keeping of such vigilant watch, would have seen said child moving towards the track, or upon the track and in danger, and could, in the exercise of ordinary care, by so stopping said gripcar in the shortest time and space possible under the circumstances, have averted the injury from said child; and if the jurors further believe and find from the evidence that plaintiffs exercised ordinary care in the custody of said child, in keeping it from being exposed to said injury, according to their condition in life, and that said child exercised the degree of care which is reasonably to be expected from a child of his years and experience under the circumstances,—then your verdict should be for the plaintiffs, and, if you find for the plaintiffs, you will assess their damages in the sum of five thousand dollars. The jurors are instructed that if the defendant was engaged in the business of transporting passengers, for hire, from one point to another within the city of St. Louis, on or about the 5th day of June, 1893, then, by Ordinance No. 17,188, read in evidence, it became the duty of the gripman in charge of the gripcar to keep a vigilant watch for persons on foot, especially for children, either on its track or moving towards it, and, on the first appearance of danger to such person or child, it was the duty of the gripman to stop the car in his charge in the shortest time and space possible under the circumstances. The court instructs the jury that the degree or measure of care or caution which said infant child, Floyd B. Hogan, was required to exercise, was that which is ordinarily exercised, and which is reasonably to be expected from a child of his years and experience, under the circumstances he was in, as shown by the evidence, and, before the jury can find him

guilty of contributory negligence, they must find that he failed to exercise such care or caution as might reasonably be expected of a child of his years and experience under the circumstances; and the burden of proving contributory negligence is on the defendant to establish by a preponderance of the evidence.

At the request of defendant the court gave the following instruction: "The court instructs the jury that in considering this case they should not indulge in any mere suppositions or imaginings as to what may or may not have been done or occurred at the time of the occurrence, but must decide the case upon the evidence of the witnesses and the instruction of the court. And the court further instructs the jury that they are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, and in weighing the testimony the jury should take into consideration, not only what they have testified to, but also their manner of testifying, and their bias, if any is shown, towards or against plaintiffs or defendant, their ability at the time to clearly see what occurred, and now to clearly recall and relate the facts; and, if the jury believe from the evidence that any witness has knowingly sworn falsely to any material fact, then the jury may disbelieve the whole or any part of such witness' testimony. The court instructs the jury that, though there was a crowd of people at the northeast corner of Twelfth street, the gripman was not required, under the allegations of the petition and the law, to slow down his train to one, two, or three, or four, or five, or six miles an hour, or to stop it, or try to stop it, before the rush of the people towards the track; and the jury must not impute any negligence to the gripman because he did not stop, or try to stop, or was not running very slowly, before the rush of the crowd occurred, or the first appearance of danger. The court instructs the jury that there is no evidence in this case tending to prove the cars were being run at a greater rate of speed than eight and one-half miles an hour, and therefore the jury should not consider the allegations of negligence that the train was being run at a greater rate of speed than eight and one-half miles an hour. And the court further instructs you that if you believe from the evidence that as the train was approaching Twelfth street the gripman rang the bell, and it could be heard at the northeast corner of Twelfth and Morgan streets, then the court instructs you that he performed his whole duty under the allegations of negligence in that regard, and under the law, and he was not required to be ringing it as he was crossing Twelfth street and approaching the east crossing, and you must find that allegation of negligence concerning the not ringing of the bell in favor of the defendant. And the court further instructs you that all the evidence in this case shows that the child, Floyd B. Hogan, was on the pavement, in the crowd, and if the jury believe from the evi-

dence that the gripman and conductor were keeping a vigilant watch for all persons on foot, especially children, as mentioned in these instructions, as the train was crossing Twelfth street and approaching the east crossing, and that as soon as the crowd surged or rushed towards the track the gripman stopped the train in the shortest time and space possible under the circumstances, then your verdict must be for the defendant, notwithstanding the gripman did not notice the boy as he ran from the pavement and onto the track, or thereafter. The court further instructs the jury that an accident may happen, and a person be injured or killed therein, that is not caused by the negligence of any person connected therewith; and if the jury believe from the evidence that the death of the child, Floyd B. Hogan, was the result of such mere accident or misadventure, then your verdict must be for the defendant. The court instructs the jury that while the child, Floyd B. Hogan, was required to use only such care and caution as could be reasonably expected of a child of his years and experience, nevertheless he was required to use such care and caution; and if the jury believe from the evidence that he did not do so, and was himself negligent in running right in front of and close to the car, and his being run upon by the car was the result of his negligence in not exercising such care, then the jury will find their verdict for the defendant. The court instructs the jury that, under the pleadings and evidence, no want of care or negligence can be imputed to the defendant because it did not have other or different appliances about its gripcar than it had, and therefore the jury must not consider that matter at all." To the giving of each of said instructions, plaintiffs duly excepted.

The court refused the following instruction prayed by plaintiffs, to which refusal plaintiffs duly excepted: "The court instructs the jurors that though they may believe from the evidence that plaintiffs were guilty of negligence in permitting Floyd B. Hogan to be upon the street unattended at the time of the accident, yet, if you further believe and find from the evidence that defendant's servant in charge of said gripcar was guilty of negligence in the management of said car, as defined in these instructions, and that such negligence was the immediate cause of the death of deceased, and that by the exercise of ordinary care and precaution on the part of said servant or gripman the death of said child might have been avoided, then you will find a verdict for the plaintiffs." The jury returned a verdict for defendant, and, plaintiffs' motion for a new trial being overruled, they perfected an appeal to this court.

Chas. W. Bates, Chas. P. Johnson, and Virgil Rule, for appellants. Smith P. Galt, for respondent.

MARSHALL, J. (after stating the facts). 1. Plaintiffs assign as error the ruling of the

trial court in striking out from their petition the averment, "and defendant did negligently fail to use ordinary care in providing said gripcar with a fender to prevent its running over the children it had run down and upon." They here contend that a plaintiff "may charge in one count as many acts of negligence on the part of the defendant as he alleges caused the injury, * * * so long as the allegations are not inconsistent in fact with each other; i. e. so long as the allegations are of such a character that the proof of one would not disprove the other or another." The law is as claimed by the plaintiffs, but this statement of a general legal proposition does not point out wherein the trial court erred in sustaining the motion to strike out. The court manifestly never proceeded upon the idea that the plaintiffs could not state in the same count as many acts of negligence as they saw fit, for the count contained three other claimed acts of negligence after this allegation was stricken out. The ruling of the court was that the acts averred did not constitute negligence on the part of the defendant, and hence should be eliminated from the case, and not because they were a sufficient charge of negligence that was improperly combined in the same count with other sufficient charges of negligence. In fact, this was all that was claimed in the motion. No claim is made here that there was any law of the state or any ordinance of the city which made it the duty of the defendant to place fenders on its cars. The obligation to do so therefore must be found in the common law, if there is any such obligation resting upon defendant. It is not claimed that the common law expressly imposed any such obligation, but it is claimed that "defective appliances, or no appliances at all, or insufficient appliances, is a question of negligence, for the jury." The obligation of the common law is that the defendant shall exercise ordinary care to prevent injury to the public. No particular kind of appliance is required to be used. It is only necessary that the defendant should have used such means to prevent injury to the public as a man of ordinary prudence would have used under the same circumstances. To predicate a charge of negligence upon a failure to use any particular kind of appliance is insufficient, especially in the absence of any averment that the appliances and means employed by defendant were not reasonably safe. As between master and servant, the master is not required to furnish the best and safest known appliances. It is enough that what he does furnish are reasonably safe for the purposes for which they are intended and used. *Parker v. Railroad Co.*, 109 Mo., loc. cit. 407, 19 S. W. 1127; *Williams v. Railway Co.*, 119 Mo. 316, 24 S. W. 782; *Bender v. Railway Co.*, 137 Mo. 240, 37 S. W. 132. So, with respect to its common-law duty to the public, it is not whether there are known appliances which the defendant did not use, but whether the appliances it does

use are such as a person of ordinary prudence would have used, which determines the question of its negligence. There was therefore no error in the ruling of the court sustaining the motion to strike out this allegation in the petition.

2. On the cross-examination of the conductor the plaintiffs' attorney interrogated him as to certain answers made by him when examined by the coroner, and the witness admitted having testified as he was asked if he had done. The plaintiffs did not read or offer to read the testimony of the witness before the coroner. But the defendant offered to read the whole of the witness' testimony given before the coroner. Plaintiffs' counsel then said: "He has got the witness' statement. There are lots of things that are irrelevant that were before the coroner, and I object." The Court: You had a perfect right to read it all, if you wanted to, and he has a right to read it. Mr. Rule: I did not offer it in evidence, I simply asked whether these questions were asked and answered. The Court: He can read it all." The whole of the witness' testimony was then read to the jury. After it was read, plaintiffs' counsel objected to the testimony because the copy was not "a certified copy of the inquest," and moved to strike out the testimony. The court held that this objection came too late. Plaintiffs saved their exceptions, and now assign this ruling of the trial court as error. The questions propounded to the witness as to his testimony before the coroner had no tendency to contradict his testimony on the witness stand in this case. His testimony on both occasions was in all material respects the same. But there was no objection by defendant that there was any variance. The matter then was left by the plaintiffs in the shape of showing that on both occasions he had testified the same way, and that he admitted that he had testified before the coroner as he was asked if he had done. In this condition of the case the plaintiffs did not offer his testimony before the coroner in evidence, and, as it would not have contradicted anything he had testified to on the stand, it would not have been admissible in evidence. But, for some reason which is by no means clear, the defendant offered the whole of his testimony before the coroner in evidence in this case, and over the objection of the plaintiffs the court admitted it. The colloquy between the court and counsel shows that the court admitted it upon the theory that the plaintiffs had introduced a part of the witness' testimony, and hence the defendant had a right to have the whole of it go to the jury. This, however, was a mistake. The plaintiffs had not introduced any part of it. They had attempted to lay the foundation for its introduction, but the witness had admitted testifying before the coroner exactly as he was asked if he had done. Hence the plaintiffs necessarily had to abandon the attempt to contradict him in this way. No part of the testimony having

been introduced by plaintiffs, there was no foundation of right in the defendant to introduce the whole of it. It was therefore error for the court to admit it. But it does not follow that the judgment must be reversed for this reason alone. A careful reading of the testimony thus introduced shows that it is substantially the same as his testimony on the stand. The plaintiffs were not in any way prejudiced by it. It was simply a reiteration of his testimony on the stand. Section 2303, Rev. St. 1889, provides, "The supreme court or courts of appeals shall not reverse the judgment of any court, unless it shall believe that the error was committed by such court against the appellant or plaintiff in error, and materially affecting the merits of the action;" and it has been uniformly held by this court, in construing this statutory provision, that it must appear that the error had or might have had a probable effect on the jury. *Gordon v. Eans*, 97 Mo., loc. cit. 603, 4 S. W. 117, and 11 S. W. 64, 370; *Valle v. Picton*, 91 Mo., loc. cit. 215, 3 S. W. 864; *Gray v. Packet Co.*, 64 Mo. 47; *Kinealy v. Burd*, 9 Mo. App. 359; *Julian v. Calkins*, 85 Mo. 202; *State v. Kring*, 74 Mo. 612. In the *Kring* Case the evidence erroneously admitted related to a fact which was really conceded in the case; and in *Julian v. Calkins* the testimony admitted was that of the surviving party to the cause of action, the other party being dead, and yet the judgment was not reversed for this error, because it appeared that other witnesses had testified to the same facts sworn to by the surviving party, and they were not contradicted. So in this case this error cannot be said to have materially affected the merits of the action, or to have prejudiced the plaintiffs' rights, as what the witness was shown to have said before the coroner was substantially the same as he testified on the stand in this case.

3. On redirect examination of the motorman, after the witness had detailed all he had done, the defendant's counsel asked this question: "Tell the jury what else there was that you could have done that you did not do, under the circumstances." Plaintiffs' counsel objected to the question on the ground that it was for the jury, and not for the witness, to decide. The court admitted the evidence, and the witness said, "There was nothing else that I could have done on the gripcar." The witness was shown to be an experienced gripman. He was competent to give an opinion. At best, it was an opinion which he gave. That opinion was not binding upon the jury. The jury was still at liberty to find that there was something else he could have done, and counsel was at liberty still to insist upon a recovery because of some act of negligence pleaded. The plaintiffs' right to recover was limited to the acts of negligence charged in the petition. There was no occasion for the defendant to attempt to prove a negative pregnant in this way. What had been done with respect to the neg-

ligence charged had been fully testified to on behalf of both parties, and no court would believe that this testimony would or could materially affect the plaintiffs' case, and hence the judgment should not be reversed for this reason alone.

4. The first act of negligence charged in the petition is that the cars were run at a greater rate of speed than is allowed under the city ordinance. The ordinance allowed the cars to be run at the rate of $8\frac{1}{2}$ miles an hour at the point where the accident happened. The uncontradicted testimony shows that they were running at only half speed at that time. This averment of the petition was therefore not sustained by the testimony, but actually disproved, and the court properly took this feature of the case from the jury. The plaintiffs predicated a right of recovery in respect to the speed of the car on a violation of the ordinance provision, and, having failed to prove their averment, cannot now be heard to rely upon common-law negligence in running the car at too great rate of speed under the circumstances of the case. No such issue was tendered or joined in this case, and the plaintiffs' right to recover for this reason was expressly made to depend upon a violation of the ordinance regulation.

5. The second alleged act of negligence is that the conductor and gripman did not keep a vigilant watch for persons, especially children, upon or moving towards the track, and did not stop the car in the shortest time and space possible after he saw or could have seen the danger to the plaintiffs' child. This was a question of fact for the jury. There was a conflict in the testimony. The circumstances and physical facts strongly supported the testimony of the defendant's witnesses, and the jury found in its favor. There is no conflict in the testimony that there appeared to be no danger until the car got within a few feet of the place where the accident occurred. Prior to that time there was no person on the roadway of Morgan street, and only four or five persons on the sidewalk on the north side of that street. The crowd was on Twelfth street, north of the building line on the north side of Morgan street. They were pressing around the policeman and his prisoners. The policeman brandished his club, and the crowd suddenly surged or rushed into the roadway of Morgan street, surrounding the car. The gripman at once stopped his car. He never saw the child at all, and did not know he was under the car until it was stopped. No serious objection is or can be urged to the manner in which the court instructed the jury on this proposition. Under these circumstances, the judgment below cannot be disturbed here.

6. The third alleged act of negligence is a failure to ring the bell or to give any signal or sufficient warning of the approach of the train. This also presented an issue of fact. Plaintiffs' witnesses testified that they did not hear any bell, but admitted that they

were not paying any attention to whether a bell was ringing or not. Defendant's witnesses testified that the bell was rung twice, which was the usual signal at a street crossing, on approaching the west crossing of Twelfth street. The plaintiffs asked no instruction whatever on this issue, and the court instructed the jury, on defendant's request, that, if the gripman rang the bell as the train was approaching Twelfth street, they must find for defendant on this issue. The plaintiffs have nothing to complain of in this regard.

7. The instructions given fairly put the case to the jury. The instruction asked by the plaintiffs, and refused by the court, to the effect that, even if the plaintiffs were negligent in permitting the child to be upon the street unattended, still, if the gripman was guilty of negligence, and his negligence was the immediate cause of the injury, and by the exercise of ordinary care and precaution on the part of the gripman the injury might have been avoided, their verdict should be for the plaintiffs, was properly refused—First, because there was no evidence in the case upon which to predicate such an instruction; and, second, because it does not correctly state the law, in this: that it fails to express the idea that the gripman could have prevented the injury "after discovery of the danger in which the injured party stood, or failed to discover the danger through its own recklessness, when the exercise of ordinary care would have discovered it and averted the calamity." *Fiedler v. Railway Co.*, 107 Mo., loc. cit. 652, 18 S. W. 849, citing *Dunkman v. Railway Co.*, 95 Mo. 232, 4 S. W. 670, and *Williams v. Railroad Co.*, 96 Mo. 275, 9 S. W. 573; *Czesewska v. Railway Co.*, 121 Mo., loc. cit. 215, 25 S. W. 914; *Lloyd v. Railway Co.*, 128 Mo., loc. cit. 601, 29 S. W. 154, and 31 S. W. 110. As drawn, this instruction asserts the proposition that where both parties have been guilty of negligence the jury must find for the plaintiff, if the defendant's negligence was the immediate cause of the injury; for so much of the instruction as says that the defendant is liable if, by the exercise of ordinary care and precaution, it could have avoided the injury, is only another form of saying that the defendant is liable if it has been guilty of negligence, without regard to any contributory negligence by the plaintiff. This is not a correct enunciation of the law. Where both parties have been guilty of negligence which directly contributed to cause the injury, there can be no recovery; for the courts never undertake to sever, apportion, and discriminate between two directly negligent acts, so as to decide which act caused the injury. There is no comparative negligence in this state. *Welch v. McAllister*, 13 Mo. App. 89; 1 *Shear. & R. Neg.* (5th Ed.) § 96. The rule that the negligence of the plaintiffs which contributes directly to the cause of the injury will prevent a recovery is without ex-

ception or qualification. *Dunkman v. Railway Co.*, 16 Mo. App. 548; *Id.*, 95 Mo. 232, 4 S. W. 670; *Craig v. City of Sedalia*, 63 Mo. 417; *Barton v. Railroad Co.*, 52 Mo. 253. Where the negligence of the plaintiff directly contributed with that of the defendant to produce the injury, there can be no recovery. *Murray v. Railway Co.*, 101 Mo. 236, 13 S. W. 817; *Kellny v. Railway Co.*, 101 Mo. 67, 13 S. W. 806. So, if the negligence which produced the injury is mutual, the plaintiff cannot recover. *Packet Co. v. Vandergrift*, 34 Mo. 53; *Callahan v. Warne*, 40 Mo. 131; *Corcoran v. Railway Co.*, 106 Mo. 399, 16 S. W. 411; *Dougherty v. Railroad Co.*, 97 Mo. 647, 8 S. W. 900, and 11 S. W. 251; 7 Am. & Eng. Enc. Law (2d Ed.) p. 371 et seq.

Upon the whole record, we are satisfied that the case was properly submitted to the jury upon correct declarations of law, and that there was abundant evidence to support the verdict, and therefore the judgment of the circuit court is affirmed. All concur.

STATE ex rel. BRUMBAUGH, County Collector, v. KANSAS CITY, ST. J. & C. B. R. CO.

(Supreme Court of Missouri, Division No. 2. May 23, 1890.)

TAXATION FOR SCHOOL BUILDINGS—RAILROADS—ILLEGAL LEVY—CIRCUIT COURT—POWER OF REVISION.

Where the circuit court, in an action against a railroad company to recover unpaid taxes against its property for school-building purposes, finds that "the tax has been illegally levied, it has no power to revise the levy made by the county court, by authority of Rev. St. 1889, §§ 7731, 7732, since the power they confer on it to ascertain the levy and amount and rate of taxation for such purposes is exclusive, and cannot be exercised by any other tribunal, and it must render judgment for defendant.

Appeal from circuit court, Holt county; Cyrus Anthony, Judge.

Action by the state, on the relation of M. C. Brumbaugh, collector of Holt county, against the Kansas City, St. Joseph & Council Bluffs Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Strong & Mosman, for appellant. S. F. O'Fallon and G. W. Murphy, for respondent.

BURGESS, J. This is an action by the state, at the relation of M. C. Brumbaugh, collector of Holt county, against the Kansas City, St. Joseph & Council Bluffs Railroad Company for unpaid school taxes levied against its property for the years 1893 and 1894. The case was tried before the court, a jury being waived. The finding and judgment were for defendant as to the school-purpose tax, and for plaintiff as to the building tax, including and counting as part of the building-fund tax the amount levied for sinking-fund and interest purposes. Judgment accordingly. The judgment is as follows:

"Now at this time, this cause coming on to be heard, the parties appear by their respective counsel, and now here plaintiff dismisses this suit as to the taxes claimed in petition as being due upon the property of the Atchison & Nebraska Company, upon the property of the St. Joseph & Nebraska Company, and also as to all taxes claimed to be due to the towns of Bigelow, Mound City, and Craig. And now here this cause is submitted to the court by the agreement of the parties, a jury being waived, and the court, having heard the evidence and arguments of counsel, and being fully advised in the premises, doth find for the defendant as to the school-purpose taxes, and finds that the aggregate of the rates levied by the various districts in Holt county for the year 1893 for building purposes was \$1.89; that the whole number of school districts in the county was 74; that the average rate found by dividing the sum of \$1.89 by 74 was .0255; that the aggregate value of the property of the defendant, including the Tarkio and Nodaway Valley branches, amounts to \$555,399.13, and that there should be charged against the defendant taxes at said average rate upon the aforesaid valuation, making a tax of \$141.62, upon which the defendant has paid \$30.54, leaving still due from the defendant \$111.29; that the defendant should be charged with interest at the rate of 1 per cent. per month since January, 1894, amounting to \$22.25, and 2 per cent. commission due the collector, \$2.67, making said tax, interest, and cost aggregated at this time \$136.21. Wherefore it is ordered that plaintiff have and recover for and on account of the building tax for the year 1893 \$136.21, and his costs in this behalf expended, and that execution issue therefor. The court doth further find for the defendant as to the school-purpose taxes of 1894, and finds that the aggregate of rates levied by the various districts in Holt county for the year 1894 for building purposes was \$4.11; that there were only 74 districts in the county; that the average rate found by dividing \$4.11 by 74 was .0568; that the aggregate value of the property of the defendant, including the Nodaway and Tarkio Valley branches, was \$585,614.20, and that there should be charged against the defendant taxes at said average rate upon the aforesaid valuation, amounting to a tax of \$332.62, upon which the defendant has paid \$32.21, leaving still due from the defendant \$300.41; that the defendant should be charged with interest at the rate of 1 per cent. per month since January 1, 1896, or \$24.03, and a collector's commission of 2 per cent., or \$6.48, making said tax, interest, and cost aggregate now \$331.92. Wherefore it is ordered by the court that plaintiff have and recover for and on account of the building tax of the year 1894 the sum of \$331.92, and his costs in this behalf expended, and have therefor execution. It is further ordered that said two sums bear interest at the rate of 1 per cent. a month until paid, and

there is hereby taxed an attorney's fee of \$46 in favor of the plaintiff's attorneys, the same to be taxed and collected as other costs in this cause; and a lien is hereby declared on the property of the defendant for the payment of the judgment herein and costs." After unsuccessful motion for new trial, defendant appeals.

As shown by the petition, the taxes assessed against defendant's property in 1893 in said county amounted to \$9,690, and in 1894 to \$10,008.68. The defendant paid all of its taxes before they became delinquent, except a portion of the school taxes. As school taxes, it paid to plaintiff for the year 1893 \$2,191.05, and for 1894 \$2,459.58, leaving unpaid school taxes for the year 1893 \$945.25, and unpaid for the year 1894 the sum of \$1,592.94. To recover these unpaid sums this suit is prosecuted.

It was agreed by the parties that the county, by its order duly entered of record, levied a school tax for "building purposes" for the year 1893 on the property of the defendant, and that so much of said order as relates to that item of tax is in words and figures as follows: "Building purposes 5 ⁷⁴/₁₀₀ cents on the \$100 valuation." The levies made were the same in each year, and the orders of the county court making them substantially in the same language, except as to the rate of taxation and the valuation of the property. For 1893 the levy for "school-purpose" tax was 46.26 cents on the \$100 valuation, and for "building purposes" 5.74 cents on the \$100 valuation in 1894; and the levy for school-purposes tax was 48.02 cents on the \$100 valuation, and for building purposes 15.392 cents on the \$100 valuation. There were 74 school districts in the county.

The following declarations of law were asked by defendant: "(1) The court declares the law to be that, under the pleadings and the evidence in this case, the plaintiff cannot recover. (2) In computing the aggregate sum of all the rates levied in the various school districts throughout the county for 'the erection of public buildings,' the court will exclude all rates ordered by the directors for the purpose of providing a sinking fund, or paying the interest on bonds issued by the district. (3) The county clerk has no power to determine what the rate of taxation should be in any school district, but it was his duty to extend the taxes for the various school purposes at the rate fixed upon by the board of directors of the various school districts, as shown by the estimates returned by such boards; and should the court find from the evidence that the county clerk, in extending the taxes in any district, failed to follow the rates fixed by the directors as shown by the estimate, but made a rate of his own, and extended the taxes on the school-tax book at the rate as found by him, such rates so found by him should not be taken into account in making up the aggregate of all rates levied throughout the county. (4) The county court, in com-

puting to ascertain the average rate of taxation for school purposes, and for the erection of public buildings, was bound to compute and ascertain each rate separately. It could not mingle together in one original grand aggregate the rates levied for school purposes, for the purpose of erecting public buildings, and for other purposes; and if the aggregate rate levied found by the county court was found by commingling, in the manner aforesaid, rates for the various purposes, the plaintiff cannot recover in this action. (5) The law requires the board of directors of school districts to state in the estimates returned by them to the county clerk the amount necessary to sustain the schools during the year, and the rate necessary to raise said amount; and, in computing the aggregate of the rates levied for the various school purposes throughout the county, the court will exclude from such computation the rates of all districts where the directors failed to fix and state the rate in the estimates returned by them. (6) The court will exclude from its computation the rates levied in districts where the directors failed to determine the rate to be levied, but merely certified that a majority of the voters voted to fix the rate at a certain sum (named in the estimate), 'provided so much was necessary to raise the amounts required for teachers and incidental funds.' (7) If the court finds that in fact there was no tax levied for the erection of public buildings, or for the purpose of providing a sinking fund and paying interest on the outstanding bonds of the district, in the various school districts throughout the county, and that in extending the tax the county clerk levied only one rate for all purposes, then the plaintiff cannot recover the building taxes mentioned in the petition. (8) If the court finds from the evidence that the defendant paid to plaintiff for and on account of the school taxes of the years 1893 and 1894 an aggregate sum of money in excess of the amount legally leviable on its property for all purposes, including the so-called building tax sued for, then the plaintiff is not entitled to recover in this action for such building taxes. (9) If the court finds that the county court, in computing to ascertain the average of taxation for building purposes throughout the county, by mistake included levies made by the clerk in districts where no levies were made by the board, and said average rate by said court was erroneous and illegal, then no new rate can be ascertained by this court, and the finding must be for the defendant." Of these, the court gave the third, fourth, and fifth, and refused the others. Defendant duly excepted to the action of the court in refusing instructions asked by it.

It is insisted by defendant that, the court having determined that the assessment and levy sued upon were so fatally defective that they could not be enforced, the case was at an end, and the court's jurisdiction and power ceased; that the collector was only au-

thorized to enforce by an action at law a tax which had been regularly assessed and levied, and that it was only empowered to determine the validity of the tax, and render a judgment enforcing the lien of the state in case the tax was a valid tax. Upon the other hand, it is claimed by plaintiff that this was not a levy made by the wrong tribunal, and that the finding of the court as set out in the judgment is, essentially, that there was still due from defendant for the year 1893 \$111.29; that the rate levied by the county court be so reduced that it would produce this amount, to which was added the commissions and costs; that for the year 1894 there was still due from defendant \$300.41, which was apportioned as before, to which also was added commissions, interest, and costs; and that this was not a new levy by the circuit court, but a revision of the action of the county court.

By sections 7731, 7732, Rev. St. 1889, the exclusive power and authority to ascertain the rate of taxation for school-building purposes, to be levied upon railroad property, is conferred upon the county courts of the respective counties in which the taxes are levied, and no such power can be exercised by any other tribunal. *City of Kansas v. Hannibal & St. J. R. Co.*, 81 Mo. 285. In the case of *Railway Co. v. Apperson*, 97 Mo. 300, 10 S. W. 478, *Sherwood, J.*, in speaking for the court, said: "Whenever, by legislative enactment, power is confided to a particular person or tribunal to perform specific acts, especially acts relating to the exercise of the important power of taxation, such legislative enactment is mandatory in its nature, its conditions must be strictly observed; and such power, in order to its validity, must be exercised, and exercised only, by the person or tribunal upon whom it is in terms conferred. This doctrine is recognized everywhere and disputed nowhere." The power to levy taxes is purely statutory, and must be clearly given; otherwise, it cannot be exercised. *City of Carondelet v. Picot*, 38 Mo. 130; *State v. Shortridge*, 56 Mo. 126; *State v. Hannibal & St. J. R. Co.*, 87 Mo. 236. The ascertainment of the amount and levy of the county court was judicial in its character, and could not be revised by the circuit court by decreasing them any more than it could by increasing them. It had no power to determine the rate of taxation for building purposes to be levied upon defendant's property. Nor did its power extend any further than the enforcement of the collection of the taxes which were legally levied by the county court. When it determined that they were not properly levied, and rendered judgment for defendant for the school-purpose taxes because no proper levy had been made as to them, that was, in effect, finding for defendant upon all the issues in the case. This question was presented by the ninth instruction asked by defendant, which was refused. It was not presented by either of the instructions that were given, and should have been given also. Our conclusion

51 S.W.—31

is that the judgment should be reversed, and it is so ordered.

There are a number of other questions raised by counsel of defendant in their brief, but, as the conclusion reached disposes of the case, we have not thought it necessary to pass upon them.

GANTT, P. J., and SHERWOOD, J., concur.

STATE v. HARRIS.

(Supreme Court of Missouri, Division No. 2.
May 23, 1899.)

CRIMINAL LAW—APPEAL—RECORD—RAPE—INDICTMENT—JOINT PROSECUTION—EVIDENCE—STATEMENTS OF CONSPIRATOR—ADMISSIBILITY AGAINST OTHERS—EXPERT TESTIMONY—INSTRUCTIONS—WITNESSES—IMPEACHMENT.

1. On appeal in a criminal case the transcript should show the organization of the court, the impaneling of the grand jury, the return of the indictment, and the arraignment.

2. An indictment charging that certain persons named on or about a certain date, at a county and state named, in and upon a certain female about the age of 14 years, unlawfully, violently, and feloniously did make an assault, and her then and there unlawfully, forcibly, and against her will feloniously did ravish and carnally know, is sufficient.

3. Three persons may be jointly indicted for rape where two of them aid and abet the third by holding the female down while he outrages her person.

4. In a prosecution for rape, testimony of a conversation with defendant several days before the rape, in which he distinctly avowed his purpose to commit it, is admissible.

5. Statements of one of three persons jointly indicted for rape, made after the crime, has been committed, and in the absence of the one being tried, are inadmissible against him.

6. A witness need not be an expert to testify that for several hours after a rape the injured person was very sick at her stomach, and vomited.

7. Where a witness testifies that he is a single man, it is proper, on cross-examination, as matter of impeachment, to show that he has a wife, with whom he is not living.

8. In a prosecution for rape, an instruction that the rape must have been accomplished by force, and prosecutrix must have made such resistance as she was capable of making to prevent it, and did not consent thereto, is sufficient, the statute defining rape as the forcible ravishing of any woman of 14 years or upward.

9. In a prosecution for rape, an instruction that, if defendant ravished prosecutrix, the subsequent receipt of money from him would not purge his guilt, does not assume a fact not proved, where the constable testifies that, after arresting him, he stated he had paid prosecutrix a certain sum for intercourse with her.

10. In a prosecution for rape, an instruction that if defendant and others, named, conspired to commit the crime, statements of one of the latter, made pending the conspiracy, and explaining acts done in pursuance of the common purpose, should be considered in arriving at a verdict, is erroneous where the only statements in evidence were made after completion of the crime, in the absence of defendant.

11. Defendant may be convicted of rape though he denies the offense and prosecutrix's testimony as to the commission is uncorroborated.

Appeal from circuit court, Dunklin county;
John G. Wear, Judge.

William T. Harris was convicted of rape, and he appeals. Reversed.

Defendant's requested instruction No. 6, referred to in the opinion, was as follows: "The prosecuting witness not being corroborated as to the fact of the rape or the forcible sexual intercourse, and the defendant, who is a competent witness in his own behalf, having positively denied his guilt as testified to by her, then if you find them equally worthy of belief you will find defendant not guilty, since there would not be that preponderance of testimony against defendant which the law requires before you can convict him, and in such case you are not called upon to decide which of the two have testified falsely and which to the truth."

D. R. Cox, W. R. Hall, and J. P. Tribble, for appellant. Edward C. Crow, Atty. Gen., and Sam. B. Jeffries, Asst. Atty. Gen., for the State.

GANTT, J. At the July term, 1894, of the circuit court of Dunklin county, the defendant was jointly indicted with Coon Owens and Henry Justice for the rape of Lizzie Edwards. The defendant in some way managed to escape trial until January, 1896. Such a delay in a public prosecution is inexcusable. The transcript sent to this court does not contain the organization of the court, the impaneling of the grand jury, or the return of the indictment nor the arraignment. All of these steps should appear in the record sent to this court. The indictment is as follows: "In the circuit court of Dunklin county, in the state of Missouri, to the July term, A. D. 1894. The State of Missouri, County of Dunklin—ss.: The State of Missouri against William J. Harris, Coon Owens, Henry Justice. The grand jurors for the state of Missouri impaneled, sworn, and charged to inquire and true presentment make within and for the body of the county of Dunklin, and state aforesaid, upon their oath present and charge that William J. Harris, Coon Owens, and Henry Justice, on or about the 15th day of April, A. D. 1894, at the county of Dunklin, and state of Missouri, in and upon one Lizzie Edwards, a female about the age of fourteen years, unlawfully, violently, and feloniously did make an assault, and her, the said Lizzie Edwards, then and there unlawfully, forcibly, and against her will feloniously did ravish and carnally know; against the peace and dignity of the state." The defendant was convicted, and sentenced to the penitentiary for 10 years. The testimony, if believed by the jury, was sufficient to sustain the verdict. The details disclose a depravity so great that we are unwilling to spread them upon the official reports. The various exceptions urged in this court will be determined in their order.

1. The indictment is sufficient. It charges an unlawful and felonious assault, and otherwise meets every requirement of a charge of rape after a long line of approved precedents.

State v. Hammond, 77 Mo. 157; Archb. Cr. Prac.; Com. v. Fogerty, 8 Gray, 489; People v. Jackson, 3 Parker, Cr. R. 391. It was entirely competent and proper to charge all three of the defendants jointly. It by no means follows that because each could not have been guilty of the sexual act at the same moment that two of them could not have been present, as testified by the prosecutrix, aiding and abetting defendant by holding her down while defendant outraged her person.

2. No error was committed in permitting the witness Foster to testify to the conversation of defendant on Friday before the commission of the rape on Sunday morning. It was a distinct avowal of his purpose to commit the offense. No possible objection can be urged to the relevancy of this testimony.

3. We think, however, that the court erred in permitting the witness Joseph Hampton to testify to statements made to him by Coon Owens after the rape had been consummated, and Owens was returning alone from the home of the girl. The common criminal enterprise was no longer pending. It was fully completed, and Owens' statement was a mere narration of a past event, in the absence of the other two actors. It was competent against himself alone. 1 Greenl. Ev. (14th Ed.) § 111; State v. Melrose, 96 Mo. 594, 12 S. W. 259; State v. Hilderbrand, 105 Mo. 318, 16 S. W. 948; State v. Minton, 116 Mo. 605, 22 S. W. 808.

4. The objection to the testimony of W. H. Hampton to the effect that the prosecutrix was very sick at her stomach, and vomiting, for several hours after the rape, is not tenable. It required no expert knowledge to testify to a fact visible and of such common understanding. It was simply a circumstance to which we can see no objection.

5. There was no error in permitting the state to cross-examine Taylor as to his marital relations. According to his own evidence, he had testified falsely that he was a single man, and the prosecuting attorney simply compelled him to admit he had a wife living in Stoddard county, with whom he was not living. The matter was largely within the discretion of the court, and it is evident the discretion was not abused in this case.

6. Instructions 2 and 3 for the state were mere abstractions, which should have been omitted; but they were not erroneous.

7. The fifth instruction for the state is criticised because, instead of declaring that the prosecutrix must have resisted the assault to the uttermost, the court instructed the jury that the rape must have been accomplished by force, and she must have made such resistance as she was capable of making to prevent it, and did not consent thereto. Rape, under our statute, is "the forcible ravishing of any woman of the age of fourteen years or upward." While it is held that the woman must resist to her utmost, "the importance of resistance is to demonstrate two elements in the crime,—carnal knowledge by

force by one of the parties, and nonconsent thereto by the other." State v. Cunningham, 100 Mo. 382, 12 S. W. 376; State v. Shields, 45 Conn. 256. When the jury were told that the woman must have made such resistance as she was capable of making to prevent the perpetration of the crime, and must not have consented thereto, it was but another way of telling them that she must have done her utmost to prevent its consummation. When a woman has used all the strength of which she is possessed to resist, and in no way consents, and, notwithstanding this, the crime is consummated, she has done all the law requires. While the defendant's instruction is the usual formula, that given by the state defines the crime denounced by the statute.

8. The seventh instruction for the state did not assume that which had not been proved, to wit, that defendant had paid the prosecutrix money after the commission of the rape. Constable Bradley testified that on Sunday night after the offense had been committed he had the warrant for defendant, and, after he had arrested him, defendant voluntarily told him that he had intercourse with prosecutrix, and paid her 50 cents for it. The court, in this instruction, advised the jury that, if the prosecutrix was ravished, the subsequent receipt of money from defendant would not purge his guilt. It was for the jury to find these facts, and, if they did, still it was no defense, as was held in State v. Hammond, 77 Mo. 157.

9. The eighth instruction is in these words: "No. 8. The court instructs the jury that if they believe from the evidence that William T. Harris, Coon Owens, Henry Justice, entered into a conspiracy to unlawfully and feloniously carnally know and ravish Lizzie Edwards, now Lizzie Tadlock, then the admissions and statements of Coon Owens, one of the conspirators and accomplices, made during the pendency of said conspiracy, concerning the offense charged, or in explanation of acts done in pursuance of a concerted criminal purpose, should be received and considered by you in arriving at a verdict." It is erroneous, because the only admissions of said Owens were made after the common enterprise had been completed, and co-conspirators were no longer bound by his statements.

10. Instruction No. 5 asked by defendant was properly refused. The court had already given an instruction as to the credibility of witnesses, which fully advised the jury of its prerogative in weighing the evidence.

11. Defendant's instructions Nos. 6 and 7 were also properly refused. This court has recently condemned the principle which they announce. State v. Marcks, 140 Mo. 656, 41 S. W. 973, and 43 S. W. 1095.

As to the remarks of the prosecuting attorney, it is unnecessary to say more than that upon a new trial the court should require counsel to discuss the evidence, and not permit the argument to degenerate in personal abuse. For the errors noted, the judgment

is reversed, and cause remanded for new trial in accordance with the views herein expressed.

SHERWOOD and BURGESS, JJ., concur.

STATE v. HUDSPETH.

(Supreme Court of Missouri, Division No. 2.
May 23, 1899.)

INDICTMENT—GRAND JURY—CHANGE OF VENUE—PREJUDICE—CRIMINAL LAW—RES GESTÆ—INSTRUCTIONS—HOMICIDE—SELF-DEFENSE—DUTY TO FLEE—EVIDENCE—JURY—CHALLENGES—TIME TO MAKE.

1. The conclusion of an indictment need not restate the time or place of the commission of the offense.

2. An indictment will not be quashed because the names of the special grand jury which indicted defendant were handed to the marshal by the regular judge of the criminal court, because an attempt to challenge the array on a ground not within Rev. St. 1889, § 4967, which limits the grounds therefor, and which also requires the challenge to be before the grand juror is sworn.

3. Ten persons testified as to prejudice, on a motion for a change of venue. Three or four of them merely testified to statements that defendant ought to be punished if the newspaper articles were true. The remainder testified to a well-divided sentiment as to defendant's guilt. Two newspapers, whose circulations in the county were, respectively, 18,000 and 42,000 daily, had commented on the homicide, giving various versions, and criticizing courts, grand jurors, and juries generally. The county has a population of over 200,000, and no adverse criticism was shown in seven of the townships. *Held*, that it was proper to refuse a change of venue.

4. Defendant and the deceased had had trouble shortly before the killing. After such trouble the deceased had a shotgun in his hands, and was asserting that he would kill defendant as soon as he could get some shells, but the wife of deceased got the gun away from him. Shortly afterwards the parties met again and quarreled, and the deceased picked up two scale weights, whereupon defendant shot him. In not more than two minutes a witness heard the deceased, lying where he fell, say to his wife, "If you had not taken the gun from me, it would have been different." *Held*, that the statement was admissible as a part of the *res gestæ*.

5. It was error to instruct that, if the jury believe any statements of defendant have been proved by the state and not denied by defendant, they are to be taken as true, as in violation of the presumption of innocence, and abrogating the efficacy of Rev. St. 1889, §§ 4218, 4219, permitting a defendant to refrain from testifying without raising a presumption of guilt.

6. Deceased on the day of the homicide told defendant that he (deceased) would kill him. Deceased afterwards got his gun, and was heard to swear he would kill defendant. Defendant then armed himself and sat down in front of a store. Deceased approached and began cursing defendant, and went into the store, and came out armed with two scale weights, again cursing defendant and making a motion to throw, according to some of the evidence, when defendant, standing 10 or 15 feet away, shot and killed the deceased. *Held*, that it was not the duty of defendant to flee, though he could have done so safely, in order to be justified on the ground of self-defense.

7. Evidence of the act of defendant, on the day of the killing, in sending a messenger for a mutual friend to come and make peace between himself and the deceased, was not part of the *res gestæ*, where the deceased was not advised of the act, and where it did not affect defendant's

right of self-defense, inasmuch as such defense was not based on his own efforts to adjust the difficulty.

8. Where defendant denied the writing of an anonymous letter causing the trouble with the deceased, evidence of certain facts offered to show the occasion therefor was inadmissible.

9. Ten minutes in which to make defendant's challenges to the jury in a murder case is an unreasonable allowance.

10. Mere words, however opprobrious or insulting, cannot justify a killing.

11. An instruction based on an hypothesis not supported by any evidence is properly refused.

Appeal from criminal court, Jackson county; D. W. Shackelford, Special Judge.

J. Lamertine Hudspeth was convicted of murder in the second degree, and he appeals. Reversed.

B. L. Woodson, J. N. Southern, and Wallace & Wallace, for appellant. Edward C. Crow, Atty. Gen., and Sam B. Jeffries, Asst. Atty. Gen., for the State.

GANTT, P. J. At the September term, 1897, the defendant was indicted for the murder of Josiah W. Kesner in Jackson county, Mo., on the 17th day of May, 1897. The defendant was duly arraigned, and entered his plea of not guilty. The cause was tried in June, 1898, and resulted in a verdict of guilty of murder in the second degree. From the sentence on that conviction, defendant appeals. Various errors are assigned.

The indictment is as follows: "State of Missouri, County of Jackson—ss.: In the Criminal Court of Jackson County, at Kansas City, September Term, 1897. The grand jurors for the state of Missouri, in and for the body of the county of Jackson, upon their oath present that J. Lamertine Hudspeth, whose Christian name in full is unknown to these jurors, late of the county aforesaid, on the 14th day of May, 1897, at the county of Jackson, state of Missouri, then and there being, in and upon one Josiah W. Kesner, then and there being, feloniously, willfully, deliberately, premeditatedly, on purpose, and of his malice aforethought, did make an assault, and with a dangerous and deadly weapon, to wit, a certain double-barrel shotgun, then and there loaded with gunpowder and leaden balls, which he, the said J. Lamertine Hudspeth, in both his hands, then and there held at and against him, the said Josiah W. Kesner, then and there feloniously, willfully, deliberately, premeditatedly, on purpose, and of his malice aforethought did shoot off and discharge, and with the double-barrel shotgun aforesaid, and with the gunpowder and leaden balls aforesaid, then and there feloniously, willfully, deliberately, premeditatedly, on purpose, and of his malice aforethought did shoot and strike him, the said Josiah W. Kesner, in and upon the head and neck of him, the said Josiah W. Kesner, then and there with the dangerous and deadly weapon, to wit, the double-barrel shotgun aforesaid, and the gunpowder and leaden balls aforesaid, giving to him, the said Josiah W. Kesner, in and upon

the head and neck of him, the said Josiah W. Kesner, one mortal wound, of which mortal wound aforesaid he, the said Josiah W. Kesner, from the 14th day of May, A. D. 1897, until the 17th day of May, A. D. 1897, in the county of Jackson and state of Missouri, did languish, and languishing did live, on which said 17th day of May, A. D. 1897, the said Josiah W. Kesner, in the county of Jackson and state of Missouri, of the mortal wound aforesaid died. And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said J. Lamertine Hudspeth, him, the said Josiah W. Kesner, in the manner and by the means aforesaid, feloniously, willfully, deliberately, premeditatedly, on purpose, and of his malice aforethought did kill and murder, against the peace and dignity of the state."

This indictment is challenged on two grounds. The first objection relates to the form of the conclusion, because it states neither the time nor the place of the commission of the offense. The point is not well taken. It was not essential to restate the time or the place in the conclusion. That is not the office of a conclusion. The time and place having been already stated, says Chitty in his Criminal Law (volume 3, p. 737), "the indictment must draw the conclusion that so the prisoner, the defendant, feloniously, etc., did kill and murder." The form used in this case is the same approved in Heydon's Case, 4 Coke, 41b. 3 Chit. Cr. Law, 750; Whart. Hom. § 849; Rex v. Nicholas, 7 Car. & P. 538. The case of State v. Meyers, 90 Mo. 107, 12 S. W. 516, does not support the contention of counsel. The defect in that indictment was the failure to charge that "*so grand jurors upon their oath do say that the said,*" etc. The omission of the italicized words was the error in that case, and not the failure to allege either time or place.

The indictment is also attacked because it is alleged that the names of the special grand jury which indicted defendant was handed to the marshal by the regular judge of the criminal court. This was one of the grounds in the motion to quash. This is in fact an attempt to challenge the array. By positive enactment the legislature has limited this right to the instances enumerated in section 4067, Rev. St. 1889. It is provided in said section that the competency of a grand juror may be challenged before he is sworn, on one of two grounds,—either that he is prosecutor or complainant, or that he is a witness on the part of the prosecution, and has been summoned or bound in a recognizance as such. It follows that the objection, coming after the finding of the indictment, was too late, and, if seasonable, was not one which the law would recognize. No error was committed in overruling the motion to quash, as to this ground. State v. Holcomb, 86 Mo. 371.

2. Proceeding in the natural order, we must next determine whether error was committed in denying defendant a change of venue.

The present statute governing changes of venue has been so recently reviewed in this court, in *State v. Goddard* (Mo. Sup.) 48 S. W. 82, that it is deemed unnecessary to repeat at length what was said in that case. We still hold that where the defendant, in addition to his own affidavit and that of two supporting witnesses, makes out a prima facie case of prejudice of the inhabitants of the county against him, and his witnesses are not impeached either by cross-examination or by evidence aliunde or direct impeachment of their veracity, and the state offers no rebuttal, he is entitled to a change of venue. That case is invoked to reverse the trial court in this case. Each of these applications depends upon the peculiar facts developed. It has been uniformly held that the trial judges have peculiar advantages in weighing the evidence in these cases, and their findings are not to be interfered with unless it appears they have abused their discretion. In *Goddard's Case* we came to the conclusion that the change ought to have been granted. The evidence of prejudice was very strong, and covered all portions of the county. We cannot agree with counsel that as strong a showing has been made in this case as in that. A short résumé of the testimony will form a more satisfactory basis for our opinion than mere deductions: P. J. Jones, a former judge of the county court, testified he lived at Independence, and did not think defendant could get a fair trial. When questioned as to the persons who had expressed a prejudice, he said he would not like to name them. They were kinsfolks of defendant, and, as many as three, neighbors. These persons did not think defendant was getting a fair chance over at Kansas City. They had no prejudice against defendant. No people who would be jurors had expressed any prejudice in his hearing against defendant. Frank Graham, managing editor of the *World* newspaper, simply testified to the daily circulation of about 18,000 papers in Jackson county. T. W. Smith, employed on the *Kansas City Star*, testified to a circulation of about 42,500 daily in Jackson county. These two witnesses also identified clippings from said papers commenting on the homicide of Kesner. W. H. Moore lived 40 years in Independence. Was inclined to think there was prejudice against defendant. Had heard half a dozen people discuss the case. Some said one thing, some another. Some thought it would be a little hard for him to get a fair trial, others thought he could get as fair trial in Jackson county as anywhere else. There were 10,000 people in Independence. Could not say that those who expressed themselves against Hudspeth outnumbered those who favored him. Martin Gossett, clothing merchant in Kansas City: Very well acquainted in the city and county. Could only speak as to prejudice from remarks heard in his store. These parties said that, if what the newspapers said was true, he ought to be

hung. Heard this several times shortly after the homicide occurred. Had heard only one man speak about it in six months. John M. Surface: Lives in Kansas City. Drug and paint business. Knew defendant well. Kept the newspapers for sale. The people who came to trade were nearly all against defendant at that time. Has been very little said recently. He sold about 20 or 30 papers daily. Has heard very little about the matter for six months. Nothing in the newspapers for six months. Mell Hulse lived in Jackson county 51 years. Had been city marshal of Independence for 11 years, and connected with marshal's office in Kansas City. Had heard this case discussed considerably, and the sentiment seemed to be against the defendant. Had heard the people at Independence and eastern part of the county discuss it, but not in the last three or four months. Some thought he ought to be hung. Some thought he ought to go to the penitentiary. Benjamin Holmes: Lived in Kansas City. Had been city treasurer and mayor. Engaged now in live-stock business. Had heard quite a number express themselves at the stock yards. Some thought he ought to be hung. Some thought he was innocent and should be discharged. Some thought he ought to be tried by the court. Had not heard it discussed recently except when the trial was mentioned. Most of those he heard speak about it in the city were against him. Capt. Parker, of the police, had been on the force 15 years. Had heard case discussed considerably. In his opinion, there was a prejudice against defendant. Had charge of the station, and people would be coming in there all the time. Some would be against defendant. With the exception of one man, he had not heard anything for three or four months. They would say, if what the newspapers say is so, he ought to be hung. His district covered a large part of the city. George Shawhan testified he had lived in Kansas City since 1872. Had heard the matter discussed some little. Some he talked with seemed to be prejudiced from the newspaper reports. People that knew the facts were not prejudiced. H. C. Chiles lived in Independence. Knew defendant well. The majority he heard talk were against defendant. Had not seen many friendly to him. People thought, from newspaper reports, defendant was getting witnesses to leave the state. A. G. Williams thought the opinion generally at first was that the case against defendant was weak. Later on the newspapers created a feeling against him. Had not heard it talked of, except in a moderate way, for several months. He had heard the talk in Kansas City, Independence, and Blue Springs. The majority of the people were favorable to him at the start. Did not know what caused a change, unless it was the indictment or newspapers. Joseph Clifton, bar-keeper, had heard the case discussed at the bar and on street, and people said that, if

this man killed this man as they say he did, he ought to be hung. Various newspaper clippings from the Star and World newspapers, giving various versions of the homicide, criticising the courts, grand jurors, and juries generally, were read,—a practice well designed to promote changes of venue. We have carefully considered them, and find they are not materially different from the usual comments in such cases. Is it plain that the trial judge, who saw these witnesses, erred in denying the change? It must be borne in mind that, of the 12 witnesses who were called, Messrs. Graham and Smith simply identified the newspaper clippings, and testified to the circulation of their papers. Judge Jones not only failed to prove any prejudice against defendant, but a strong sentiment in his favor. Mr. Moore's testimony disclosed that as many of those whom he heard discuss the case, and they did not exceed a dozen in a city of 10,000 people, thought defendant could get a fair trial in Jackson county, and the others thought it would be a little hard for him to do so. Mr. Gossett could only speak from what parties who traded with him had said, and their opinions were contingent upon the truth of the newspaper accounts, and for six months he had heard nothing. Surface sold 20 or 30 newspapers a day, and nearly all his patrons were against defendant soon after the homicide; but he had heard very little about the case recently, and had seen nothing in the newspapers for six months. Hulse had been marshal of Independence for 11 years, and testified that the sentiment seemed to be against defendant in Independence and the eastern part of the county. Ex-Mayor Holmes' evidence showed about a standoff. One-half thought defendant was innocent. The other half thought he was guilty. Capt. Parker testified to statements showing a conditional opinion, to wit, that, if the newspapers told the facts, he ought to be punished. Williams thought the opinion was largely in favor of defendant at first, but had changed some since the indictment. Mr. Chiles thought the majority were against defendant; that is to say, that he was guilty. In a word, outside of three or four witnesses, the evidence tended to show a well-divided sentiment as to defendant's guilt or innocence. The remainder had opinions that he was guilty, contingent upon the truth of the newspaper articles. These articles were editorial and reportorial comments, and did not contain any evidence. After mature consideration, we are not of opinion that this evidence made out a plain prima facie case of prejudice such as would deprive defendant of a fair trial. Considering that Jackson county has a population of over 200,000 people, and the further fact that, outside of Kansas City and Independence, no adverse criticisms were shown, and there are seven other townships, we think the circuit judge properly decided as he did; and his decision should not be dis-

turbed without much more cogent proof than the record discloses.

3. It is earnestly urged by defendant that the circuit court erroneously excluded the statement made by deceased to his wife or Miss Hudspeth immediately after the shooting, and while he was yet lying in the doorway of Van Cleave's store; that, "If you had not taken that gun away from me, it would have been different." Exception was duly saved to this ruling at the time. In this connection it should be observed that the other testimony disclosed that, just after a previous altercation on that morning between deceased and defendant, deceased had a double-barrel shotgun in his hands, and was loudly asserting he would kill defendant as soon as he could get some shells for his gun; that his wife and Miss Hudspeth succeeded in getting the gun from him; that Mr. Carr came to the house of deceased, to get him to go down to the office to get a money order; that he went; and that defendant and deceased had another wordy altercation, and deceased went into Van Cleave's store, and took up two scale weights, and came out of the door with a weight in each hand, and began cursing defendant; and there was testimony that deceased was in a throwing attitude when defendant shot him. Carr, who was standing inside of the store, went immediately for Kettle, the blacksmith, who was at his shop, just in the rear of the store. Kettle came at once, and just as he got there, which would not have been more than two minutes after he heard the report of the gun, he heard deceased say to Mrs. Kesner or Miss Hudspeth, "If you had not taken the gun from me, it would have been different." Was this statement a part of the *res gestæ*? "The *res gestæ*," says Dr. Wharton, "may be defined as those circumstances which are the automatic and undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act." These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist, as we will see, of sayings and doings of any one absorbed in the event, whether participant or bystander. They may comprise things left undone as well as things done. In other words, they must stand in immediate causal relation to the acts,—a relation not broken by the individual wariness, seeking to manufacture evidence for itself." 1 Whart. Law Ev. § 259. In *State v. Sloan*, 47 Mo. 604, the defendant offered to prove that while the surgeons were dressing the wounds of Moore, for whose murder he was being tried, and immediately after the shooting took place, Moore, in speaking about the matter, said that Sloan was not in fault, that he had drawn on the difficulty by attacking him, and that, if his pistol had not hung when he went to draw it, he would have killed him. The circuit court rejected that statement, but this court reversed the ruling and held it admissible. That this statement of the deceased to his

wife or Miss Hudspeth, made immediately upon their reaching him, as he was lying where he fell, and relating to facts that had so recently occurred within the knowledge of both, was illustrative of the result they saw and he felt, cannot be doubted. From it the jury might have drawn one of two inferences,—either that “it would have been different” if he had retained his gun, in that he would have executed his threat of the morning, and killed defendant, instead of being shot by him, or, as contended by the attorney general, he would have defended himself from the assault of defendant. But, whatever the inference, it was one which the jury, in weighing all the complicated facts, should have been permitted to draw; and, in our opinion, it was a part of the *res gestæ*,—an undesigned incident of the homicide which the jury were considering,—and the circuit court erred in excluding it.

4. The court, over the objection and exception of defendant, gave the following instruction, numbered 12: “The court instructs the jury that if you believe any statements of the defendant have been proven by the state, and not denied by the defendant, they are taken as true.” That this instruction violates the fundamental principles of a criminal prosecution, we think, is apparent. In every criminal trial at the common law, the burden of proof is upon the state to establish all the essential elements of the crime charged in the indictment, beyond a reasonable doubt. An invariable concomitant of this rule is the presumption of innocence which accompanies and abides with the defendant until his guilt is established beyond a reasonable doubt. The accused is not called upon to establish his innocence, but the burden rests upon the state throughout the trial to prove his guilt, and never shifts to the defendant. That this instruction required the accused to take the stand and deny the several statements of the witnesses against him is too plain for argument. That in so doing it violated the settled law of the state is equally undeniable. No such obligation rested upon him. He had a perfect right to sit still and decline to testify at all, and no presumption of the truth of the evidence against him would arise from his failure to do so; and his silence would not authorize or justify the court in instructing the jury that, as a matter of law, his failure to deny the evidence against him raised a presumption that such evidence was true. By this instruction the court invaded the province of the jury, and decided for them the weight of the evidence and the credibility of the witnesses, whereas, under our constitution and laws, it is the exclusive right and duty of the jury to pass upon the witnesses and the weight of testimony. If this instruction be law, then the jury may be required to accept that as truth which under their oaths they may believe to be falsehood. It was a maxim of the common law, “that with respect to the question of law the jury must not

respond, but only the judges, and as to questions of fact the judges must not respond, but only the jury.” Broom, *Leg. Max.* 80; *Co. Litt.* 295b. In *Rex v. Pool, Lee, Cas. t. Hardw.* 28, it was said by Lord Hardwicke: “It is of the greatest consequence to the law of England and to the subject that the powers of the judge and the jury be kept distinct; that the judge determine the law, and the jury the fact; and, if ever they come to be confounded, it will prove the confusion and destruction of the law of England.” The right of trial by jury in criminal cases is justly regarded of inestimable value, and is imbedded in our constitution. That there are presumptions of law which the court may properly call to the attention of the jury may be conceded, but nowhere, at the common law, or under our system in Missouri, is there a presumption that any witness has testified truthfully, nor that his evidence must be accepted as true, merely because the accused does not take the witness stand and deny the evidence against him categorically. The plea of not guilty puts to the test of the jury all the evidence against the defendant, and the presumption of innocence protects him until the jury, not the court, shall find him guilty beyond a reasonable doubt. This presumption of innocence is axiomatic and elementary. Mr. Justice White, in *Coffin v. U. S.*, 156 U. S. 432, 15 Sup. Ct. 394, traces the origin of this principle of criminal law. He demonstrates beyond all cavil that this presumption of innocence is entirely distinct from the doctrine of reasonable doubt. Greenleaf lays it down that this presumption is to be regarded by the jury as matter of evidence, to the benefit of which the defendant is entitled. 1 *Greenl. Ev.* § 34. Best declares it a *presumptio juris*, whereas reasonable doubt is the result of the proof or failure thereof, and is in no sense evidence. That this instruction obliterated the presumption of innocence, and cast upon the defendant the burden of proving his innocence by overturning the evidence adduced against him, is perfectly evident. An illustration by Mr. Justice White demonstrates the antiquity of the presumption, and the necessity of the proof beyond a reasonable doubt. Ammianus Marcellinus relates an anecdote of the Emperor Julian. Numerius, the governor of Narbonensis, was on trial before the emperor, and, contrary to the usage in criminal cases, the trial was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, “a passionate man,” seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, “Oh, illustrious Caesar, if it is sufficient to deny, what hereafter will become of the guilty?” to which Julian replied, “If it is sufficient to accuse, what will become of the innocent?” It is true that under our statutes a defendant in a criminal case may testify, but the statute itself safeguards him against an instruction like this. Sections 4218, 4219,

Rev. St. 1889. The statute, in conferring the privilege of testifying, expressly provides "that no person on trial or examination nor wife or husband of such person shall be required to testify, but any such person may at the option of defendant testify in his behalf or on behalf of a co-defendant, and shall be liable to cross-examination as to any matter referred to in his examination in chief." He cannot be required to testify directly or indirectly, and his cross-examination is restricted to matters about which he has been examined in chief. It is expressly provided that his failure to testify shall not be construed to affect his innocence or guilt, nor raise any presumption of guilt, nor be commented upon or referred to by any attorney in the case, or considered by the court or jury. And yet it requires no argument to demonstrate that this instruction says to the defendant, "You must taken the stand and refute the evidence of the witnesses against you, or the court will instruct the jury that your failure to do so raises an absolute presumption of the truth of their testimony." Such an instruction is a palpable violation of the spirit and language of section 4219. Numerous cases are to be found in our Reports in which we have reversed causes for the infraction of this right of the accused under this section, and the cross-examination of defendants on matters not included in their direct evidence. *State v. Porter*, 75 Mo. 171; *State v. Palmer*, 88 Mo. 568; *State v. McGraw*, 74 Mo. 573; *State v. Graves*, 95 Mo. 510, 8 S. W. 739; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330. But we are confronted with the fact that, beginning with *State v. Musick*, 101 Mo. 271, 14 S. W. 212, this court has said upon appeal that where various statements of the defendant have been given in evidence, and he has subsequently gone on the witness stand and testified, and failed to deny the making of such statements, they are to be taken as admitted by him. It is true that, arguendo, as to the propriety of giving instructions as to the grade of offense, and as to the sufficiency of the evidence in several cases to sustain the verdict, this court did use such language; but in no case has this court, or any other appellate court, within our knowledge or research, ever sustained such language in an instruction to a jury. This court long ago cautioned trial courts against the practice of embodying passages taken from a general discussion by this court in instructions to the jury. *Hurt v. Railroad Co.*, 94 Mo., loc. cit. 263, 7 S. W. 3. The duty of an appellate court in reviewing a case is very different from that of a jury. The instruction is erroneous, and constitutes reversible error.

5. Error is also predicated upon the action of the court in refusing instruction "A" of defendant, and giving instruction No. 6 for the state. The portion of this instruction to which defendant objects is found in these words added by the court to the usual instruction on self-defense: "But to justify

the defendant on the ground of self-defense, the apprehended danger must have been apparent, impending, and one from which it must have reasonably appeared to the defendant that he could not escape otherwise than by firing the fatal shot. If it reasonably appeared to defendant that he could have escaped the apprehended danger otherwise than by shooting the deceased, then it was his duty to have done so, and he cannot be justified on the ground of self-defense." The evidence very clearly tended to prove that on the morning of the homicide defendant went to the station of which deceased was in charge as agent, and was heard to say, "Joe, I didn't do it." This was a denial of writing an anonymous letter to Mrs. Hudspeth, mother of defendant, warning her of the attentions of deceased to Miss Mary Hudspeth. Deceased was heard to denounce defendant as a liar, and to say he was going to get his gun and shoot him. He was soon afterwards seen with his gun, and swearing he would kill defendant. His wife and Miss Hudspeth took the gun from him. Afterwards, about half-past 10 o'clock that morning, defendant was seen to get off his horse and hitch him, and sit down on a block in the street in front of Van Cleave's store. After awhile deceased and a man named Carr came down to Van Cleave's store. As they approached, defendant arose, and asked deceased if he had got his gun, and told Carr to stand aside. Deceased cursed defendant, and told him he was not afraid of him, and hurriedly went into Van Cleave's store, took two scale weights off of the counter, and came out on the small porch in front, and renewed the quarrel by cursing and threatening defendant. There was evidence that he was in the act of throwing a weight at defendant when defendant shot him. The question now arising is this: Was defendant required to attempt to flee from deceased, before he could avail himself of the plea of self-defense? In *State v. Evans*, 124 Mo. 397, 28 S. W. 8, this court ruled that, when one expected another to assault him, he had a right to arm himself, and so long as he was where he had a right to be, and did no overt act and made no hostile demonstrations, he did not lose his right of self-defense, if he was assaulted and about to be killed or suffer great bodily harm; that he was not required to leave the public highway or his own premises because he was threatened. In this case defendant's life had been threatened on that morning. Deceased had refused to accept his disclaimer of the letter, but had denounced him as a liar, and told him he would kill him. He did get his gun, and was heard to swear he would kill defendant. Under these circumstances, defendant armed himself, and was sitting in front of Van Cleave's store. When deceased again approached him, he was armed, whereupon deceased again cursed him, and, suiting his action to his words, went into Van Cleave's store, and emerged

armed with two scale weights, and began to curse defendant, and, according to some of the evidence, was in the attitude of throwing one of these weights at defendant, who stood only about 10 or 15 feet distant. Under such circumstances, we think the defendant, being without fault himself, had a right, if attacked in such a manner as to furnish reasonable ground for apprehending a design to take his life or do him great bodily harm, to act upon appearances, and to defend his life, and was not required to flee from the public highway in which he had been assailed. Hence the qualification to the instruction should not have been given, and was erroneous. We find abundant authority to support our position. *People v. Newcomer*, 118 Cal. 263, 50 Pac. 406; *La Rue v. State* (Ark.) 41 S. W. 53; *Beard v. U. S.*, 158 U. S. 550, 15 Sup. Ct. 962; *Page v. State* (Ind. Sup.) 40 N. E. 745; *Williams v. State* (Tex. App.) 17 S. W. 1071; *Baird v. State*, Id. 1106; *State v. Sherman* (R. I.) 18 Atl. 1040; *State v. Evans*, 33 W. Va. 417, 10 S. E. 792; *Bohannon v. Com.*, 8 Bush. 481.

6. Another contention of the defendant is that during the morning, and after the first altercation between himself and deceased, he put a boy on his horse, and sent him to the house of a mutual friend, with the request to this friend to come to Lake City and make peace between deceased and himself. After careful consideration, we are of the opinion that this was no part of the *res gestæ*. It is not claimed that Kesner was advised of this action, and it did not in the least affect defendant's right of self-defense, which was based, not upon his own efforts to adjust the difficulty, but upon the conduct of deceased in connection with his threats, from which defendant might reasonably have apprehended a design to take his life or do him great bodily harm, and that such danger was imminent. This offer was properly denied.

7. The court did not err in excluding the evidence offered to show that deceased often visited the store of Miss Hudspeth. This had no tendency to justify the killing of deceased by defendant. If it was the occasion for the writing of the anonymous letter, still, as defendant at all times denied being the author of that letter, it afforded him no justification.

8. As to the time allowed for making the defendant's challenges, the statute is very plain. The list of jurors who have been found competent shall be delivered to the defendant 24 hours before the trial. In all cases the prosecuting attorney is required to first announce the challenges for the state, and then a reasonable time should be given defendant to make his challenges, with reference to the action of the prosecution. This must be confided largely to the discretion of the court. Ten minutes, in a matter in which the defendant is on trial for his life, is utterly inadequate, and violates the spirit of the statute.

9. The court instructed on murder in the

first degree, murder in the second degree, and manslaughter in the fourth degree. There was no error in instructing the jury, under the evidence in this case, that mere words alone, however opprobrious or insulting, could not justify defendant in killing deceased. Opprobrious epithets under some circumstances may be left to the jury to determine whether they constituted a reasonable provocation to reduce a homicide from murder in the first degree to the second degree, and from murder to manslaughter; and such expressions, coupled with an otherwise insufficient assault, may produce the provocation which reduces the offense to manslaughter, but not a protection against all punishment. The court, in the other instructions, properly instructed on manslaughter as well as other grades of homicide.

10. The instruction asked by defendant, and designated "B" was properly refused. There was no evidence tending to support the hypothesis of a withdrawal in good faith from the difficulty, after having brought on the difficulty. For the errors noted, the judgment is reversed, and the cause remanded for a new trial.

SHERWOOD and BURGESS, JJ., concur.

STORTS v. GEORGE.

(Supreme Court of Missouri, Division No. 2.
May 23, 1899.)

BANKS—INSOLVENCY—RIGHT TO SET-OFF AGAINST NOTE—TRUST FUND.

1. The maker cannot set off against a note to a bank, due when the bank made an assignment for creditors, the amount of his part payment after the assignment as co-surety of an account due by the bank to a depositor.

2. Money obtained by a note made by an insolvent bank does not, where deposited as a part of its assets, become a trust fund for the benefit of guarantors of the note who were induced by the false representations of the cashier to guaranty the same.

3. A guarantor of a note by a bank cannot set off against his own note to it, due at the time of its assignment for creditors, money paid as guarantor after the assignment.

Appeal from circuit court, Saline county; Richard Field, Judge.

Action by Com. P. Storts, assignee of the Citizens' Stock Bank, against John C. George. A demurrer to the answer was sustained, and defendant appeals. Affirmed.

This is a suit by plaintiff assignee for the benefit of creditors of the Citizens' Stock Bank, a corporation duly organized under the laws of this state, against the defendant, on two notes executed by him to said bank,—one for \$1,400, dated October 7, 1890, upon which there were several credits, and the other for \$125, dated May 3, 1894; both payable on demand to Joseph Field, cashier of said bank. The assignment was made on the 17th day of December, 1894. Plaintiff instituted this suit on the 21st day of October, 1895. The petition is in the usual form. The exe-

cution of the notes is not denied, but defendant pleads what are denominated certain equitable set-offs, which are stated by him to have originated in the following manner: On the 4th of January, 1893, defendant, as surety for said bank, joined in a bond to one Winning, treasurer of Saline county, who kept some of the public funds on deposit therein, conditioned that said bank would duly pay over said money. It is alleged that at the time of the failure Winning had in the bank \$2,396.78, and that this was due and payable at the time of the assignment; that defendant and his co-securities then and there became liable to pay the same; and that on the 4th of March, 1895, before the commencement of this suit, defendant paid his part of the liability due December 15, 1894, to wit, \$299.68. It is further charged in the answer that defendant, as surety for the bank, also signed a bond to the collector of Saline county to indemnify him against loss on account of deposits of public funds that he might make therein; that at the time of the failure the collector had on deposit in the bank \$2,186.42, which then and there became due, and defendant and his co-securities became then and there liable therefor; that defendant, before the commencement of this suit, to wit, on the 5th of March, 1895, paid to said collector \$218.60, being his part of the sum due said collector at the time of the assignment. It is also charged that when each of said bonds was signed, the bank was insolvent, and that this was known to its cashier, who, notwithstanding, fraudulently induced defendant and his co-securities to execute the same. The answer, as to the third equitable set-off, alleges that on the 15th of November, 1894, said Citizens' Stock Bank was wholly insolvent, and that this fact was well known to its cashier, but that he concealed that fact from defendant; that said bank on that day executed its note for \$25,000 to the National Bank of Commerce of Kansas City, due four months after date, bearing 8 per cent. interest, and that said cashier fraudulently represented said bank to defendant to be solvent, and abundantly able to pay said loan, and thereby induced defendant and others to make a guaranty on the back of the note as follows: "We personally guaranty the payment of the within note, and do hereby waive protest on same;" that the cashier procured the money on the faith of said guaranty, and used the same for the purposes of the Citizens' Stock Bank, when in fact the money, by reason of the insolvency of said bank, and fraudulent representations of said cashier in behalf of said bank, was held by it in trust for the defendant and his co-obligors, and that a trust attached to said fund on the 15th of November, 1894, and said fund was due to the defendant and his co-guarantors on the said 15th of November, 1894, the day it was received by said Citizens' Stock Bank; that before the institution of this suit defendant paid \$2,500 to the Na-

tional Bank of Commerce of Kansas City, and obtained a release from his liability upon said guaranty. The amounts paid to the collector and treasurer of Saline county by defendant, as above set out, and the sum paid by him to the National Bank of Commerce, are asked to be set off against the notes sued on, and there is the further prayer for such other and further relief as defendant may be entitled to receive. Plaintiff filed a general demurrer to the answer, which was sustained. Defendant declining to plead further, judgment was rendered for plaintiff for \$373.98, the amount of the notes sued on, and the defendant appealed.

Thos. Shackelford and W. M. Williams, for appellant. John A. Rich, for respondent.

BURGESS, J. (after stating the facts). Defendant insists that the answer states and the demurrer admits that the items of \$299.68 and \$218.60, sought to be set off against the demands sued on, were at the time of the assignment due and payable to the treasurer and collector of Saline county, respectively; that this money was on deposit in the bank, and at the date of the assignment constituted an existing indebtedness against it, which was then due, and could have been sued for and recovered at that time; and that, as defendant, by reason of his suretyship, was compelled to substitute his money for these deposits, he is therefore entitled in equity to be subrogated to all the rights, remedies, and securities of the creditors. No principle is better settled than that when a surety pays the debt of his principal, he, by reason thereof, becomes entitled in equity to be subrogated to all of his rights, remedies, securities, funds, liens, and equities which the creditor may have for the same debt. *Miller v. Woodward*, 8 Mo. 169; *Berthold v. Berthold*, 46 Mo. 557; *Rubey v. Watson*, 22 Mo. App. 428; *Clark v. Bank*, 57 Mo. App. 277; *Dorshelmer v. Bucher*, 7 Serg. & R. 9; *Brought v. Griffith*, 16 Iowa, 26. But the question in this case is as to whether defendant is in position, under the facts disclosed by the record, to invoke in his aid that rule. In passing upon this question we must first determine what rights or equities the treasurer and collector had in the moneys to their credit in the bank at the time of its assignment, for it is just such rights, and no more, that defendant can be subrogated to. It is not claimed in the argument that these funds were trust funds, so that it seems clear that the treasurer and collector were general creditors of the bank, and that these deposits, as all others of like character, went into, and formed part of, its general funds, and by the assignment passed to the assignee for the benefit of all the creditors of the bank, unincumbered by any liens or priorities in favor of the treasurer or collector. It may be, if the suit had been against either of them upon a note executed by him to the bank, that he could have plead-

ed any amount due him by the bank at the time of the assignment as a set-off thereto (*Smith v. Spengler*, 83 Mo. 408), but in this case it is sought to set off against a suit by the assignee on notes executed by defendant to the bank, which were due at the time of the assignment, the indebtedness of the bank to other parties, to no part of which did he become entitled to be subrogated until the conditions of the bonds signed by himself and others for the protection of the treasurer and collector were complied with by them. *Huse v. Ames*, 104 Mo. 91, 15 S. W. 965, was a suit by the assignee of an insolvent corporation on an account, and it was held that a defendant's equitable set-off, to be available, must in such case exist at the time of the assignment. The court observed: "The status of the creditors is fixed by the assignment in trust for them. If the right of set-off exists at that time, it continues as against the assignee. If there is at the time an equitable right in favor of a creditor to a set-off, or to any of the property assigned, that right is not disturbed by the assignment, but the equitable right must exist at that time; and this is true whether the creditor is or is not a surety. Here the defendant had no equitable set-off at the date of the assignment, and he therefore has none now." See, also, *Homer v. Bank*, 140 Mo. 225, 41 S. W. 790. No right of set-off existed in favor of either the treasurer or collector as against the bank at the time of its assignment, because they nor either of them owed it anything; therefore defendant acquired none. Had the right of set-off existed in favor of the treasurer and collector against the bank at the time of its assignment, then defendant, by being subrogated thereto, would have acquired such right, and could have pleaded it as an equitable set-off to this suit, if it accrued before its institution, although after the assignment. *Huse v. Ames*, supra; *Homer v. Bank*, supra. But no such right existed in favor of either of them. Moreover, defendant, by being subrogated to the rights of the treasurer and collector, is entitled to his pro rata of the bank's indebtedness to them, and their equities in connection therewith; but, as he did not, by reason thereof, acquire the right to have such indebtedness set off against the notes sued upon in this case, his right to do so must be regarded as extending no further back than the time of the satisfaction of the bonds, which was subsequent to the assignment. Furthermore, in no event could he have been subrogated to more than his pro rata part of the indebtedness of the bank to the treasurer and collector, and he and others, having satisfied this indebtedness, were jointly entitled to be subrogated to it as a whole, and not to any particular part thereof. It could not be portioned out among them, and a separate action maintained by each one for his proportionate part; and for like reason defendant could not plead his pro rata part as a set-off in this case. A part of the debts

could not have been assigned by the persons to whom due, after the assignment, without the consent of the assignee (*Burnett v. Crandall*, 63 Mo. 410), and certainly no greater right could be acquired by being subrogated thereto. But it is claimed by defendant, if he is not entitled to be subrogated to the creditors' rights in the deposits, but must stand upon the implied promise to reimburse him for money paid after the assignment as surety for the bank, but before the commencement of the suit, that he is entitled to plead the same as a set-off. We are not, however, impressed with the logic of this contention. There was no assignment by the creditors, or either of them, to defendant, of their demands; hence it is only by being subrogated to their rights that defendant could plead them as a set-off to this suit. Indeed, the answer is framed upon this theory alone.

With respect to the third equitable set-off, it is claimed by defendant that the money obtained from the National Bank of Commerce, to wit, \$25,000, on November 15, 1894, was upon a note the payment of which was guarantied by himself and others, which guaranty was obtained by fraud practiced upon them by the cashier of the Citizens' Stock Bank, and, as the money thus obtained went into the coffers of the bank, and helped to swell its assets, by reason of said fraud it became a trust fund for the use of defendant and his co-guarantors, and, he having paid his pro rata part of the money thus obtained, to wit, \$2,500, a right of action accrued to him as soon as the money was obtained. We are unable to see how the money obtained by the Citizens' Stock Bank, upon a note whose payment defendant and others were induced to guaranty by reason of false and fraudulent representations, when deposited in said bank became a trust fund for their benefit; and no reason is given in defendant's brief, why it is so. And, as defendant as guarantor paid the money for the Citizens' Stock Bank, after the bank assigned he cannot set off the amount paid against the notes sued on. This question was before this court in *Huse v. Ames*, supra, in which it is said: "While the insolvent is not bound to pay otherwise than according to his contract, it is considered no hardship that he should accept payment of a demand owing to him before maturity. Hence it has been often ruled in the state of New York, and is now the law of this state, that, if the claim against the assignee was due at the date of the assignment, then there is an equity because of the insolvency of the assignor, and the debt so due may be set off against the claim in favor of the assignee, though the claim held by the assignee was not due at the date of the assignment. *Smith v. Spengler*, 83 Mo. 408; *Smith v. Felton*, 43 N. Y. 419; *Smith v. Fox*, 48 N. Y. 674; *Coffin v. McLean*, 80 N. Y. 560. But the claim against the assignee must be due at the date of the assignment, and, if it is not then due, there is no equitable set-off. Keep

v. Lord, 2 Duer, 78; Myers v. Davis, 22 N. Y. 489; Chipman v. Bank, 120 Pa. St. 86, 13 Atl. 707." "A demand cannot be set off because of the insolvency of the plaintiff in equity any more than at law, unless it existed against the plaintiff in favor of the defendant at the time of the commencement of the suit, and had then become due. Reppy v. Reppy, 40 Mo. 572; Spaulding v. Backus, 122 Mass. 553; Pom. Eq. Jur. § 704; Lockwood v. Beckwith, 6 Mich. 168. To justify a set-off against an assignee for the benefit of creditors, there must be a present debt due at the date of the assignment. In this respect a surety stands on no better footing than any other creditor. The defendant had no such debt against the assignor at the date of this assignment. Indeed, he had no such debt when this suit commenced." See, also, Homer v. Bank, supra. Our conclusion is that the demurrer was properly sustained, and that the judgment should be affirmed. It is so ordered.

GANTT, P. J., and SHERWOOD, J., concur.

DUFFIELD et al. v. SPENCE et al.

(Court of Chancery Appeals of Tennessee.
April 21, 1897.)

PUBLIC LANDS — STATE GRANTS — ENTRY — BOUNDARIES — DESCRIPTION — NATURAL MARKS — FRAUD — ESTOPPEL — HARMLESS ERROR.

1. A grant based on a valid special entry relates back to, and covers the land embraced in, the entry.

2. Where the entry and the grant call for natural and well-known marks, they will control over the call for so many poles, so that the grantee obtains title to the extent of the natural calls, though to reach them embraces more poles than are called for in the survey, or though the area thus embraced exceeds the stated number of acres in the grant.

3. A call in a survey as "thence south 1,850 poles, crossing said creek to Cumberland Mountain; thence along said mountain,"—does not mean to go to the top of the mountain, and then pursue a course along its top, or that, when a stream was reached, it would be followed up to its head, and then descended on the other side as the top of the mountain might appear, but means a line to the foot of the mountain, and then to follow the general line of the mountain.

4. Under Acts 1829, c. 85, § 1, providing that any person may enter, and obtain grants for, any quantity of land, not exceeding 5,000 acres, north and east of a certain line, the state is the only one that can complain if a person obtained more than 5,000 acres under his grant issued on a special entry, and following its calls.

5. Fraud in obtaining a grant of land from the state cannot be urged where the grant is not assailed for fraud in the petition.

6. A purchaser, under probate proceedings, of the land purporting to be embraced in a certain grant from the state, is not equitably estopped from claiming all the land embraced in the calls and boundaries of the grant because the remote grantors had sold the land as containing 5,000 acres, and the grant was treated and sold and confirmed, under the probate proceedings, as containing only 5,000 acres.

7. It is not reversible error for a chancellor to reject evidence offered to sustain an immaterial issue.

8. The exclusion, by a chancellor, of evidence offered to show the ancient boundary of a state grant was not prejudicial, where such boundary was otherwise established by the calls for well-known objects.

Appeal from chancery court, Fentress county; T. J. Fisher, Chancellor.

Bill in chancery by Bethune Duffield and others against J. F. Spence and others. From a decree dismissing the bill on the merits, complainants appeal. Affirmed.

Smith & Smith and J. L. Rogers, for appellants. Jourolemon, Welcher & Hudson, for appellees.

WILSON, J. The bill in this case was filed February 20, 1893, to establish the title in complainants to certain lands in Fentress county, and to remove a claim of defendants, as a cloud thereon. Complainants claim title under grants numbered 4,713, 4,737, 4,739, and 4,740, issued by the state of Tennessee to John B. McCormick. Grant No. 4,713 was issued August 1, 1836; and the other three, August 23, 1836. Grant No. 4,713 was based upon entry No. 725, dated February 22, 1836, and which purports to have been surveyed April 29, 1836. Grant No. 4,737 was based on entry No. 683, made July 27, 1835, and surveyed April 27, 1836. Grant No. 4,739 was based upon entry No. 683, dated July 27, 1835, and surveyed April 28, 1836. Grant No. 4,740 was based upon entry No. 714, dated October 26, 1835, and surveyed April 28, 1836. There is no difficulty in locating these entries and grants, each calling for 5,000 acres of land; and it is conceded in the record that complainants deraign title, through intermediate parties, from John B. McCormick. Defendants, it is conceded, deraign title under grant No. 6,402, issued October 11, 1837, to James Clemens, assignee of Orion Clemens and others, based upon entry No. 547, dated October 18, 1830, and surveyed September 29, 1837. This grant purports to grant to the grantee 5,000 acres of land. It is seen, therefore, that complainants claim under older grants than the one claimed under by the defendants. But these older grants are based upon younger entries than the one upon which the grant of defendants issued. This being so, nothing more appearing in the case, the law is well settled that the younger grant, based upon the older special entry, would carry the better title, where there was conflict in the grants. This is not disputed. One of the main contentions is over the location of grant No. 6,402. It is insisted by the complainants that it can be located, under its calls and the calls of the entry on which it is based, so as to embrace 5,000 acres, without conflicting with the calls and location of their grants, and that, to locate it as is insisted by defendants, it would embrace 45,000 instead of 5,000 acres, and cover their land. This, they urge, would be grossly inequitable, as well as make

the grant violate the statutes of the state then in force, which limited the amount of land that could be entered and granted to one person to 5,000 acres. Chancellor Fisher heard the cause October 24, 1895. He held that the title of the defendants to the lands described in the bill and answer was superior to that of complainants, being based upon entry No. 547, which is special, and that grant No. 6,402, which follows in its calls, related back to its date. He held that the north boundary line of entry No. 547, and of grant No. 6,402, based thereon, is the south boundary line of the McIver 40,000-acre survey, and that this line is as shown on the map (Exhibit No. 1 to C. R. Schenck's deposition); that this McIver line lies at the foot of the main Cumberland Mountain, and crosses the East Fork of Obed's river near Jacob Choate's place, following near the base of the general contour of said mountain, and as surveyed and marked prior to 1830. This holding included in grant No. 6,402 all the lands claimed by complainants under their grants, and resulted in dismissing the bill, with costs. Upon the hearing, defendants objected to certain questions propounded to some witnesses of complainants, and their answers thereto, and their objections were sustained, and to this action of the chancellor there was an exception taken at the time. These questions and answers, or the purport of the testimony embodied therein, will be noticed hereafter in this opinion.

The complainants prayed and obtained an appeal from the decree of the court to the supreme court, and have assigned errors. The errors assigned are: First. That the chancellor erred in holding that the title of defendants to the land in controversy was superior to that of complainants, and in dismissing the bill. Under this assignment it is argued that he should have held that the entry on which the grant of defendants was based was void to the extent that it embraced more than 5,000 acres, the amount specified in the entry, and moreover that, inasmuch as complainants entered, surveyed, and had their grants issued before the survey of the entry upon which the grant of defendants was based, he should have held their title to be superior. It is further urged under this assignment that the original owners of grant No. 6,402, under which defendants claim, always conceded that it only included 5,000 acres, and never set up title to any more land; and the inference intended to be advanced, we presume, is that the doctrine of estoppel applies. Second. This error relates to the action of the chancellor in ruling out questions from 9 to 13 and from 20 to 23, inclusive, in the deposition of D. C. Travis, a witness for complainants. It is said that this was error because the proof tended to show that the original grantee under grant No. 6,402 claimed that it only included 5,000 acres, and that this was an issue raised by the pleadings. Third. This error relates to the action of the court in excluding questions 11,

12, and 13 in the deposition of G. W. Scroggins, and questions from 2 to 5, inclusive, in the deposition of J. C. Phillips. It is urged that this excluded evidence was competent because it tended to prove the ancient boundary of grant No. 6,402, which was an issue raised by the pleadings. Fourth. This error is directed to the finding of the chancellor that the north boundary line of entry No. 547, and grant thereon No. 6,402, is the south boundary line of the McIver survey or grant, because this finding includes in grant No. 6,402 45,000 instead of 5,000 acres, the number of acres it calls for. Fifth. The chancellor erred in holding that the McIver line, as set out in the grant, ran east from the point marked on the map (Exhibit No. 1 to C. R. Schenck's deposition), because he should have held that said grant ran southwardly from this point, with the Cumberland Mountain, to the head of the East Fork Valley, and thence northwardly, with the Cumberland Mountain as a natural boundary, including said valley, and that the grant of respondents only ran north to the Cumberland Mountain south of said Valley of the East Fork.

As before stated, one of the main points of controversy in the case is over the location of grant No. 6,402, and the difficulty with respect to its location grows out of a difference as to the correct location of one of the lines of the McIver grant or survey for which it calls. In order to understand the exact nature of the dispute on this point, it is necessary to state or recite the calls of the McIver grant or survey, and those of grant No. 6,402, and the entry on which it is based. January 4, 1795, the state of North Carolina granted to Srokely Donaldson and William Terrel 40,000 acres of land. This grant describes the land as lying and being in our Middle district, on Roaring Spring creek, a large branch of Obed's river, on the north side of Cumberland Mountain, in a cove of said mountain known by the name of "Donaldson's Cove," beginning on two white oaks, sugar tree, and poplar, on the north bank of said creek, near a path that leads from Coyatte Landing, on the Tennessee, to Obed's river, below a salt spring including the same; "running then north 1,800 poles to a stake; then west 3,300 poles to a stake; then south 1,850 poles, crossing said creek, to Cumberland Mountain; then along said mountain, the various courses thereof, as a natural boundary, to the point of a spur south of the place of beginning; then north 100 poles to the beginning,—as by the plat hereto annexed doth appear, together with all wood, waters, mines, minerals, hereditaments," etc. It is conceded in the bill that the title to this body of land passed from the grantees, Donaldson and Terrel, to one John McIver, and that thereafter it was known and called the McIver grant or survey. Entry No. 547, on which grant No. 6,402 issued, is as follows: "State of Tennessee, Fentress County. By virtue of an act of the assembly in such cases made and provided, Jas. A. H. Lampton, Orion

Clemens, and Benjamin Quarls enter 5,000 acres of land in said county, on Cumberland Mountain, on the waters of the East Fork of Obed's river, beginning at a point, one mile east from the southeast corner of Overton county, as made by Col. Douglass, of Williamson county, in his second survey of said county of Overton, viz. the corner made at the termination of the line running north, $28\frac{1}{2}$ degrees east, from Johnson's stand, running west to the old line of Overton county, as run by Jonathan Douglass; thence northwardly with said line to the south boundary line of McIver's 40,000-acre survey; thence eastwardly with the said south boundary of said survey to a point due north from the beginning; thence south to the beginning." This is dated October 18, 1830, and signed, "John M. Clemens, Locator." The survey of this entry is as follows: "State of Tennessee, Fentress County. By virtue of entry 547, dated 18th day of October, 1830, I have surveyed for James Clemens, as assignee of Orion Clemens and others, 5,000 acres of land in said county, on the waters of the East Fork of Obed's river, beginning on a white oak one mile east from the southeast corner of Overton county, as made by Col. Douglass, of Williamson county, in his recent survey of Overton county, viz. the corner made at the termination of the line running north $23\frac{1}{2}$ degrees east, from Johnson's stand; thence west 640 poles to a stake in the old county line, as run by Jonathan Douglass, of Overton county; thence north, $23\frac{1}{2}$ degrees west, with said line 1,375 poles to a stake in the line of McIver's 40,000-acre survey; thence east with the various courses of McIver's line, being a natural boundary, in all, when reduced to a straight line, 1,175 poles, to a stake in said line, at a point due north from the beginning; thence south 1,230 poles to the beginning,—plating out 2,200 acres, prior claims. Surveyed Sept. 20th, 1838. [Signed] S. M. Scroggins, Deputy Surveyor for Fentress County." October 11, 1838, Gov. James K. Polk issued grant No. 6,402 to James Clemens, Jr., for the land described in the above survey, and this grant defines and bounds the land as it is in the survey. The grant, as to the entry and survey, designates the amount of land as 5,000 acres. It will be observed that the entry, the survey, and the grant all call for the south boundary line of the McIver survey.

Preliminary to what is further to be said, it is proper to state that it was agreed by the parties on the hearing in the court below, and which agreement is embodied in the record, that the southeast corner of Overton county, and the lines run by Col. Douglass and Jonathan Douglass, called for in entry No. 547, were then, and are now, well-known and notorious objects.

It is manifest, we think, from the record before us, that the McIver grant was surveyed, and its lines, and especially its line relating to entry No. 547, and grant No. 6,402 based thereon, were located before said entry

was made. It is further clear from the evidence that the line of the McIver grant, relating to the issue here, was definitely located and known to the people living in that immediate vicinity, and that its location was as found by the chancellor. If this be conceded,—which, it is proper to state, complainants do not concede,—this state of facts is presented, and on it complainants insist that their title is superior: The surveys on which the grants of complainants were issued were made before entry No. 547 was surveyed, and before its grant No. 6,402 was issued; and the proposition is that, under the law as it then stood, the priority of their surveys, their entries, and their grants, with respect to the survey of the prior entry, No. 547, and the issuance of the grant thereon, gives them the better title. In support of this position the act of 1829, c. 85, and the act of 1824, c. 22, are cited. Under the former act, it is said, it was unlawful for any person to enter and obtain a grant for more than 5,000 acres. Under the latter act, it is alleged, it was provided that "in all cases where an entry may be made, the calls of which may include more than the quantity embraced in the entry, it shall be the duty of the surveyor, in surveying the same, to pay due regard to the special point of beginning called for in said entry, and in surveying same, pursue the call of such entry, so as to include the quantity called for; and in making out the certificate of survey, he shall certify the facts, and record such survey with conformity thereto." It is further said that by section 12 of this act it was made unlawful for any entry taker to receive any entry for land more than twice as long as wide, and no survey was to be made more than twice as long as wide, unless bounded by the land appropriated or by natural boundaries. The argument is that these laws were in force at the time these entries and grants were issued, and that, if their provisions had been observed, the land embraced in the grants of complainants would not have been interfered with, and the Clemens grant contained its full complement of 5,000 acres. The proposition is thence deduced that the lands covered by the grants of complainants having been appropriated by surveys and grants before there was any survey of defendants' entry, leaving their entry No. 547 so that it could be surveyed, under the law, in such a way as to give the defendants the quantity of land called for in their entry without interfering with the grants of complainants, the grant of the defendants, to the extent it covers land surveyed and granted to complainants, is void. This is but another mode of stating the rule asserted, that a prior survey of a younger entry, accompanied by the issuance of a younger grant thereon, will, where they conflict, give the better title. An examination of the acts cited will show that the first section of the act of 1829 (chapter 85) provides "that it shall and may be lawful for any per

son or persons to enter and obtain grants for any quantity of land, not exceeding 5,000 acres, north and east of the congressional reservation line, and north of the Tennessee river." The act of 1824, c. 22, also refers to entries for vacant lands in the several counties in this state north and east of the congressional reservation line, and north of the Tennessee river, and in its first sections contains the directions above stated. In the second section of the act it is provided "that in all cases of interference between entries, made under the provisions of the aforesaid act, and between such entries and any old entries or grants, made and issued under the law of this state, either party shall have the liberty of filing a caveat thereto, as heretofore, subject to the same rules and regulations, and to be proceeded on and determined in the same way, in which similar proceedings are decided and acted on, under existing laws, in regard to caveats; and caveats may hereafter be filed, either in the county or circuit courts." This act of 1824 was supplemental to the act of 1823, c. 49, to establish offices for receiving entries for the vacant lands in the several counties of this state lying east and north of the congressional reservation line, and north of Tennessee river. *Whitney's Land Laws*, 308, 315, 316. Section 29 of chapter 1 of the act of 1819 contains, among others, the following provisions: "And if any survey contains more land within its line, than one-tenth more than the quantity called for in said survey, the quantity exceeding said addition of one-tenth, shall be deemed vacant land, and shall be thrown off on the second line by the owner in one tract; nor shall any surveyor make any entry, or survey, for more than 5,000 acres in any one tract; nor shall the register, secretary, and governor issue any grant, which calls for a larger quantity than 5,000 acres, and if it should appear that any survey, or grant, should be made, which calls for a larger quantity than 5,000 acres, the same shall be null and void, and such grant shall not be admitted as evidence in any court of record in this state." The next section makes it indictable for the principal or deputy surveyor to fail in any of the duties prescribed by the act, and subjects him to amercement and deprivation of his office, and, in addition, renders him incapable of taking it again, and also liable to any party injured, in damages.

It is insisted by complainants that their right, under the state of facts presented, is not an open question in this state; and they cite the cases of *Webb v. Haley*, 7 Baxt. 600, and *Berry v. Wagner*, 13 Lea, 591. In the former case, Judge Sneed, speaking for the court, said: "We apprehend, therefore, that while the title lies in embryo, in the mere primitive form of a survey, the provisions of Act 1819, c. 1, § 29, would apply, and, prior to the issuance of a grant, any intervening en-

terer, by entering the excess, might obtain a valid grant therefor. But, if the land has actually been granted upon the erroneous survey before any such intervention, then the matter is concluded, as to third parties, and the state alone can complain; and, in the absence of any special and appropriate proceeding for avoiding the grant of the excess, the right of the first grantee is the better right." He cites *Bowman v. Bowman*, 3 Head, 48. Judge Cooper, in *Berry v. Wagner*, supra, said: "The general rule is that a grant, being a matter of record, cannot be impeached and declared void in a collateral proceeding, not between the parties thereto, except by some evidence of like grade and dignity, or by facts apparent on the face of the grant. And, therefore, in ejectment between adverse claimants of land, evidence is not admissible to show that the grant upon which the interest of one of the parties depends was obtained by fraud. *Smith v. Winton*, 1 Tenn. 230; *Curle v. Barrel*, 2 Sneed, 63." In *Curle v. Barrel* the court said: "A person claiming title in virtue of a subsequent entry and grant, with notice of a prior grant which remains in force, has no such interest as will entitle him to litigate." "Entries and grants," says Judge Cooper in *Berry v. Wagner*, supra, "are void, and may be resisted on a trial in ejectment, wherever there is a want of property in the grantor, or want of power in the officers appointed by the government to receive the entries or issue the grants. *Polk v. Windel*, 2 Tenn. 433. It was so held where the entry and grant were of lands reserved for the Indians before these lands were opened for entry (*McLemore v. Wright*, 2 Yerg. 326); and where they were of lands in one district by an entry taker only authorized to enter lands in another district (*Crutchfield v. Hammock*, 4 Humph. 203); and where they were of lands entered in an office which is vacant or closed by law (*Roach v. Boyd*, 1 Sneed, 135; *Woodfolk v. Nall*, 2 Sneed, 674)." "This court," continues Judge Cooper, "has reached the same conclusion in construing an analogous statute" (referring to *Webb v. Haley*, 7 Baxt. 600), and adds: "That act, like the one before us [the act before him was the act of North Carolina of 1777, c. 1, which had been held to be in force in this state], is silent as to the error condemned, when it has passed into a grant. This court held that prior to the issuance of the grant any third person might, by entering the excess of land, obtain a valid title therefor, but that after the land had been granted, no third person having intervened, the state alone could complain." It is to be noted that the act of 1819, c. 1, is entitled "An act making provision for the adjudication of North Carolina land claims, and for specifying the same by an appropriation of the vacant soil south and west of the congressional reservation line, and for other purposes," and hence, in terms, at least, is not applicable to lands lying north and east of

the congressional line. "It is the established doctrine in this state," says Chief Justice Nicholson in *Brummett v. Scott*, 4 Helsk. 319 et seq., "that, in an action of ejectment, an elder entry with a younger grant will prevail against a younger entry with an elder grant. *Parrish v. Cummins*, 11 Humph. 297. The entry is in the nature of a contract of sale by the state to the enterer, and, when the evidence of this contract is placed upon the books of the entry taker, it operates as notice to all subsequent purchasers by entry, the entry taker's book being regarded as a public record. The reason of the rule, therefore, that an elder entry with a younger grant will prevail against a younger entry with an elder grant is that, the subsequent enterer being affected with notice, his younger entry is fraudulent and void as to the older enterer. Hence the importance attached to the dates of entries in such controversies. Ever since the case of *Reld's Lessee v. Dodson* (decided in 1809) 1 Overt. 396, it has been held that 'an entry taker's book is a record, and that parol evidence is not admissible to show an alteration or erasure therein, or that an entry was put on the record after the date expressed in the record itself.'" In other words, a grant based upon a valid special entry relates back to and covers the land embraced in the entry. *Wood v. Elledge*, 11 Helsk. 612; *Sampson v. Bone*, 4 Helsk. 704, 706. In the early days of the state, Judge White says: "It is not, in my opinion, of the essence of a grant that an actual survey should have preceded it. Though no survey was ever in fact made, if the land be so described in the grant that it can be identified and its boundaries ascertained, it ought to hold the land." *Smith v. Buchanan's Lessee*, 2 Overt. 306.

Entry No. 547, upon which grant No. 6,402 issued, is, under all the authorities, a special entry; and the cases, without exception, we believe, hold that the grant in such cases relates back to the date of the entry. We take it that the law is equally well settled that where the entry and grant call for natural and well-known monuments, objects, or marks, they will control over the mere call for so many poles, and that the grantee will get title to the land to the natural calls, although to reach them embraces more poles than are called for in the survey. In other words, a line calling to run so many perches or poles to some natural or well-known object will be extended to the object, although the distance greatly exceeds the poles called for, and although the area thus embraced in the grant may transcend the estimated or stated acres in the grant. *Fowler v. Nixon*, 7 Helsk. 719 et seq., and authorities cited. Nor can any one object to the excess, however great, except the state. Authorities supra. In the case of *Fowler v. Nixon*, supra, the grant called for 2,000 acres. Under the calls as run, it embraced 15,000 acres. The scheme or system of this state seems to have been based

upon the idea of protecting the holder,—special enterer,—and of not making him responsible for the error of the surveyor in running a younger entry into the older one. 3 Meigs, Mil. Dig. p. 1762, § 1817 et seq. It seems, also, to be settled that the survey of the younger entry before the elder one does not affect the right of the latter. And if this be so, and the doctrine of relation between the grant and its entry be sound, the contention of complainants, that they have the better title because their entry was first surveyed and their grant prior in its issue, cannot be maintained. 3 Meigs, Mil. Dig., supra, and authorities cited.

The next contention of complainants is that the grant of defendants does not follow its calls. It is said that, after getting to the McIver line, the call is: "Thence with the various courses of McIver line, being a natural boundary, in all, when reduced to a straight line, 1,175 poles, to a stake in said line at a point due north from the beginning; thence south 1,200 poles to the beginning,—plattling out 2,200 acres of prior claim." The insistence is that when the grant, as respondents want to locate it, gets to McIver's line, they do not follow any "natural boundary." This insistence ultimately rests upon the proposition that the McIver survey, if located at the point of contact with grant No. 6,402, as fixed by the chancellor, was surveyed and located in violation of its calls. The McIver, Donaldson, and Terrel grant from North Carolina is thus located with respect to the line controversy: "Thence south, 1,850 poles, crossing said creek, to Cumberland Mountain; thence along the said mountain, with the various courses thereof, as a natural boundary, to the point of a spur south of the place of beginning; then north 100 poles to the beginning." The argument is that the call "thence south 1,850 poles, crossing said creek, to Cumberland Mountain," meant to go to the top of the mountain, and that the next call meant to pursue a course along its top. Hence it is insisted that when, in pursuing this course, Obed's river was reached in making this line, it should have been run up this river to its head, and then down the other side opposite where the line started up, instead of going directly across to the foot of the mountain. Under this method this line would have been some 60 or 75 miles in length, and really, under the contention of counsel as to how this line should be surveyed, following up one side and down the other of all the streams to be met, would make the line some 500 miles in length. We are of opinion that this contention is not well founded. The McIver survey or grant called to go to the mountain, and not to the top of the mountain, and thence to follow the general line of the mountain. And, in our opinion, it did not mean that, in locating this line, when a stream was reached it would be followed up to its head, and then descended on the other side,

as the top of its cliffs might appear. But, however this may be, the McIver line, from the proof, was located as the chancellor fixed it, and seems to have been a well-known line and object, before any of the entries and surveys and grants in this case had any existence. Indeed, J. B. McCormick, from whom complainants deraign title, conveyed by deed a tract of land, June 19, 1839, to Austin Choate, and this deed calls for the McIver line; and the Choate tract runs to the McIver survey at the point, and locates the McIver survey or line as it is located in the decree of the chancellor. The evidence, we think, conclusively settles the question as to the anterior location of the McIver survey and line as it is located by the chancellor.

It is argued that this holding of the chancellor, if affirmed, will nullify the act of the legislature under which those grants were issued. The act is that "it shall and may be lawful for any person to enter and obtain grants for any quantity of land, not exceeding 5,000 acres, north and east of the congressional reservation line, and north of the Tennessee river." This argument proceeds on the theory that, while the entry of James Clemens (entry No. 547) is special, it is special only as to 5,000 acres authorized under the act to be granted to one person. We cannot assent to this argument. If said Clemens perpetrated a fraud on the state, and got, under his grant issued on the special entry, and following its calls, more than 5,000 acres, the state is the only party that can complain. The authorities before cited settle this point. In addition, the bill in this case is not framed with reference to assailing this grant for fraud in its obtention. If the state was in court, seeking to set aside this grant, as to its excess over 5,000 acres, on the ground of fraud, the question would be presented, and how it ought to be decided in such an event it is not at all necessary for us to indicate.

It is next insisted that James Clemens, to whom grant No. 6,402 was issued, and John M. Clemens, to whom the grant passed, all along dealt with it as only containing 5,000 acres, and not the large quantity now contended for. This appears to be so,—at least until about the war. August 23, 1840, James Clemens sold the land in this grant to John M. Clemens for 5,000 acres, along with the land in another grant calling for 5,000 acres. In his deed he uses this language: "Both of the above-described tracts of land, taken together, amount to 10,000 acres, be the same more or less." After the death of John M. Clemens, his heirs sold his lands in Fentress county, under proceedings instituted in the county court of that county. This grant, No. 6,402, in that proceeding, under the proof, was treated and sold as containing 5,000 acres, and the price fixed on it at 10 cents per acre. The sale of it at this price, and as containing 5,000 acres, was confirmed at the December term of that court, 1853. We do not think these facts are controlling. The purchaser

at that sale, nothing more appearing, got the land embraced in the boundaries of the grant. The opinion of witnesses could not control or change the fact as to the number of acres actually contained in it. So far as we can see from this record, no witness speaking in that case pretended to have run and located the lines of said grant, and in his evidence exhibited a plat of survey designating, identifying, and locating the particular land sold by the court as the land embraced in grant No. 6,402. In fact, it appears that all parties presumed, as the grant called for 5,000 acres, that it contained that number. Whether there were more, no one seemed to concern himself to find out at that time. These facts, in our opinion, neither constitute an equitable estoppel on the purchasers at said sale, or their privies, from insisting upon claiming all the land embraced in the boundaries of the grant, nor do they have the effect of limiting the grant to 5,000 acres, provided its calls rightfully embrace more.

The action of the chancellor in excluding questions 9, 10, 11, 12, 13, 20, 21, 22, and 23, and the answers thereto, in the deposition of D. C. Travis, is assigned as error. The bill charged that James Clemens, to whom grant No. 6,402 was issued, always treated it as containing 5,000 acres; that when he deeded it to his father, John M. Clemens, he conveyed it as containing 5,000 acres; and that the heirs, in selling it, after the death of John M. Clemens, under the county court proceedings, treated it as embracing only 5,000 acres. This was denied in the answer, and thus an issue was made as to the fact as to the quantity of acres embraced in the grant, under the understanding of the parties owning the grant. The evidence, it is claimed, was pertinent and relevant to the issue thus made in the pleading. We are inclined to the opinion that the evidence was pertinent and relevant under this issue, as thus made in the pleadings. But the real question of concern is, was the issue, as made, pertinent or material to the real substance of the controversy? We think not. This being so, the evidence, while, in a sense, pertinent and relevant under the pleadings, was immaterial, in so far as the real issue was concerned. It is not error—at least, reversible error—for a chancellor to disregard or reject evidence adduced to sustain an immaterial averment in a bill, although it may be denied in the answer. In addition, these questions and answers, in effect, sought the opinion of the witness as to the facility and opportunity which Abner Phillips, Hiram Millsaps, and John Linder had to know, when they fixed, in their affidavits or evidence in the county court proceedings in which this land, with others, was sold, the acreage in this grant. This is, to say the least, a very unsatisfactory sort of evidence. The witness does not pretend that these witnesses ever surveyed the grant or located its boundaries.

It is next assigned as error that the chanc-

cellor was in error in excluding the evidence of one G. H. Scroggins, contained in certain questions propounded to him, and the answers thereto, and also certain questions and answers to one J. C. Phillips. This evidence is admissible and competent, it is insisted, because it tended to prove the issue raised in the pleadings as to the ancient boundary of grant No. 6,402. We are of opinion that there is no reversible error in this action of the chancellor. It is doubtless true that James Clemens and his father, John M. Clemens, to whom he sold, regarded and thought this grant contained only 5,000 acres. It is manifest that the heirs, in having it sold under the county court proceedings before referred to, dealt with it as a grant containing 5,000 acres. But these facts can have but little, if anything, to do with fixing the boundaries of the grant. These were, for the most part, wild, unoccupied mountain lands. The well-known objects were the corners of surveys, with respect to the Overton county line, established by Col. Douglass and Jonathan Douglass, as to one point of contact of the grant, and the line of the McIver survey as to another. These, under the proof in this case, were well known. These are the controlling facts, in our opinion, in this case. The fact that the grant, under its legal calls, based on the calls of its entry, embraced 45,000 acres, if such be the fact, instead of 5,000 acres, does not invalidate the grant, at the instance of a third party, nor does it give him a status in court to complain of the excess. *Fowler v. Nixon*, supra. In this case 15,000 acres passed, instead of 2,000, called for in the grant.

It need only be stated that what is herein said is not in contravention of the case of *Webb v. Haley*, supra. That case was decided under the act of 1819, c. 1, which, in express terms, made a grant void, as to the excess allowed in the grant to one person, where the excess exceeded one-tenth more than the permissible acreage; and that act had reference to the lands of the state south and west of the congressional reservation line.

It is said that the insistence for the present construction of this grant is an afterthought, and is the conception of speculators in land. It is doubtless true that defendants bought because of the profits supposed to be possible in the investment. We are not able to see from this record that the complainants occupy any other or higher ground, if there be a higher. All the parties, we presume, as they had the right to do, bought because they hoped to get the land, and in some way derive a profit from their purchase. The question, at last, is one of cold, unbending land law, and is to be decided, under our decisions and statutes, as construed, irrespective of the motives of the respective speculators in these lands. We feel constrained, under our view of the law as settled in this state, to hold that there is no reversible er-

ror in the decree of the chancellor, and that it must be affirmed, with costs.

BARTON and NEIL, JJ., concur.

Affirmed orally by supreme court, November 15, 1898.

*SMITH et al. v. CAIRNS.

(Supreme Court of Texas. June 5, 1899.)

WILLS—CHARGING LEGACIES ON LAND.

A will providing that testator's debts shall be paid out of his estate, and that a certain sum shall be spent for his monuments, and giving to his only heir his homestead and \$20,000, and reciting, "After the above bequests and expenses are paid in full, I give and devise," following which are several general legacies, and then empowering his executors, if necessary to pay his debts, to sell his real estate, except the homestead, charges the legacies on the real estate except the homestead, as well as on the personalty.

Error to court of civil appeals, Second supreme judicial district.

Application of C. R. Smith and others, executors of L. G. Cairns, deceased, for an order to sell land for payment of legacies. The order was granted, and Mahala F. Cairns appealed. The court of civil appeals reversed it (49 S. W. 728), and said executors bring error. Reversed.

Potter & Potter, for plaintiffs in error. Matlock, Cowan & Burney, for defendant in error.

WILLIAMS, J. This proceeding originated in the county court of Cooke county by an application of plaintiffs in error, who are the executors of the will of L. G. Cairns, deceased, for an order renewing a former order of the court, authorizing them to sell certain land of the estate for the purpose of paying pecuniary legacies bequeathed by the will of the decedent. The application was resisted by defendant in error, who was the adopted daughter and is the only heir of the decedent, on the ground that by the law the lands which descended to the heir are not charged with the payment of the legacies, and that no such charge had been imposed by the will. The objections were overruled, and the order of sale was granted, both in the county court and in the district court, to which defendant in error appealed; but in the court of civil appeals, to which a further appeal from the judgment of the district court was taken by defendant in error, that judgment was reversed, and judgment was rendered denying the order applied for, the court sustaining the two propositions of defendant in error (1) that the will of the decedent did not charge the land in question with the payment of the legacies, (2) that the law does not impose such a charge. 49 S. W. 728.

In reviewing this decision, we have concluded that it is necessary to pass upon the first proposition alone, since our construction

of the will in question is decisive of the case. Before proceeding to a discussion of it, however, it may be well to refer to the doctrine of equity upon the subject of the marshalling of the assets of decedents' estates, and to the rules which obtain in determining the relative rights of creditors, legatees, devisees, and heirs. In the present case the legacies were general, and the land which plaintiffs in error seek to subject to their payment was not devised to any one, but descended to the heir; and among the rules which we find stated by high authority is one that, where personal property of an estate, which would be the primary fund for the payment of legacies, is applied in administration to the discharge of debts and expenses of administration, so that enough does not remain to pay the legacies, legatees are subrogated to the rights of creditors, and may subject land which has not been devised by the testator, but has descended to the heir. *Hope v. Wilkinson*, 52 Am. Rep. 149; *Alexander v. Miller's Heirs*, 7 Heisk. 77; *Robards v. Wortham*, 17 N. C. 173; *Mollan v. Griffith*, 3 Paige, 402; 3 Pom. Eq. Jur. § 1135, and note 2; *Trumbo v. Sorrencoy*, 16 Am. Dec. 103, 105, 106, note. There are many authorities upon this subject, but, in view of the condition of the record, and its failure to show the disposition made of the large personal estate left by the testator, we do not consider it proper to enter upon a critical examination of them, nor determine whether or not, if it were true that such property had been devoted to the payment of debts and expenses of administration, so as to deprive the legatees of the fund out of which their legacies were primarily payable, they would have the right to look to the land to compensate them, to the extent that the sums going to them were thus diminished. We refer to the subject to avoid any improper implication from our decision. Conceding, for the purposes of the argument, that the proposition urged by counsel for defendant in error, "that the personal estate is not only the primary fund, but prima facie the exclusive fund, from which pecuniary legacies are to be paid, and that they are not charges upon the real estate unless the testator so directs, either expressly or by necessary implication," correctly announces the law of this state, we are yet of the opinion that a proper construction of the will before us discloses the purpose of the testator to devote, not only the personal estate, but the land not specifically devised, to the satisfaction of the legacies. The material parts of the will are as follows: "Item 1. It is my will that my just debts and all charges be paid out of my estate. Item 2. It is my will that the sum of five thousand dollars be expended for a monument to be placed to my memory by my executors hereafter named, such as to them may seem suitable and appropriate. Item 3. I give and devise to my adopted daughter, Mahala Florence Cairns, my homestead property, consist-

ing of five town lots fronting on Water street, in the said town of Pontiac, Livingston county, state of Illinois, also two lots adjoining thereto on the south, together with all building and improvements thereon, and twenty thousand dollars (\$20,000) in money; and then as follows, viz." "Item 4. After the above bequests and expenses are paid in full, I give and devise to my friend," etc. (Here follow 15 bequests of legacies to different beneficiaries, aggregating \$69,000.) "Item 19. I do hereby nominate and appoint my friends C. R. Smith and C. C. Potter, of Gainesville, Texas, and J. T. Terry, of Pontiac, Illinois, executors of this, my last will and testament, hereby authorizing and empowering them to compromise, adjust, release, and discharge in such manner as they may deem proper the debts and claims due me. I do also authorize and empower them, if it shall become necessary, in order to pay my debts, to sell by private sale, or in such manner, upon such terms of credit or otherwise, as they may think proper, all or any part of my real estate, except my homestead property mentioned in item 3, and deeds to purchasers to execute, acknowledge, and deliver in fee simple. I desire that an inventory of my personal property be taken, but that no appraisal be made thereof, and that the court of probate direct the omission of the same." The will was dated August 13, 1892, at Pontiac, Ill. The testator died there April 12, 1893, and the will was in due time probated in Illinois and Texas. The inventory of the estate in Texas, which appears in the record, and was returned July 14, 1893, shows personal property in Texas appraised at about \$66,000, and the land in question situated in Gainesville, Tex., appraised at \$20,100. Nothing appears, except from the will, as to the estate in Illinois. At the August term, 1892, of the county court of Livingston county, Ill., L. G. Cairns regularly adopted Mahala F. Cairns, the daughter of Moses W. Cairns, aged about 18. These are substantially all of the facts shown, which, the parties contend, affect the construction of the will.

We must begin the construction of the will with the presumption that the executor intended the extensive legacies to be paid. In express terms he provided no fund for the payment of either the debts or legacies, but left undisposed of, specifically, a large amount of personal property and valuable lands. The only property specifically disposed of was the homestead, devised to his adopted daughter. This he took from the body of his estate, and set apart to her, so that it could not be taken from her for any purpose, unless the law should require it to be subjected to payment of debts against which his will could give her no protection. He then provided for her a legacy of \$20,000, to be paid to her in preference to everything else except his debts and the sum appropriated for the monument. He then left all his property, real and personal, except the homestead, undisposed of by spe-

cific bequest or devise. This, of itself, is a significant feature of the will. It strongly suggests that the property was intended to be a fund for the satisfaction of money demands which he established against his estate; for his will, while creating the demands, makes no specific provision for meeting them, and expresses no other intention concerning either kind of property, real or personal. It may be suggested here that in this condition of the will the law will step in, and determine the fund out of which the legacies are to be paid, and this fund is the personal property alone. If this is the rule applicable between legatee and heir, an assumption that the testator left his estate so that it ought to apply is not in harmony with the dispositions of the will. Had such been his view, he need not have been at such pains to secure to his favorite beneficiary the land selected and devised to her specifically. The only purpose of that devise was obviously to protect that property from the claims of other legatees. He could not protect it from creditors. When we discover this purpose in the testator to take out of the body of his estate a part of the land, and secure it from the operation of the subsequent provisions of the will, we necessarily conclude that the remainder was left subject to those provisions. The same intent prompts the making of this devise and the legacy of \$20,000; and this is made plain by the words which introduce the other bequests, "After the above bequests and expenses are paid in full." The intent is to distinguish from the general mass of the estate, which the testator means to devote to the purposes subsequently mentioned, the property and money mentioned in item 3, and secure that to the adopted daughter absolutely, as far as lay in his power; and this, as we have already said, implies that such is not his purpose with reference to the remainder of the estate. This applies both to real and personal property, because his provision for her includes both real and personal property. If his purpose was to devote to the payment of legacies only the personal property, the devise of the homestead property was useless. Such property would have gone to her as heir as fully as the other land, without any direction to that effect.

It is contended that the nineteenth clause of the will, wherein power is given to the executors to sell land to pay debts, excludes the construction that the land was charged with legacies. But the absence of power in the executors to sell to pay legacies is not inconsistent with the existence of a charge upon the real estate to pay them. The executors may not have power to make the sale, and still the charge may exist, and be enforced through the proper courts. So far as this limitation of the power of sale may tend to disclose the testator's mind, an explanation of it is found in the fact that it withholds power to sell the homestead even to pay debts. The reason was that it was not intended that the executors should disturb the daughter, to

whom it had been given, in the enjoyment of it, and hence no discretion was left them to select this as a fund to pay debts. This is wholly consistent with the idea that the other land was subject, not only to debts, but to legacies. The fact that power is not given to sell to pay legacies is not controlling. There was no power given to sell personal property for any purpose. Having reached this construction of the will, we have deemed it unnecessary to decide the question whether or not, in the absence of provisions in the will charging land with the payment of legacies, it can, under the laws of this state, be subjected, in the hands of the heir, to their payment. The conclusion necessitates the reversal of the judgment of the court of civil appeals, and the affirmance of that of the district court.

INTERNATIONAL & G. N. R. CO. v. DALWIGH.

(Supreme Court of Texas. June 1, 1899.)

EVIDENCE—LEADING QUESTION—COMPETENCY.

1. A question in the following form: "Up to the time you saw [plaintiff], did you hear any whistle blown or bell rung by the approaching train?"—is leading, as being capable of eliciting, by an answer of "Yes" or "No," more than one simple proposition.

2. The admission of an answer to a leading question is ground for a reversal of the judgment.

Error to court of civil appeals of Fourth supreme judicial district.

Action to recover damages for personal injuries by Herman Dalwigh against the International & Great Northern Railroad Company. A judgment for plaintiff was affirmed by the court of civil appeals (48 S. W. 527), and defendant brings error. Reversed.

F. C. Davis and Franklin, Cobbs & McGown, for plaintiff in error. Upson, Bergström & Newton and Lewy & Sehorn, for defendant in error.

GAINES, C. J. The defendant in error, while attempting to cross the track of plaintiff in error on a street in the city of San Antonio, was struck by an engine and was injured. This suit was brought to recover damages for the injuries so received. The suit was predicated in part upon the alleged negligence of the servants of the defendant in failing to give the statutory signals upon approaching the crossing, and therefore it was a material issue upon the trial whether or not the required signals were given. Mrs. Theresa Laux, a witness for the plaintiff, testified that she saw him approach the crossing. Counsel for the plaintiff then propounded to her the following question: "Up to the time you saw Herman Dalwigh, did you hear any whistle blown or bell rung by the approaching train?" The question was objected to upon the ground that it was leading, but

the objection was overruled, and the witness was permitted to answer as follows: "No, sir; I did not hear the whistle blow, nor the ringing of the bell. I did not hear any signal." The ruling of the trial court in this particular was assigned as error in the court of civil appeals, and is also assigned in this court.

Is the question leading? According to the definition given by the best text writers on the law of evidence, it undoubtedly is. Mr. Starkie says, "Questions to which the answer 'Yes' or 'No' would be conclusive would certainly be objectionable, and so would any question which plainly suggested to the witness the answer which the party or his counsel hoped to extract." Starkie, *Ev.* p. 166. According to Phillips, "Questions are objectionable, as leading, not only when they directly suggest the answer which is desired, but also when they embody a material fact, and admit of an answer by a simple negative or affirmative, though neither the one nor the other is directly suggested." 2 Phil. *Ev.* 745. Mr. Greenleaf, after defining leading questions as those "which suggest the answer desired," says, "Questions are also objectionable, as leading, which, embodying a material fact, admit of an answer by a simple negative or affirmative." 1 Greenl. *Ev.* § 434. See, also, *Rap. Wit.* § 241. In *Nichols v. Dowding*, 1 Starkie, 81, Lord Ellenborough says, "If questions are asked to which the answer 'Yes' or 'No' would be conclusive, they would certainly be objectionable." According to the rule announced by these authorities, the question under consideration is clearly leading. The rule has, however, been somewhat modified by this court, so as to hold that a question is not necessarily leading because it admits of a direct affirmative or negative answer, but that, to make it objectionable when but a single fact is sought to be elicited, it must also suggest the desired answer. *Lott v. King*, 79 Tex. 292, 15 S. W. 231. It seems to us that the effect of the decision in the case cited is to hold that a question is not leading merely because it is put in the form of "did or did not," or "whether or not," etc. When an interrogatory is put in the form of "Did you not," etc., or of "Did you," etc., we have quite a different question. According to the idiom of our language, when we ask a question with a view to elicit an affirmative answer, we put it in the negative form; as, for example, "Did you not hear," etc. Clearly, such a question suggests the desired answer, and it has been so held by this court. *McAlpin v. Ziller*, 17 Tex. 508. So it would seem that a question put in the affirmative form, such as "Did you," etc., suggests, though in a lesser degree, a negative answer. Very high authorities hold that such a question is leading. *Hardtke v. State*, 67 Wis. 552, 30 N. W. 723; *Dudley v. Elkins*, 39 N. H. 78; *U. S. v. Angell*, 11 Fed. 34; *Lawder*

v. Lawder, 5 Ir. C. L. 27. There may be cases in which it was held that certain questions in the form last indicated were not objectionable as being leading, but, as we are inclined to think, a careful examination of the cases will show that the facts sought to be elicited were mere introductory matter. But, even if the question should not be held objectionable by reason of its form, we think it objectionable as eliciting, by an interrogatory which admitted of an answer "Yes" or "No," more than one simple proposition. The question embraced not only the inquiry as to the fact whether the signals were heard or not, but as to the very time at which they may or may not have been heard. The question put in the power of the witness, by the simple answer "No," to echo back the words of counsel, and to give a desired answer in a desired form upon a most material point in the case. *Railway Co. v. Hammon* (Tex. Sup.) 50 S. W. 123. The often-cited remarks of Evans in the appendix to his translation of Pothier on Obligations are in point here: "And here it may be proper to advert to a distinction which has often occurred to me, and was referable to the preceding case, between the word used by, and proceeding from, the witness, as his own, and his giving an answer of 'yes' or 'no' to the question proposed to him; the former being an indication of his own impressions and recollections upon the subject of inquiry; the latter being the result, the adoption, or rejection of an intrinsic suggestion." 2 Evans, *Poth. Obl.* 214.

It is urged also that, although the question may be leading, since it was in the discretion of the court to permit leading questions the admission of the answer to it is not a ground for a reversal of the judgment. There are authorities which so hold, but such is not the rule in this state. The question was sharply presented in *Davis v. State*, 43 Tex. 189, and in disposing of it the court there said: "The questions suggested to a person of the lowest capacity the answers desired. As such, these questions should not have been permitted to be put to the witness, and the court should have sustained the objections to them. While a large discretion is necessarily vested in the presiding judge relative to the form of questions, or the mode of interrogating a witness, under a peculiar state of feelings, intellect, or information, yet, to justify or sanction a departure from the established rules of evidence to so great a degree, and on matters of vital interest to the accused, as was permitted in this case, the explanation or statement of the reason for such departure should be shown in connection with the bill of exceptions taken. No reason is stated in the record." The decision in *Railway Co. v. Hammon*, *supra*, is in accord with that ruling.

We have examined the other assignments filed in this court, but think no one of them points out any error.

LESS v. GHIO.

(Supreme Court of Texas. June 1, 1899.)

GUARDIAN AND WARD—SUFFICIENCY OF BOND—FOREIGN GUARANTY COMPANY—APPEAL—AND ERROR—MOTION TO DISMISS—COSTS.

1. Laws 25th Leg. p. 52, amending Rev. Civ. St. art. 2601, declaring that bonds required to be given by guardians may be made by corporations organized under the laws of the state for the purpose of issuing surety, guaranty, or indemnity bonds, is not in conflict with Laws 25th Leg. p. 244, c. 165, authorizing certain corporations named therein to engage in business in the state, and to become sureties upon various classes of bonds required by law, embracing both domestic and foreign corporations; and consequently a foreign corporation, authorized to do business in this state, may become surety on a guardian's bond.

2. On motion by a creditor to require a guardian to give a new bond, the sufficiency of the bond only is at issue, and a motion to dismiss a writ of error to review the order sustaining the motion, because his claim against the estate has since been paid, will be overruled, as the claim was never in controversy.

3. A statement, in a motion to dismiss a writ of error to review a decision of the court of civil appeals, that the plaintiff in error has agreed to pay the cost of prosecuting the appeal and writ of error, will not be considered, as the statement is ex parte, and not supported by an agreement in writing signed by the plaintiff in error.

Error to court of civil appeals of Third supreme judicial district.

Motion by A. L. Ghio to require Mrs. Etta Less, guardian of the estate of Isaac Kosminsky, to file a new bond. An order of the district court sustaining the motion having been affirmed by the court of civil appeals (49 S. W. 635), Mrs. Etta Less brings error. Reversed.

P. A. Turner, for plaintiff in error. Todd & Glass, for defendant in error.

BROWN, J. The facts found by the court of civil appeals are as follows: "On January 17, 1898, appellant was appointed guardian of the estate of Isaac Kosminsky, minor, and her bond was fixed at \$22,000 by the county court of Bowie county, Tex. On the same day she took the oath and made the bond, and it was approved by the county judge of said county. This bond was subscribed by appellant as principal, and by the Fidelity & Deposit Company of Maryland and A. G. Robb as sureties. On January 27, 1898, A. L. Ghio, appellee, who held a claim against the estate of said minor for about \$2,800, filed a motion in said county court to require said guardian to make a new bond, because one of the sureties on the old bond, to wit, 'The Fidelity & Deposit Company of Maryland, is a foreign corporation, not organized or created under the laws of Texas, and such company is not a competent surety on said bond, and the same is illegal and insufficient.' On February 4, 1898, this motion was heard and overruled by the county court, and A. L. Ghio perfected his appeal therefrom to the district court of said county. On April 9, 1898, this motion was heard by the district court, and was sustained, and appellant was required to make a

new and a good and sufficient bond, and she has perfected her appeal therefrom to this court. It is agreed that the Fidelity & Deposit Company of Maryland is a corporation created by the laws of the state of Maryland, and that it has complied with all the laws of this state authorizing it to do business herein, and that the only objection to the bond is that the Fidelity & Deposit Company of Maryland cannot execute the same, for the reason that it is not organized or created under the laws of this state."

The defendant in error has filed a motion in this case to dismiss the writ of error because his claim against the estate of the minor has been paid since the action of the court below, and he claims that the controversy between himself and the plaintiff in error has terminated. Ghio's claim against the estate was never in controversy in this suit. The subject of the litigation was the bond of the guardian, which the court set aside, and ordered her to give a new one. If this judgment stands, she must either give a new bond or cease to be guardian. The subject of this litigation has not been settled, and the motion to dismiss the writ of error is therefore overruled.

The 25th legislature of the state of Texas amended article 2601 of the Revised Civil Statutes upon the subject of guardians' bonds and sureties thereon. As amended, that article reads as follows: "Any bond required by the provisions of this chapter to be given by a guardian shall be subscribed by such guardian and by at least two good and sufficient sureties, to be approved by the county judge of the county in which the guardianship is pending; provided, that such bond may be made by corporations organized or created under the laws of this state for the purpose of issuing surety, guaranty, or indemnity bonds, guarantying fidelity of executors, administrators and guardians, and may be accepted by the county judge." This act was passed on the 23d day of March, 1897. Laws 25th Leg. p. 52. Prior to the passage of this act, there was no authority under the laws of this state for such corporation to become surety on the bond of a guardian. At the same session of the legislature, on the 10th day of June of the same year, another act was passed, being Gen. Laws 25th Leg. p. 244, c. 165, which authorized certain corporations named therein to engage in business in this state, and to become sureties upon various classes of bonds required by law to be given. We make the following extract from the law: "Section 1. That whenever any bond, undertaking, recognizance, or other obligation is by law or the charter, ordinances, rules or regulations of the municipality, board, body, organization, court, judge or public officer required or permitted to be made, given, tendered or filed with a surety or sureties, and whenever the performance of any act, duty or obligation or the refraining of any act is required or permitted to be guaranteed, such

bond, undertaking, obligation, recognizance or guaranty may be executed by a surety company qualified as hereafter provided." This section proceeds then to prescribe the effect that shall be given to such bonds, and excepts official bonds of state and county officers from the operation of the act. The subsequent sections prescribe what shall be done by the corporations to qualify them to become sureties under the preceding section, and the terms embrace both domestic and foreign corporations of this class. Under the law first quoted, a domestic corporation created for the purpose could become surety for a guardian upon his bond, and, under the act last quoted, the same corporation can likewise become a surety upon the same character of bonds. There is no conflict between the two laws in that particular. Under the former law a foreign corporation of this class could not become surety because not authorized by law, while under the latter act a foreign corporation may sign or execute such bond as surety for a guardian. There is no conflict in this respect between these laws; the latter simply adds another class of corporations to the former that may become surety on guardian's bonds. There can be no repeal by implication where there is no substantial conflict between the provisions of the two laws. Mr. Sutherland, in his work on Statutory Construction (section 152), says: "It is not enough to justify the inference of repeal that the later law is different; it must be contrary to the prior law. It is not sufficient that the subsequent statute covers some or even all the cases provided for by the former; for it may be merely affirmative, accumulative, or auxiliary. There must be positive repugnancy, and even then the old law is repealed by implication only to the extent of the repugnancy." How can it be said that a law which authorizes the doing of a certain act is repealed by another law which authorizes the doing of the same thing and other consistent things? The later act of the 25th legislature above quoted enlarged upon the subject of the first act, and is auxiliary and cumulative to it, in the fact that it adds other corporations, which may become sureties on the same bonds, and requires certain qualifications of all corporations that will render their obligations more valuable and the surety more satisfactory than before. We know of no rule of construction by which the specific terms of the older will restrict and limit the broader and more liberal terms of a later statute. There being no conflict, both statutes will stand and co-operate. If there were a conflict, then the later act would prevail.

The intention of the legislature to include guardians' bonds in the language above quoted is strongly indicated by the proviso in section 1 of that act, which reads as follows: "That nothing herein shall be construed to permit any corporation to become a surety upon the official bond of any state or county official in this state;" and also by section 5 of

the act, which provides: "Any surety company may withdraw from the bond of any trustee, guardian, assignee, receiver, executor, administrator or other fiduciary in like manner and by like proceeding as is now provided by law in the case of individual sureties." Naming official bonds of state and county officers as excepted from the operation of the general language used in that section excludes from the exception all other bonds that are embraced in the general terms of the law. *Suth. St. Const. § 328; Wallace v. Stevens, 74 Tex. 559, 12 S. W. 283; Roberts v. Yarbrough, 41 Tex. 449.* Clearly, the general language includes bonds of guardians.

The language of section 5 embraces both domestic and foreign corporations of this class, and gives the right to withdraw from guardians' bonds to foreign corporations as well as to domestic. If the legislature had not understood the act to confer upon foreign companies the power to guaranty guardians' bonds, it would not have provided for their withdrawing as sureties from such bonds; for they could not withdraw from the relation of surety if they could not contract it. The district court erred in holding that a guardian's bond could not be secured by a foreign corporation, if qualified under the laws of the state, and the court of civil appeals erred in affirming that judgment. It is therefore ordered that the judgments of the district court and of the court of civil appeals be reversed, and this cause remanded.

The defendant in error states in his motion that the plaintiff in error had agreed to pay the costs of prosecuting the appeal and writ of error, but his statement is *ex parte*, not supported by any agreement in writing signed by the plaintiff in error, and it cannot, therefore, be considered. The plaintiff in error will recover the costs of the court of civil appeals and of this court.

WELLS v. HARDY et al.

(Court of Civil Appeals of Texas. June 7, 1899.)

BREACH OF MARRIAGE PROMISE—MINORS—ACTIONS.

A claim for damages cannot be based on the refusal of a female minor 18 years of age to perform a marriage contract, though *Rev. St. art. 2957*, provides that a female of such age may contract for marriage without her parents' consent, since the statute does not affect the rule that a minor is not bound by an executory contract.

Appeal from district court, Hays county; H. Teichmueller, Judge.

Action by C. M. Wells against Mrs. Willo Hardy and husband. From a judgment for defendants, plaintiff appeals. Affirmed.

Burgess & Hopkins, for appellant. A. B. Storey and Will G. Barber, for appellees.

KEY, J. Appellant brought this suit against Mrs. Willo Hardy (making her hus-

band a party defendant pro forma) to recover damages for breach of a promise to marry. He admitted in his petition that Mrs. Hardy, who was Miss Willo Lipscomb at the time the marriage contract was made, was at that time only 18 years of age, and that she was under 21 years of age when she repudiated the contract and married W. H. Hardy. Because of this admission in the plaintiff's petition, the court below sustained an exception thereto upon the ground that the defendant, being a minor when the contract was made, was not in law bound thereby, and a claim for damages could not be based upon her refusal to perform. Of this ruling appellant complains, and this is the only question presented for decision. It is not denied by counsel for appellant that the general rule is that a minor is not bound by an executory contract to marry, and the authorities to that effect are abundant. Bish. Mar. & Div. §§ 201, 206, 561, 564, 584; Schouler, Dom. Rel. § 415; Tyler, Infancy, 55; 4 Am. & Eng. Enc. Law (2d Ed.) 883; Warwick v. Cooper, 5 Sneed, 659; Pool v. Pratt, 1 D. Chp. 252; Rush v. Wick, 31 Ohio St. 521; McConkey v. Barnes, 42 Ill. App. 512; Frost v. Vought, 37 Mich. 65; Hunt v. Peake, 5 Cow. 475; Hamilton v. Lomax, 26 Barb. 615. Such contracts are considered analogous to a minor's contract for necessities, which, if he receives and gets the benefit of, he is bound to pay for, but he cannot be compelled to receive necessities contracted for, nor will his estate be liable for his refusal to comply with his contract for necessities. Pool v. Pratt, supra. It is contended, however, that the authorities referred to, and others to the same effect, are not applicable to this case, because under our statute a female is permitted to marry without the consent of her parents as soon as she attains the age of 18 years, and that such statutory provision does not exist in the jurisdictions where the cases cited were decided. Under the title "Husband and Wife," the Revised Statutes of this state fix the age of consent to marriage at 16 for males and 14 for females, and prescribe what officer shall issue the marriage license, and who may perform the marriage ceremony; and article 2957 thereof reads as follows: "No clerk shall issue a license without the consent of the parents or guardians of the parties applying, unless the parties so applying shall be in the case of the male 21 years of age, and in the female 18 years of age." It is contended by counsel for appellant that a proper construction of this article leads to the conclusion that when a female reaches the age of 18 years she is to be considered an adult in reference to marriage, and can bind herself by an executory contract to marry, so that her estate will be liable for damages, if she refuses performance of the contract. The argument is that, as the common law did not authorize a minor to marry, until he or she reached the age of 21, without such consent, and as the statute referred to authorizes females to marry at the age of 18 without the

consent of parent or guardian, it confers upon them a power not before possessed; and that, as a power necessarily implies the ordinary and appropriate means to execute the same, it follows that a female 18 years of age has the power to bind herself by an executory contract to marry. We are not prepared to agree with counsel in the construction sought to be placed upon the statute. It is well settled that marriages without the consent of parents by infants over the age of consent are valid unless there be a statute declaring them null and void. Bish. Mar. & Div. §§ 551-559, and authorities there cited. There is no statute of this state declaring any marriage void on account of minority, and, in view of the rule referred to, it must be held that a female over the age of 14 and under the age of 18 possesses the power, without the consent of her parents, to enter into a valid marriage; and therefore article 2957 does not confer upon a female 18 years of age a power not previously possessed.

Counsel assert in their argument that the female develops in all respects, but especially those to be considered in reference to marriage, much earlier than the male; and that this fact tends to support their contention that, in reference to marriage, the legislature intended by article 2957 that the female 18 years of age should be put upon the same footing as the male who has attained the age of 21. Physically speaking, it is true that the female develops earlier than the male, but we are not prepared to assent to the proposition that she so develops in all other respects. Mentally and morally speaking, the difference in the time of development, if any, is slight. The law of minority is based mainly upon mental immaturity, causing inability of persons under the age of 21 to exercise proper discretion and judgment; and we can readily understand that, as the inclination to marry and appreciation of marital obligations usually keep pace with physical development, the legislature might appropriately authorize the developed female, though a minor, to enter the marriage state without the consent of parent or guardian, and without removing her disability to bind herself by executory contracts. And this, we think, is all that was intended by article 2957.

In support of their contention, counsel for appellant cite article 25 under the head of "Apprentices," which provides that the "duration of apprenticeship shall be until the minor, if a male, arrives at the age of twenty-one years, if a female until she arrives at the age of eighteen years, or until she marries, if she marries before that age"; and contend that this article involves the idea that the female at 18 has absolute power of marriage. It seems to us that this statute either proves too much or proves nothing in reference to the question under consideration. It is not contended by counsel that it has the effect of entirely removing the minority of a female at the age of 18, but that it discloses a legisla-

tive construction of article 2957 in accordance with their contention. But why not argue that, as it releases females from apprenticeship when they arrive at the age of 18, therefore such females are no longer minors in any sense. It seems to us that the one construction is about as plausible as the other, and that neither is correct.

Counsel also cite articles 2963 and 2964 under the chapter relating to marriage contracts. Article 2963 places certain limitations upon the power to make antenuptial contracts; and article 2964 requires such contracts to be acknowledged before some authorized officer, and attested by two witnesses, and declares that the "minor capable of contracting matrimony may give his consent to any agreement which this contract is susceptible of, but such agreement must be made by the written consent of both parents, if both be living; if not, by that of the survivor. If both be dead, then by the written consent of the guardian of such minor." We do not think these provisions of the statute in any wise aid appellant, but, on the contrary, article 2964 requires the consent of the parent or guardian before the contracting minor can create a liability against his estate in behalf of his future wife. In our opinion, the phrase, "the minor capable of contracting matrimony," means any person, of either sex, of the age of consent and under 21, and not otherwise disqualified from entering the marriage state. If appellee had the power to bind herself by an executory contract to marry, she had the power to provide indemnity, in the event she breached the contract, by mortgaging her estate for a given sum, agreed upon as liquidated damages. So, if we correctly construe article 2964, and appellant's construction of article 2957 should be adopted, we would have this legal anomaly in Texas: A female under 21 years of age could not, without the written consent of her parents or guardian, make a binding antenuptial contract in reference to the property rights of herself and her contemplated husband; but if she be 18 years of age she could, without such consent, or permission of any court, mortgage her entire estate to indemnify him, if she refused to comply with her agreement to marry. By article 2964, as we construe it, such females (as well as all other minors) are protected against unwise and improvident antenuptial contracts; thereby indicating that the legislature did not consider them, in reference to property rights, as possessing the same discretion that is possessed by persons 21 years of age. Therefore it appears to us that article 2964 tends to break down, instead of uphold, appellant's interpretation of article 2957.

By the common law, the status of minority continues as to both sexes up to the age of 21; and not only is the common law in force in this state, but as early as 1870 the legislature enacted what is now article 2552 of the Revised Statutes, reading thus: "Male persons under twenty-one years of age, and

females under twenty-one years of age, who have never been married are minors." This article is one of the general provisions under the title denominated "Guardian and Ward." It is comprehensive in its terms, and it seems to us that it must be held to apply to all persons therein described as to all transactions that affect their estates, unless some statute can be found that expressly or necessarily ingrafts an exception upon it; and we do not believe that article 2957, or any other article to which our attention has been called, creates such exception. Although article 2957 removes the right of parents to object to such marriages as their 18 year old daughters may choose to make, we think the analogy pointed out in *Pool v. Pratt*, 1 D. Chp. 254, between a minor's contract for necessities and contract to marry holds good in this and similar cases. The comparison may be thus stated: An 18 year old girl has a perfect legal right to live, and a similar right to marry, regardless, in each instance, of parental approval; and these rights draw to them, and include in them, whatever powers are necessary to their full enjoyment. Hence it is that, as food and raiment are necessary to sustain and enjoy life, the power to procure them by contract of purchase exists in such a girl; and, as a husband is necessary to consummate marriage, she has a like power to make a contract, by the terms of which she and her intended husband promise to marry each other. Now, if the one promise, while executory, is binding upon her, the other should be; and, if she is not bound by the one, she should not be by the other; and as it is uniformly held that executory contracts for necessities are not binding, so it ought to be held as to an executory contract to marry. If any distinction should be made in this respect, and the woman be permitted to repudiate one contract, and not the other, it appears to us that the right of repudiation should apply to the agreement to marry, instead of the contract for necessities; because, accepting a particular man as a husband is of much more importance to a woman than the acquisition of food and raiment from a particular dealer. Comparatively speaking, it is of little consequence to her whether she procure her bread from one baker or another; but it is vitally important to her whether she marry one man or another. Marriage, in its proper sense, is founded mainly upon considerations of mutual esteem and respect. And if, after a woman promises to marry a man, she becomes convinced that these sentiments cannot exist between them, the law can accord her few greater favors than the right to repudiate such a promise.

Counsel for appellant place great reliance upon the case of *Develin v. Riggsbee*, 4 Ind. 464. In that case the plaintiff sued for damages for a breach of promise to marry. The defendant pleaded a release executed by the plaintiff after she arrived at the age of 18 years. The plaintiff demurred to this plea.

and the demurrer was sustained. The statute law of that state is similar to ours, and the court held that, as the plaintiff at the age of 18 was at liberty to marry without the consent of parent or guardian, her contract releasing the defendant from damages for violating the marriage contract was binding upon her; and used language that tends to support the theory urged by counsel for the appellant in this case. It may be, as suggested by counsel for appellee, that that case was correctly decided, because the plaintiff could not retain the consideration for the release and deny its binding force; but the court did not rest it on that ground, and the reasons given for the decision tend to support appellant's contention. However, we are not willing to follow the Indiana case, if it was intended to hold that a statute similar to article 2957 would render a female under 21 years of age liable for damages for the breach of an executory contract to marry. We are also referred to *Stevenson v. Westfall*, 18 Ill. 209, but that case is not in point. It was there held that a proviso in a statute reading, "and the minority of females shall cease at the age of eighteen years," was intended by the legislature to be general in its effect, and that females attained majority by force of the statute in that state at the age of 18.

This case has been presented in this court by counsel for both parties with skill and ability. We have given it careful and thorough consideration, and our conclusion is that the appellee was not bound by her executory promise to marry, and that the court below ruled correctly in so holding. Judgment affirmed.

HOUSTON & T. C. R. CO. v. SMITH.¹

(Court of Civil Appeals of Texas. Feb. 18, 1899.)

RAILROADS—DEATH OF BRAKEMAN—NEGLIGENCE—EVIDENCE—DEFECTIVE APPLIANCES—INSTRUCTIONS—APPEAL—HARMLESS ERROR—ABSENT WITNESS—TESTIMONY AT FORMER TRIAL—METHOD OF PROOF—JURORS—QUALIFICATIONS.

1. A conductor of a freight train detached three cars after they were set in motion on a down grade towards a stock car, with knowledge that there was no one on the cars to control them. A brakeman mounted the stock car after it was set in motion by the detached cars, and set the brake, when the car was struck a second time by the detached cars, and he was thrown from the car and killed. Held sufficient evidence to justify the submission of an issue whether the conductor was negligent.

2. Where a brakeman was killed by being thrown from a car when it was struck by other cars, which the evidence showed another brakeman could have stopped if a brake had not been defective, an issue of the defects in it is properly submitted, though there were other antecedent causes with which it was associated.

3. Special charges are properly refused where the charge given correctly instructs on the phase of the case to which the special charges are directed.

4. The fact that an employe's acts, in connection with others, occasioned threatened danger to the employer's property, does not preclude a recovery for death caused by his attempt to ward off the danger, where his acts were not culpable.

5. In an action for causing the death of a brakeman by collision with a car on which he was setting a brake, an instruction to find for defendant if the brakeman failed to keep a lookout for his safety is misleading, as the question whether he was required to keep a lookout while performing his duty is for the jury.

6. An erroneous sustaining of a challenge of a juror for cause is not reversible error, where appellant did not intend to permit the challenged juror to sit in the case, and does not show that he was prejudiced.

7. Under the statute disqualifying a juror who has bias or prejudice in favor of either party, a railroad employe is disqualified from being a juror in an action against the railroad company.

8. A statement of facts prepared, in contemplation of an appeal, after a former trial, and not containing the detailed testimony of the witnesses, is inadmissible to prove the testimony of an absent witness.

9. A mere statement of counsel that a witness is absent, that diligent search had been made for him, and that his whereabouts could not be ascertained, is insufficient to justify proof of the witness' testimony at a former trial.

10. A verdict is conclusive on the issue of negligence and contributory negligence, where the evidence would have justified a finding either way on both issues.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by Mrs. Josie Smith against the Houston & Texas Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mrs. Josie Smith instituted this action against the Houston & Texas Central Railroad Company for the recovery of pecuniary damages suffered by her in the death of her husband, John H. Smith, whose death, she charges, was caused by the negligence of the defendant railway company. It is alleged that he was in the employ of the defendant company as brakeman, and while in the performance of his duties as such brakeman he was killed through negligence of the company. The defendant answered by general denial, plea of contributory negligence, assumed risk, and negligence of fellow servant, etc. The trial resulted in a verdict and judgment for the plaintiff in the sum of \$7,500, from which the railway company has appealed. The evidence was fairly sufficient to show this state of facts: On the 8th day of January, 1893, John H. Smith was a brakeman in the employ of the defendant company. About 2 or 3 o'clock in the afternoon of that day, while engaged in doing some switching of cars in the yards of the company at the town of Bremond, Tex., he was knocked from the top of a car, upon which he was endeavoring to set a brake, by three other cars running against the one upon which he was standing; and he was thrown to the ground, and the three cars passed over his body, killing him instantly. He was braking upon a freight train going south, and his train arrived at Bremond about 10 minutes in advance of the north-bound passenger, and was backed into

¹ Writ of error denied by supreme court.

the passing track on the east side of the main track. A stock car was to be picked up here, and one car for Waco was to be dropped out and left. The stock car, called "4-C Stock Car," was standing on the extension track. The third car from the engine had a hot box on the arrival of the train, and one of the brakemen on the train (W. M. Byers) went immediately to the repair shop to get a man to repair the car. While he was gone upon this mission the rest of the train crew undertook the switching, under the directions of the conductor. The attempt was made to drop the second, third, and fourth cars from the engine in upon the extension track, and couple onto the stock car. The extension or switch track was constructed upon a down grade. The three cars were attempted to be thrown upon this track by making what is termed a "drop switch." The conductor pulled the pin cutting these cars loose from the train; and Smith, who was on the rear end of the coal car attached to the engine pulling the cars, and next to the cars to be dropped, pulled the pin cutting them loose from the motive power at the point of connection with the extension track; and the cars were thrown in upon the extension track without any one on them to control them, the other brakeman being engaged in setting the switch. They moved upon the down grade at a rapid rate,—witnesses say, at about the rate of eight miles an hour. Smith rode the coal car down the main line to a point nearly opposite the stock car, left the coal car, and ran to the stock car to set the brake on it. The loose cars struck the stock car once, and then Smith mounted the stock car; and just as he set the brake the loose cars struck it the second time, and knocked him off the car. Byers came out of the repair shop, 50 or 60 feet away, as the three cars were dropped in upon the extension track; and, seeing Smith running to the stock car, he ran to the loose cars, to mount them and set the brakes before they could strike the stock car. They struck the first time before he got upon the car, and he seized the brake and attempted to set it before the second collision. The brake was out of repair, and would not work, and he then ran to another car, but reached the brake too late to prevent the fatal collision. Had the brake of the car which he first mounted been in working order, he could have prevented the second collision, and the consequent injury and death of his fellow brakeman, Smith. As soon as the three cars were cut loose by the pulling of the pins by the conductor and the deceased, and were started in upon the extension track, the former left the cars, and started to the office to register, knowing that no one was upon these cars to control them. The evidence tended to show that the deceased was in the proper discharge of duty when injured, and was not guilty of any negligence contributing to his injury. The conductor and the deceased both gave

signals to the engineer, in doing the switching; but the conductor was in control, and the deceased was subordinate and subject to his commands. There was evidence tending to show that the conductor knew that Byers had gone to look after the repair of the hot box, that the conductor assumed to do his work in the switching, and that he should have ridden the loose cars in upon the extension track, and controlled them. There was also evidence that the switching was attempted in a manner that was dangerous and wholly unnecessary.

R. De Armond, for appellant. Geo. H. Plowman, for appellee.

FINLEY, C. J. (after stating the facts). 1. It is first assigned as error that there was no evidence justifying the submission of issue of negligence on the part of the conductor. In the part he took in the switching. This ground of negligence was distinctly set out in the pleading, and we are not able to say that there was a total lack of evidence tending to its proof.

2. It is claimed that the court should not have submitted the issue of defective brake, because the evidence showed that the accident did not occur by reason of a defective brake,—in other words, that the defective brake was shown not to be the proximate cause of the injury. The second collision of the cars threw the deceased from the stock car. This collision would not have occurred, had not the brake been defective. Byers would have set the brake and prevented the collision, had the brake been in working order. The defective brake was immediately connected with the accident, and, while there were antecedent causes with which it was associated, it was a proximate and effective cause; and the court properly submitted its determination to the jury.

3. Complaint is made at the refusal of special charge No. 2, upon the defensive issue of assumed risk. The charge of the court correctly instructed the jury upon this phase of the case, and it was not error, therefore, to refuse the special charge asked. Besides, we regard the form of the charge asked as objectionable.

4. It was not error to refuse special charge No. 6. The main charge gave the law of assumed risk and contributory negligence, and it is not claimed that the law is erroneously stated. The latter part of this requested charge, to the effect that if the acts of the deceased occasioned the threatened danger to the company's property, and he was killed while attempting to prevent it, he could not recover, was not a correct proposition of law, as applied to the facts of the case, and would have been misleading to the jury. His acts, in connection with others, switching the cars in on the extension track, brought on the occasion which threatened the safety of the cars; but his acts may not have been cul-

pable, and, unless they were, they would not cut off the right of recovery.

5. It was not error to refuse the seventh special charge, which is as follows: "If you believe from the testimony that, at the time of the accident by which plaintiff's husband lost his life, it was reasonably safe for the deceased to go upon the 4-C car to set its brake, and that he was acting in the line of his duty as brakeman, and, after the cars of the cut had collided once with the cattle car, it was reasonably certain they would strike again, then the duty was upon the deceased to keep a reasonably prudent outlook for his safety; and if you believe from the evidence that he did not do this, and the accident occurred by reason of his failure to do this, then you will find for the defendant." The undisputed evidence showed that Smith necessarily had his face to the south in order to set the brake upon the stock car, and that the three loose cars approached the stock car from the north. It may be—indeed, it is quite likely—that he could not set the brake, and at the same time keep a lookout for the approach of the loose cars. The evidence is that just about the time he got the brake set the second collision occurred. To have charged the jury that he must have "kept a lookout for his safety" in this particular connection, without the qualification of consistency with his duty then being performed, would have most likely misled the jury. The law required of him such care as would generally characterize the conduct of an ordinarily prudent man under similar conditions, and whether this embraced a lookout, under the circumstances, should be determined by the jury, and not the court. We recognize the rule that the appellant was entitled to have the law applied to the particular facts upon which it relied to show contributory negligence, upon proper request; but the charge asked must be free from objection, or its refusal will not be held error, when the court had correctly charged the law in the general charge. The special charge was objectionable, and the court covered the principle in the general charge.

6. Appellant complains of the action of the court in sustaining the challenge of a juror for cause by appellee's counsel. The juror was challenged, and stood aside by direction of the court, upon the ground that he was at the time of the trial an employé of the defendant company. It is claimed that this did not disqualify the juror. The bill of exceptions recites that the defendant's counsel did not intend to permit the challenged juror to sit in the case, but he objected only to him being challenged for cause. The bill in no way shows that the interests of the defendant were prejudiced by this action, and under such conditions the assignment does not present reversible error, regardless of the legal question involved. Our statute names these disqualifications: (1) "Any witness in the case. (2) Any person interested directly or indirectly in the subject-matter of the suit.

(3) Any person related by consanguinity or affinity within the third degree to either of the parties to the suit. (4) Any person who has a bias or prejudice in favor of or against either of the parties. (5) Any person who has sat as a petit juror in a former trial of the same case, or of another case involving the same questions of fact." Each of these statutory disqualifications is a disqualification at common law, and the statute seems to be but declaratory of the common law. 2 Cooley, Bl. p. 362. Mr. Blackstone treats the fact that the juror "is the master, servant, counselor, steward, or attorney" as conclusively showing favor, and as ground for principal challenge. In *Railroad Co. v. Mitchell*, 63 Ga. 173, the court says: "The power of employer over employé is that of him who clothes and feeds over him who is clothed and fed. Hence the common law excluded all servants, and our statutes have nowhere altered the rule, and it should not be altered. A close relative is a less dangerous juror, if not a dependent kinsman, than one who is dependent on his employer." In *Thomp. & M. Jur. § 185*, from which we take the above quotation,—the report not being accessible,—it is said that an employé of a railroad company is not a competent juror to try a case to which the company employing him is a party. The impartial character of jurors lies at the basis of jury trials, and to hold an employé of a party to the litigation to be a qualified juror would be destructive of this principle. The language of our statute should be construed to embrace such disqualification, and we so construe it, and hold that the court below properly sustained the challenge of the juror.

7. It is contended that the court erred in not permitting the appellant to introduce a part of an agreed statement of facts, signed by counsel and approved by the court, prepared after a former trial of this case, for the purpose of proving the testimony of an absent witness, to the effect that the brakeman Byers was not on the loose cars at the time deceased was knocked from the cattle car, and other matters favorable to the defense; it being stated by counsel that the witness was absent, and after diligent search he had been unable to learn his whereabouts. This was not a legal way of proving the testimony of the absent witness upon a former trial, and the court properly excluded it for this reason. It is presumed that the statement of facts referred to was prepared in contemplation of an appeal. The statutes and rules governing the preparation of such a statement of facts do not contemplate that the detailed testimony of the witnesses shall be therein set forth, but only that the facts proven shall be set out. In view of the questions to be determined by appeal, counsel may, and often do, omit from the statement of facts much testimony given upon the trial. Such statement would not ordinarily be the best evidence of what the witness swore upon a for-

mer trial. Some person who heard and remembered his testimony should be called to testify as to what it was. 1 Greenl. Ev. § 166; Roth v. Smith, 54 Ill. 431-433. Again, the mere statement of counsel that the witness was absent, that diligent search had been made for him, and that his whereabouts could not be ascertained, did not furnish a sufficient basis to justify the supplying of his testimony by showing what he swore upon a former trial. Sullivan v. State, 6 Tex. App. 319; Mawrich v. Elsey, 47 Mich. 10, 10 N. W. 57; Slusser v. City of Burlington, 47 Iowa, 800.

8. The eighth assignment challenges the verdict as being contrary to the evidence. The issues of negligence on the part of defendant and contributory negligence on the part of deceased were sharply contested upon the trial, and the evidence would have justified a finding either way upon both issues. In this condition of the evidence, we must treat the verdict as settling the conflict, and support the verdict by these conclusions: (1) The deceased came to his death through the negligence of the defendant; (2) he was not guilty of contributory negligence.

No other errors are assigned. Judgment affirmed.

BOOKHOUT, J., is disqualified, and does not sit in this case.

On Motion for Rehearing.

(April 8, 1899).

FINLEY, C. J. We have given to the motion for rehearing careful consideration, and find no reason to change our disposition of the case. There are some slight inaccuracies in the recitation of the facts in the opinion rendered, but not of such a character as should change the result of our decision. We will, however, correct these inaccuracies in the opinion. The motion for rehearing is overruled.

HOUSTON & T. C. R. CO. v. SPEAKE.¹

(Court of Civil Appeals of Texas. May 3, 1899.)

INJURY TO SERVANT—NEGLIGENCE—PLEADING—INSTRUCTIONS.

1. Complaint for death of a railroad employé killed by lumber falling on him from a car allows the showing of negligence in running the train too fast; it being alleged that the lumber was improperly loaded in the car, or, if properly loaded, it was negligently permitted by defendant's servants to become improperly and unsafely loaded while on defendant's line.

2. A charge denying defendant's liability if ordinary care on its part would not have discovered the defect in time to have remedied it embraces the idea that, to render defendant liable, the occurrence must have been one that might easily have been anticipated.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Action by Jane H. Speake against the Houston & Texas Central Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Head, Dillard & Muse, for appellant. C. B. Randell and Wilkins, Vinson & Batsell, for appellee.

JAMES, C. J. There was testimony that James M. Speake, a section hand of defendant, came to his death by lumber falling on him from a car, the cause of which was the negligence of defendant. The damages awarded plaintiff, his wife, were not excessive.

The errors complained of relate to the charges, the admission of certain testimony, and the amount of the verdict.

The first, second, third, and fourth assignments insist that the petition was not sufficient to authorize the submission of the question of negligence of defendant in running its train at too high a rate of speed. The allegations of the pleading, in our opinion, included this form of negligence. It alleged that the lumber was improperly loaded upon the car, or, if properly loaded, it was negligently permitted by defendant's servants to become improperly and unsafely loaded while on defendant's line.

With regard to the sixth assignment, the requested charge was substantially contained in the first, second, and third clauses of the charge given. Our conclusions of fact dispose of the seventh assignment.

The eighth assignment complains of the refusal of the following charge: "If you find in favor of plaintiff, you will only allow her such a sum as will reasonably compensate her for the pecuniary loss, if any, that she may have sustained by the death of her husband; and, in arriving at this amount, you may take into consideration the wages he was receiving at the time of his death, the amount, if anything, he had earned during a reasonable period prior to his death, the amount that he had contributed to plaintiff during a reasonable period prior to his death, his habits in reference to intoxication and sobriety for a reasonable period prior to his death, the age of plaintiff, and all other facts and circumstances in evidence that will reasonably tend to show the amount of pecuniary assistance that plaintiff would have received from her husband had he lived." The charge related to the measure of damages, and called attention to certain features of the evidence, and limited the effect of certain evidence. We think the charge was not as free from objection as the one that was given.

There is no merit in the ninth and tenth assignments.

The fifth assignment involves the necessity of giving the following requested charge: "To render the master liable for an injury to a servant, it is necessary that the master's negligence be the proximate cause of the in-

¹Rehearing denied May 31, 1899.

jury, which means that the danger that such an injury might occur ought reasonably to have been within the contemplation of the master at the time it was guilty of the negligence for which it is held liable." The evident object of this charge was to impress upon the jury the idea that the occurrence must have been one that might reasonably have been anticipated. This idea was clearly conveyed by the charges given, in which defendant's liability was denied if ordinary care on the part of defendant would not have discovered the defect in time to have remedied it. The judgment is affirmed.

LINARES v. LINARES.

(Court of Civil Appeals of Texas. April 19, 1899.)

HOMESTEAD—RIGHT OF WIDOW.

A wife, though forced by her husband's cruelty to abandon him, is on his death entitled to have set aside to her, under Rev. St. art. 2046, as a homestead exemption, property which the husband, coming to Texas after such abandonment, thereafter acquired and lived on alone till his death.

Error from district court, Webb county; A. L. McLane, Judge.

Application by Concepcion Garcia de Linares, widow of Pioquin Linares, to have property set aside to her as a homestead was resisted by Alejandro Linares, administrator of deceased, and refused by the county and district court, and she brings error. Reversed.

A. Winslow and O. A. McLane, for plaintiff in error. Bethel Coopwood, for defendant in error.

FLY, J. Plaintiff in error, the surviving widow of Pioquin Linares, deceased, applied to the county court of Webb county to set apart to her lot No. 7 in block 116, in Laredo, Tex., with the improvements thereon, as her homestead, alleging that it was all the real estate possessed by him at his death, and also asking that all the exempt personal property be set apart to her. The application was resisted by the administrator, on the ground that the applicant had willfully abandoned the deceased in the republic of Mexico over 20 years before he acquired the lot in question, and never resided with him on said lot. The application was refused by the county court, and on appeal to the district court the same action took place. In the inventory the lot was valued at \$120, and the personal property at \$18.50. The court found the following facts: "Applicant and deceased were married in the republic of Mexico about thirty years ago, and separated about the year 1878; the wife going from New Laredo, Mexico, where she and her husband had been living, to Monterey, and there remained until the death of her husband, in 1898. The husband came to Laredo, Tex., and in 1897 acquired lot 7 in block 116, in Laredo. He built a house and lived alone on

said lot for about one year previous to his death. Husband and wife separated by agreement, the wife being induced thereto by reason of the cruel treatment of the husband. There are no children of the marriage, and there are unpaid debts due by the husband's estate." From the foregoing facts the court concluded that "the husband was not the head of a family, and did not acquire a homestead exempt from forced sale." In article 2046, Rev. St., it is provided that "at the first term of the court after an inventory, appraisement and list of claims have been returned, it shall be the duty of the court, by an order entered upon the minutes, to set apart for the use and benefit of the widow and minor children and unmarried daughters remaining with the family of the deceased, all such property of the estate as may be exempt from execution or forced sale by the constitution and laws of the state, with the exception of any exemption of one year's supply of provisions." In article 2047 it is provided that, "in case there should not be among the effects of the deceased all or any of the specific articles so exempted, it shall be the duty of the court to make a reasonable allowance in lieu thereof, to be paid to such widow and children, or such of them as there may be, as hereinafter directed." It has been held in a number of instances that, where the wife has voluntarily abandoned the husband, such abandonment will preclude her from having set apart to her the exemptions mentioned in the statute, or the allowance in lieu thereof. *Earle v. Earle*, 9 Tex. 630; *Trawick v. Harris*, 8 Tex. 312; *Meyer v. Claus*, 15 Tex. 518; *Sears v. Sears*, 45 Tex. 557; *Duke v. Reed*, 64 Tex. 705.

The statute does not seem to contemplate any exception based upon the loyalty of the wife, but the exception has been made by the supreme court, and is well settled; but it has never yet been held that the wife who has been driven to a separation from her husband by his cruelty is by such separation deprived of her rights as a widow, under the statutes above cited. On the other hand, it would seem that the converse of the proposition is established by the ruling that the wife who has not been true to her marital contract shall be deprived of her rights as surviving widow. Construing the statutes hereinbefore copied in connection with article 2055, which applies to insolvent estates, Chief Justice Hemphill, in *Green v. Crow*, 17 Tex. 180, said: "If the husband had a domicile at the time of his death, she is, in case of insolvency of the estate, entitled in full property to that domicile, not so much because it is a homestead, as because the law intervenes and guaranties to her a portion of the estate for her comfort and maintenance, independent of and superior to the claims of creditors, except for funeral expenses and those of last sickness." It may be inferred, though not stated in terms, that the wife had at one time lived on the land, but no importance was attached to that fact; but the decision rested on the proposition that she

was entitled to a maintenance out of the estate, whether solvent or insolvent.

In the case of *Henderson v. Ford*, 46 Tex. 627, a single man had bought a home in Texas, and resided on it with his slaves, and while in Alabama, in the service of the Southern Confederacy as a soldier, married, and it was held that the homestead rights of the wife attached at once, and the subsequent sale of the home, without the wife joining in the deed, was void. It was held that by the marriage the wife at once acquired a domicile in Texas.

The case of *Clements v. Lacy*, 51 Tex. 150, is more nearly like the case now under consideration. In that case the husband had come to Texas, and had acquired a homestead, in which he lived for years; the wife remaining in another state, and never coming to Texas until years after his death. She had remained away from Texas a part of the time, with the consent of her husband, to superintend the education of their daughter, and afterwards could not come because of the Civil War. The court held that the domicile of the husband was the domicile of the wife, and that the fact that she never had lived on the place did not prevent it from assuming the homestead character. It is true that it is said in that case that the wife intended at some indefinite time to make the domicile of the husband her home; but we think the same rule would apply where the wife is prevented from making her home with her husband on account of his cruelty to her. She certainly has done nothing to forfeit the privileges conferred upon her by law, but is the innocent victim of the cruelty of one who should have prepared a shelter for her, and contributed to her happiness and support. The cruelty of her husband did not rob her of her rights, and, when he made a home for himself, it became her home, although she may not have been permitted to enjoy its shelter. *Wheat v. Owens*, 15 Tex. 243. It is indeed a humble home, being valued at \$120; but, poor as it is, it is given to her by the constitution and laws of Texas, and, unaffected by the fact that she was a resident of a foreign country, the law extends its protection over it, and renders it sacred from the grasp of creditors. The judgment will be reversed, and judgment here rendered in favor of plaintiff in error that the lot in question be set apart to her as her homestead.

On Motion for Rehearing.

(May 31, 1899.)

The contention of defendant in error is to the effect that the deceased husband and his wife were citizens of a foreign country, and therefore that a homestead was not acquired that could be claimed by plaintiff in error. There is no testimony in the record that plaintiff in error and her husband were citizens of Mexico; the only finding being that they resided in Mexico at the time of the separation, and that the wife continued to reside in Mex-

ico. How long the deceased lived in Texas after the separation is not clear, but it may be inferred from the finding of facts that immediately after the separation he came to Texas. In the case of *Meyer v. Claus*, 15 Tex. 518, the husband came to Texas, leaving his wife in Germany, and acquired real estate which he conveyed, and the court held that it would be a fraud upon the rights of innocent purchasers to allow the wife to maintain a claim of homestead to the property conveyed by the husband. In this case no rights of others intervened, and it does not appear that credit was extended to the husband on the faith of the land in controversy. It is not held in the case of *Meyer v. Claus*, as contended by defendant in error, that the wife was not entitled to a homestead because she was a foreigner. No such proposition has been announced by any appellate court in Texas, nor is the judgment of the trial court based on that proposition. The motion is overruled.

MISSOURI, K. & T. RY. CO. OF TEXAS v. O'CONNOR et al.

(Court of Civil Appeals of Texas. May 3, 1899.)

EMINENT DOMAIN—DAMAGES TO REAL ESTATE—EVIDENCE—PLEADING—INTEREST.

1. Evidence of the value of the rents before and after a permanent injury to the use of real estate by an unlawful act is admissible to show the depreciation in the value of the land.

2. The issue being the damage to plaintiff's property from construction of a railroad, evidence of the effect on the property of another from the presence of a railroad in a street in front of his house is inadmissible.

3. On the issue of damages to property from the construction of a railroad, it cannot be shown that the city, though it had graded other streets contiguous to it, had not graded the one in front of it, on account of the railroad.

4. Under a petition alleging that plaintiffs are the joint owners in equal interest of the land, it cannot be shown that the one of them whose claim is not barred by limitations owns more than half the land, entitling her to more than half the damages to the entire tract.

5. Testimony that plaintiff could get only \$150 for the land immediately after defendant's railroad was built is admissible in answer to a question as to the market value of the land after the injury, as it can refer to nothing but the market value.

6. Interest may be allowed from the time of the injury on the amount by which the value of property is diminished by an injury wrongfully inflicted.

Appeal from Grayson county court; J. H. Wood, Judge.

Action by Mary O'Connor, for herself, and as next friend of Annie O'Connor, against the Missouri, Kansas & Texas Railway Company of Texas. Other persons were made parties. Judgment for Annie O'Connor against said company, and it appeals. Reversed.

Head, Dillard & Muse and Wilkins, Vinson & Batsell, for appellant. A. L. Beatty and John C. Wall, for appellees.

FLY, J. Mary O'Connor, for herself, and as next friend of her minor daughter, Annie

O'Connor, instituted this suit to recover damages to certain real estate in the city of Sherman. Appellant pleaded general denial, and statutes of limitation of two and four years, and pleaded that a number of parties had agreed to indemnify it for all damages that might arise in the premises, and asked that they be made parties to the suit, and that judgment be rendered against them in any sum that might be rendered against appellant. Trial by jury resulted in a verdict for Annie O'Connor for \$200, and in favor of appellant for the same sum against those who had given the bond of indemnity. The court instructed a verdict against Mary O'Connor on the ground of limitation.

The first three assignments of error presented in the brief are not copies of the assignments of error filed in the county court, and would not be considered, were it not that the case will be remanded, and the same questions may again arise. It is held by the court of civil appeals of the First district, in the case of Railroad Co. v. Becht (Tex. Civ. App.) 21 S. W. 971, that in cases of this character evidence as to value of rents, and their loss in consequence of the injury inflicted to the property, was erroneous. The measure of damages in cases of damages to real property is usually the difference between the market value of the premises immediately before and immediately after the injury is inflicted. Evidences as to the value of rents at one time and another did not tend to show such market values. The evidence of witness Hopson as to how many railroad tracks run in front of his house in another part of the city could have no possible bearing on this case.

It was error to permit a witness to testify that the city had graded other streets contiguous to the property, but had not graded the street in front of the property, on account of the railroad.

In the petition it was alleged that the plaintiffs were "the joint owners in equal interest" of the land, and it was error to instruct the jury as to a larger portion of the property having been the separate estate of the deceased father of Annie O'Connor, for the reason that it authorized the jury to find that Annie O'Connor owned more than one-half of the property, and had, therefore, been damaged in a sum greater than one-half of the damage inflicted upon the entire property. It is elementary that a charge should not authorize a recovery for more than is claimed. For the reasons given, the judgment is reversed and the cause remanded.

On Motion for Rehearing.

In the case of Railroad Co. v. Becht (Tex. Civ. App.) 21 S. W. 971, cited in our former opinion in this case, the measure of damages is held, in the language of Shearman and Redfield in their work on Negligence, to be "the difference between the market value of the land immediately before the injury occurred, and the like value immediately after the in-

jury is complete"; and it was held error to admit evidence as to the value of rents, and their loss by the injury to the land. In the case of Railroad Co. v. Molloy, 64 Tex. 607, however, it is said: "When a permanent injury to the use of real property is shown to have resulted from the unlawful act of another, it is proper for the owner to show the depreciation in the rental value, diminution of the business to which the property is adapted, or diminution in other like things resulting from the unlawful act; for all these things but tend to show the depreciation in the value of the thing itself, which must depend on those things that alone give value to property." From the meager statement in the case of Railroad Co. v. Becht, it may be gathered that the injury in that case was not permanent, but could be repaired, although no importance seemed to have been attached to that point; and in that regard it may be different from the case of Railroad Co. v. Molloy and the case before us, in which the injuries were permanent. However, we cannot see how the measure of damages would be changed by the fact of the injuries being temporary or permanent. It might influence the amount. Under the authority of the case of Railroad Co. v. Molloy, we feel constrained to hold that evidence of the value of rents before and after the damages were inflicted was properly admitted.

While it might be admissible, as touching his knowledge of such matters, to permit a witness to state that a railroad ran in a street in front of his house,—although we think it extremely doubtful,—still the inquiry should not be extended to the effect it had on his property. The question before the court was the injury inflicted on the property of appellee, and not on that of any one else.

We think the question as to the charge is raised by the fourth assignment of error, and adhere to our opinion in regard thereto.

In our former opinion the cross assignments were not considered, for the reason that the agreement waiving the filing of them in the lower court was not brought to our notice. Appellee offered to prove by Mary O'Connor, after proving the value of the property immediately before the railroad was built, that she could only get \$150 for it afterwards, and the testimony was excluded. The answer excluded was in answer to a question as to the market value of the land after the injury, and could have referred to nothing but the market value. It should have been admitted.

Appellee Annie O'Connor asked a charge to the effect that she was entitled to recover interest at the rate of 8 per cent. per annum from January 1, 1891, on any amount of damages found by the jury. Appellee was entitled to recover interest on the amount of the damages at the rate of 8 per cent. per annum from the time that the injury was inflicted upon the property until September 22, 1891, when the constitutional provision went into effect that made the legal rate 6 per cent., and

she should from that time receive 6 per cent., and the court should have so charged the jury. "Where the value of property is diminished by an injury wrongfully inflicted, it has been held that the jury may give interest on the amount by which the value was diminished from the time of the injury." Sedg. Dam. § 320.

It is not necessary to discuss the fourth cross assignment. Appellee Annie O'Connor is in no position to complain of the charge in regard to separate and community property, in view of the fact that she claimed in her pleadings to own only half of the property. The motion for rehearing is overruled.

PADGITT et al. v. EVANS.

(Court of Civil Appeals of Texas. May 13, 1899.)

JUDGMENT—SETTING ASIDE—DILIGENCE OF ATTORNEY.

Defendant's attorney, who did not live where suit was brought, did not employ local counsel to assist him, because plaintiff's attorney stated that the case would not be reached that term. Shortly before the next term the latter wrote that he would have the case set, and notify the latter, and would take no advantage. Defendant's attorney wrote that he would have to go to a distant place, and would return shortly after the term day, and would trust plaintiff's attorney to take care of the case until his return. Plaintiff's attorney continued the case from time to time until the last day of the term, when, having heard nothing further from defendant's attorney, he tried it in the latter's absence, and obtained judgment. In a suit to set the judgment aside, plaintiff's attorney testified that, about the time defendant's attorney returned, he wrote that the latter could set the case at any time he chose. Defendant's attorney denied receiving such letter. *Held*, that a finding that defendant's attorney had not exercised sufficient diligence would not be disturbed.

Appeal from district court, Hood county; J. S. Straughan, Judge.

Bill of review by Padgitt Bros. against M. F. Evans to set aside a judgment in favor of defendant against plaintiffs. From a judgment for defendant, plaintiffs appeal. Affirmed.

H. F. Lively, B. M. Estes, and G. G. Wright, for appellants. N. L. Cooper & Son, for appellee.

CONNER, C. J. This was a suit by appellants filed in the district court of Hood county on June 6, 1898, in the nature of a bill of review, to set aside a judgment of said court rendered at a former term, to wit, on April 14, 1898, in favor of appellee and against appellants and others. In the petition in the present suit it was alleged, in substance, that appellants were prevented from presenting their defense (which was set out) in said former suit by reason of the action of plaintiff's counsel therein. The court below heard evidence on this issue alone, excluding all other evidence, and denied the relief herein sought, and rendered judgment for appellee. Hence this appeal.

51 S.W.—33

The facts, so far as here necessary to state, are, in substance, that the suit of Mrs. Evans was upon certain vendor's lien notes upon lands claimed by appellants herein. N. L. Cooper & Son were the attorneys for Mrs. Evans, and G. G. Wright, a resident attorney of Dallas, Tex., was the attorney for Padgitt Bros. Wright had visited Granbury, the county seat of Hood county, after having been notified of the institution of suit by the service of citation upon his clients, with the view of employing local counsel to assist him in the defense; but, before having done so, he met N. L. Cooper, counsel for Mrs. Evans, who informed him that the docket was very much crowded; that there was no probability of reaching the case at that term, and that he might go home, and, if the opportunity presented, he (Cooper) would set the case, and notify him in time to return and try it; and that no advantage would be taken of him (Wright) in the matter. Wright, hence, without having employed local counsel, returned home, and afterwards received a letter from Cooper stating the fact that the cause had not been reached during the term. Shortly before the next term of the court, to wit, on the 6th day of March, 1898, N. L. Cooper & Son wrote the following letter, duly addressed to G. G. Wright, Esq., Dallas, Texas: "Dear Sir: Our district court convenes on the 28th of this month, and we can have the case set at that time and notify you. You can rest assured that we shall not take any advantage of you in the matter. Yours, truly, N. L. Cooper & Son." Thereafter Wright wrote to N. L. Cooper & Son the following letter: "Dallas, Texas, March 26, 1898. N. L. Cooper & Son, Granbury, Texas. Dear Sirs: I have to go to St. Louis to-morrow morning on urgent business. Think I will get back about the 3d of April. Hence cannot be with you until I return. Will therefore trust you to take care of my case until I return. Yours, truly, G. G. Wright." Wright testified that, pursuant to the letter last mentioned, he went to St. Louis, and returned about the time named in said letter, to wit, April 8d, and that he continued from said time until on and after the date of the judgment, April 14, 1898, to remain in Dallas; that, trusting N. L. Cooper & Son to set the case and notify him, he did not go to Granbury to attend to said case, and knew nothing of the rendition of the judgment until after the adjournment of the term. N. L. Cooper, for the defendant, testified that, about the time Wright stated in his letter that he would be back, he (Cooper) wrote said Wright that he (Wright) could set the case for any time that would suit him; that he never heard anything from Wright in reply to said letter, or anything further; that said case was called several times during the March term, 1898, and was not tried until the last day of the term.

The court below held that the diligence shown in behalf of appellants herein by G. G. Wright was not sufficient. The term of

the court at which the judgment here sought to be set aside was rendered began on March 28, 1898, and ended April 14, 1898. Said judgment was in favor of Mrs. Evans for the amount specified in the note sued on, with foreclosure of the vendor's lien on the land herein claimed by appellants. Appellants had on file in said suit an answer setting up superior title in themselves. It was said by our supreme court in the case of *Johnson v. Templeton*, 60 Tex. 238: "Such bills seeking relief from final judgments, solemnly rendered in the due and ordinary course of the administration of justice by courts of competent jurisdiction, are always watched by courts of equity with extreme jealousy, and the grounds upon which interference will be allowed are confessedly narrow and restricted. It will not be sufficient to show that injustice has been done by the judgment sought to be enjoined. It must further distinctly and clearly appear that this result was not caused by any inattention or negligence on the part of the person aggrieved, and he must, among other matters, show a clear case of diligence and of merit, to obtain the interference of a court of equity in his behalf at such a stage of the case." Thus tested, we have been unable to say that the court below erred in the ruling complained of. He had the witnesses before him, and had better opportunity of determining the matter than this court can have from the record; and the diligence shown by Wright is not so clearly sufficient as to authorize us, in our judgment, to reverse the action of the trial judge. It would seem that after the return of Wright, early in April, in view of the wording of the letter written by him to Cooper & Son, he should have manifested some further interest or made some further inquiry as to the probability of a trial at that term. His letter to Cooper was that he should take care of his case while gone. This could hardly have been understood by Cooper & Son as a direction to continue to do so after his return. Cooper testified, as will be seen, that about the time of Mr. Wright's return he wrote him that he could set the case. We are unable to say that it was incumbent upon him to continue to write, or to make extraordinary effort to notify Mr. Wright that he desired a trial at that term of the court. It ordinarily might be presumed that a party desires a disposition of his case. It appears that in fact Cooper continued the case from time to time when called, until the last day of the term, when, not having further heard from Mr. Wright, he proceeded to trial and procured judgment. Wright denied having received any such letter from Cooper as last above mentioned, but this presented a mere conflict in the evidence, which was settled by the court below. We therefore feel constrained to refuse to disturb the finding of the court upon the issue of diligence stated. This conclusion renders immaterial the other questions presented. The judgment is accordingly affirmed.

NELSON et al. v. BRENHAM COMPRESS OIL & MFG. CO.

(Court of Civil Appeals of Texas. May 17, 1899.)

LIMITATIONS—AMENDMENT—NEW CAUSE OF ACTION.

1. Where action was against a corporation by its corporate name, the petition stating it was an "organization," and not alleging it to be a partnership, the allegation of incorporation could be added by amendment, without making it a new proceeding.

2. An amendment setting up a demand for damages for failure to deliver all the goods contracted for, in an action for money overpaid, introduces a new cause of action, which is barred if limitation has run against such a claim at the time of the amendment.

Appeal from Washington county court; E. P. Curry, Judge.

Action by Nelson, Morris & Co. against the Brenham Compress Oil & Manufacturing Company. There was a judgment for defendant, and plaintiffs appeal. Reversed.

Rogers & Herbst, for appellants. Searcy & Garrett, for appellee.

JAMES, C. J. The original petition designated the defendant as the Brenham Compress Oil & Manufacturing Company, and alleged that defendant was an organization composed of certain officers and directors, doing business under the firm name and style of the Brenham Compress Oil & Manufacturing Company, of which D. C. Giddings, Jr., is president; W. E. Dwyer is secretary; D. C. Giddings, Sr., treasurer; and William Perry, general manager. The cause of action stated in this pleading was a shortage in a shipment of oil which plaintiffs had paid defendant for, and sues for \$412.16 on account of such shortage. The first amended original petition alleged the defendant, the Brenham Compress Oil & Manufacturing Company, to be a corporation under the laws of Texas, and alleged the contract to have been created by correspondence, and prayed judgment for the sum overpaid, as alleged in the original petition. The second amended petition alleged the contract to have been in writing, arising by correspondence between the parties, whereby defendant agreed to deliver to plaintiffs a certain quantity of cotton-seed oil, for which plaintiffs paid defendant the agreed price, but in fact there was delivered a less quantity, making the shortage referred to, defendant thereby violating the contract; whereby defendant became liable to repay said sum, and also became and is liable to plaintiffs in the sum of \$800 damages for failure to perform the said contract. The prayer was for the money overpaid, interest thereon, and costs, and, in case plaintiffs are not so entitled to recover, then that they recover damages for breach of the contract. The court sustained exceptions of defendant, and, plaintiffs declining to amend, rendered judgment for defendant.

The exceptions were that the action for

money overpaid was barred by the statute of two years, and the action, so far as it seeks to recover damages for a failure to ship the full quantity of oil, was barred by the statute of four years. The defense of limitations of two years against the action for money overpaid was evidently sustained on the proposition that the original petition was not brought against the defendant as a corporation. It is true that the defendant therein was denominated an "organization," and it did not state that it was a corporation. If the suit as against the corporation be held to have been commenced only by the first amended original petition, the action would probably have been barred. But we cannot agree with the view contended for. The original petition did not state that defendant was a partnership, and it was perfectly consistent with its statements that it was a corporation. A corporation may sue and be sued in its corporate name. Here the action was against the defendant by its corporate name, and plaintiffs could, by amendment, add the allegation of incorporation, without making it a new proceeding. 6 Thomp. Corp. § 7679, and cases cited. We conclude, therefore, that limitations should clearly not have prevailed as to the action for the recovery of money overpaid.

The second amended original petition first introduced a demand for damages for failure to furnish all the oil contracted to be furnished. This was a new cause of action. It is manifest that a suit for the recovery of money overpaid indicated satisfaction with the failure of defendant to supply all the oil, and, upon this theory, sought merely to recover the money for which no consideration had been received. We think the action for damages for breach of the contract was not begun until the second amended original petition was filed, and, if this was more than four years after such right of action accrued, it was barred. Reversed and remanded.

SMITH et al. v. FARMERS' LOAN & TRUST CO. et al.¹

(Court of Civil Appeals of Texas. April 26, 1890.)

LIMITATIONS—COMMENCEMENT OF ACTION—BONA FIDE PURCHASER—NOTICE OF LIEN—ESTOPPEL—VENDOR'S LIEN—ASSUMPTION OF PAYMENT.

1. A petition alleging conveyance of land by B. to R.; execution of vendor's lien note by R. to B.; negotiation by indorsement of note by B. to W.; reconveyance of land by R. to B. by deed reciting as consideration a certain amount of cash and the assumption of the payment by B. of said note; nonpayment of the note; and that B. conveyed the land to P., and that P., S., and A. claim some interest in the land; and praying for judgment against R. and B. for the debt represented by the note, for foreclosure of the vendor's lien, for writ of possession, etc.,—is the commencement of the suit in reference to B.'s assumption of the note, within the statute of limitations, though making no other reference to the assumption than by referring to the recital of the deed.

¹ Writ of error denied by supreme court.

2/Persons buying land from B. are charged with notice of a vendor's lien note, and its negotiation or assignment, where the recorded deed to B. refers to the note, which is not barred by limitations, and recites, as part of the consideration of the deed, the assumption of the payment of the note by B.

3. Failure of the holder of a vendor's lien note to assert it for a period less than the statute of limitations does not estop him to assert it against purchasers of the land with record notice of the note.

4. Assumption by the purchaser of land of payment of a vendor's lien note thereon inures to the benefit of the holder thereof, without any acceptance of the assumption.

Appeal from district court, Dallas county; W. J. J. Smith, Judge.

Suit by the Farmers' Loan & Trust Company against R. F. Smith and others. Judgment for plaintiff. Defendant Smith and another appeal. Affirmed.

Thomas & Turney, for appellants. W. H. Ford and Robertson & Firmin, for appellees.

JAMES, C. J. Suit by appellee against J. O. Roberts, W. J. Betterton, and others to recover upon a vendor's lien note and to foreclose the lien. The third amended original petition alleged, in substance, on April 28, 1890, J. C. Roberts executed the note sued on to Betterton, the deed being recorded on May 18, 1890; that on May 10, 1890, before the maturity of the note, Betterton, for value, sold and indorsed it to the J. B. Watkins Land Mortgage Company; that afterwards, about May 15, 1890, the J. B. Watkins Land Mortgage Company, for value, assigned it to plaintiff in trust, to secure its debenture bonds; that after this, on, to wit, June 17, 1890, Roberts reconveyed to Betterton the land for which the note had been given, by a deed reciting, among other things, as its consideration, the sum of \$6,000 in cash, and the assumption by Betterton of the payment of the note in question (which had been given by Roberts to Betterton), who thereby assumed and promised Roberts in terms to pay said note, and continued in effect the lien created by said deed of April 28, 1890, whereby said Betterton became liable to pay same as a guarantor thereof, but, should plaintiff err in charging that Betterton so assumed said debt as guarantor, it further shows and avers that it has never accepted such liability of Betterton as in any manner releasing, discharging, or modifying the liability of Roberts upon the note, who still remains liable thereon; that said deed last named from Roberts back to Betterton was duly recorded on April 11, 1891, in Brazos county, where the land is situated; that on April 23, 1891, Betterton conveyed the land to defendant Philpott, who claims some interest therein. Then follows allegations of the terms of the note, description of the land, and allegations that defendants Smith, Philpott, and Adriance claim some interest in the land, and concluding with a prayer for judgment against Roberts and Betterton for the debt, interest, and attorney's fee, for foreclosure of the vendor's lien, etc.

All the defendants pleaded limitations, and Smith and Adriance pleaded bona fide purchase without notice of the lien. The judgment was against Betterton for the debt, discharging Roberts, and decree of foreclosure as to all defendants. Smith and Adriance appeal.

The material facts are as follows: Betterton, on April 28, 1890, conveyed the land to Roberts, and the latter gave Betterton the \$3,000 note in suit, secured by vendor's lien and a trust deed. The deed was filed same day for record. On June 17, 1890, Roberts reconveyed the land to Betterton, the deed reciting, as part of the consideration, the assumption by Betterton of the payment of the \$3,000 note, and expresses that a vendor's lien was retained against the land until the said note and all interest thereon are fully paid. This deed was filed for record April 11, 1891. After the registration of said instruments, Betterton conveyed the land, and the rights of the other defendants arose under such conveyance by Betterton. Such facts as were found by the jury on special issues will be stated in another connection, under the second conclusion of law. The suit was brought less than four years after the maturity of the note.

Conclusions of Law.

1. The first assignment is that the court erred in failing to sustain the pleas of limitations. Smith and Adriance, in their first amended original answer, pleaded that "Betterton, as well as Roberts, was principal in the debt in suit, as between them and defendants and their land; that plaintiff and J. B. Watkins Company failed to sue or take any steps to collect the debt from them until about four years after its maturity, and have never yet sued Betterton in any other character than that of indorser, and never had said note protested, and have thus, by negligence, lost all right against Betterton, the principal as aforesaid, his assumption [assumption] of the note in question being now barred by four years' limitation, and said land in the hands of these defendants is thereby discharged." In their first supplemental answer, same defendants pleaded "that the cause of action against Betterton accrued more than four years before it was set up by plaintiff, and Betterton had been discharged from obligation thereon by the statute of limitations, and thereby defendant Roberts is discharged by the negligence and laches of plaintiff and J. B. Watkins Land Mortgage Company, and thereby these defendants and their land is discharged from the lien in suit." By rule 14 for the government of district courts, pleadings that are substituted by amended pleadings should be looked to as a part of the record, when necessary in determining a question of limitations, and we take it that, under this rule, it is not necessary that such pleadings should appear in the statement of facts. The original petition was

filed before the expiration of four years after the maturity of the note, and it alleged, in substance, the conveyance by Betterton to Roberts; the execution of the vendor's lien note by Roberts to Betterton; the negotiation by indorsement of the note by Betterton to the Watkins Land Mortgage Company; the reconveyance of the land by Roberts to Betterton by deed reciting, as consideration therefor, the sum of \$6,000 in cash, and the assumption of the payment by Betterton of the note herein sued on; the nonpayment of the note; and that Betterton conveyed the land to Philpott; and that Philpott and Smith and Adriance claim some interest in the land. The prayer was that plaintiff have judgment against Roberts and Betterton for the debt, for foreclosure of the vendor's lien, for writ of possession, etc. The ground upon which appellants base this assignment is that the only reference in this original pleading to the assumption by Betterton is by way of describing the deed from Roberts to Betterton, and that it has no averment that Betterton assumed to pay. In our opinion, there is nothing in this assignment. The prayer does not confine the petition to asking judgment against Betterton on his relation as indorser of the note, nor upon any particular ground of liability. The judgment is asked in view of the matters stated in the petition. The indorsement and the assumption are both shown, and we conclude that this petition was the commencement of the suit in reference to Betterton's assumption of the note.

2. The court submitted special issues to the jury, and they found the following facts: That the J. B. Watkins Land Mortgage Company, when notified by Roberts that Betterton had assumed the payment of the note in question, accepted the assumption of Betterton to pay same; that Philpott assumed the payment of said note in a transaction with Betterton; that Adriance and Smith, when they acquired title to the land, were not notified of the existence of the note and lien; and that they used the diligence of prudent persons, in their situation, to learn whether or not there was any incumbrance on the land when they bought. The court was of opinion, notwithstanding the findings of the jury as to notice, that the record was notice, to all parties dealing with the land under Betterton, of the existence of the note and lien. From the recital in the deed from Roberts to Betterton, that the latter assumed to pay the note that had been given him by Roberts as part of the consideration, no one could but understand that the note was at that time outstanding in the hands of some other party. It had not apparently become barred by limitations when these parties dealt with the land, and its mere nonassertion would not warrant any one in assuming that it had been paid. Those holding under Betterton must therefore be held as dealing with the land upon the theory of such note

being outstanding. The cases cited by appellants do not apply. It is true the jury returned a finding that these parties used the diligence of prudent persons, in their situation, to ascertain whether or not any incumbrance existed on the land, and failed to discover any, and did not have any notice of the existence of this note and lien; but this is, we think, not sufficient to protect them where they were charged with notice of the lien note, and of its negotiation or assignment, and when they dealt with the land a sufficient time had not run to bar the note. No circumstance of estoppel is claimed save that the Watkins Land Company, or plaintiff, did not sooner assert the note; and appellants contend that plaintiff's course was negligent and fraudulent in suppressing the fact of the outstanding existence of the note, and it should not be allowed to assert the lien after thus enabling Betterton and Philpott to impose on these defendants. With this we cannot agree.

3. The assumption by Betterton of the note inured to the benefit of the holder thereof, and acceptance thereof was not necessary in order to make Betterton liable to the latter. *Spann v. Cohran*, 63 Tex. 240. An acceptance of the assumption was found, and it is immaterial when it was made, or whether it was made at all.

4. The other assignments are either disposed of by what has been stated in this opinion or are regarded as without merit. Affirmed.

On Motion for Rehearing.

(May 31, 1899.)

The motion is overruled. There is nothing which shows that Betterton and Roberts rescinded the former's undertaking to pay the note given by Roberts.

The case of *Mathews v. Jones* (Neb.) 66 N. W. 622. is direct authority supporting the opinion in this case that the record charged defendants with notice of the existence of the note as an outstanding claim and lien. They were not merely put upon inquiry, but charged with knowledge of the lien, and they dealt with the property subject to the lien, if it in fact existed as was shown.

Overruled.

INTERNATIONAL & G. N. RY. CO. v. RHOADES.

(Court of Civil Appeals of Texas. June 7, 1899.)

CARRIERS—ALIGHTING FROM MOVING TRAINS—NEGLIGENCE—MENTAL ANGUISH—PROOF.

1. It is not contributory negligence for a passenger inexperienced in getting on and off trains, and believing that the train was moving slowly by his station, though it was too dark to see how fast it was moving, to jump off at the usual stopping place, under the direction, and relying on the skill and care, of the conductor, where the train was not going so fast that the

danger of alighting was obvious to one so inexperienced.

2. Where there is evidence of physical injury justifying submission of injury from mental suffering, the amount of mental damages need not be proved in any sum or amount.

3. Where a passenger was injured in alighting from a moving train he cannot recover, even if he was not guilty of negligence, unless the agents of defendant in charge of the train invited him to so alight, and in so doing he acted with ordinary prudence.

Appeal from Milam county court; W. M. McGregor, Judge.

Action by Jeff Rhoades against the International & Great Northern Railway Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

S. R. Fisher, for appellant. F. M. Adams, for appellee.

FISHER, C. J. This is an action by appellee, Rhoades, against the railway company for damages which he alleges were sustained by him through negligence of the defendant in failing to stop its train on which he was a passenger at the usual stopping place for passengers to alight from trains at Gause, on the night of April 26, 1898, which was the place that plaintiff desired to leave the train; and that by ringing the bell and blowing the whistle it caused the plaintiff to believe that the train had slowed up, when it had not, but was moving rapidly, it being too dark for the plaintiff to see how fast the train was moving; and, while thus moving past the usual stopping place, the conductor commanded and directed the plaintiff to alight from the train, and plaintiff, not being able to see in the darkness, believing the train had slowed up, and being inexperienced in getting on and off moving trains, and relying upon the skill and care of the conductor and employes in charge of the train and operating the same, and in properly instructing him when and where to alight from the same, tried to get off at the time and place as directed by the conductor, and in so doing was injured, etc. The defendant pleaded general and special demurrers, general denial, and alleged contributory negligence upon the part of plaintiff in jumping off the moving train in the darkness. Verdict and judgment were in plaintiff's favor for \$250.

There was no error in overruling the demurrers. The petition, upon its face, does not allege facts showing that the appellee was guilty of contributory negligence in alighting from the train under the circumstances.

The court, on the question of liability of the railway company, instructed the jury as follows: "If you believe from the evidence that the plaintiff was a passenger on one of the trains of defendant, and had paid his fare from Milano to Gause, and that he was promised by the conductor on said train that said train would be stopped at Gause for a time sufficiently long to allow plaintiff to alight from said train of cars, and when said train arrived at Gause it was not stopped at the usual place for stopping for passengers to

alight from said cars, but that plaintiff was instructed by the conductor to alight from said train of cars, and that plaintiff was at the time ignorant of the danger of jumping from a moving train, but was made to believe by said conductor or other agent and employé of defendant that he could safely get off of said train of cars at the time, and did jump from same, and thereby injured himself, then you will find for the plaintiff such actual damages as the evidence shows will be a fair and reasonable compensation to plaintiff for the injuries sustained. A passenger riding on a train of cars is required to use such care and diligence in getting off the train as a prudent, cautious, and competent person would use under similar circumstances, and the want of such diligence on the part of plaintiff in alighting from said train of cars would prevent him from recovering a judgment against defendant." There is evidence in the record which authorized the court to give the charge quoted. The effect of the verdict is that the jury gave credence to the facts in the record, which shows that the plaintiff was in the exercise of proper care at the time that he alighted from the train, and that he was inexperienced, and that he relied upon the instructions of the conductor that there was no danger, and that then and there was the proper time to leave the train. If the train had been going at a rate of speed that it was dangerous to leave it, and that it was so obvious that a prudent man would not encounter it, a passenger would not be justified in relying upon the advice and instructions of the conductor that he could alight with safety. But there is evidence in the record which would justify the conclusion that the train was not going at such a rate of speed that the danger in alighting therefrom was obvious to a man of inexperience in the movement of trains and in alighting from them. The rule of law applicable to the facts consistent with the verdict is as follows: "A passenger is not guilty of negligence per se in jumping from a moving train by the advice or order of the conductor or other authorized servant of the carrier, on whose opinion or judgment in the matter he has a right to rely, if the danger of such act would not be apparent to a man of ordinary prudence. Railroad Co. v. Schaufier, 75 Ala. 142; Railroad Co. v. Winn, 93 Ala. 309, 9 South. 509; Railroad Co. v. Person, 49 Ark. 182, 4 S. W. 795; Railroad Co. v. Cantrell, 40 Am. Rep. 105; Railroad Co. v. McCurdy, 45 Ga. 288; McCaslin v. Railway Co., 93 Mich. 553, 53 N. W. 724; Railroad Co. v. Krouse, 30 Ohio St. 222." Railway Co. v. Brown (Tex. Civ. App.) 23 S. W. 618; Railway Co. v. Bingham (Tex. Civ. App.) 21 S. W. 569; Railroad Co. v. Viney (Tex. Civ. App.) 30 S. W. 252.

At the request of the defendant, the court gave the following instruction: "If, from the evidence, you believe that the plaintiff, in jumping or stepping from the moving train, sustained some or all of the hurts of which

he complains, then he cannot recover, even if you find that he was not, in so doing, guilty of negligence, unless you further find from the evidence that the agents and servants of defendant in charge of the train commanded, directed, and invited plaintiff to leave the train while in motion, and that plaintiff in so doing acted as would have acted a person of ordinary prudence. And in this connection, you are further instructed that a command, direction, or invitation given by an agent or servant of defendant to disembark from a moving train will not make defendant liable for resulting injuries if a person of ordinary prudence would not have acted upon such command, direction, or invitation." This charge, when considered in connection with the main charge of the court as quoted, correctly presents all of the issues arising from the evidence, and it was unnecessary for the court to further instruct the jury on the questions submitted in the special charges which were refused. There was sufficient evidence of physical injuries upon which to base a submission of injury arising from mental suffering, and as to this item it was not essential, in order for the plaintiff to recover for damages sustained for mental anguish, that he should prove an amount or sum covering the injuries in this respect.

The language used by counsel in his argument, as complained of in the fourteenth assignment of error, is not ground for reversal. We have carefully considered the questions raised in the sixth assignment of error, and those raised in the other assignments that are not specially noticed. We find no error in the record, and the judgment is affirmed. Affirmed.

HOLMES et al. v. STONE.

(Court of Civil Appeals of Texas. May 17, 1899.)

EXECUTORS—POWER TO SELL HOMESTEAD—RIGHT TO OBJECT.

Where a husband dies, leaving as the only constituent member of his family his wife, in whom by law and by her husband's will the homestead rights vest, a child, who is a devisee of a portion of the remainder, cannot question the power of the executor to sell the homestead unless it affirmatively appears that the sale was not to pay debts and legacies.

Appeal from district court, Collin county; J. E. Dillard, Judge.

Action by Lucy S. Holmes and husband against W. H. Stone. From a judgment entered on a verdict instructed for defendant, plaintiffs appeal. Affirmed.

E. F. Brown and Woods & Holt, for appellants. Abernathy & Beverly, for appellee.

FLY, J. This suit was instituted by Lucy S. Holmes, joined by her husband, W. H. Holmes, to recover of appellee a portion of a parcel of land described by metes and bounds, the number of acres not being given. The case was tried by jury, and a verdict in

structed for appellee, upon which judgment was entered.

It was proven that in 1880 John Huffman died, leaving the following will: "First. I direct that all my just debts and funeral charges shall, by my executor hereinafter named, be paid out of my estate as soon after my decease as shall be found convenient. Second. I give and bequeath unto my faithful and beloved wife, Helen M. Huffman, all my household and kitchen furniture, silver plate and ware, books, pictures, my pair of horses and buggy, and all property exempt from forced sale by the laws of this state, and the sum of four thousand dollars, to be paid to her by my executor within twelve months after my decease, to have and to hold the same unto the said Helen N. Huffman, her heirs and legal representatives, forever. I also give to her the use of my dwelling house, lots, gardens, orchards, and all appurtenances to the same belonging,—the same being the place where I now reside, situated in Collin county,—to have and to hold the same unto the said Helen N. Huffman during her natural life. I also desire that the net proceeds arising from the rent of all lands and tenements belonging to my estate be paid to my said wife, the said H. N. Huffman, annually by my executor, to do with as she may deem proper, so long as she may live. Third. * * * I desire and direct that all the residue of my estate remaining after the death of my said wife shall be equally divided among my said children, or their heirs, share and share alike, taking into account the said advancements above specified: provided that, if my heir or heirs deny or controvert having received said amounts, they shall not be entitled to anything more from my estate, and I direct that my said estate be divided equally as aforesaid among the other heirs which shall not deny and controvert the amounts to them charged. Fourth. It is my will that no other action be had in the county court in the administration of my estate than to prove and record this will, and to return an inventory and appraisement of my estate. I authorize and empower my executor to sell and dispose of any portion of my said estate at public or private sale in a manner that may be best for the purpose of paying my just debts and legacies herein bequeathed, saving and excepting from such sale and disposition that portion of my estate specially devised, and authorize and empower and direct my executor to sell on a credit of twelve (12) months all property remaining on hand at the decease of my said wife, and upon the payment of the purchase money of the same to divide the net proceeds as directed heretofore in the 3rd division of this will." That part of the third paragraph omitted showed the amounts of advancements made to the children of the testator. The will was properly probated, and Joseph W. Baines was appointed executor. John Huffman left surviving him his wife, Helen N. Huffman, and 11 children; Lucy S. Holmes

being among the number. Mrs. Huffman was the only member of the family of John Huffman at the date of his death, and she afterwards married two men named Douthitt. The debts and legacies amounted to \$6,500, and the lands and personal property were sold to pay the same; and among the land so sold was the homestead of Mrs. Huffman, she buying the homestead, of which the land in controversy is a part. Mrs. Huffman sold to appellee.

The contention of appellants is that, the land being the homestead, the executor had no authority to sell the same to pay the debts and legacy. When John Huffman died, leaving no constituent member of his family except his wife, the homestead right was vested in her by law, as it was by the terms of the will, and she alone could complain of a sale of the homestead. She not only did not object to the sale, but became the purchaser, and afterwards sold the land to appellee. So far as appellants are concerned, the homestead occupied the same position that the balance of the property did, and, unless it affirmatively appeared that the land was not sold to pay off the debts and legacies, they have no cause of complaint. The judgment is affirmed.

FOUKE v. BRENGLE.¹

(Court of Civil Appeals of Texas. May 3, 1899.)

ASSIGNMENT OF ERROR—SUFFICIENCY—PARTNERSHIP—WHAT CONSTITUTES.

1. An assignment of error dealing with two distinct propositions cannot be considered.

2. Where one furnishes another with property to use in carrying on a business, stipulating for a share of the profits as compensation, it makes him a partner in the business.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

Action by C. O. Brengle against Claude Fouke. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry & Henry, for appellant. Vaughan & Vaughan, for appellee.

JAMES, C. J. The assignments complaining of the refusal of a continuance of the overruling of the general and special demurrers are not well taken.

The foundation of the action was the failure of the warehouseman to insure plaintiff's goods against fire for the latter's benefit, as it was alleged and proved he contracted to do. The question is one of breach of contract, and not of negligence. Hence there is nothing in the sixth assignment.

The eighth assignment of error is not entitled to be considered, as it deals with two distinct grounds of error or propositions. Insurance Co. v. Chowning, 86 Tex. 654, 26 S. W. 982.

¹ Rehearing denied June 7, 1899.

The ninth assignment is not sustained, because there was evidence of the market value of the property at the time and place where burned. There is nothing in the assignment referring to an objection to the evidence on the ground that the witness was not qualified to testify as to the value of the goods.

The only matter of error which has the semblance of merit and which requires discussion is that the evidence failed to show that appellant, Fouke, was liable as a partner of L. J. Culley. It appears from the evidence that L. J. Culley was manager of the Texarkana Transfer & Storage Company, and appellant, Claude Fouke, made an arrangement with Culley by which Fouke rented to Culley, manager, for use in the said transfer and storage business, two warehouses and fixtures, and a team, wagon, and harness, for which he was to be paid \$15 per month, and one-third of the profits of the business, if any, over and above the running expenses. The arrangement was made at the time at or before the business was commenced. The evidence does not otherwise connect appellant, Fouke, with participation in the business; and the circumstances relied on as tending to indicate that the real relation of Fouke to the concern was partner, instead of lessor, do not appear to us to be of any force. The question is, after all, whether or not the fact that Fouke furnished the concern property for use in its business, stipulating for a share of the profits of the business as compensation for its use, made him a partner. The case of *Cothran v. Marmaduke*, 60 Tex. 370, decides the question in the affirmative; and the doctrine of this case has never, so far as we know, been questioned in this state, and in *Buzard v. Bank*, 67 Tex. 83, 2 S. W. 54, and *Brown v. Watson*, 72 Tex. 216, 10 S. W. 395, has been cited without disapproval. We can see, and there is, no distinction between a case where money is furnished and a case where other means to carry on business is furnished; the compensation agreed on in either case being a share in the profits of the business. While we doubt its soundness, it has become the recognized rule in this state, and was recently followed by the court of civil appeals at Dallas, in *Dilley v. Abright*, 48 S. W. 548. We therefore affirm the judgment. Affirmed.

SMITH v. BOARD.

(Court of Civil Appeals of Texas. May 11, 1899.)

NOTES—ATTORNEY'S FEES—JUDGMENT—SUFFICIENCY OF PETITION.

Where a petition on a note which provides for attorney's fees in case it is placed in an attorney's hands for collection fails to allege that it was placed in an attorney's hands, judgment by default cannot include attorney's fees.

Error from district court, Brazos county; W. G. Taliaferro, Judge.

Action by A. G. Board, as administrator of the estate of J. B. Conway, deceased, against

R. L. Smith. Judgment by default was rendered for plaintiff, and defendant brings error. Reversed.

Sam R. Henderson, for plaintiff in error.

GARRETT, C. J. A. G. Board, as administrator of the estate of J. B. Conway, deceased, brought this suit in the district court of Brazos county against the plaintiff in error for recovery upon three promissory notes, dated 15th of November, 1893, for \$425 each, which provided that, if said notes were put in the hands of an attorney for collection, the maker should pay 10 per cent. of the principal and interest in addition as attorney fees. The notes were not paid, and suit was brought upon them for collection of the amount due thereon, and 10 per cent. thereof as attorney fees mentioned therein. The petition alleged due execution of the notes, the agreement to pay attorney fees, and averred liability on the part of the maker to pay the amount found to be due thereon, including attorney fees for the collection thereof, but failed to allege that the notes had been placed in the hands of an attorney for collection. When the case was called for trial below, the defendant failed to appear, and judgment was rendered against him by default for the full amount of the notes, principal and interest, and 10 per cent. thereon as attorney fees as provided. The defendant has prosecuted this writ of error, and seeks to reverse the judgment of the court below on the ground that there was no allegation in the petition that the notes had been placed in the hands of an attorney for collection, in support of the judgment rendered for attorney fees. Upon the authority of the case of *Maddox v. Craig*, 80 Tex. 600, 16 S. W. 328, this contention must be sustained. The judgment of the court below will be reversed, and judgment will be here rendered in favor of plaintiff in the court below for the amount of the notes, principal and interest only, and the costs of the court below, but the costs of the proceeding in error to this court will be adjudged against him. Reversed and rendered.

SAYERS v. DAVIS et al.¹

(Court of Civil Appeals of Texas. May 18, 1899.)

APPEAL—DIRECTING VERDICT.

Where, in trespass to try title, the land described in plaintiff's pleadings is not that embraced in her chain of title, it is proper to direct verdict for defendant.

Appeal from district court, Angelina county; Tom C. Davis, Judge.

Action by Claudia Sayers against J. W. Davis and others. From a judgment in favor of defendants, plaintiff appealed. Affirmed.

Mantooth & Townsend, for appellant J. T. & J. W. Davis and A. Chesnutt, for appellees.

¹ Writ of error denied by supreme court.

PLEASANTS, J. This suit was brought by appellant to recover 160 acres of land, a part of 640 acres patented to R. K. Goodloe, in Angelina county. The defendants answered by general denial and statute of limitations. There was much testimony before the jury tending to show title by prescription in the plaintiff to a part of this 640 acres of land, though there was some conflict in the evidence on this issue. It would seem from the evidence that it would be only by prescription under the statute of limitations that the plaintiff could recover, since she derails title under the pre-emption claim of one whose location was upon patented land. After hearing the evidence the judge instructed the jury to return a verdict for the defendants, which the jury did, and a judgment was rendered for the defendants. There are several assignments of error made by appellant, but they will not be discussed or decided, since we are of the opinion, after an inspection of the record, that the land described in the pleadings of the plaintiff is not that embraced in her chain of title. The land described in the petition is in another part of the 640-acre tract than that described in her title, and therefore the action of the judge in instructing a verdict for the defendants should be sustained by this court. The judgment is affirmed. Affirmed.

WESTERN UNION TEL. CO. v. WILSON.
(Court of Civil Appeals of Texas. April 27, 1899.)

TELEGRAMS—FAILURE TO DELIVER—LIABILITY.

A telegram stating that the mother of the person to whom it is sent is very low is sufficient to notify the telegraph company that the proximate consequence of its failure to deliver with proper diligence would be to deny such person an opportunity to attend his mother's funeral, so as to render it liable for such failure, it being unnecessary that the message state the place of burial.

Appeal from district court, Angelina county; Tom C. Davis, Judge.

Action by J. E. Wilson against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Norman G. Kittrell, for appellant. Man-tooth & Townsend, for appellee.

WILLIAMS, J. The only reason assigned for reversal of the judgment is alleged error in the refusal of the court below to sustain an exception which asserted that the petition was insufficient because the damages sued for were too remote. The damages claimed were alleged to have been sustained in the inability of plaintiff to attend the funeral of his mother, resulting from negligent delay of defendant in delivering a telegram advising him of her illness. The facts alleged, so far as

they are necessary to the decision, are that plaintiff's mother, Mrs. Wilson, resided at Springdale, Ark., his sister, Mrs. Gladden, at Purdy, Mo., and himself at Lufkin, Tex. Mrs. Wilson, being at Purdy on a visit to Mrs. Gladden, became dangerously ill, and on June 28, 1898, Mrs. Gladden delivered to appellant, for transmission and delivery to appellee, a message in these words: "Ma is very low. [Signed] Kate Gladden." Defendant negligently failed to deliver this message to plaintiff until after 3 a. m. of June 29, 1898. Mrs. Wilson died June 29th, and was buried at noon on June 30, 1898, at Springdale, Ark. Had the message been delivered, as, with proper diligence on defendant's part, it could have been, at any time before 3 a. m. of the 29th, plaintiff could and would have taken the train leaving Lufkin at that hour, and have been present at the funeral; Springdale being on the railroad which he would have traveled going from Lufkin north, and between that point and Purdy.

The point urged is that the message was not sufficient to put appellant upon notice that a proximate consequence of the failure to deliver it would be a denial to plaintiff of the opportunity to attend his mother's funeral. We are unable to see that the case is distinguishable from that of *Loper v. Telegraph Co.*, 70 Tex. 689, 8 S. W. 600, and subsequent cases, which have approved the decision therein, in which it is held, in effect, that such a message puts the telegraph company on notice that the sick person may probably die, and the sendee of the message may desire to attend the funeral. *Telegraph Co. v. Edmondson*, 91 Tex. 209, 42 S. W. 549; *Telephone Co. v. Seiders*, 9 Tex. Civ. App. 431, 29 S. W. 258; *Telegraph Co. v. Kinsley*, 8 Tex. Civ. App. 527, 28 S. W. 831. We do not consider the place at which the burial may take place as of any consequence, except as its locality may affect the party's ability to reach it, and therefore hold that it is unnecessary that the message should convey any notice as to such place. Affirmed.

COLBERT et al. v. BROWN et al.

(Court of Civil Appeals of Texas. May 4, 1899.)

REVIEW—JUDGMENT—MOTION TO SET ASIDE DEFAULT—DISCRETION.

1. Every intendment in favor of a judgment must be indulged where there is no statement of the facts in evidence on the trial, nor conclusions of facts or law found by the judge in the transcript on an appeal from a refusal to set it aside.

2. A judgment refusing to set aside a default decree and to grant a new trial will be affirmed where the evidence in support of the motion does not show an abuse of discretion in refusing it.

Error from district court, Harris county; William H. Wilson, Judge.

Suit by Adeline and Anderson Colbert against L. E. Brown and another. There was a judgment refusing to set aside a decree in

¹ Writ of error denied by supreme court.

favor of defendants, and plaintiffs bring error. Affirmed.

Boyd & Thompson, for plaintiffs in error.

PLEASANTS, J. This is an appeal from a judgment of the district court of the Fifty-Fifth judicial district refusing the motion of appellants to vacate and set aside a decree rendered in cause No. 20,078, wherein appellants were plaintiffs and appellees were defendants, and to grant plaintiffs a new trial. The case is this: The appellants sued appellees to remove cloud from title to lot No. 4, in block 4, in the city of Houston, Tex. The suit was filed on the 9th of November, 1896, and the petition alleged that plaintiffs were the owners of said lot, and had been in peaceable possession of the same from April 27, 1880, up to April 30, 1896; at which latter date, having need of money to pay the taxes on said lot, they borrowed of defendant L. E. Brown the sum of \$30, and to secure the payment of said sum to Brown they executed to him a warranty deed to said lot, but that it was well understood and agreed between them and the said Brown that said deed was intended as a mortgage only; and that afterwards, on the 19th of September, 1896, plaintiffs then being in possession of said premises, and occupying same as their homestead, the said Brown pretended to sell and transfer said property to defendant John Coss, and which pretended sale and transfer is evidenced by a deed of conveyance from Brown to Coss, and which deed is duly recorded in the deed records of Harris county; and plaintiffs charge such sale and transfer was and is fraudulent, and that same was effected through fraud and collusion between the said Brown and the said Coss, and that the said Coss knew at the time of said pretended sale that the deed from plaintiffs to said Brown was in fact but a mortgage. They aver that the deed from them to Brown and that from Brown to Coss constitute a cloud upon their title to said lot, and they pray for citation for the defendants, and that upon hearing of the cause said deeds be canceled, and the cloud upon their title be removed, and that plaintiffs be quieted in their possession, and for costs and for general relief. Defendants were cited, and duly appeared in said cause, and on February 1, 1897, answered by general demurrer and general denial. The cause was set for trial on the 11th of June, 1897, and, plaintiffs failing to appear on said day, a continuance was granted, and the cause was set for some day in the October term, 1897; and on the 11th of November, 1897, the plaintiffs again failed to appear, and on said day the defendant Coss filed an amended answer, and a cross bill, and plea in reconvention, in which pleadings he denies all and singular the allegations of the plaintiffs' petition, and avers that he purchased the property in controversy from defendant Brown, without notice of any understanding and agreement between plaintiffs and defendant Brown to the effect that said deed from plaintiffs to said

Brown was intended only as a mortgage, and that he had no knowledge that the plaintiffs were claiming the property as their homestead; that he purchased the same, and paid valuable consideration therefor, after being advised by counsel that the title to the property was in Brown; and he further avers that the plaintiffs refuse to recognize him as the owner of said lot, and are holding the same adversely to him; that he is the owner of the property, and prays that plaintiffs take nothing by their suit, and that he recover the property from their possession, and that the cloud cast upon his title by the conduct of plaintiffs be removed, and that he recover his costs. On the said day, November 11, 1897, the court rendered judgment that plaintiffs take nothing by their suit, and that the defendant Brown go hence with his costs, and that the defendant Coss recover the property in controversy, duly describing the same, and that the cloud cast upon defendant's title be removed, and that he recover his costs. The judgment contains this recital: "On this 11th day of November, 1897, the above numbered and entitled cause came on to be heard in its regular order, when the plaintiffs failed to appear, and the defendant L. E. Brown appeared in person and by attorney, and announced 'Ready for trial,' and also the defendant John Coss appeared in person and by attorney, and announced 'Ready for trial' on his cross bill and plea in reconvention; * * * and no jury being demanded, the cause was submitted to the court, and, after hearing the pleadings and evidence, and being fully advised, the court is of the opinion that the plaintiffs ought not to recover, and that the defendant L. E. Brown ought to go hence, and recover his costs, and that the defendant John Coss ought to have and recover of and from the plaintiffs, Adeline and Anderson Colbert, the title and possession of the property herein after described, and that the cloud cast on defendant Coss' title by the plaintiffs be removed." The grounds of the motion for new trial were, substantially, that plaintiffs had no knowledge whatever that said cause was set for trial on the 11th of November, 1897, or that said cause was being tried on said day; that their attorney had failed to give them notice that the cause was set for trial, and that he abandoned their cause, and did not notify them of his abandonment, or of his intention to do so, and that they were ignorant of such purpose until after the trial of the cause; and that upon the day the cause was set for trial in June, 1897, plaintiff Anderson Colbert was sick, and unable to attend the court; that on the next day he did appear in court, and was advised by his counsel that the cause had been continued until the October term, and that he would have it set for trial, and would notify plaintiff of the time, which plaintiff averred his attorney failed to do; and further, that on the 11th of November, 1897, the plaintiff Adeline Colbert was an important witness in said cause; that on said

day she was sick in bed, and could not have been in attendance upon the court on said day if she had been notified that the cause was set down for trial on said day. The motion further avers that they had a just cause, and that the averments in their petition were true. This motion was duly filed, and was supported by the affidavits of each of the plaintiffs. There was a counter motion by the defendant Coss, in which he averred the lot in controversy was not occupied by the plaintiffs; that the same adjoined the lot on which plaintiffs resided; and further, that on the 11th of November, 1897, the plaintiff Adeline Colbert was on the streets of the city of Houston, and in apparent good health; and this motion was duly filed and sworn to by the defendant. By the affidavit of S. E. Tracy, the attorney who brought the suit for plaintiffs, it appears that he notified the plaintiffs that the cause was set for trial in June, 1897, and upon their failure to appear on said day he obtained a continuance of the cause, and had same set for some day in the October term,—the precise day not remembered,—and that he gave notice to plaintiffs of the day on which the case was set for trial, and that from that time until the 12th of November, 1897, he neither heard from nor saw either of the plaintiffs. There is no statement of the facts in evidence upon the trial of the cause, nor conclusions of fact or of law found by the judge, in the transcript, and, as every intentment in support of the judgment must be indulged, and as the evidence in support of appellants' motion to set aside the judgment and grant them a new trial does not show an abuse by the judge of his discretion in refusing the motion, the judgment must be affirmed. Affirmed.

ZIMMERMAN v. PEARSON et al.

(Court of Civil Appeals of Texas. May 18, 1899.)

TRESPASS TO TRY TITLE—REPLEVIN BOND—SURETIES—LIABILITY FOR COSTS—JUDGMENT.

1. The sureties on a replevin bond given by the occupant of land sequestered in trespass to try title, under Rev. St. art. 4875, requiring such bond to be conditioned that the principal will not injure the land, and will pay the value of the rents, in case he shall be condemned to do so, are not liable for costs of suit.

2. In trespass to try title, where the land is sequestered and replevied, the judgment for plaintiff need not award a writ of possession against sureties on the replevin bond.

Appeal from district court, Houston county; W. H. Gill, Judge.

Trespass to try title by George Zimmerman against Aaron Pearson. Plaintiff sequestered, and defendant replevied the land, and judgment was rendered against defendant and the sureties on his replevy bond. From an order of the court reforming the judgment as against the sureties, plaintiff appeals. Affirmed.

Moore & Kline, for appellant. Moore & Newman, for appellees.

GARRETT, C. J. The appellant, George Zimmerman, as plaintiff below, brought this suit, as an action of trespass to try title, against Aaron Pearson for the tract of land described in the petition. He sued out a writ of sequestration, which was levied upon the land. The defendant, Pearson, replevied the land, giving as his sureties B. S. Elliott and J. H. Gregg. Amelia Hawkins intervened in the suit, but it is not necessary to further notice this intervention. The case was tried by the court without a jury, and judgment was rendered in favor of the plaintiff against Pearson for the land in controversy, and against the sureties on his replevy bond for writ of possession and all costs of suit. The defendant, Pearson, and his sureties, Elliott and Gregg, filed a motion to reform the judgment in so far as it was rendered against the sureties on the replevy bond. The court heard the motion, and granted the same, and reformed the judgment as prayed for. The plaintiff in the suit below has appealed, and complains of the action of the court as error in releasing the sureties upon the replevy bond from liability for costs. It has been expressly decided that the sureties upon a replevy bond executed in accordance with the statute for the replevy of real estate which has been sequestered are not liable to have costs of the suit adjudged against them. Rev. St. art. 4875; *Henderson v. Brown* (Tex. Civ. App.) 41 S. W. 406. And, since the sureties upon the bond are not parties to the suit, it would not be error for the judgment to fail to award a writ of possession against them. The judgment of the court below will be affirmed. Affirmed.

MOODY et al. v. FIRST NAT. BANK OF ATHENS.

(Court of Civil Appeals of Texas. May 10, 1899.)

APPEAL—STATEMENT OF FACTS—ATTACHMENT—PETITION—PRAYER—WAIVER OF PRIVILEGE.

1. Statement of facts filed 2 days after the time allowed therefor cannot be considered under *Sayles' Civ. St. art. 1382*, allowing it, on a showing of due diligence, to obtain the approval and signature of the judge, and to file it in time, and that failure to file it in time was not due to fault or laches of the party, but was the result of causes beyond his control, where it is merely shown that appellant sent a statement to the other party on the seventh of the 10 days allowed for filing it, with a request, that it be returned on the next day, which was done without it being agreed to, and that on the next day it was presented to the trial judge, it not appearing when it was approved, or what was done with it after approval, or that it was not approved in time for filing within the 10 days.

2. An amended petition in an attachment suit, alleging that R. and G. are setting up some pretended claims to the premises levied on, that their claims are fraudulent, fictitious, and void as against plaintiff's lien, and are clouds on the title to the premises, is sufficient, as against a general demurrer, to allow proof that R. and G. were setting up claims under defendant in the attachment suit.

3. Defendants' pleas of privilege to be sued in the counties of their domicile are waived, not being presented to the court for action at the term when filed, though there was then time for them to be heard, the case having gone over the term at defendants' request.

4. Defendants, after waiving the privilege to be sued in the counties of their domicile, cannot assert the privilege of being sued in the counties where the land involved is situated.

5. Where the affidavit for attachment states that defendants are indebted to plaintiff in the sum of \$5,000, and makes no claim for interest and attorney's fees, it is error to foreclose the attachment lien for a greater sum, the excess being for interest and attorney's fees.

Appeal from district court, Henderson county; W. H. Gill, Judge.

Action by the First National Bank of Athens against J. D. Moody and others. Judgment for plaintiff, and defendants appeal. Reformed and affirmed.

Cone Johnson and T. B. Butler, for appellants. Faulk & Faulk and Richardson, Watkins & Miller, for appellee.

FLY, J. Appellee sued J. D. Moody and H. H. Rowland on a promissory note for \$5,000, bearing interest at 10 per cent., and providing for the same per cent. for attorney's fees in case it became necessary to institute legal proceedings to collect the debt. The note was signed by Moody, and indorsed by H. H. Rowland. Appellee, simultaneously with filing suit, sued out writs of attachment for the sum of \$5,000, and the same were levied upon lands in Henderson, Navarro, and Titus counties. In an amended petition it was alleged that B. W. Rowland was setting up some pretended claim to the land so levied upon in Navarro county, and that T. J. Groce was "setting up some pretended claim to the land and premises so levied upon in Titus county; that said claims of both defendants Rowland and Groce are fraudulent, fictitious, and void as against the plaintiff's said lien, and are clouds upon the title to said premises, and will prevent the same from bringing their fair value upon a sale thereof." B. W. Rowland was alleged to reside in Smith county, and Groce in Galveston county. H. H. Rowland and Moody filed a general denial, and also alleged that Rowland had paid the note. The defendants Groce and B. W. Rowland filed pleas of privilege to be sued in their respective counties, and then filed pleas of misjoinder of persons and actions, on the ground that Rowland claimed only the land in Navarro county, and Groce the land in Titus county. The pleas were overruled, and they then filed general demurrers and general denial. There was a trial by the court, which resulted in a judgment for the principal, interest, and attorney's fees specified in the note against Moody and H. H. Rowland, and foreclosing the attachment as against all the defendants. There is no statement of facts in the record, and it is urged by appellants that its omission is caused through no fault or omission on their part. It is provided in article 1382, Sayles' Civ. St.,

that whenever a statement of facts has not been filed in the time prescribed by law, "and the party tendering or filing the same shall show to the satisfaction of the courts of civil appeals that he has used due diligence to obtain the approval and signature of the judge thereto, and to file the same within the time in this chapter for filing the same, and that his failure to file the same within said time is not due to the fault or laches of said party or his attorney, and that such failure was the result of causes beyond his control, the court of civil appeals shall permit said statement of facts to remain as part of the record, and consider the same in the hearing and adjudication of said cause, the same as if said statement of facts had been filed in time." It is insisted that appellants have been deprived of the statement of facts through the fault of judge or attorney, and that this should cause a reversal of the judgment. There are two affidavits appended to the brief of appellants,—one by Cone Johnson, one of the attorneys for appellants; and the other by B. W. Rowland, one of the appellees. The trial court adjourned on September 30, 1898, 10 days being granted in which to prepare and file a statement of facts. It is shown by the affidavit that on the 6th of October appellants' counsel sent a statement from Tyler, in Smith county, prepared by them, to counsel for appellee, at Athens, in Henderson county, requesting that they should examine the same, agree to it, and return to the senders. In the affidavit of Cone Johnson it is stated that he requested that the statement, whether agreed to or not, should be returned on October 7th; but it is shown by a letter which he wrote to counsel for appellee, which is appended to a counter affidavit, that the letter was written on the 7th, and that the request was that the statement be returned by the noon train on October 8th. The statement was not agreed to by appellee's attorneys, and was returned, as requested, to the attorneys for appellants, on the noon train of October 8th. On the morning of the 9th the statement was presented to the trial judge. The statement of facts in the record was filed on October 12th, but when it was approved, or what was done with it after approval until its filing, is not shown. It may have been prepared on October 9th, and placed in the hands of R. B. Rowland, who handed appellants' statement to the judge, and, if so, no reason is shown why it was not sooner filed. There is no allegation that it was not approved in time for appellants to have filed it on October 10th, within the time allowed by law. No adequate diligence whatever appears to have been used to obtain the statement of facts. Some effort should have been made by appellants to have arrived at an agreement with appellee on the statement of facts. Sending a prepared statement through the mail, with the request that appellee agree to it, and return it whether agreed to or not, did

not indicate any effort or desire for an agreement. It was natural to suppose that there would be points of disagreement, and no opportunity was offered for the meeting of their minds on such points. The statement of facts will not be considered by this court, and there is no merit in the assignment of error which, in the language of the proposition thereunder, seeks a reversal on account "of the failure of the judge, or by reason of some fault or failure on the part of the attorneys for the opposite party," in connection with the preparation of the statement of facts.

The contention that the general demurrer to the petition should have been sustained cannot be acceded to. The allegation of claim to the land on the part of B. W. Rowland and Groce was very general; but the statement that they were setting up a claim to the land presented a cause of action, and the petition was not subject to general demurrer. Being protected by the rule that every intendment should be indulged in its favor, it must be held that it opened a way for proof that the claim being set up by the two appellants mentioned was one under the parties whose property had been attached. The pleas of privilege to be sued in the counties of their domicile on the part of B. W. Rowland and Groce were filed in the district court on February 7, 1898, and were not passed upon by the court until September 30, 1898, when the cause was called for trial. The pleas were then overruled by the court, on the ground, as stated in a qualification of the bill of exceptions, that the "pleas were filed at the last term of the court, and were not presented to the court for action, although there was time at the said term for the same to be heard; and, in addition thereto, it is shown to the court that when the said cause was about to be reached and called attorneys for said defendants requested plaintiff's attorneys, by wire, to continue the said cause, and charge the continuance to defendants, which request was called to the attention of the court, and plaintiff's attorneys agreed to the same, and the case went over for the term." The action of the court was not erroneous, but is fully sustained by late rulings of the supreme court. *Aldridge v. Webb*, 46 S. W. 224.

On September 29th, long after appellants B. W. Rowland and T. J. Groce had waived their privilege of being sued in the counties of their domiciles, they filed a plea, which is denominated by them "a plea of misjoinder of persons and actions," which seeks to avoid a trial in Henderson county, either on the ground that defendants owning separate interests in different tracts of land cannot be joined in a suit to foreclose an attachment lien on such lands, or on the ground that the lands in which they claimed interests were not situated in Henderson county. The exact point intended to be raised is also left doubtful by the assignment of error which pre-

sents objection to the action of the court in overruling the plea, but we assume that the error complained of is based upon the fact that none of the land claimed by the appellants B. W. Rowland and T. J. Groce was situated in Henderson county, and that by reason thereof the appellants were entitled to the privilege of being sued in the respective counties in which the land was situated. In the case of *De La Vega v. League*, 64 Tex. 205, and in *Bonner v. Hearne*, 75 Tex. 242, 12 S. W. 38, it was held by the supreme court that the requirement of the statute that suits for the recovery of lands should be brought in the county where the land, or a part thereof, is situated, "is not a matter that affects the jurisdiction of the district courts over the subject-matter of controversies about the title or possession of lands. Every district court in the state has cognizance of such suits. The requirements as to the county in which the suit may be brought is a mere personal privilege granted to the parties, which may be waived, like any other privilege of this character." Appellants had waived the personal privilege of being sued in counties of their residences, and the question is presented as to their right to avail themselves of another personal privilege,—that of being sued in the county in which their respective lands may be situated,—after they have once surrendered themselves to the jurisdiction of the court. We are of the opinion that their waiver of personal privilege in the one case was a waiver for all purposes, and that they cannot assert one such privilege, lose that by neglect or indifference, and then claim the personal privilege to be sued in a different county on another and different ground. The district court had jurisdiction of the subject-matter of the suit, and, when jurisdiction was once obtained over the persons of appellants, it was jurisdiction for all purposes of the suit. Appellants could have presented both grounds in the same plea, and either would have been good, but cannot, long after waiver of one ground, be heard to present another.

In the affidavit for attachment it was stated that J. D. Moody and H. H. Rowland were "justly indebted to the plaintiff in the sum of five thousand dollars," and it was error for the court to foreclose the attachment lien for the sum of \$6,367.73, which included \$1,367.73 interest and attorney's fees. The case of *Piggott v. Schram*, 64 Tex. 447, is cited as sustaining the judgment; but, while there are expressions in that case that might be so construed, an inspection of that case shows that in the affidavit it was stated that the defendant was indebted in a certain sum, with interest at a certain rate from a certain date. In the affidavit in this case no interest or attorney's fees were claimed. The judgment will be reformed so as to foreclose the attachment lien for \$5,000, and, as reformed, will be affirmed.

McCONNELL v. COLEMAN COUNTY.

(Court of Civil Appeals of Texas. June 7, 1899.)

COUNTIES—EXPENSES OF KEEPING PRISONERS—LIABILITY.

By Code Cr. Proc. art. 1094, a county is liable for the expenses of keeping prisoners confined in its jail, except those brought from another county for safe-keeping, or on habeas corpus, or change of venue, in which cases the county from which the prisoner is brought is liable; and hence a county where an offense was committed is not liable for expenses of keeping the offender in another county where he was apprehended.

Appeal from district court, Coleman county; J. O. Woodward, Judge.

Action by J. P. McConnell against Coleman county. Judgment for defendant, and plaintiff appeals. Affirmed.

Sims & Snodgrass, for appellant. H. H. Orr, J. A. B. Miller, and J. K. Baker, for appellee.

FISHER, C. J. McConnell, as sheriff of Sutton county, brought this action against Coleman county to hold it liable for the expenses incurred by him in the safe-keeping and custody of prisoners in Sutton county for offenses committed in Coleman county. The prisoners, when confined in custody in Sutton county, were not sent there for safe-keeping, nor were they carried there on habeas corpus process, or upon change of venue, but they were arrested by the sheriff of Sutton county for offenses committed in Coleman county, and were confined in the jail of Sutton county, and it was during this time that the expenses were incurred. The sole question presented is whether Coleman county can be held liable for the costs and expense of keeping and maintaining these prisoners while in the custody of the sheriff of Sutton county. The trial court held that Coleman county was not liable, and with this ruling we agree. The section of the law which we think controls the disposition of this case is article 1094, Code Cr. Proc., which is as follows: "Each county shall be liable for all expenses incurred on account of the safe-keeping of prisoners confined in their respective jails or kept under guard, except prisoners brought from another county for safe-keeping or from another county on habeas corpus or change of venue, in which cases, the county from which the prisoner is brought, shall be liable for the expense of his safe-keeping." Article 1105 goes on to provide how the sheriff shall make out his account for expenses incurred for the keeping, support, and maintenance of prisoners from another county. And there are other articles of the Code of Criminal Procedure which state the amounts that the sheriff may be entitled to, and the items of expenses for which he may make charges. There is no conflict in the several provisions of the statute upon this subject. There is no uncertainty about the terms or the language of the article quoted.

It expressly states that each county shall be liable for the expenses incurred on account of the prisoners confined in their respective jails, with three enumerated exceptions, in which the liability is imposed upon another county; that is, where the prisoner is carried to the county for safe-keeping or on change of venue or habeas corpus. There is no common-law liability resting upon Coleman county in a case of this character, and, if it is held liable at all, we must look to some statute which imposes liability upon it. It might be just to impose liability upon the counties where the crime was committed, and to which the prisoner properly belongs; but the legislature has seen fit to otherwise regulate the matter, and, of course, the law that they have passed upon the subject must be applied. The particularity with which the legislature, in the section quoted, pointed out the instances in which some other county than where the prisoner was confined should be held responsible for the cost of his support and maintenance, would seem to indicate that it was the intention that the liability should be limited to the special instances noted, and that in all other respects the county where the prisoner was confined should be liable and responsible for his support and maintenance, and for other items that the sheriff was allowed by law to charge in connection with the custody of the prisoner. We find no error in the record, and the judgment is affirmed. Affirmed.

LILES v. PRICE.

(Court of Civil Appeals of Texas. May 10, 1899.)

LANDLORD AND TENANT—LIEN—EXECUTION OF NOTES—EVIDENCE.

Evidence that one purchased horses and farming utensils from another, giving his notes therefor, and that he thereafter rented a farm from the seller, does not show that the giving of the notes had any reference to the renting of the farm, and the owner has no landlord's lien by virtue thereof.

Appeal from Ellis county court; J. C. Smith, Judge.

Action by John Price against D. J. Liles. From a judgment for plaintiff, defendant appeals. Affirmed in part, and reversed and rendered in part.

Templeton & Harding, for appellant. Tom P. Whipple, for appellee.

JAMES, C. J. The petition of appellee filed in the county court was to recover of appellant on three notes given by him to J. C. Beck, and indorsed to appellee, the notes reciting that they were given in part payment for a span of horses, a wagon, a cultivator, a turning plow, a cotton planter, a set of harness, etc., and expressing a lien therefor upon said articles. The petition alleged that Liles rented certain land of J. C. Beck, and purchased from said Beck the said animals and tools mentioned in the notes to enable him to

cultivate, and make a crop upon, the rented premises; that he planted and raised a crop of corn and cotton upon said land under such lease, and Beck, in addition to his landlord's lien on said crop, tools, and animals furnished as aforesaid, took a mortgage on the tools and animals to secure said notes; and that plaintiff had sued out a distress warrant, and levied the same on the tools and one of the horses, the other being dead, and certain cotton, all being in the hands of the constable under said levy; and prayed for judgment for the amount of the notes, interest, and attorney's fees, and foreclosure of the landlord's lien on all of said property, without prejudice to plaintiff's mortgage lien. The court gave judgment as prayed for.

It is clear from the evidence that plaintiff was not entitled to a landlord's lien. There is nothing to show that the transaction between Beck and appellant in which the notes were given had any reference to the relation of landlord and tenant between them. Appellant is shown to have purchased the animals, tools, etc., from Beck on September 11, 1897, giving these notes and mortgage therefor, and that, after such purchase, defendant rented from Beck the farm, and moved upon it. The testimony clearly separates the two transactions. Beck had no landlord's lien for these notes, and therefore his transfer of them to plaintiff gave the latter none. The question discussed in the briefs, whether or not, if Beck had a landlord's lien, plaintiff was entitled to assert such lien by the transfer of the debt, is not in the case. The personal judgment is affirmed against appellant, but the distress warrant is quashed, the judgment foreclosing landlord's lien is set aside, and judgment here rendered declaring that no such lien exists, and that defendant is entitled to the property in the hands of the constable, without prejudice, however, to any mortgage lien of plaintiff in any other proceeding. Affirmed in part, and reversed and rendered in part.

On Rehearing.

(June 7, 1899.)

The answer pleaded one matter only, viz. that the court had no jurisdiction, because plaintiff was not defendant's landlord, and had no landlord's lien, and therefore he had no right to a distress warrant. This being the only issue, the statement of facts relates to it, and to nothing else. This statement of facts shows that the party who assigned the notes to plaintiff was not landlord of defendant in respect to the notes sued on, and consequently it is apparent of record that plaintiff was not entitled to a landlord's lien nor to a distress warrant. The plea was really an answer denying the existence of the landlord's lien. It may be true that defendant's contention in the county court and in this court has been that plaintiff obtained no landlord's lien by a transfer of the notes in question,

upon the theory that the plaintiff's assignor was defendant's landlord when the notes were given, relying on the decision of *Manis v. Flood* (Tex. Civ. App.) 47 S. W. 1017, which holds that a transfer of the landlord's claim does not carry with it the landlord's lien. But we are not required to go into such question when the record here affirmatively shows that the debt did not grow out of the relation of landlord and tenant, and it is apparent therefrom that no landlord's lien could have existed at all. We decline to decide a question not involved. As to appellee's motion for rehearing, we will state that the action upon the notes was in no manner dependent on the distress proceeding, and the court had jurisdiction to render judgment upon them. The motions are overruled.

NICHOLSTONE CITY CO. v. SMALLEY.

(Court of Civil Appeals of Texas. May 4, 1899.)

MECHANICS' LIENS — FIXTURES — MATERIALS FURNISHED UNAUTHORIZED AGENT—OWNER'S LIABILITY — CORPORATIONS — ACTS OF DIRECTORS AND STOCKHOLDERS — LIABILITY.

1. Where improvements on land constitute fixtures, they become the property of the owner, and can be affected with a lien for materials furnished to erect them only by operation of the statute giving such lien.

2. Individual directors, or a majority, however great, of stockholders acting separately, cannot bind a corporation to pay for an improvement on its land, but such action must be taken as a body at a properly constituted meeting.

3. An agent unauthorized to make an improvement of his principal's realty cannot charge it with lien for materials furnished him for such an improvement.

Appeal from district court, Galveston county; William H. Stewart, Judge.

Action by B. A. Smalley against the Nicholstone City Company and F. McC. Nichols. Judgment for plaintiff, and the defendant company appeals. Reversed.

Austin & Rose, for appellant.

WILLIAMS, J. Appellee sued F. McC. Nichols and appellant jointly to recover a balance of \$896.21 for lumber alleged to have been sold and delivered to Nichols, as the agent of appellant, and also as joint owner with appellant of certain land, and to foreclose a material man's lien upon such land and the improvements thereon, in making which the lumber had been used. The pleadings involved the questions passed upon. Appellant is a corporation, the purpose of whose organization is expressed in its charter to be the erection of buildings and the accumulation and loan of funds for the purchase of real estate in cities, towns, and villages. It acquired title to a large tract of land at Dickinson, of which that on which the improvements were put is a part. Appellant has the board of directors and the officers usual in such corporations, and besides has an executive com-

mittee, which the by-laws invest with authority to have "the supervision and direction of all improvements to be made upon the property of the association, and it shall be their duty to recommend to the board of directors, from time to time, the making of such improvements as may, in their judgment, seem necessary and proper to be made to meet the purposes and objects, and promote the interest and welfare of this association." This committee has no authority, however, to contract for the making of improvements. Nichols was chairman of the executive committee, a director, and one of the largest stockholders in the corporation, but he had no title in himself to any part of the land in question. The only direct evidence of the authority under which Nichols acted in making the improvements consisted of the following writing: "Galveston, Texas, August 16, 1895. It is hereby agreed by the undersigned stockholders of the Nicholstone City Company that we authorize F. McC. Nichols, chairman of the executive committee, to improve the ground at Nicholstone at his own expense, and that he be reimbursed for said expenditures (subject to approval of executive committee) either by sale of stock or lands, or any revenue derived from said property, and that we will, at the next meeting of the company, vote a resolution agreeing to the above. [Signed] Ed. McCarthy. G. A. Meyer. Leon Blum. N. Weekes. Robert Bornefeld. J. Lobit. M. Marx. J. E. Galbraith. C. H. Moore. Max Neethe." This was not executed at any meeting of the executive committee, or of the board of directors or stockholders, or by them in a body, but was signed by the individuals whose names appear at different times and places. No action was ever taken upon it at any meeting, though several were afterwards held to give Nichols an opportunity to appear and submit his proposition concerning the improvement of the property. He did not appear, and no action was taken. Nichols, however, proceeded to cause the property to be improved by building a race track, buildings, fences, and structures appropriate to fair grounds, and purchasing from appellee the lumber used; and, after the completion of the work, a fair was held under the management of an association formed for that purpose. There is evidence to the effect that the lumber was purchased by Nichols upon the credit of appellant, but that appellant's directors and officers had no knowledge of that fact, and were ignorant of the fact that the improvement of the property was in progress, and only learned of it after completion. There is also parol evidence that the instrument copied above was not intended as definitive authority, but simply as an agreement on the part of its signers to consent to a project for improving the property urged by Nichols, and to settle the extent and character of the work at a meeting to be held. This evidence indicates that there was a purpose to limit the cost of the improvement to \$10,000 or \$15,000, while

the cost incurred was in the neighborhood of \$40,000. The charge of the court instructed the jury to find for plaintiff against Nichols for the debt, and against appellant for a lien on the buildings, but not on the land, if they found that the instrument referred to was executed by stockholders owning about 60,000 shares, and all of the shares except about 100, and by all of the directors, and by the chairman and most of the executive committee. All of the facts which the jury were required to find were undisputed, and the charge is the same as if the specified verdict had been directly instructed for the plaintiff. In order to sustain the charge the conclusion must be reached that the facts enumerated, or such facts in connection with other undisputed ones, necessitate the judgment rendered. The evidence indicates that the improvements were of such a character as to constitute fixtures upon the land. Whether they were or not was not submitted to the jury. If they were, they became the property of the owner of the realty, and can only be affected with a lien by operation of the statute giving lien for material furnished to make such improvements. *Sheer v. Cummings*, 80 Tex. 294, 16 S. W. 37; *Association v. Perkins*, 80 Tex. 65, 15 S. W. 633. It is not pretended in the pleading or evidence that there was any contract for the sale of the lumber made directly with the owner of the land, or with any one who had a contract with such owner for making such improvements.

The case is rested upon the allegation that the contract was with appellant through Nichols, its agent and co-owner. It has been shown that there is no evidence that Nichols has any estate in the land, and this reduces the inquiry to the question whether or not the land or fixtures upon it are affected with a lien because Nichols was the agent of the owner in purchasing the lumber, and in making the improvements. There is no evidence that he was held out as agent. If there was any evidence that the company knew of his action, and acquiesced in and ratified it, it cannot be claimed that it was of so conclusive a character that the determination of its effect could be taken from the jury. The judgment must, therefore, rest upon the legal effect of the written instrument. Did it, by itself, constitute Nichols the agent of the corporation, with authority to incumber its property with liens for improvements made? Considering the fact that the persons signing only designated themselves as stockholders, and agreed to vote for the proposition at the next meeting, we cannot see that by the terms used, although it is said "we authorize," it was intended to give present authority. The instrument is, at least, so ambiguous that evidence of the circumstances attending its execution was admissible to show its real purpose and meaning. The evidence, so far as admitted, tended to support the construction of it just intimated,—that it was not intended by itself to confer authority. But superior to any such con-

considerations is the proposition that neither the individual directors, nor a majority, however great, of stockholders, acting separately, could thus bind the corporation. Action, in itself binding on the corporation, could only be taken by them as a body at a properly constituted meeting, for the reason that it is only thus that all interests are represented and heard. 4 Thomp. Corp. § 4875. It cannot be held, therefore, as an undisputed fact that the instrument was ever so acted upon as, by its own terms, to bind the company. Had it been, what its effect would be we need not decide. An agent who has no authority to make an improvement of his principal's property cannot charge it with such a lien. Though Nichols was chairman of the executive committee, and as such, in a sense, an agent of the company, this did not authorize him to make improvements; and without such authority no lien on the land or its fixtures could arise from his contract. Phil. Mech. Liens, § 79. Of course, we do not mean to dispute the proposition that the company, as well as an individual, could, by acquiescence and ratification in any of the ways recognized by law, become bound by the unauthorized acts of its agent done in its behalf. So, though the instrument referred to did not become, by the mere signing and delivery of it, the contract of the company, it is doubtless true that it might be shown to have been in the same way recognized and adopted by it. But, if there was evidence sufficient to require the submission of these questions, which we need not determine, they were not submitted. The court erred in directing a verdict for plaintiff, and for this reason the judgment against appellant is reversed, and the cause remanded. As to Nichols, the judgment is left undisturbed. Reversed and remanded.

PADGITT et al. v. DALLAS BRICK & CONSTRUCTION CO.

(Court of Civil Appeals of Texas. June 7, 1899.)

MECHANICS' LIENS—NOTICE OF CLAIM—SUFFICIENCY—NECESSITY.

1. The requirement of the statute that notice of a claim for a lien shall be served on the owner of the building or his agent is complied with by service on a member of a church building committee of an unincorporated society.

2. Where it appears that, before paying the contractor, the owner knew of a claim for a lien for materials furnished him, and required him to give a bond of indemnity against it, failure of the material man to give notice of his claim in the time and manner prescribed by statute will not defeat it.

Appeal from district court, Dallas county; W. J. J. Smith, Judge.

Action by the Dallas Brick & Construction Company against J. D. Padgitt and others to enforce a mechanic's lien. Judgment for plaintiff, and defendants appeal. Affirmed.

Holloway & Holloway, for appellants. Clark & Clark, for appellee.

51 S.W.—34

KEY, J. The material facts of this case are stated thus in appellants' brief: "The First Presbyterian Church of Dallas, Texas, an unincorporated concern, contracted with Alexander Watson to construct a church building. Watson sublet certain brickwork to Gary & Reach, subcontractors. The Dallas Brick & Construction Company furnished brick to Gary & Reach for the church building to the amount of \$589.50, upon which there remained unpaid a balance of \$339.55. The brick was furnished at different times from June 22, 1897, to September 7, 1897. No notices or claim of lien were given to any one until September 25, 1897. At that time there was money due on the original contract from the church to Alexander Watson more than sufficient to pay the claim of the plaintiff, but no money was then due from Watson to Gary & Reach, the subcontractors. They had been paid in full for all the materials and work furnished and done by them. They threw up their contract, and it cost Watson more to finish their job than the original contract price with them. On September 25, 1897, the following notice was served by the plaintiff on F. D. Matthews: 'Dallas, Texas, Sep. 24, 1897. F. D. Matthews: You are hereby notified, as agent and representative of the First Presbyterian Church, of every item furnished to Gary & Reach, to be used by them in the erection of said building, by the Dallas Brick & Construction Company, a private corporation, showing how much there is paid, and how much due and unpaid, on every bill of brick furnished by said corporation to said Gary & Reach; and you are further notified that the Dallas Brick & Construction Company looks to the First Presbyterian Church for payment of the balance due said corporation for materials furnished and used in said building. [Signed] W. J. Bassett, Pt.' Attached to the notice was an itemized statement of the account. A similar notice was also served at the same time on F. E. Flanders. Matthews was one of the members of the building committee, which contracted with Watson for the erection of the building. There was also a finance committee, composed of three others. Matthews was not a member of the board of trustees, in whom the title to the church property was vested, nor an officer of the church, nor a member of the church. Flanders was the architect that drew up the plans and specifications, and supervised the erection of the building. The money for the building was paid out on his orders. He was neither an officer nor a member of the church. When Flanders was served with the notice, he informed either the building committee or the finance committee of the notice and claim of lien. It does not appear what Matthews did with the notice served on him. Upon the completion of the work by Watson, he was paid in full, but the church required him to give a bond to indemnify it against the lien claimed by the Dallas Brick & Construction

Company. At the time the notices were served on Flanders and Matthews, nothing was due to Gary & Reach on their contract. A considerable sum was then due from the church to Watson, but it was all necessary to pay for material and to complete the balance of the contract. None of it went to Watson but what had to go into the building. It was proved that all the trustees of the church were served with citation in this suit on November 27, 1897, and on November 29, 1897. The citation stated the sum total claimed for brick furnished for the construction of the building, but did not give the items of the account."

In response to a question submitted by this court, the supreme court has held that appellee's rights do not depend upon the state of account between Watson, the contractor, and Gary & Reach, the subcontractors, but upon the condition of accounts between Watson and the church. 50 S. W. 1010.

The statute authorizes service of notice of the material man's claim upon either the owner of the building or his agent; and, as Matthews was a member of the church's building committee, we are of the opinion that service of notice of the claim upon him was sufficient compliance with the statute. But, if we are mistaken in holding that he was the agent of the church, the point urged on the subject of notice affords no ground for reversing the judgment, because it appears that before making a final settlement with Watson the church had notice of appellee's claim, and required Watson to give a bond to indemnify it against the claim. This latter notice may not have been given in the time and manner prescribed by statute, but the constitution gives to persons furnishing material for a building a lien thereon, and the legislature cannot defeat such lien by requiring something which the constitution does not require. If the owner of the building should settle with the contractor without any notice that material had been furnished by the party asserting a material man's lien, equitable reasons might exist for refusing to enforce the lien. But this is not such a case. The church had notice of appellee's claim before it settled with the contractor, and that is all that need be shown to entitle appellee to enforce its constitutional lien. *Strang v. Pray*, 89 Tex. 526, 35 S. W. 1054; *Bank v. Taylor* (Tex. Civ. App.) 40 S. W. 876; *Id.* (Tex. Sup.) 40 S. W. 966. We find no error in the record, and the judgment will be affirmed. Affirmed.

INTERSTATE BUILDING & LOAN ASS'N v. HUNTER.

(Court of Civil Appeals of Texas. May 17, 1899.)

BUILDING AND LOAN ASSOCIATION—MATURITY OF STOCK—REPRESENTATION OF AGENT—ESTOPPEL.

1. Where a certificate of stock in a building and loan association recites that it is issued and held

subject to the by-laws, which make the stock mature when it equals its face value, a representation of an agent of the company, made when issuing the stock, that it would mature in a certain time, is inadmissible, being contradictory, and not explanatory of the contract; the by-laws meaning that the stock would mature when it equaled its face value through the business of the company.

2. Where a certificate of stock in a building and loan association recites that it is issued and held subject to the by-laws, which make the stock mature when it equals its face value through the business of the company, a representation of the company's agent that the stock would mature in a certain time does not estop the company from denying its liability as for matured stock after such time, there being no fraud, accident, or mistake.

Error from district court, Bexar county; J. L. Camp, Judge.

Action by H. M. Hunter against the Interstate Building & Loan Association. Judgment was rendered for plaintiff, and defendant brings error. Reversed.

C. A. Keller, for plaintiff in error. Wurzbach & Wurzbach, for defendant in error.

JAMES, C. J. This is an action by H. M. Hunter to recover of the association the sum of \$5,000, as the matured value of 50 shares of its stock, less a certain indebtedness due by plaintiff to the association, and for cancellation of plaintiff's notes and deed of trust. The petition alleges that on or about November 1, 1889, plaintiff subscribed for, and became owner of, 50 shares of defendant's stock, of the par value of \$100 each, and agreed to pay 60 cents per share monthly thereon, or \$30 monthly in the aggregate; that defendant's agent represented to plaintiff that the subscription was to continue for the term of 7 years, or 84 months, at which time the said shares were to mature, and be paid for by defendant to plaintiff at the rate of \$100 per share, or the full sum of \$5,000; that plaintiff, relying on said representation, became a stockholder as aforesaid, and received a certificate executed to him by the corporation for 50 shares of stock; that, in consideration of plaintiff's paying said monthly sums until the same should mature, and of his compliance with the terms and conditions and by-laws printed on the front of the certificate, defendant agreed to pay him \$100 for each of said shares at their maturity; that plaintiff had complied with the terms of the contract of subscription, and had paid cash and every installment for the full period of 84 months, by reason whereof defendant was obligated, on November 1, 1896, to pay plaintiff the sum of \$5,000. Then, after alleging the sums due by plaintiff to defendant, the petition prays for judgment for the balance, with interest, and for cancellation of plaintiff's obligation, etc.

We do not deem it necessary to state the defendant's pleadings, nor do we deem it necessary to discuss any assignment of error except the second and seventh, which, according to the views we entertain, are decisive of the appeal, and probably of the case.

The second assignment objects to the testi-

mony of the representation alleged to have been made by the agents to plaintiff at the time of making the contract, on (among the grounds) the ground that the testimony varied and added to the terms of the written contract between the parties. The seventh assignment alleges error in the court submitting the following issue: "Did the authorized agents of defendant contract and agree with plaintiff, at the time he purchased the stock, that said shares of stock would mature in eighty-four months, to be paid for by defendant to plaintiff at the rate of one hundred dollars per share at such maturity?" Plaintiff originally, in 1889, subscribed for 40 shares of stock, and afterwards purchased of some one 10 more, and they were thrown into one certificate of 50 shares, and presumably the terms of the original certificates were the same as the one in evidence for 50 shares. At any rate, there is nothing to indicate the contrary, and plaintiff alleges his contract with defendant to be in the terms of the 50-share certificate. The certificate recites that it "is issued, accepted, and held subject to the rules and regulations of the association, and the obligation of one shareholder to another to sustain perfect mutuality of interest in the contracts of the association, under the plans and methods of business carried on by mutual building and loan societies. The person in whose name this certificate is issued, so long as he is the holder of the same, is entitled to all the rights, powers, privileges, benefits, and profits which, under the by-laws of the association, shall accrue to the class and series of stock of which these shares form a part, and shall in all respects be governed by the charter and by-laws of the association." The by-laws that were in evidence show that what was meant by the "maturity of stock" was when the stock was ultimately made of the value of \$100 per share by the business of the corporation, and show, also, that the shareholder was to pay 60 cents per share monthly until the stock matured. These provisions were a part of the contract, and therefore the contract fixed no date for the maturity of the stock, but by its terms made the date of its maturity indefinite, and dependent on circumstances. It does not appear that plaintiff's stock had in fact matured. The foundation of plaintiff's action, therefore, is that the statement or representation made by the agents to him, to the effect that the stock would mature in seven years, should be considered with the contract, as explaining what was meant by "maturity of stock," or that such representation should estop defendant from denying its liability for the stock, as matured stock, after the expiration of the seven years. We think the rule of evidence forbidding written contracts to be varied by parol testimony of a contemporaneous understanding is clearly in the way of plaintiff's contentions. The representation alleged was not a misstatement of an existing material fact, but was, if it was anything more than an opinion or estimate,—which it is not nec-

essary to decide,—in the nature of a promise, agreement, or guaranty that the ultimate time for the maturity of the stock would be 84 months. We forego examination of the question whether or not the agents had authority to make such representation or agreement, if made, and we may assume that the company itself gave such assurance at the time; still its consideration as a part of the written contract is excluded, because it was not made a part of it and is contradictory of it. Nor can this rule be avoided by putting forward the verbal understanding as an estoppel. *Jones v. Risley*, 91 Tex. 1, 32 S. W. 1027. No relief was sought in respect to the contract that was entered into, upon the ground of fraud, accident, or mistake. We see no reason why a person's contract with a building and loan association should not stand as any other contract, at least in reference to varying it by parol.

Defendant in error claims that the contract as made was silent as to what was meant by "maturity of the stock," and hence the testimony would but explain, not change, it. The by-laws (only a part of them seem to have been introduced) that are in evidence show that stock was matured when it was made of the value of \$100 per share, through the business of the concern, of course. We do not know of any other sense in which the term could be understood. The time of maturity, as found in the agreement, was indefinite, and dependent on circumstances. The effect of defendant in error's effort would be to change this, and make it certain and absolute. We conclude that the assignments under consideration are well taken, and, believing it unnecessary to go into the merits of other assignments, we reverse the judgment and remand the cause.

GULF, C. & S. F. RY. CO. v. JOHNSON et al.¹

(Court of Civil Appeals of Texas. May 10, 1899.)

RAILROADS—INJURIES TO MINORS—NEGLIGENCE OF PARENTS—PROXIMATE CAUSE—INSTRUCTIONS—TRIAL.

1. Where a child lying in a cradle in its parents' home is injured by fire escaping from a locomotive, which is negligently operated and defectively constructed, such negligence is the proximate cause of the injury.

2. In an action by a minor for injuries received by fire escaping from defendant's engine and igniting its clothing while it lay in its cradle in its parents' home, any negligence of the parents cannot be imputed to the child.

3. Where a child lying in its cradle in its parents' home is injured by fire escaping from a passing locomotive, and igniting its clothing, its parents cannot be held negligent for placing it in an exposed position, since they are not hampered in the use of their home by its being near a railroad.

4. It is not error to instruct a finding against a plea in reconviction where the pleading and proof do not justify a recovery thereon.

¹ Rehearing denied June 7, 1899.

Appeal from district court, Harris county; John G. Tod, Judge.

Action by W. T. Johnson and another against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. W. Terry and Chas. K. Lee, for appellant. Burke, Griggs & Co., for appellees.

FLY, J. W. T. Johnson, for himself, and as next friend of his minor daughter, Oceana Johnson, instituted this suit to recover of appellant damages inflicted by the emission of sparks of a locomotive which set fire to the clothing of said minor, a babe, at that time about 3 months of age, who was lying in a cradle in her father's home, and burned her to such an extent as to inflict upon her great and permanent injury. Appellant pleaded, in addition to a general demurrer and a general denial, that the parents of the child had not used proper care in effecting a cure of the child, and that the minor could not recover for any damages except such as would have ensued had proper care and prudence been used by the parents in connection with her. A plea in reconvention was also filed against the father, W. T. Johnson, for failure to use reasonable care in effecting a cure of the child. W. T. Johnson was permitted to take a nonsuit. The cause was tried by jury, the minor recovering a verdict and judgment for \$5,000. We find that permanent injuries were inflicted on the child through the negligence of appellants, and that it was damaged in the sum found by the jury.

The court gave the following charge: "That if, from the evidence, they believe that sparks of fire escaped from the defendant's engine, and set fire to the bed and clothing of the plaintiff Oceana Johnson, and that said fire was communicated to said plaintiff, and injured her, then such facts constitute a prima facie case of negligence on the part of the defendant, and, in the absence of rebutting evidence sufficient to overcome such prima facie case of negligence, will render the defendant liable for the injury occasioned thereby. If, from the evidence, they believe that sparks of fire escaped from the defendant's engine, and set the fire which caused the plaintiff's injuries, but if, from the evidence, they believe that the engine from which the sparks escaped was equipped with the most improved spark arresters in use, and that the agents and employes of the defendant in charge of said engine used ordinary care in operating said engine to prevent the escape of sparks, then they are instructed that the prima facie case made out by proof of escape of sparks and fire resulting therefrom is rebutted, and if they so believe they will find for the defendant; but if, from the evidence, they believe that the defendant failed to equip its engine from which the sparks escaped that caused the fire with the most approved spark arresters in use, or that the agents and employes of the defendant engaged in operating

said engine failed to use ordinary care to prevent the escape of sparks, then they are instructed that the prima facie case made out by proof of sparks escaping and causing the fire has not been rebutted." The charge has been held a proper one by the supreme court. *Railway Co. v. Johnson*, 50 S. W. 563.

It is contended that, if it be admitted that the clothes of the child were ignited through the negligent manner of operating the engine, which was defectively constructed, still appellant is not liable, because such negligence was not the direct and proximate cause of the injuries. We see no merit in such a proposition. Clearly, upon proof of such facts, appellant would be liable for the damages. Neither can the doctrine be upheld that appellant would not be liable if the parents of the child ought to have known that sparks might ignite its clothing, or the mosquito bar above it. It has been held in New York and other states that the negligence of the parents will be imputed to the infant of tender years, but that doctrine has been repudiated in other states, Texas among the number. *Railway Co. v. Moore*, 59 Tex. 68; *Railway Co. v. McWhirter*, 77 Tex. 356, 14 S. W. 26; *Telegraph Co. v. Hoffman*, 80 Tex. 420, 15 S. W. 1048.

The proposition to the effect that the parents of the child could have been guilty of negligence, so far as the railroad company is concerned, in placing their child at any place in their house, cannot, for a moment, be entertained. They were not compelled to secrete their child for the purpose of protecting it from the unlawful acts of any one, and were in no wise hampered in the use of their home by the fact that they lived near a railroad.

It was not error to instruct the jury to find against the plea in reconvention. There was nothing in the pleading or proof justifying any such recovery. What has been said disposes of all the assignments of error. The judgment is affirmed.

KING et al. v. C. M. HAPGOOD SHOE CO.
et al.¹

(Court of Civil Appeals of Texas. May 4, 1899.)

TRIAL—CHARGE—HARMLESS ERROR—
HOMESTEAD—EXEMPTION—ME-
CHANIC'S LIEN—SALE.

1. Error in a charge was harmless, where the jury could not, under the evidence, have arrived at any other verdict.

2. Where a homesteader fits up a part of his residence homestead for a store and rents it, it loses its residence homestead character.

3. A homesteader rented a space 100 by 25 feet in his one-story building for a store, reserving a 12-foot space in front for his office. He was agent for a cotton buyer domiciled in the town and having an office there, and he did not need an office. *Held*, that the room was not his business homestead.

4. A homesteader, having built on land worth less than \$5,000 a three-story and a one-story building, adjoining, occupied part of the three-

¹ Rehearing denied.

story building, and leased the rest for a hotel, and afterwards occupied the whole building as a home, except the ground floor, which was rented for mercantile purposes. His former homestead had been abandoned, and afterwards sold. *Held*, that the three-story building was exempt as a residence homestead.

5. The owner of property subject to a mechanic's lien may insist on his nonexempt property being first subjected thereto, before selling his homestead.

Appeal from district court, Houston county; W. H. Gill, Judge.

Action by the C. M. Hapgood Shoe Company and others against R. D. King and others. There was a judgment for plaintiffs, and defendants appeal. Reversed.

John I. Moore and G. H. Gould, for appellants. Crook & Crook and Aldrich & Lipscomb, for appellees.

PLEASANTS, J. In the year 1895 the appellant R. D. King was a merchant doing business in the town of Crockett, Tex., and in said year erected in said town a brick building of three stories, and also a brick building of one story. The two buildings were in fact but parts of one structure. The two had one wall in common, and they were connected by a stairway running from the floor of the one-story to an opening in the common wall on the second floor of the three-story building. The buildings were completed in the fall of 1895, and, when completed, the appellant R. D. King, with his family, moved into the house; they occupying three rooms on the second floor, while the other rooms on that and on the third floor, with the single story, were leased for a hotel, and the first floor of the three-story house was used by the appellant R. D. King as his place of business. Previous to this time he and his family occupied a cottage in the town as their homestead, and this was verbally sold in October, 1895, to appellant's father, but no conveyance was made to the property from appellant and his wife until December of that year. The appellant continued to conduct a mercantile business in the brick building until some time in January, 1896, when he failed, and executed a deed of trust of his merchandise for the benefit of certain creditors. The original lessee of all the building not occupied by King and family as residence and business homesteads surrendered his lease in December, 1895, and the hotel was subsequently conducted by a company of which appellant King was a member. But in the summer of 1897 the appellant agreed, for a valuable consideration, with other hotel keepers in the town, that his house should not be used or rented for hotel purposes, and he continued to reside in the building and took in boarders. And subsequently the lower story of the building was rented to Mistrot Bros., who conducted a mercantile business therein; and in September, 1897, the one-story building was leased to one C. W. Ellis for a grocery store, the stairway having been previously separated from the rest of the house

by a partition wall. The appellees, being creditors of the appellant, reduced their claims to judgments, and had abstracts thereof duly recorded in the office of the clerk of the county court, and these abstracts were so recorded prior to the lease to Ellis; and on the 13th of September, 1897, appellees brought this suit to subject the above-described property to the payment of their judgments. The petition alleged that the appellant R. D. King and his wife, Rena, claimed the property as their homestead, and that such claim is made to defraud creditors, and not in good faith, and that the property is not adapted for the purposes of a homestead, and is not intended by the owner for such purpose, but that said property is adapted, and by the owner intended, for a source of pecuniary profit and income, and as a means of temporarily holding capital to its value, to wit, \$9,000, in fraud of his creditors, and that said appellant King acquired said property and paid off the incumbrances existing upon it by means of money and goods of which he had defrauded plaintiffs and other creditors. The petition further alleged that the First National Bank of Crockett and one J. B. Smith claim some lien upon said property, and that said bank and said Smith have had in their hands, assigned to them by said King, for the purpose of settling claims against him in their favor, money and property sufficient in value and amount to have paid off all such claims and satisfied such lien, if any there was, but, to aid the said King in defrauding his creditors, said bank and said Smith had colorably kept alive said lien, but in fact their said debt had been discharged, and the property released from lien. And plaintiffs pray that Mrs. King, the said national bank, and the said Smith, and C. W. Ellis, who, it is alleged, is the lessee of a part of said property, and the said R. D. King, be made defendants and cited to answer plaintiffs' petition, and that plaintiffs have judgment foreclosing their judgment liens, and for order of sale, and that if the defendants, the First National Bank aforesaid, or the said Smith, should establish a lien superior to plaintiffs' upon said property, that they be required to resort first, for the satisfaction of such lien, to the portion of said property upon which it may be determined plaintiffs have no lien. The defendants King and wife answered, denying the allegations of the petition, and averring that said buildings since their erection had been dedicated by defendants, and by them occupied and used, as their residence and business homesteads, and that same were exempt from forced sale. The defendant the national bank answered that there was yet due it on notes executed to defendant J. B. Smith, and secured by mechanic's lien, and which notes and lien were assigned by said Smith to it, about the sum of \$4,000, and said bank prayed that it might be protected. The defendants Smith and Ellis each disclaimed any interest in the subject-matter of litigation,

and each was dismissed. The cause was tried on the 20th of April, 1893, and the jury, under the instructions of the court, found that the whole of the three-story building was exempt, as a residence homestead, from plaintiffs' claim, and that all of the one-story building, save the staircase and the approach to the same, and the landing of the stairway, connecting the latter with the door opening into the second floor of the three-story building, with so much of the lot as was covered by these several portions of the one-story building, was subject to the plaintiffs' liens; and the jury further found that the bank's debt secured by mechanic's lien was \$1,588.16; and judgment was rendered foreclosing the liens of the bank and of the plaintiffs, the lien of the latter being declared to be subordinate to the lien of the bank. And it was further adjudged that the bank's lien upon each of said buildings be in proportion to the value of each building to the amount due it; and the respective values of the two buildings were fixed at \$1,500 and \$9,000. From this judgment the bank and defendants King and wife appealed to this court.

If there was error in the charge of the court in reference to the claim of homestead by the defendants King, we think the error was harmless, since our conclusion is that, under the evidence before them, the jury could not have found otherwise than that the three-story building was the homestead of the defendants King and wife, and that, while the one-story building had been once a part of their residence homestead, only so much of it remained a part of the homestead as was not included in the lease to Ellis in September, 1897. When the defendant separated by a partition wall the stairway from the rest of the one-story building, and had such portion fitted up for a store, and rented it to Ellis, he dedicated the property to uses and purposes inconsistent with those of a residence homestead; and that portion of the single story must be considered as having been abandoned, from the time of the lease to Ellis, as a residence homestead. Nor do the facts sustain the defendant's claim of a business homestead. The evidence shows that, when he leased to Ellis, a space of about 12 feet in the front part of the room was occupied as an office by Edmiston Bros., and, in case this space should not be retained by them, then defendant reserved the same for his own business office. The Edmiston Bros. vacated the premises, and the defendant occupied this space as his place of business, while Ellis occupied the remainder of the room as a grocery store. The room, minus the space cut off by the partition wall, was 100x25 feet. The business of the defendant at that time was that of an agent for a cotton buyer domiciled in the town, and who had an office there. The evidence fails to show, in our opinion, that the business of the defendant required an office, and we think the room was not the business homestead of the de-

fendant, but was set apart for and rented for commercial purposes.

That the three-story building, and so much of the one-story as had not been devoted to other purposes, constituted the residence homestead of the appellants King and wife, there can be no question. They had been occupied and used as their home ever since their completion, their former homestead having been abandoned and subsequently sold; and the lots on which the two buildings were erected were, unimproved, of less value than \$5,000. As to the motive of the defendant King in changing his homestead, or as to the manner in which he acquired the property, the source from which the money came which paid for the improvements, and as to the intention or purpose of devoting the property to other uses than those of a residence homestead, were not legitimate inquiries, and the court did not err in ignoring them. The contention of appellees' counsel as to these matters is without support, we think, in the decisions which they cite in their interesting brief. The exemption from forced sale of the homestead of the family is founded upon public policy, and must be upheld and enforced, notwithstanding the fact that it sometimes indirectly assists a dishonest debtor in wrongfully defeating his creditors in the collection of their just dues. To invest money derived from the sale of goods bought on credit, and which have not been paid for, in exempt property, for the purpose of preventing the investor's creditors from collecting their debts, is conduct which all honest men must condemn, and yet it is a wrong for which the law affords no remedy of which we are cognizant. This is not the case of a debtor who attempts to change his homestead by removing to property upon which his creditor had acquired a lien by levy of execution or by recording his judgment against the debtor. In such cases the homestead exemption cannot be asserted, to the destruction of vested rights previously acquired by the creditor. Nor is this case analogous to that of *Henkel v. Bohnke*, 7 Tex. Civ. App. 16, 26 S. W. 645. In that case the homesteader was held estopped as against his vendee with warranty of title. The difference between the relation of vendor and vendee and that of a homesteader and his judgment lien creditor is manifest. In the first the homesteader may be estopped, and in the second he cannot.

The court did not err in instructing the jury that the mechanic's lien held by the defendant the First National Bank could be enforced, as against the plaintiffs, to the extent only of the amount due upon the notes of defendant King executed to Smith, and by him assigned to the bank, after crediting the amounts paid by King on said notes with 10 per cent. interest upon such amount from the reduction of the debt by said payments.

The defendant King requested the court to require the bank, in the enforcement of its lien, to sell first that portion of the property

which was not exempt from forced sale, and this, as we have seen, the court refused to do; and in this, we think, the court committed an error for which the judgment must be reversed. Under the authority of *Pridgen v. Warn*, 79 Tex. 588, 15 S. W. 559, we are constrained to hold that it was the right of the defendant King to have the property not exempt from execution sold, and the proceeds applied to the discharge of the mechanic's lien, before selling his homestead. The judgment will therefore be reversed, and a judgment here rendered such as should have been rendered by the trial court. Reversed and rendered.

POLK COUNTY v. PHILLIPS.

(Court of Civil Appeals of Texas. June 8, 1899.)

CORONERS—AUTOPSY—COMPENSATION OF PHYSICIAN.

Under Code Cr. Proc. art. 1024a, providing that whenever an inquest is held to ascertain the cause of death, the justice is authorized to call a physician to determine whether the death was occasioned by violence, and, if so, the nature and character of the violence used, and that he shall be compensated for such services, a physician who, at the request of a justice, makes an autopsy of one deceased to determine whether he was lying down, or on his feet, resisting an arrest, at the time he was shot, there being question that deceased came to his death at the hands of a constable and posse from gunshot wounds, and that the constable had a warrant for his arrest, is entitled to compensation.

Appeal from district court, Polk county; L. B. Hightower, Judge.

Motion for rehearing. Refused.

For former opinion, see 51 S. W. 328.

C. L. Carter and A. C. Bullitt, for appellant. F. Campbell, for appellee.

PLEASANTS, J. That the question involved in this appeal might be authoritatively and definitely settled, we certified to the supreme court the following question: "On the 16th of February, 1897, an inquest was held in Polk county, by a justice of the peace of said county, upon the body of one W. W. Gatling, who was killed in said county by a constable and his posse; and at said inquest the appellee, in obedience to an order of said justice, attended said inquest, and made an autopsy of the deceased, and he presented a bill of \$25.00 for such services to the county commissioners' court, and said bill was rejected in toto by said court, whereupon he instituted suit in the justice's court, and recovered judgment against the county for ten (\$10) dollars, and upon appeal to the district court, the county court of that county not having jurisdiction of such suits, the judgment was affirmed, and from the judgment of the district court, the county of Polk appealed to this court. There was no question at the time of the inquest but that the deceased came to his death at the hands of the constable and his posse from gunshot wounds,

and that the constable at the time of the homicide held a warrant of arrest for the deceased, and that it was known to both the justice of the peace and to the appellee, before the autopsy was made, that the deceased came to his death from violence inflicted as above stated; and the justice caused the autopsy to be made for the purpose of determining whether the deceased was, at the time of the assault upon him, lying down, as testified to by his companion, or whether he was on his feet, resisting his arrest with deadly weapons, as testified to by other witnesses. The appellee is a regular practicing physician, and made the autopsy after he had been duly summoned for the purpose by the justice of the peace, and testified, as an expert, that the deceased, at the time he was shot, was on his feet, with his arms raised. There was at the time a county physician for Polk county, but, it being impracticable to secure his services, the appellee was engaged by the justice of the peace holding the inquest. Upon the foregoing statement, we respectfully submit the following question: Was the county liable to the appellee for the services rendered in making the autopsy, under the law authorizing the employment of a regular physician for certain purposes by a justice of the peace when holding an inquest?" Article 1024a of the Code of Criminal Procedure provides that: "Whenever an inquest is held to ascertain the cause of a death, the justice of the peace is hereby authorized, if he deems it necessary, to call in the county physician, or if there be no county physician, or if it be impracticable to secure his services, then some regular practicing physician, to make an autopsy to determine whether the death was occasioned by violence; and if so, the nature and character of the violence used; and the county in which such inquest and autopsy is held, shall pay to the physician making such autopsy a fee of not less than ten, nor more than fifty dollars; the excess over ten dollars to be determined by the county commissioners' court after ascertaining the amount and nature of the work performed in making such autopsy." And to our question the supreme court made reply as follows: "The question may be solved by determining the meaning which is to be given to the words, 'the nature and character of the violence used'; that is to say, by determining whether they are to be restricted to the ascertainment of the physical nature of the violence, or whether the meaning is to be extended as to include other circumstances attending the act which may disclose its moral quality. The object of the statute which provides for an inquest upon a dead body is to aid the enforcement of the law by the detection of crime, in case an offense has been committed. This is its sole purpose. It might be to the interest of science in most cases to ascertain whether a death has resulted from poison or from natural causes, or whether it was produced by a

gunshot wound or other physical injuries. But in many cases the inquiry, if stopped at that point, would fall short of accomplishing the purpose of the law. The fact that death had resulted from violence, and the further fact, for example, that the violence consisted of a blow upon the head, are but steps in ascertaining whether or not a crime has been committed. The blow may have characteristics other than those of a physical nature. It may have been accidental, or it may have been intentional. It may have been willful, and without justification, or it may have been justifiable. In accomplishing the purpose of the inquest, it is as important to determine these latter characteristics of an act of violence which has led to a death as it is to determine that there was violence, and that death was its result. We think the purpose for which the physician was brought in to make the examination of the dead body was a purpose contemplated by the statute under consideration, and we therefore answer the question certified in the affirmative."

The opinion of the supreme court as to the meaning of the words of the above-cited article of the Revised Statutes, "the nature and character of the violence used," being the same as that of this court, and upon which our decision of this appeal, affirming the judgment of the lower court, rests, that decision must be adhered to, and this motion refused. Refused.

HOUSTON & T. C. R. CO. v. LOEFFLER.¹
(Court of Civil Appeals of Texas. May 11, 1899.)

TRIAL—INSTRUCTIONS—DEATH BY WRONGFUL ACT—DAMAGES—MEASURE—DETERMINATION.

1. It is not error to refuse a request for an instruction that is substantially covered by the general charge given.

2. In an action by a wife for the wrongful death of her husband, where the evidence showed the monthly earnings of deceased and the amount he usually turned over to her, it was error to instruct that, in finding for plaintiff, her damages should be assessed at such sum as, from the evidence, the jury believe she would probably have received in a pecuniary way from her husband if he had not been killed.

3. In an action by a wife for the wrongful death of her husband, the jury may give such damages as they think proportioned to the injury resulting from his death.

4. In determining the damages suffered by a wife for the wrongful death of her husband, the jury should consider all evidence bearing on the subject, including the pecuniary status of the parties, and their reasonable expectations from the husband's labors; and from all the facts, and from the experience and observation of the jury, determine what sum would be a just compensation for her pecuniary loss, allowing nothing for her distress and the deprivation of his society.

5. In an action for a wrongful death, declarations of the deceased, made some minutes after he was injured, in response to inquiries made by a witness, are admissible as part of the res gestæ.

¹ Application for writ of error dismissed for want of jurisdiction.

Appeal from district court, Harris county; John G. Tod, Judge.

Action by Mrs. Kate Loeffler against the Houston & Texas Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Baker, Botts, Baker & Lovett and Frank Andrews, for appellant. O. T. Holt, for appellee.

PLEASANTS, J. This suit was instituted in the district court of Harris county in May, 1895, by the appellee, to recover damages for the death of her husband. The petition averred that on the 21st day of April, 1895, John Loeffler, the husband of the plaintiff, while engaged in the performance of his duties as brakeman on defendant's railroad, on one of its freight trains at Waller, Tex., a station on said railroad, in Harris county, Tex., was knocked off, and thrown off said train, receiving serious injuries, resulting in his death; that the depot at said station was negligently constructed, in that the roof and awning of the same projected out over and near the railroad track, rendering operation of trains on said track dangerous to brakemen in the discharge of their duties, which was known to defendant, but unknown to plaintiff's husband; that the tracks in and around said station were negligently constructed by defendant, and were rough and uneven, causing the movement of trains thereon to be irregular and dangerous to those employed thereon, which was known to defendant, or could have been known to it by the exercise of ordinary care, and which was unknown to the deceased; that plaintiff's husband was a hale, hearty, hardy man before his injury and death, was 24 years of age when injured, and was earning \$75 per month, with prospect of promotion and increased compensation; that plaintiff was 20 years old, and wholly dependent upon her husband for support. To this petition defendant answered by general demurrer and a general denial, and especially pleaded contributory negligence on part of the deceased, averring that he was injured by coming in contact with the roof of the depot; that the condition of the roof was patent and open to his observation, and a risk which he assumed; and, further, if there was any negligence other than the negligence of the deceased contributing to his injury, it was the negligence of his fellow servants. There were several trials of the case, with various results, and on the 24th of June, 1898, there was another trial, which resulted in a verdict for the plaintiff for \$10,000; and, a new trial being refused the defendant, it appealed to this court.

There are many assignments of error, but it is not necessary, in view of the disposition we make of the case, to notice many of them. In regard to the assignments which challenge the correctness of different paragraphs of the court's charge, we think the assignments,

with one exception, are not well taken. Neither the first nor the fifth paragraph of the court's charge is upon the weight of the evidence, nor do we think the court committed error in the refusal of any one of the charges requested by the defendant. Some of these charges were not authorized by the evidence, and some were not applicable to the case, while others were unnecessary, inasmuch as they were substantially given in the general charge of the court. The general charge of the court, with the instructions given at the request of the defendant, correctly presented the law of the case to the jury in every particular, except in that complained of by the appellant under its seventh assignment. This assignment challenges the eighth paragraph of the charge, which tells the jury that, "if they find for the plaintiff, they will assess her damages at such sum as from the evidence they believe she would probably have received in a pecuniary way from her husband, if he had not been killed." The evidence showed what the monthly earnings of the deceased were; and it showed, further, that the earnings for each month, less \$15 or \$20 thereof, were turned over by the deceased to the plaintiff. Under this evidence, the jury might well infer from the charge that they should ascertain what sums of money would probably have been received by the plaintiff from the earnings of her husband had he not been killed, and that the aggregate of these sums must be taken by them as the measure of the plaintiff's damages. Such a verdict, giving in advance the aggregate of the sums of money which would probably be received by the wife during an ordinary lifetime from her husband's earnings, would seem to be not the correct measure of her damages. The law is: "The jury may give such damages as they think proportioned to the injury resulting from the death." We do not think the law as quoted is clearly reflected by the charge. The charge intrenches upon the discretion of the jury, if they are to look only to the sums of money which would probably have come into the hands of the wife from the earnings of the husband had he not been killed. The jury are to consider all evidence bearing on the subject, including the pecuniary status of the parties, and their reasonable expectations from the labors of the husband; and from all the facts, and from the experience and observation of the jury, determine what sum would be a just compensation to the wife for the pecuniary loss sustained by her in the death of her husband, allowing nothing for her distress and the deprivation of his society.

In respect to the testimony of the witness G. J. Hopper, as to his conversation with the deceased after he was injured, which was admitted over the objections of the defendant, we are of the opinion that the testimony was properly admitted. Some of the objections go to the weight, rather than to the competency, of the testimony. The objection that

the declarations of the deceased made some minutes after he was injured, in response to inquiries made by the witness, were not "res gestæ," seems to be sound, if we consider the definition usually given to this term; but repeated decisions of our supreme court, as well as decisions of the courts of many other states, recognize such declarations as *res gestæ*. There is much force in the contentions of the appellant that the verdict is both excessive in amount and is against the great preponderance of the evidence; and while the damages awarded the plaintiff are, to say the least, large, and while the evidence is not satisfactory, we do not reverse the judgment on either of these grounds, but because of the error in the charge. The judgment is reversed, and the cause remanded. *Vide* *Railway Co. v. Lehmberg*, 75 Tex. 67, 12 S. W. 838. Reversed and remanded.

SAN ANTONIO & A. P. RY. CO. v.
BROOKING.¹

(Court of Civil Appeals of Texas. May 11, 1899.)

EXCESSIVE DAMAGES—DUTY OF MASTER TO
FURNISH SAFE PLACE FOR SERVANT TO
WORK—CONFIDENTIAL COMMUNICATION—
OPINIONS.

1. Plaintiff was about 42 years of age, able-bodied, and in good health at the time he was injured; was earning from \$75 to \$100 per month; had been employed either as a farmer or railroad man all his life, and knew no other business. By reason of the injury his left arm was amputated near the shoulder, and the left leg near the ankle, and he was confined to his bed about three months, and had earned nothing since the injury. *Held*, that a verdict for \$11,750 was not excessive.

2. It is the duty of the master to exercise ordinary care to furnish the servant a safe place in which to work, and the servant may assume that the master has performed such duty.

3. A servant is under no obligation to ascertain defects in the place furnished by the master for him to work in; he is only bound to exercise ordinary care in prosecuting his work there.

4. A statement made by a client to his attorney of a fact to be alleged and incorporated in a pleading which is to be filed in court is not such a confidential communication between attorney and client as will exclude evidence thereof.

5. It is competent to show by parol evidence that plaintiff did not authorize an averment in the original petition which is at variance with the allegations of an amended petition on which plaintiff seeks to recover.

6. One who has had long service in the railroad business in various capacities is competent to give an opinion as to whether or not a track is safe.

7. In an action against a railroad for personal injuries, where a witness testified that plaintiff was injured by having his foot caught in a hole under the main-line rail, it is not error to permit him to state that there was no connection between plaintiff's being hurt and a switch rail, in which defendant claims plaintiff caught his foot, as it is merely a statement of fact, and not a conclusion of the witness.

Appeal from district court, Harris county; William H. Wilson, Judge.

Action by W. G. Brooking against the San Antonio & Aransas Pass Railway Company.

¹ Rehearing denied.

From a judgment in favor of plaintiff, defendant appealed. Affirmed.

O. T. Holt, for appellant. Price & Green, Wheeler & Rhodes, and Fisher, Sears & Sherwood, for appellee.

GARRETT, C. J. This was an action brought by W. G. brooking to recover of the San Antonio & Aransas Pass Railway Company damages for personal injuries sustained by him while attempting to uncouple cars in the yards of the company at Yoakum, Tex., on December 27, 1896. In his original petition, filed May 24, 1897, the plaintiff alleged that while he was in the discharge of his duties as a switchman, and endeavoring to uncouple two cars, his foot was caught and fastened between the switch rail and the rail of the main line of the track, his foot being so caught between said rails as to become fastened in a hole or cavity beneath the rails, and under the bottom thereof, so that he was unable to extricate it, causing him to be run over by the train, and his foot and arm crushed so that they were amputated. In his first amended original petition, filed March 19, 1898, plaintiff omitted the allegation that his foot was caught between the switch rail and the rail of the main line of the track, and averred that the injury was caused by his left foot being caught and fastened by reason of a hole or cavity by, near, and under and beneath one of the rails, and averred negligence on the part of the defendant in permitting the hole to be and remain in the track, and the track to be in a dangerous and unsafe condition by reason thereof. Defendant answered by general demurrer, general denial, and special answer, alleging (1) that the accident occurred through known dangers of the employment assumed by plaintiff in entering the service of defendant; and (2) contributory negligence of plaintiff in putting his foot where it would be caught between the rails, and special denial that there was any hole under or near the rails. There was a trial by a jury, which returned a verdict in favor of plaintiff for the sum of \$11,750, upon which the judgment was rendered in his favor from which this appeal is taken. The accident occurred about dawn on the morning of December 27, 1896. The evidence conflicts as to whether or not there was a hole in the track, as alleged by the plaintiff, and as to how the injury occurred,—whether the plaintiff's foot was caught between the switch rail and the rail of the main line, or was thrust in a hole or cavity under the main line rail, and was crushed by the rail when pressed down by the car running over it. There is evidence to support either contention, and, giving effect to the verdict of the jury, we find that in endeavoring to uncouple two cars, while slowly moving, the plaintiff, in facing the couplers, and moving along on the outside of the track, and leaning forward to take hold of the coupling pin, got his left foot caught under the rail of the track nearest to him in a hole in

the track under the rail, and the weight of the car passing over the rail pressed it down, and crushed and broke the bones of the foot, and plaintiff was thrown down alongside the track, and his left arm was caught under the wheels and crushed and broken. On account of the injuries thus received, his leg was amputated near the ankle, and his arm near the shoulder.

Plaintiff was familiar with the switch yard of the defendant in Yoakum, where the accident occurred, but did not know of the existence of the hole in the track. He was a brakeman, and was in the discharge of his duties as such, and was attempting to uncouple the cars in the usual and customary manner in which cars are uncoupled. It was not a part of his duties to inspect the track, and see that it was free from holes and otherwise in a safe condition. He was injured without fault on his part. The accident occurred by reason of the defective condition of the track on account of the hole therein. The defendant was negligent in permitting the track to be in a defective condition and in not discovering and repairing the track. There is evidence that it had servants employed whose duty it was to inspect the track; but it appeared that there are about 12 miles of tracks in the yard at Yoakum, and only one man to inspect them, and that he could only go over about 6 miles a day. No reason is shown why the hole should not have been discovered and repaired, except that the defendant's witnesses denied the existence thereof; but this issue was found against it by the jury.

At the time the plaintiff received his injuries he was about 42 years of age, and had been engaged in the business of farming and railroading, and was familiar with no other kind of employment. He had been in the service of railroads in Texas for 17 years as brakeman, engineer, switchman, and fireman. He was able-bodied, and in good health, and was earning at the time of the accident from \$75 to \$100 a month. Since then he has earned nothing. He was confined by his injuries to his bed about three months.

The conclusions of fact reached by us dispose of the twenty-eighth and twenty-ninth assignments of error, which question the sufficiency of the evidence to support the verdict of the jury. There was a conflict of evidence as to the manner in which the injuries were received, and we see no reason to disturb the conclusions reached by the jury upon this or the other facts necessary to support the judgment. Plaintiff's injuries were severe, and the amount of damages awarded was not excessive.

The second paragraph of the charge is not upon the weight of the evidence, and is not subject to the objections urged against it by the appellant. It does not assume the existence of a hole in the track under the rail, but submits that question to the determination of the jury, as it does all of the other questions of fact necessary to make out plaintiff's case.

It did not assume the existence of any fact. The facts enumerated and submitted for the determination of the jury, as modified by language in the charge, were sufficient, if found in his favor, to support a recovery by the plaintiff. It was the duty of the defendant to exercise ordinary care to keep its track in a safe condition, and to furnish the plaintiff a safe place to work. The plaintiff had the right to assume that the defendant would do this. It was no part of his duty to inspect the track to see if it was in a safe condition, but he could go on in the discharge of his duties as brakeman in coupling and uncoupling cars relying upon the performance of its duty by the defendant. The hole in the track under the rail was not an obvious or patent defect in the manner of the work or in appliances that the plaintiff was then using or dealing with, so as to render the instruction to the jury applicable, as requested by the defendant, that if, from the evidence, the jury should believe that by the exercise of ordinary care the plaintiff could have discovered the alleged defect, and failed to do so, he could not recover. As stated, it was no part of the duty of plaintiff to inspect or seek to discover defects in the track. The special instruction No. 6 requested by the defendant imposes the same duty, as to inspection of the track, upon the plaintiff as upon the defendant. It was not error in the court to refuse these requested instructions, nor to give the paragraph of the charge complained of in the sixth assignment of error, limiting the assumption of the risk by plaintiff to his knowledge of the defective condition of the track. *Railroad Co. v. Bingle*, 91 Tex. 287, 42 S. W. 971; *Railway Co. v. Hohl* (Tex. Civ. App.) 29 S. W. 1131; *Railway Co. v. Guy* (Tex. Civ. App.) 23 S. W. 633; *Railway Co. v. O'Fiel*, 78 Tex. 486, 15 S. W. 33; *Railway Co. v. McClain*, 80 Tex. 85, 15 S. W. 789; *Railway Co. v. Lehmborg*, 75 Tex. 61, 12 S. W. 838; *Railway Co. v. Aylward*, 79 Tex. 675, 15 S. W. 697. Special instruction No. 7, set out in the eleventh assignment of error, was clearly upon the weight of the evidence, and was properly refused. Special instructions 9 and 11, set out in the twelfth and fourteenth assignments of error, imposed the same degree of duty upon the plaintiff as upon the defendant to discover defects in the tracks. Plaintiff was not required to use any diligence to ascertain whether or not there was a hole in the track. He was only bound to exercise care in the use of the appliances that were at hand. So there was no error in refusing the requested instructions 9 and 11, to the effect that, if plaintiff had the same opportunity for discovering the defects by which he was injured as the defendant, he could not recover. The court did not err in refusing the special instructions 1, 3, and 12 requested by the defendant, because the plaintiff did not seek to recover on account of the pressure of the rail on his foot only, or because the pin in the drawhead had become fast, and to have given the instruction No. 12

would have been misleading to the jury in denying the right of recovery for the injury by the pressure of the rail upon plaintiff's foot. The charge of the court fully submitted the issues to the jury, and none of the requested instructions mentioned would have been proper; at least there was no material error in refusing them. Remarks of counsel shown by the sixteenth, seventeenth, and eighteenth assignments of error were improper, and should not have been indulged in; but they do not appear to furnish any ground for a reversal of the judgment.

Contributory negligence on the part of the plaintiff was relied on by the defendant to defeat his right to recover, and the defendant sought to show that the accident was the result of carelessness and negligence of the plaintiff in walking into the switch, and getting his foot caught between the switch rail and the rail of the main line. For this purpose it introduced in evidence plaintiff's original petition, containing the averment that his foot was so caught; and while the plaintiff was on the stand upon cross-examination defendant asked him the question: "Didn't you tell your attorney that your foot was caught between the main rail and the switch rail?" This question was probably asked for the purpose of showing that allegations in the petition, which had not then been introduced, was made from information given by the plaintiff. This was objected to and excluded on the ground that it was a confidential communication by the plaintiff to his counsel. Since the communication, if made, was of a fact to be used in a pleading to be filed in the court, and thus made public, we are inclined to think, without further investigation, that the plaintiff should have been required to answer the question; but the error, if any, was obviated and rendered harmless by the subsequent testimony of the witness on recross-examination. He testified that he did not think he ever made such a statement as that his foot was caught between two rails, and not in a hole or cavity; that he had answered all questions his counsel asked him regarding the facts in the case, and that he told him the facts. R. T. Wheeler, counsel for the plaintiff, was permitted to testify, over defendant's objection, that he had dictated the original petition, and signed it for counsel in the case; that afterwards, at the time the amended petition was drawn, the original petition was read to plaintiff, and he challenged the correctness of it, stating that it was all wrong after the statement that his foot was caught. The objection to this evidence urged here is that the variance between the original and amended petitions did not admit of parol testimony to explain, alter, or change such variance, as the petitions were plain and unambiguous in their expressions. The rule of not allowing a written instrument to be varied by parol evidence does not apply. It was perfectly competent to show by parol evidence that plaintiff did not authorize the averment contained in the original petition

that his foot was caught between two rails, and that it was not so made by him, and to show why the petition was amended.

It was competent evidence for the witness Carroll to testify that the track was unsafe, because the opinion was such as the witness might give. He qualified himself as an expert by showing a long service in the railroad business in various capacities,—as he expressed it, “from the shovel up to conductor.” The twenty-second assignment of error, that the court permitted the witness to testify, over the objection of defendant, that the switch where plaintiff was injured was dangerous, is not supported by the bill of exceptions. Carroll had testified that the plaintiff's foot was caught in a hole under the main-line rail, and to allow him to testify that there was no connection between plaintiff's being hurt and the switch rail was nothing more than permitting him to state what the fact was, and there was no error in receiving the evidence.

The twenty-sixth assignment of error is not supported by the bill of exceptions. The evidence referred to was as to holes about a year prior to the accident, and after the defendant's counsel himself had before that interrogated plaintiff in reference to holes in other parts of the yard. The error, if any, was immaterial. After a careful examination of all the errors assigned, we are of the opinion that the judgment of the court below should be affirmed. Affirmed.

SHIELDS v. STARK.

(Court of Civil Appeals of Texas. May 6, 1899.)

LIMITATIONS—JUDGMENT—SET-OFF.

1. Issuance of a writ of garnishment by a judgment creditor is not equivalent to an execution, so as to prevent the judgment being barred by limitations.

2. A note executed by S. to W., and assigned to plaintiff, cannot be set off by S. with a judgment against the wife of W.

Appeal from district court, Jack county; J. W. Patterson, Judge.

Action by Sil Stark against W. M. Shields. Judgment for plaintiff, and defendant appeals. Affirmed.

Thos. D. Sporer, for appellant. Stark & Turner, for appellee.

STEPHENS, J. Appellee sued to recover the amount of two small promissory notes, with foreclosure of vendor's lien. The notes were made in the year 1892 by appellant, payable to the order of J. T. Walters, one due January 1, 1894, and the other January 1, 1895, and were both pledged to appellee as security for debt. Appellant pleaded in offset a judgment for \$89.53 rendered December 29, 1885, in favor of Stewart Bros. & Co. against Mrs. J. F. Franklin, then a widow, and since the wife of J. T. Walters, and assigned to him December 29, 1895, or, as alleged by him,

January 24, 1896. The last and only execution ever issued on this judgment was issued May 10, 1886, which was more than 10 years before the institution of this suit, though since the year 1892 Walters and wife have been nonresidents of this state. In avoidance of this plea, appellee replied that the judgment was both dormant and barred by limitations. In the year 1895 several writs of garnishment were issued at the instance of the plaintiff in the judgment, and unless this had the effect of keeping the judgment alive, as seems to have been held by the district judge, it was not a valid offset. In order to keep the judgment alive, it was not necessary, execution having issued within 12 months after rendition of judgment, to revive by *scire facias* or suit, and hence the absence from the state of the defendant in the judgment did not interfere with the issuance of further executions, which was all that was necessary. We understand that a judgment in this state is not capable of being revived, and hence is barred by limitation, after the expiration of 10 years from the date of the issuance thereon of the last execution. Rev. St. arts. 3361, 1664, 1650; McKinnon v. McGown (Tex. Civ. App.) 29 S. W. 696; Willis v. Stroud, 67 Tex. 516, 3 S. W. 732. It is also the rule that, if barred when suit is brought, a set-off is not available where the statute of limitations is pleaded against it. Holliman v. Rogers, 6 Tex. 98; Howard v. Randolph, 73 Tex. 459, 11 S. W. 495. “Execution” is defined thus: “Putting the sentence of the law in force.” “The act of carrying into effect the final judgment or decree of a court.” We know of no reason or authority for holding that a writ of garnishment is in any sense an execution. It is of the nature of pleading, and not of final process, to enforce the collection of a judgment. Indeed, without a further judgment and execution in the garnishment suit, it avails nothing in the collection of the original judgment. That appellee is not precluded from having an affirmance of the judgment on this ground by the trial court's conclusion on the limitation issue to the contrary, the facts being undisputed, see Byrd v. Perry (Tex. Civ. App.) 26 S. W. 749, and cases there cited. Our conclusion, therefore, is that, in denying the offset in this case, the judgment was correct, though the reasons given in the conclusions filed by his honor may not have been.

But, if mistaken in this, we still do not see upon what ground appellant was entitled to offset a note payable to order of J. T. Walters, and assigned to appellee, with a judgment against Mrs. Franklin. The legal title to the note certainly never was in Mrs. Franklin, and, if she ever had any equitable title, it was only to an undivided interest, her children owning the other interests. Appellant's type-written brief of 13 pages is too long, if not too dim, to admit of our taking up and discussing the numerous questions there raised, though it is apparent, from a cursory examina-

tion, that if the judgment pleaded as an offset was barred there is no merit in the appeal. Judgment affirmed.

GALVESTON, H. & S. A. RY. CO. v. BAUDAT.¹

(Court of Civil Appeals of Texas. May 18, 1899.)

HIGHWAYS—PRESCRIPTION—RAILROADS—CROSSINGS—ESTOPPEL—MEASURE OF DAMAGES—LOSS OF PROFITS.

1. A road cut through a forest and canebrake, and confined by the character of the country to a single path, was used by the public generally, and was worked and was looked on as a public road for 50 years. *Held*, that the right to have the road kept open was complete, notwithstanding the use of the road had become beneficial to only one person.

2. The easement of the public in a highway, as against the owner of the fee, is not affected by the building of a railroad across it before the limitation by prescription; the railroad not acquiring the fee, but only an easement.

3. A railroad, having maintained a crossing for 40 years over a road, and acquiesced in and recognized the public's right thereto, is estopped to say the public has not acquired a prescriptive right therein.

4. Where a railroad wrongfully closed a crossing, knowing that plaintiff's access to market was thereby cut off and that damages would result, it was proper, in estimating the damages, to consider probable loss of sales of plaintiff's produce.

5. Plaintiff had a right to assume that the railroad might open the crossing at any time, and hence he was justified in putting in his crop on the assumption that he would get it to market.

Appeal from district court, Ft. Bend county; T. S. Reese, Judge.

Action by J. Baudat against the Galveston, Harrisburg & San Antonio Railway Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Pearson & Wharton and A. L. Jackson, for appellant. Spencer C. Russell, for appellee.

GARRETT, C. J. The appellee brought this action against the appellant for the recovery of damages on account of the closing by appellant of the crossing over its railway track of a road leading from the appellee's premises over the railway into a public road running from the town of Richmond towards the city of Houston. The damages claimed were for injury to the business of appellee, as a truck farmer, in preventing him from getting his produce to market, and in the prevention of access to his farm by his customers. A trial by the court without a jury resulted in a judgment in favor of the appellee for the sum of \$750. The court filed conclusions of fact, which we adopt, as supported by the evidence, as follows (striking out such as we deem immaterial): "The plaintiff, J. Baudat, owns a piece of land about 1½ miles from the town of Richmond, upon which he lives. His business is that of a truck farmer or market gardener, and he is, and has

been since he has been living on this place, engaged in that business, in a small way at first, but since about 1890 rather largely for this country, gradually increasing his business. He has had since 1892 or 1893 about 100 acres in cultivation, in all kinds of vegetables, which he disposed of by shipping to various places, by selling to customers in Richmond and to persons who came on the place and bought in various quantities, from a nickel worth to a wagon load; the larger quantities being bought of him and hauled to Houston for sale, and this last being a very lucrative trade. Plaintiff rented the land in 1887, and lived on it as a tenant until he bought in 1890, and has continuously lived on this place, and carried on this business since 1887. The place was visited by a great many persons, some to buy vegetables, and many attracted by the sight (novel to this country) of a garden on so large a scale. The cultivated land ran down to within 75 or 100 yards of the defendant's track at the crossing in question, and his residence was about 600 yards from said point, in the field or cultivated land. Ingress and egress to and from plaintiff's home and premises were along and over a roadway through his land to its northern boundary, thence across the narrow strip belonging to Ryan to the line of defendant's right of way, and thence across defendant's right of way and track, over the crossing in question, on to a junction with a public road or highway, and running along the north side of the defendant's right of way, and leading from the town of Richmond east. * * * The defendant's railway was built in 1854. At that time, and prior to that, as far back as 1843, this road on the north line of defendant's track and right of way had run from Richmond along its present location up to a point opposite the crossing. Thence it turned south, and ran across what is now defendant's right of way, at the crossing in question, a short distance, where it forked,—one branch going off to the left, down the river, on the east; the other branch running south along the present road, through plaintiff's land, to a gin and mill on the east bank of the river, and thence up the river to a ferry just below the town of Richmond. The road over, at, and from the crossing in question through plaintiff's land, and up to his residence, follows the same track as the present road. The country was all uncultivated, uncleared, wooded land, and canebrake; and this road, as described, was cut out through the timber and canebrake, and was used by the traveling public as a public road in all respects, though there is no evidence that it was ever laid off and opened by the proper authority as a public road. When the defendant's railroad was built, a regular crossing was built at the point where the road crossed the track, and at the same point where the present crossing is located; and this crossing was kept up and maintained by defendant in all respects as a public crossing

¹ Writ of error denied by supreme court.

until 1894, when it was closed by defendant. * * * In 1884 defendant fenced its right of way, but left this crossing open, erecting the necessary cattle guards as in case of other public crossings, but without signal posts for whistling. By permission of the defendant, Ryan, who owned a strip of land along the right of way up to the crossing, and between the right of way and plaintiff's land, was allowed to put in gates on both sides of the crossing to keep his stock in his pasture. In 1865 the mill and gin aforesaid on the river were moved away, and about the same time the ferry was discontinued; and, there being no occasion for the public generally to use the road, it was not much used, except by persons living in that bend of the river. This land was afterwards fenced up, and the lands in the bend put in cultivation; but gates were put upon this road, and, so far as necessary, the public use of the road continued, and as far as up to plaintiff's residence, has always continued, though beyond that point there does not appear to have been any use of the road as a public road for possibly 25 years. * * * The road in dispute (that is, from and through plaintiff's land across the railway at the crossing in question) was cut out through timber and canebrake, and continuously used and recognized as a public road, as it is now laid out, by the general public from 1843, and prior thereto, up to the present time, except the time its use was prevented by the closing of the crossing by defendant in 1894. From the time of the building of the railway in 1854 up to 1894, a crossing where the road crossed the defendant's railway (being the crossing in question) was kept up and maintained in all respects as a public crossing by the defendant's company, and such crossing was used by the general public traveling these roads as a public crossing, without question, let, or hindrance, until 1894. When plaintiff bought the land and established his present business in 1890, he regarded this road and crossing as a public road and crossing. There was no other public outlet from his place. This road and crossing afforded a good road and convenient means of ingress and egress to and from his place, increasing the value of his property very largely for his business, and operated as a prominent inducement in the purchase of the place and establishment of this business. From the extent and nature of plaintiff's business, and the proximity of his place to the railroad, I conclude that it was known to defendant's agents and servants, and that they may be said to have had knowledge of such business, and of the probable damage to him in his business resulting from the closing of the crossing; and I find as a fact from the evidence that they had such knowledge. In 1894 the defendant's agents required plaintiff, as a condition for keeping the crossing open, to sign a contract to keep the gates put there by Ryan with defendant's permission, as aforesaid, closed, and to be responsible for

all stock killed at the crossing by the cars. This plaintiff refused to do, on the ground that the crossing was a public crossing, and the defendant had no right to impose any condition upon which it should be kept open. Defendant thereupon closed the crossing by fencing it up. * * * There was a private way in and out to and from plaintiff's place through the inclosed and cultivated land of his neighbor, Pleasants. This road or way has two gates and a pair of bars on it, the gates being sometimes locked. Plaintiff had permission from the owner of the land to use this way at will. The distance from plaintiff's premises to Richmond by this way was a little shorter than by the public road aforesaid, but it was merely a turn-row road through a plowed and cultivated field, rough and inconvenient to travel, and had several bad places. Plaintiff could not haul as many loads in a day, and as much at a load, as by the public road; and in addition, on account of the roughness his produce was bruised, and rendered less valuable and less fit for shipment. In addition to this, this way was so inconvenient to persons coming to the place to buy, that such trade was entirely lost to plaintiff while the crossing was closed as aforesaid. But, under these circumstances, plaintiff marketed a large part of his crops in 1894 and 1895, using this private way, but at increased expense and great inconvenience, and at an additional loss, on account of the roughness of the way. Plaintiff had growing on his land when the crossing was closed in July, 1894, about 10 acres of watermelons, and about that time planted 5 or 6 acres in beans, and about the same amount of cabbage. He had also other vegetables in smaller quantities. He planted some of these after the crossing was closed, because he expected the defendant would open the crossing. The watermelons, if they had been marketed, would have realized about \$100 an acre, the cabbages about \$150 or \$200 per acre, and the beans about \$75 per acre. In 1895 plaintiff, still thinking the crossing would be opened, planted more largely, and raised during the year, besides small vegetables, 12 or 15 acres of beans, worth \$100 per acre; 6 acres cabbages, \$200 per acre; potatoes, 8 or 10 acres, \$75 per acre; and about 1 acre of tomatoes, worth \$150. A large percentage in value of these crops was lost to plaintiff on account of his being unable to get them to market conveniently and in good shape, and on account of buyers not being able to get to the place conveniently. From the evidence I cannot find with any certainty what the amount of this loss was, but, from the best evidence I make, I find the damage to plaintiff to be \$750, of which \$250 was for crops growing when the crossing was closed, and \$500 for crops planted after the crossing was closed; said crops having been planted under the belief that the crossing would be opened by defendant, and that the plaintiff would be able to market

them over the public road in question. I find that the above loss and damage was the proximate result of the acts of defendant in closing the crossing in 1894, and keeping it closed until October, 1895. I find that the public road in question over the said crossing was a good, level, smooth road, free from any bad places, all the way from plaintiff's place to Richmond, and that the private way through Pleasants' field was hardly a road at all, but merely a turn row, a part of the way rough and inconvenient, and that plaintiff could not haul as much at a load, nor as many loads in a day, by about half, as over the other road, and that in addition the vegetables were bruised and rendered less valuable, and their value impaired, by hauling over the road."

It appeared from the evidence that the road in question, leading south from the Richmond public road over the land now owned by the appellee, and down into the bend of the river, was cut out through the forest and canebrake many years ago, and used as a wagon road by the public generally, and that it adhered and was confined to the route as originally cut out, and from appellee's residence to the Richmond road, as now used, it has never been changed. Worthington, a witness for the appellee, testified that when he came to Texas in 1849 the road was then used as a public road, and looked upon as such; that he supposed it was worked by a road overseer, but did not know; that some one worked it. Access to the appellee's premises from the direction of Houston was cut off by the closing of the crossing, and his only outlet was through Pleasants' field, in the direction of Richmond. The trial judge concluded, as matter of law, that the road was not only a public road, but that the appellant was estopped from closing the crossing by its acts with regard to the same, which were that when appellee bought the land it was maintaining a crossing over its track for the road with knowledge of appellee's intended use of the land. We do not think that the appellant was estopped from closing the crossing by the facts stated. But we are of the opinion that the conclusion that the road is a public road is correct and must be sustained. It became a public road by prescription, as well as by dedication and acceptance. *Hall v. City of Austin* (Tex. Civ. App.) 48 S. W. 55; *Elliott, Roads & S.* pp. 7, 91, 121, 123, 126, 134, 139, 140. From the long and continuous use of the road, cut out as it was through the forest and canebrakes, and confined by the character of the country to a single path, the presumption arises that at some antecedent time the land was acquired under the right of eminent domain; and, this being the case, it would not be necessary to show by direct evidence an acceptance of a dedication of the land as a public highway. We quote from *Elliott on Roads and Streets*, at page 134: "When the use of the way has continued for the period prescribed by the statute, or for the period designated

by the common-law authorities as from a time immemorial, there exists a right by prescription, founded, as Chief Justice Shaw says, upon the presumption that the way was at some anterior period laid out and established by competent authority,"—citing *Reed v. Inhabitants of Northfield*, 13 Pick. 94. A prescriptive right in the public to have the road kept open would not be defeated by the principal use of the road having become beneficial only to the appellee. The authorities to the effect that dedication will not be presumed of roads running over uncultivated and uninclosed lands are not applicable to the facts of this case. The right of the public to have the road kept open by prescription is complete, but, from the evidence in the case, dedication and an acceptance thereof may also be implied. Acceptance by the proper authorities may be implied from the use of the road for so long a period of time, and its having been worked, as appears from the testimony of Worthington, its beneficial nature, and the general reputation that it was a public road. *Elliott, Roads & S.* pp. 115-117. The author cited sums up by saying that "It may now be considered as the prevailing opinion that an acceptance may be implied from a general and long-continued use by the public as of right." From about the year 1843 up to the close of the war between the states,—more than 20 years,—the use of the road was more extensive than since, but its use has always been general. The road has never been abandoned, except as to that part of it south of the appellee's residence. There is nothing in the contention that the easement for the road could not be acquired over the appellant's right of way, which is of itself only an easement. When the appellant acquired its right of way the road was already laid out over the land, and it was bound by law to restore the road to its former condition and put in the crossing. The easement for the road was acquired, as against the owner of the fee of the land, and such would have been the case although the right by prescription had not become complete when the railroad was built. The right of the public by prescription has certainly matured since, and the acquiescence in and recognition of the appellant in this right of the public to the crossing for so long a time is conclusive against it as to this right.

Admission of testimony upon the question of damages is complained of. Since the case was tried by the court without a jury, and there is sufficient evidence to support the finding of the court as to damages, it becomes unnecessary to inquire whether or not the evidence, the admission of which has been assigned as error, should have been received. As a rule, however, proof of the loss of possible profits of a business is not admissible. Appellee would not have been justified by the rule that would prevent one from allowing damages to accumulate in not planting his crop for the year 1895. It could not be presumed that the appellant would continue its

wrongful act of keeping the crossing closed. The matter was entirely within its control, and it could have opened the crossing at any time. Appellant's act in closing the crossing was wrongful, and it became liable to the appellee for all damages to him that naturally flowed therefrom. It will be readily seen that damages did result. It was not necessary that the appellant should be able to contemplate just what the damage would be. Its servants and agents knew that the appellee was being shut off, by their act, from convenient access to market, and to the town of Richmond and elsewhere, and that he would probably suffer damage by reason thereof. The measure of damages in the case cannot be arrived at with much degree of accuracy, but it is our opinion that the court below was correct in considering what the loss would be by hearing evidence to show probable loss of sales of the appellee's produce. It was shown by the evidence, in comparison with other years, before and after, that the sales were greatly reduced. Not only this, but the appellee could estimate with some degree of accuracy how much of the particular crops was lost to him by reason of convenient access to market having been closed against him. The evidence sustains the conclusion reached by the trial judge, and the damage is not too speculative and remote to prevent a recovery. The judgment of the court below will be affirmed. Affirmed.

WEEKES et al. v. CITY OF GALVESTON.¹
(Court of Civil Appeals of Texas. April 27, 1899.)

TRUSTS — STATES — CONSTITUTIONAL LAW — STATUTES — AMENDMENT — MUNICIPALITIES — ULTRA VIRES — COSTS.

1. Pelican Island and Flats constitute for several miles the northern boundary of Galveston Harbor, and lie parallel with Galveston Island, and are of great value for the preservation and improvement of the harbor and for increasing the maritime facilities of the port. It has always been the policy of the state to foster the improvement of the harbor. It has also been the policy of the state not to grant to individuals the islands in the bays along the Gulf shore. In 1856 this island was beyond the limits of Galveston city, and was not available for municipal purposes. Held, that Act Feb. 2, 1856, conveying the island to Galveston city, was in trust for the use and benefit of the public at large, and not for merely private uses, and hence the city had no power to lease it for a long term of years to an individual for private use.

2. Conceding such conveyance did not create a trust for the public, the joint legislative resolution of March 8, 1879, declaring that this property should not be subject to judicial process for the city's debts, and that the city could not transfer the title to any one, limited the city's control of the island to public uses.

3. Such resolution was not unconstitutional as impairing contracts or depriving one of property without due process of law.

4. The resolution was not an amendment of Act Feb. 2, 1856, within Const. art. 3, § 36, providing that no law shall be amended by reference to its title, but that the law amended shall

be re-enacted at length, but was a separate expression of the legislative will.

5. Const. art. 3, §§ 29, 30, requiring an enacting clause to all bills, and that no law shall be passed except by bill, do not apply to laws passed by joint resolution.

6. Where a city made a lease ultra vires, and afterwards revoked it, it was not liable to the lessee's assignee for the sum he had paid for the lease, the city having received none of it.

7. In a suit to annul the lease, the city should not have been taxed with half the costs.

Appeal from district court, Galveston county; William H. Stewart, Judge.

Suit by the city of Galveston against N. Weekes and others. There was a decree for plaintiff, and each appeals. Reversed on plaintiff's cross appeal.

Hume & Kleberg, Maco Stewart, and W. M. Jerdone, for appellants. R. Waverley Smith, City Atty., for appellee.

PLEASANTS, J. By virtue of a resolution of the council of the city of Galveston, of the 18th of June, 1894, the mayor of the city and Robert Shaw on the 29th of the same month, entered into the following contract: "The State of Texas, County of Galveston. This contract, made and entered into the 29th day of June, 1894, between the city of Galveston, a municipal corporation, incorporated under the laws of the state of Texas, of Galveston county, Texas, acting in this behalf by and through A. W. Fly, mayor of said city of Galveston, and by virtue of a resolution passed and adopted by the city council of the said city of Galveston at a regular meeting thereof held on the 18th day of June, A. D. 1894, of the first part, and Robert Shaw, of Galveston county, Texas, of the second part, witnesseth: First. The said party of the first part doth hereby grant, demise, lease, and farm let unto the said Robert Shaw, his heirs and assigns, for the period of twenty-five (25) years commencing on the 29th day of June, A. D. 1894, the following described property and premises situated in the county of Galveston, and state of Texas: That certain parcel or tract of land known and described on the maps of Galveston county as 'Pelican Island,' and the land adjacent thereto, usually covered with shallow water, and commonly called and designated as 'Flats'; said Pelican Island and Flats being the land heretofore ceded, granted, and conveyed to the city of Galveston by the state of Texas; said island and flats lying north of the channel of Galveston Bay, running in front and north of the city of Galveston,—except so much of said island and flats as have been released and quitclaimed unto the state of Texas by the city of Galveston as described in a certain quitclaim deed recorded in Book One Hundred and Thirty (130), page thirty (30), of the deed records of said county of Galveston, Texas; and at the termination of the said period of twenty-five years it is hereby especially agreed between the said parties of the first and second parts that the said party of the second part, his heirs and as-

¹ Writ of error denied by supreme court.

signs, shall have the privilege of renewing this lease for a further period of twenty-five (25) years from the date of the termination hereof. Second. For and in consideration of the above premises the party of the second part agrees to pay to the party of the first part the annual rent of twenty-five dollars (\$25.00), to be paid annually in advance, and the rent for the first year having been paid to the party of the first part by the party of the second part, the receipt whereof, to wit, the sum of twenty-five dollars, is hereby acknowledged. Third. The party of the second part hereby agrees not to maintain, transact, carry on, or cause, or allow to be maintained, transacted, or carried on, any business on said property that may be contrary to the charter and ordinances of said city, or contrary to the laws of the state of Texas. Fourth. Should there at any time be any default in the payment of any rent due, or in any of the covenants herein contained, then it shall be lawful for the party of the first part to re-enter said premises, and remove all persons therefrom, without prejudice to any legal remedies which may be used for the collection of rent; all and every claim for damages for or by reason of said re-entry being hereby expressly waived. Fifth. At the expiration of this lease, unless the party of the second part, his heirs or assigns, avail themselves of the privilege of the renewal hereof, the party of the second part agrees to quit and surrender the said premises in as good state and condition as a reasonable use and wear thereof will permit. Sixth. It is expressly agreed and understood by and between the parties hereto that the party of the first part have, and by his contract has, a valid first lien upon any and all the goods, furniture, chattels, or property of any description belonging to the party of the second part as a security for the payment of all rent due or to become due, and any and all exemption laws in force in this state by which said property might be held are hereby expressly waived. In witness whereof, I, A. W. Fly, as mayor as aforesaid, and acting in this behalf for the city of Galveston, do herunto subscribe my official signature and office, under the corporate seal of said city, this, the 29th day of June, 1894, and the said Robert Shaw in witness whereof sets his hand on the said 29th day of June, A. D. 1894. A. W. Fly, Mayor of the City of Galveston, Texas. [Seal.] Attest: E. K. Marrast, City Clerk of the City of Galveston, Texas. Robert Shaw." Two other instruments, amendatory and explanatory of the above, were subsequently executed between the parties, and on the 2d day of May, 1898, this suit was instituted by the attorney for the appellee in obedience to a resolution of its council adopted on the 17th of January, 1898, against the appellants, to whom the lessee, Shaw, had assigned said contracts, to cancel and annul the same, and for the removal of cloud from appellee's title, and for the recovery of the premises from

51 S.W.—35

possession of appellants. The appellants answered by general and special demurrers and general denial, and upon trial of the cause by the judge of the court without a jury judgment was rendered annulling the contracts of lease, and restoring the property to the possession of the appellee, with a judgment for appellants against appellee for the rents paid by them to the city collector, with interest on same, and also for \$500, the alleged consideration for the assignment of the lease by Shaw to appellants, and that the costs of the suit be paid equally by plaintiff and defendants; and from the judgment the defendants appealed to this court, and the plaintiff made cross assignments of error. The numerous assignments presented in the brief for appellants, and discussed by counsel with much learning and ability, need not be discussed seriatim by us, for the case was tried by the judge alone; and, if his rulings upon the exceptions to the pleadings and in the admission of evidence over the objections of the defendants were in part erroneous, if the judgment canceling and holding void the contracts of lease sought to be annulled by the appellee be such as should have been rendered, it must be affirmed, and we will therefore proceed to inquire if the judgment be authorized by the law under the pleadings and the facts adduced in evidence.

The validity or invalidity of the lease involves the interpretation of the act of the legislature of Texas passed February 2, 1856, granting Pelican Island to the city of Galveston. If that act conveyed to the city a title in fee simple, without limitation or trust, as its language might import,—that is to say, if the legislature intended to convey the island to the city for its municipal or private uses,—then the lease in question should be upheld, unless, as is insisted by appellee, the inadequacy of the consideration for the lease demonstrates the contract to be fraudulent, and that the assignees of the lease knew of, or at least were chargeable with notice of, the fraud, when they took the assignment; or unless the joint resolution of the senate and house of representatives of Texas, passed on the 8th of March, 1879, could and did impose and ingraft a public trust upon the property. In construing the act of February 2, 1856, we should look beyond the words of the statute to ascertain the intent and purpose of the legislature. That municipal corporations may acquire and hold property for public as well as for corporate uses seems to be well settled, and, when the grant is for public purposes, duties are imposed upon the grantee which can neither be ignored nor their performance delegated to others than the governing power of the corporation. Vide Dill. Mun. Corp. § 96, and authorities there cited; City of Corpus Christi v. Central Wharf & Warehouse Co., 8 Tex. Civ. App. 94, 27 S. W. 808. Pelican Island and its adjuncts, known as "Pelican Flats," constitute, for a large portion of the distance between the Gulf and the western

shore of the bay, the northern boundary of Galveston Harbor. It stretches for several miles from east to west, its southern shore being nearly parallel with the northern shore of Galveston Island; and from its position, and its availability for the construction of sea walls, wharves, and docks, is of inestimable value for the preservation and improvement of the harbor, and for expending and increasing the maritime accommodations and facilities of the port of Galveston. The people of the entire state are interested in the commercial and maritime improvement of this port, and the policy of the state has been to foster this interest from the foundation of the city. This is evidenced by the grant from Texas to Menard and his associates to the lands upon the bay shore situated between the low and high tide, and much of which is now occupied by the wharves of the Galveston City Company, the successor of Menard and his tenants in common; and it has also long been the policy of the state not to grant to individuals the islands in its bays and along the Gulf shore. For years, as is well known, these islands were reserved from location by the holders of land certificates, who were authorized by such certificates to appropriate portions of the public domain. All these matters, considered with the further fact that in February, 1856, when the act granting Pelican Island was passed, the island was beyond the jurisdictional limits of the city, and was not essential—if, indeed, it was available—for municipal purposes, are sufficient to authorize the conclusion that the purpose and the intention of the legislature by the act of February 2, 1856, was to convey the island to the city for public, and not for merely private, uses; and that the property is held by the city in trust for the use and benefit of its citizens, and for the benefit of the public at large. But if we are in error in thus interpreting this act, we are of the opinion that the joint resolution of the legislature of March 8, 1879, does, and as we think, without violation of any provision of the state or federal constitution, limit the power and dominion of the grantee over the property for public purposes, when it declares that "said property shall not be subject to attachment, execution or other judicial process for debt or debts of said city; nor shall said corporation have the power to transfer the title to the same to any person or corporation whatever." If the island was the private property of the city, it was surely not the intention of the legislature to declare it should not be subject to debts of the city previously contracted, and then existing; such purpose should not be imputed to the legislature, unless evidenced by clear and explicit language. In support of their insistence that the legislature is without power to attach a condition to an unconditioned grant of land made to a public corporation, or to otherwise change, abridge, or modify the absolute title and power of use and disposition invested by such grant, coun-

sel, among other authorities, cite the cases of *Milam Co. v. Bateman*, 54 Tex. 153. In that case the supreme court decided that it was not in the power of the legislature to divest title from a county to lands which had been granted it by the state for school purposes. The joint resolutions of March, 1879, do not undertake to divest the title to Pelican Island. It affirms the title, but inhibits its alienation by the city, and also exempts the property from liability for the debts of the city. In the case of *Baker v. Dunning*, 77 Tex. 28, 13 S. W. 617, it was held that the legislature could require a county to sell its school lands, when put upon the market, to actual settlers upon the land, if they desired to purchase, in preference to all other bidders; and a sale made to another by the county, without evidence that the county or its vendee even knew that there was a settler upon the land, was held to be imperative as to the settler, who, after the sale by the county, made a tender to it, and to its vendee, of an amount of money sufficient to pay for 160 acres at the price per acre for which the entire body of lands—a league or more—had been sold. If the act requiring a county to sell its lands, in preference to other bidders, to settlers, and in small quantities, and for the same price per acre for which it could sell to one bidder all of its lands, is not violative of section 16, art. 1, of the bill of rights of the constitution of this state, inhibiting the impairment of a contract by legislation; or of section 10, art. 1, of the federal constitution, inhibiting the deprivation of property without due process of law, it would seem that the joint resolution of March 8, 1879, should not be held to violate either of these constitutional limitations upon the legislative power of the state. There is not wanting authority for the doctrine that these sections of the state and federal constitutions are without application to acts of the legislature respecting the powers, rights, and property of municipal and public corporations, and that the authority of the legislature over such corporations is quite without limit; and such doctrine seems to be consistent with sound reason, since it is by the will of the legislature that these corporations exist. But, without giving our assent to the construction, that these corporations hold their property and their powers, as they do their existence, the weight of authority seems to be that there may be rights in such corporations which are beyond destruction by the legislature, though not beyond reasonable and legislative authority and control. *Vide Dill. Mun. Corp. § 68.* And we are of the opinion that the authority exercised by the legislature in the resolutions of 1879, in respect to the property granted the city of Galveston by the act of February, 1856, was reasonable and legitimate.

But it is insisted by reason of sections 29, 30, art. 3, of the constitution of the state the joint resolutions of 1879 are ineffectual to repeal, abridge, enlarge, or amend the act of

February 2, 1856; in other words, that such resolutions have not the force and effect of law. The constitution recognizes two modes by which the will and purpose of the legislature may be declared, and such will, when expressed in either one or the other of these modes, has the force and effect of law, and is imperative upon the courts; and such resolutions vest or divest title to property, and may enlarge or restrict an existing law. Sections 29, 30, art. 3, are applicable to laws passed by bills, but not to such as are created by joint resolutions. *Vide* *Suth. St. Const.* § 61, and the *State v. Delesdenier*, 7 Tex. 76. The joint resolutions of March, 1879, do not purport to be an amendment of the act of February 2, 1856, nor are they in fact an amendment in the sense in which that term is used in section 36, art. 3, of the constitution. They are in part, another and separate expression of the will and purpose of the legislature touching the subject-matter of the act of 1856, and the two, being construed each in connection with the other, constitute the title of the city of Galveston to Pelican Island and Pelican Flats, and under that title the city of Galveston holds the property in trust for the public, and is charged by law with the duty of administering the trust through the exercise of its legislative and governmental powers upon the property, as the needs and exigencies of the harbor and port may from time to time demand. And these powers, as we have seen, cannot be delegated, nor can the city government avoid its duty to the public by placing the property out of its possession and beyond its control. By the lease made to the appellants, they are given possession of Pelican Island and its flats, to be by them occupied and used for the period of 25 years, with privilege of renewing the lease for the like period, and upon the same terms; this possession and use of the property to be without interference or control of the city government. It is true, the lease provides that the property shall not be used to the injury of the harbor, and that no business shall be carried on by the lessees, nor will they permit any others to carry on any business, upon the island in violation of the laws of the state or the ordinances of the city. But these restraints upon the rights and powers of the lessees are only those under which every citizen of the city holds and enjoys his property. Thus, practically, for half a century, the city, by its contract, has voluntarily abdicated its office of trustee for the public, and obligated itself to suspend for the same period of time all exercise of its legislative and administrative powers of government, as regards this island, other than such as it may exercise in respect to the property of any citizen. Such action by the city council must be held to be *ultra vires*, and, without deciding that there could not be a valid lease made of this property, we declare the one under consideration to be unauthorized and illegal, and the judg-

ment of the lower court cancelling and vacating the same to be correct. *Dill. Mun. Corp.* § 97; *City of Corpus Christi v. Central Wharf & Warehouse Co.*, 8 Tex. Civ. App. 94, 27 S. W. 808; *Macdonell v. Railway Co.*, 60 Tex. 591; *Waterbury v. City of Laredo*, 68 Tex. 576, 5 S. W. 81.

As to the second ground upon which appellee sought to have the contracts of lease avoided and annulled, our conclusion is that, while the petition does not charge specific act of fraud against any member of the city council, or the lessee or his assignees, and while the evidence does not warrant a finding that there was actual fraud committed by any one connected with the lease, the very great inadequacy of the consideration received by the city for the lease, coupled with the fact that the dealings of the lessee were not with the real owners of the property, but with those who were trustees for the owner, the public, brands the contract as fraudulent in the eyes of the law. There may have been incompetent, and perhaps irrelevant, evidence admitted for the plaintiff over objections from the defendants, but there was competent and relevant evidence amply sufficient to warrant a finding by the court that the sum of \$25 was grossly and shockingly inadequate as annual rental for the property. *Vide* *Pom. Eq. Jur.* § 927; *Tied. Eq. Jur.* 229; *Story, Eq. Jur.*; *Macoupin Co. v. People*, 58 Ill. 195; *Madison Co. v. Same*, *Id.* 457; *Byers v. Surget*, 19 How. 303.

The cross assignments of the appellee are, we think, well taken. Neither law nor equity authorized a judgment for the appellants for the sum alleged to have been paid by them for the assignment of the lease to them by Shaw. The appellee received no part of the money paid by appellants to Shaw, and appellants have no claim upon the appellee for any of this \$500. Nor should the court have divided the costs of the suit between the parties. It follows from what we have said that the judgment will be reformed, and here rendered that the contracts of lease set out in the petition be canceled, and held for naught, and that the property sued for be restored to the possession of the appellee, and that the writ of possession issue for this purpose, and that appellee pay to the appellants the sum of \$75 paid by them into the treasury of the appellee, in compliance with said contract of lease, with interest on said money at 6 per centum per annum from dates of payment, and that appellee recover all costs of suit in this and in the lower court.

SIEDERS v. MERCHANTS' LIFE ASS'N OF UNITED STATES.

(Court of Civil Appeals of Texas. May 31, 1899.)

INSURANCE—CONSTRUCTION OF POLICY.

Where a contract of insurance is entered into, to be performed in the state, in determining the effect to be given to the policy the laws of

the state will govern; and where statements in the application are false, and were warranted to be true, no recovery can be had on the policy, though, under the law of the state in which it was issued, false representations not actually contributing to the contingency on which the policy is payable do not vitiate the policy, and such false statements did not contribute to the loss.

Appeal from district court, Travis county; R. E. Brooks, Judge.

Action by Mary Sleders against the Merchants' Life Association of the United States. Judgment for defendant, and plaintiff appeals. Affirmed.

Z. T. Fulmore, for appellant. Fiset & Miller, for appellee.

FISHER, C. J. This is an action by Mrs. Mary Sleders, the wife of P. W. Sleders, deceased, against the appellee, on a policy of insurance covering the life of her husband. Certain defenses were pleaded, which are indicated by the findings of the trial court. The court below found its conclusions of fact and law, which resulted in a judgment in favor of the appellee. The evidence supports these conclusions, which are adopted by this court. They are fully stated in the record, and it is unnecessary to repeat them in this opinion. The assured, in his application for the policy, warranted statements to the effect that he had not applied for or been refused insurance in other companies, and that no policy had been issued upon his life which had been previously canceled; nor did he use ardent spirits, wines, or malt liquors. The court finds that these statements were false, and that they were warranted in the application to be true, which was made a part of the policy. And the court further found that none of the false matters stated in the application contributed to the death of Sleders. The plaintiff pleaded a statute of Missouri, as follows: "No defense based upon misrepresentations made in obtaining or securing a policy of insurance on the life or lives of any person shall be deemed material or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due or payable, and whether it so contributed in any case, shall be a question for the jury." The main point raised by the appellant in her brief is the refusal of the court to give effect to this statute, in determining the effect to be given to the policy. The court below refused to apply this statute, for the reason that the policy should be construed according to the laws of this state, as it was evidently contemplated that it was to be performed here, and that its collection should be enforced through the courts of this state. Without entering into a discussion upon this question, we think the conclusion reached by the trial court is justified by the case of *Fowler v. Bell*, 90 Tex. 150, 37 S. W. 1058. In response to the third assignment of error, we think it plain that the application was made a part

of the policy, and that the court properly construed it. We find no error in the record, and the judgment is affirmed. **Affirmed.**

WEATHERFORD v. McFADDEN.

(Court of Civil Appeals of Texas. May 20, 1899.)

SCHOOL LANDS—PURCHASE BY MINOR—INSTRUCTION.

1. Refusal of special instruction as to purpose for which certain evidence may be considered is not prejudicial, where it is impliedly given in the general charge, and was, in substance, stated to the jury when the evidence was admitted.

2. The only condition made essential by the law itself to the right to purchase school lands of the state being actual settlement, the disability of minority cannot be urged by one who seeks to purchase such land after the commissioner of the land office has awarded it to a minor.

Appeal from district court, Palo Pinto county; J. S. Straughan, Judge.

Action by Claude McFadden against W. W. Weatherford. Judgment for plaintiff. Defendant appeals. Affirmed.

Arthur Speer and W. P. Gibbs, for appellant. Wm. Veale & Son, John H. Eaton, and Theodore Mack, for appellee.

STEPHENS, J. Whether appellee or appellant had the superior right to purchase from the state fractional section 80 of school land in Palo Pinto county was the question at issue in the trial of this case; appellee, the plaintiff in the action, holding the affirmative of the issue. This was made to depend mainly upon the question of fact whether or not appellee was an actual settler when he made his original application to purchase, December 7, 1897. The jury found that he was, and that finding is conclusive here, since the following is the only complaint made of the verdict in the motion for new trial, "Because the verdict of the jury is contrary to the law and the evidence," which assignment, as has been repeatedly held, was too general.

It is insisted that there was error in refusing the following special instruction requested by appellant: "You are instructed that the question of improvements, or their value, cannot be considered in this case, except as a circumstance of good faith, and that plaintiff, McFadden, acquired no legal title to any improvements by any purchase he may have made of the occupancy and improvements in question from C. L. Williams." The evidence which appellant sought to limit by this instruction was to the effect that appellee had bought of C. L. Williams (paying him therefor \$400) the improvements put on the land by Williams under a prior but void purchase from the state, and was admitted over the objection that it was "irrelevant and misleading, and for the reason that plaintiff had theretofore shown that Williams had no legal right to said improvements, but all claim thereto had been forfeited." To the bill of exceptions making this ruling a part of the

record was added the following: "This bill is allowed, with the explanation and qualification that said testimony was admitted, not as evidence of title in the plaintiff, but only as a circumstance to be considered by the jury on the question of plaintiff's good faith in seeking to purchase the land from the state for a home; and the jury were so instructed at the time said testimony was admitted." In addition to this, the charge of the court, in submitting as the only ground of recovery the prior actual settlement and purchase of the land from the state by appellee in good faith for the purposes of a home, excluded, in effect, the idea of his right to recover upon any other ground; the charge concluding the submission of the issue with the following paragraph: "As to whether the plaintiff or defendant was in fact an actual settler upon the land in good faith, for the purposes of a home, is a question of fact for your determination; and, in determining the question of the good or bad faith of the parties, you may look to the situation of the parties, their acts, conduct, and declarations, as well as all other facts under circumstances in evidence before you." We are therefore of opinion that, while this special instruction might have been given, its refusal, under these circumstances, was not prejudicial to appellant. The jury could not with any show of reason have concluded that appellee acquired any title to the land by purchasing the improvements of Williams, or that any recovery was even sought by him upon that ground. The special instruction does not controvert, but impliedly concedes, that the testimony was admissible "as a circumstance of good faith," though, under the assignment complaining of the admission of the evidence, even this is controverted; but we think its admission for that purpose was not erroneous.

It is further insisted that inasmuch as appellee was not 21 years old, though past 18, when his application to purchase was made and accepted, he was ineligible as a purchaser of school land from the state; and this seems to be the most serious question in the case. It is well settled that the contracts of a minor are not void, but only voidable at his instance, and that third parties will not be heard to interpose such disability. But the question suggests itself, did the legislature ever intend to authorize the commissioner of the general land office to sell the school lands to minors? The homestead donation law allows a single man of the age of 18 years or over to acquire 80 acres of vacant and unappropriated public land. Rev. St. art. 4161. But we know of no similar provision in the law providing for the sale of the school lands. Purchasers under that law are required to execute their written obligations to the state for the deferred payments of purchase money, principal and interest, which would seem to indicate that persons under the legal disability of minority were not contemplated as purchasers. The only condition, however,

made essential by the law itself to the right to purchase, is that of actual settlement. It may be, then, that it was contemplated that any actual settler in good faith should have this right, at least within the discretion of the land commissioner, and that his contract of purchase, when accepted by the state, should be attended with the same legal consequences as if made with an individual. We cannot see how the interests of the state or the school fund or of the minor could be made to suffer by this construction. We are therefore inclined to adopt it, though not without some hesitation, at least to the extent of holding that where, as in this case, the commissioner of the land office has awarded the land to a minor, a subsequent settler and applicant cannot be heard to urge the disability of minority so waived by the land commissioner. Whether he could be compelled to accept the application of a minor, we need not decide. Judgment affirmed.

JONES et al. v. ROACH.

(Court of Civil Appeals of Texas. April 22, 1899.)

RECEIVERS — POWERS AND DUTIES — TELEGRAMS — DAMAGE FOR DELAY — VERDICT.

1. A receiver of a telegraph line will, in the absence of plea or proof of limitations of authority, be presumed to have authority to contract to transmit a message beyond his line, or, at least, that it is his duty to transmit it with dispatch to the end of his line, and there deliver it for transmission to the connecting line.

2. Recovery from a telegraph company for delay in transmitting message, whereby plaintiff's wife was buried before his arrival, is not barred on the ground that damages are speculative, though delay in burial was dependent on the will of a third person.

3. Where plaintiff received a telegram from J., "Anna is dead. Come. If not, answer;" and within a few hours thereafter plaintiff delivered to the telegraph company his answer, "We will be there on first train," and urged its speedy transmission,—the company has notice that the purpose of the answer is to delay the funeral till plaintiff's arrival; and, it being immaterial by whom it should be delayed, the wife of J., of whose existence the company had no notice when the telegrams were sent, may testify that, had the answer been received in proper time, she would not have permitted the burial.

4. Failure to require the jury to itemize their verdict for damages cannot be complained of, request to that effect or objection to such failure not appearing.

Appeal from district court, Potter county; H. H. Wallace, Judge.

Action by John D. Roach against Morgan Jones, receiver, and another. Judgment for plaintiff. Defendants appeal. Affirmed.

Stanley, Spoons & Thompson, for appellants. Browning & Madden, for appellee.

CONNER, C. J. This is an appeal from the district court of Potter county, and the following statement of the nature and result of the suit is taken from the brief of appellants: "Suit was brought by appellee to recover of the Ft. Worth & Denver City Rail-

way Company and Morgan Jones, its receiver, the sum of \$5,000 damages for mental suffering, and \$100 for personal expenses incurred, by reason of the failure of Morgan Jones, as receiver, to promptly transmit and deliver a telegraph message sent by plaintiff from Amarillo, Tex., to S. E. Jones, Jacksonville, Tex., as follows: 'February 15th, 1896. To S. E. Jones, Jacksonville, Texas: We will be there on first train. John D. Roach.' It was filed for transmission on February 15, 1896, at 11:10 a. m., and not delivered until about noon of February 16, 1896, whereby plaintiff was prevented from being present at the burial of his wife, who had died at Jacksonville, February 14th, and was there buried, about 4 o'clock p. m., February 15th, and where appellee arrived February 17th. Defendants answered by general and special demurrers and by general denial. On first trial demurrer sustained, but on appeal overruled, and case reversed. *Roach v. Jones* (Tex. Civ. App.) 44 S. W. 677. On second trial, demurrers and exceptions overruled; jury trial; verdict and judgment in favor of plaintiff against both defendants for \$1,175, July 13, 1898." It was proven that at and prior to February 15, 1897, the appellant the Ft. Worth & Denver City Railway Company owned a continuous railway and telegraph line from and beyond Amarillo, Potter county, Tex., to Ft. Worth, Tex., and that on said day said telegraph line was managed and operated by Morgan Jones, as receiver duly appointed under the orders of the district court of Tarrant county, Tex. It was also proven that appellee's wife, Anna, for several months prior to said February 15th, had been seriously sick at the home of her brother, S. E. Jones, in the town of Jacksonville, Tex.; that the Western Union Telegraph Company had an office and agent in said Jacksonville, and owned and operated a continuous telegraph line from said point to the city of Ft. Worth, Tex., where it connected with the telegraph line of appellant railway company. There was no proof, however, that either of appellants had any power or control over said Western Union telegraph line, nor was the business arrangement, if any, in accordance with which telegrams over one line were transmitted over the other, shown; it being shown as a fact, however, as will more fully hereinafter be set out, that a telegram from S. E. Jones to appellee was transmitted from Jacksonville to Amarillo, and appellee's reply was transmitted from Amarillo to Jacksonville, it not appearing that any other telegraph lines were operated between the two points. The specific powers of the receiver, and the instructions and limitations, if any, relating to his management and operation of the property placed in his possession, were not shown. It was proven that appellee's wife died about 7:40 p. m. on February 14, 1896; that S. E. Jones, at about 8:30 p. m., caused the following telegram to be sent to appellee: "To John D. Roach, c/o Elmer Roach, via

Ft. Worth, Amarillo, Texas: Anna is dead. Come. If not, answer. S. E. Jones." This telegram was duly received at Amarillo, and delivered to appellee at about 10 a. m. on February 15, 1896. Appellee and his little son were then on their way to Amarillo, with the intention of taking the first train to Jacksonville to see his wife. Upon receipt of the above telegram, he immediately went to the agent of the receiver in Amarillo, and prepared and delivered to him for transmission the following telegram: "To S. E. Jones, Jacksonville, Texas. Will be there on first train. John D. Roach." This telegram was so delivered at 11:10 a. m. of the 15th day of February, 1896, and at the time of its delivery appellee impressed upon the receiving agent the necessity of a speedy transmission; his purpose in so doing being that the burial of his wife might be delayed until his arrival in Jacksonville. To this end appellee paid 25 cents more than the usual fee for transmission, in consideration of which said receiving agent promised and agreed that the telegram should be immediately transmitted and delivered to said S. E. Jones at Jacksonville. Appellee and his son took the first regular train out of Amarillo, at 4:20 p. m. of February 15, 1896, and by due course of travel arrived in Jacksonville at 7:40 a. m. of February 17, 1896, when to his great distress, as the evidence tends to establish, he first learned that his wife had been buried. The evidence further tended to show that the above telegram to S. E. Jones was not sent out from the Amarillo office until some time about or after 8:55 p. m. of February 15, 1896, and it was not in fact delivered to S. E. Jones until about 10 a. m. of February 16, 1896. The evidence also tended to show that after S. E. Jones sent his message to appellee he several times went to the telegraph office in Jacksonville, where he was well known, for the purpose of securing an answer, so that the burial of Mrs. Roach could be delayed in the event the appellee was coming; but not having received such answer, and having had time to do so, and despairing of hearing from him, he, about 9 a. m. on February 15, 1896, caused funeral notices to issue, and afterwards, at about 4 p. m. of said day, buried the body of Mrs. Anna Roach. There was evidence also tending to show that the burial could and would have been delayed had appellee's answer been promptly received.

It is admitted that appellee gave the proper notice of his damage, and that since the institution of this suit the receiver has been discharged, and appellant railway company has again received possession of its said properties, under such circumstances as to render it liable herein, if the receiver was liable.

In the very able brief and oral argument of counsel for appellant, it is insisted, in effect, that the pleading and evidence do not support the judgment, in that it does not appear that the receiver was authorized to make any

such contract as was sued on in this case, for the reason that the receiver's powers are such alone as are granted by the court under whose appointment he acts, and that no authority to contract to deliver a telegram beyond its own line, and at a point beyond the jurisdiction of the district court of Tarrant county, was alleged or shown; and the cases of *Railway Co. v. Wentworth* (Tex. Civ. App.) 27 S. W. 680, and *Vault Co. v. McNulta*, 153 U. S. 554, 14 Sup. Ct. 915, are cited in support of this contention. In the *Vault Co. Case*, supra, T. M. Cooley, as receiver, had rented certain rooms for his use from January 1, 1887, to April 30, 1891, a period of four years and four months, at a yearly rental of \$10,500, payable in monthly installments, in advance, of \$875 each. In 1889 the receivership proceedings were terminated by the sale of the property and the discharge of the receiver, he paying regularly the monthly installments of rent to July 31, 1889, and the vault company's suit was to enforce the payment of the rent as contracted for the unexpired period. The court held, no express power from the court being shown, that the receiver had no such general power as authorized him to enter into a contract involving a large annual expenditure, and extending beyond the receivership proceedings, so as to bind the trust fund in his hands. In the *Wentworth Case*, supra, Judge Neill, speaking for the court of civil appeals for the Fourth district, held that an agent of the receiver of the railway company was not, by virtue of his general power as such, authorized to charge the property in his hands by contracting to ship certain sheep over other lines to Chicago, Ill., by a special route, and for damages for delay arising on such other lines of railway. Our supreme court, however, on writ of error in the same case, refused to pass upon the question. See *Railway Co. v. Wentworth* (Tex. Sup.) 28 S. W. 277.

Whatever may be the merit of the decisions quoted, and without at this time undertaking to discuss the authorities, we think it is not to be doubted that, in the absence of plea or proof of a limitation of authority or disaffirmatory act of the court, a receiver of a railway and telegraph line, under our statutes, and who is shown thereunder to have been operating them, will be presumed to have general authority to make such contracts as are usual and necessary in the proper discharge of his duties, and that the power to take possession, manage, and operate the same devolves upon him, in his official capacity, the same duties and obligations as rested upon the company before his appointment. If so, then it has not been made to appear on the record before us that the receiver did not have power to receive and contract to transmit the telegram in question. If, for the purposes of the argument, it be assumed that the agent at Amarillo exceeded his authority in contracting to transmit said message to S.

E. Jones at Jacksonville, nevertheless we may safely assume it to have been his duty, upon receipt of said telegram, to transmit it with reasonable dispatch to the end of his line, and there deliver it for transmission to the connecting line. It would seem that power and duty to so do would certainly be necessary to the profitable management of the property, and in discharge of public, or quasi public, duties devolving upon the receiver. In the case before us, it does not appear that the delay in delivering the telegram to S. E. Jones was due to any fault or negligence of the Western Union Telegraph Company. On the contrary, the evidence leads almost irresistibly to the conclusion that the message in question remained in the office of the agent at Amarillo until some hours after the burial of Mrs. Roach, and that, had it been promptly transmitted to the connecting line, it would have been received by S. E. Jones in time to have delayed the funeral. We are of opinion that, under such circumstances, appellant cannot avoid the consequences of the delay and negligence in the transmission of the telegram to S. E. Jones on the ground of a want of power to make the contract in question, and we therefore overrule all assignments involving this issue.

Again, it is insisted that there can be no recovery in this case, for the reason, in substance, that the petition and proof showed that delay *vel non* in the burial of Mrs. Roach was dependent upon the independent will of a third person, S. E. Jones, and that, therefore, the injury and damages are speculative and remote. It would perhaps be a sufficient answer to this contention to refer to the decision of this court on a former appeal of this case. The same contention, in effect, was then urged by the receiver, and on this ground the court below sustained the eighth special exception to the petition. The court held that there was error in so doing, and, in effect, held that the damages and injuries claimed were not remote and speculative, because dependent on the will and action of S. E. Jones; distinguishing this case from the case of *Telegraph Co. v. Motley*, 87 Tex. 38, 27 S. W. 52. See *Roach v. Jones* (Tex. Civ. App.) 44 S. W. 677. This should conclude the question on this appeal, unless clearly erroneous, and we do not so think. In every case of the kind,—and many of them have been before our courts for decision,—the time of the burial of the deceased, with reasonable limitations, must necessarily be dependent on the will of one or more third persons. The question in such cases is and should be, had the contract for transmission and delivery been complied with, could and would the interested party have been able to reach the body before burial in fact? This is a question of fact, determinable by the court or jury from all the facts and circumstances in evidence. We therefore overrule all assignments of error raising this question.

In the tenth assignment of error, it is

urged that the court below erred in permitting Mrs. S. E. Jones to testify to the effect that, had the telegram in question been received in proper time, she would not have permitted the burial. We think it unquestionably true, as contended, that the telegram in question was not sufficient in terms to constitute notice to the receiver that S. E. Jones had a wife, and that it was within the reasonable contemplation of the parties that her influence in delaying the burial was relied upon. See *Telegraph Co. v. Carter*, 85 Tex. 581, 26 S. W. 961. We are nevertheless of opinion that there was no error in this. The telegram to appellee from S. E. Jones, "Anna is dead. Come. If not, answer,"—on its face constituted notice of the relationship of the parties named in the message, with notice of such purposes as might be reasonably inferred from the language used, including a probable desire of the addressee to attend the burial, and the mental anguish naturally arising from an inability to so do. See *Telegraph Co. v. Carter*, 85 Tex. 580, 22 S. W. 961; *Loper v. Telegraph Co.*, 70 Tex. 690, 8 S. W. 600; *Telegraph Co. v. Luck*, 91 Tex. 180, 41 S. W. 469; *Telegraph Co. v. Edmondson*, 91 Tex. 209, 42 S. W. 549; *Telegraph Co. v. Smith* (Tex. Civ. App.) 33 S. W. 742. Within a few hours after the receipt of this message by the agents of the receiver in Amarillo, appellee delivered his answer thereto. The two were closely connected in point of time and in relation to general purposes. From the necessary legal import of the two messages, and from the impressive manner of appellee in urging its speedy transmission, the receiving agent at Amarillo must have had notice that the central and governing purpose of appellee's answer was to delay the funeral of his wife, if possible, until he could arrive at Jacksonville. It could have been of no importance by or through whose instrumentality the burial should be delayed. It was the fact of delay that was sought. The common experience of mankind teaches that such results are often, if not more commonly, brought about by the mutual conference and agreement of relatives or others surrounding the deceased at the time of death, and it must be held that the receiver, at the time of making the contract of transmission in question, had in contemplation not only appellee's desire to attend the burial of his wife, but also that, upon the prompt delivery of his answer to S. E. Jones, such burial would, in the natural order of things, be delayed through the usual agencies and influences.

If in error in this conclusion, however, we are of opinion that the action of the court below in the particular complained of was without prejudice, in that Mrs. S. E. Jones, on cross-examination, testified, among other things, as follows: "The body was buried about the usual time after death, and it would have been very inconvenient and unwholesome to have kept it out of the ground much longer, but we would have done so had we

heard from plaintiff at the time and known that he was coming." "The burial was not delayed because we did not know how long we would have to delay it, as we had not heard from Mr. Roach, and we had ample time." "If we had received the dispatch before burial, we would not have buried Mrs. Roach before arrival of plaintiff." "Mr. Roach was telegraphed to. We expected a reply, and, if we had gotten a reply that he was coming, we would have deferred burial until after his arrival. Of course, we would not have advised him to come, and have buried his wife before his arrival, had we known he was coming." There appears to have been no objection to the introduction of this testimony, and, in view thereof, we are unable to say that injury to appellant's prejudice resulted from the error of the court, if any, in this particular.

It is also urged that the verdict and judgment below should be set aside, for the reason, in effect, that the evidence is insufficient to show that the burial would have been postponed had the message been transmitted as agreed, and that the verdict is excessive, in that it includes the expense of appellee and his son. The evidence tended to contrary conclusions, but S. E. Jones testified that they had not heard from appellee, and "so we went ahead rather than longer hold the body on guesswork"; and again, that, had he received appellee's answer in due time, he was "about sure" he "would have deferred burial until after arrival of plaintiff." The attending physician testified that he "supposed the body might have been preserved for several days, and until after plaintiff's arrival, had they gone to trouble and expense enough." A part of Mrs. S. E. Jones' testimony has been set out, and it was shown that the weather was cold at the time, from all which it must be apparent that there was evidence supporting the verdict, and it is not so manifestly against the weight of the whole testimony as to authorize us to set aside the verdict on that ground. Nor can we say that, in fact, the jury included the expense mentioned in their verdict for damages. The court, among other things, charged the jury that, if they found for the plaintiff, they "should consider and estimate only such damages, if any, that plaintiff may have sustained by reason of such negligence, if any"; and, in this connection, that, if they should "find that plaintiff would have made the alleged trip to Jacksonville regardless of the sending and delivery of the message alleged to have been delayed, then you should not allow him any damages on account of his personal expenses in making such trip." The verdict is in the gross sum of \$1,175. It has been suggested that the court erred in failing to require the jury to itemize their verdict, so that it could be determined whether said personal expense had been included, but there appears in the record no request to that effect, nor any objection to such failure, that we can notice.

We have failed to find reversible error in the trial below, and the verdict and judgment of the district court are accordingly in all things affirmed.

On Motion for Rehearing.

(May 27, 1899.)

In the motion for rehearing our attention has been called to the fact that in reciting the evidence in the original opinion we were in error in stating that the evidence tended to show that "after S. E. Jones sent his message to appellee he several times went to the telegraph office in Jacksonville * * * for the purpose of securing an answer." We do not know how this oversight crept into the record, but upon this rehearing, having carefully examined the facts, we find no such evidence, although alleged, and although it was recited as an alleged fact in the opinion on the former appeal, that appeal having been decided on demurrer. As stated in the opinion, however, the evidence did show that S. E. Jones lived within a short distance of the telegraph office in Jacksonville, and that he was well known to the employés in said office and in said town, and we do not deem the fact so erroneously stated as of controlling influence. We therefore overrule the motion for rehearing, with the correction indicated.

FLEMING et al. v. PRINGLE et al.

(Court of Civil Appeals of Texas. May 4, 1899.)

GARNISHMENT — PARTIES — DEED — CONSIDERATION — PLEADING — VARIANCE — BREACH OF WARRANTY — DAMAGES — AMENDING RETURN.

1. Where, pending garnishment proceedings, defendant's assignee sues the garnishee for the fund, and the latter brings in the debtor and the garnishment creditors by interpleader, and their pleadings raise all the issues involved in the garnishment, they can properly be determined in the action, though the garnishments are not consolidated therewith, but remain undisposed of, and though defendant is not served in the garnishment.

2. Where the consideration of a warranty deed is other land, but in an action on the warranty, aided by garnishment, plaintiff states it to be "lawful money," and he is brought by interpleader into another action between defendant's assignee and the garnishee, he avoids the variance as to the latter action by alleging the true consideration.

3. The measure of damages for breach of warranty is the purchase money and the interest from the time of the ouster, which is sufficiently certain to support attachment and garnishment.

4. A petition in an action for breach of warranty, aided by garnishment, alleged a stated liability, with 6 per cent. interest from a certain date, and the application for garnishment and the writ claimed the principal and interest. The evidence showed the consideration of the warranty was property worth the sum sued for. *Held*, that there was no variance between the petition and the writ.

5. Where a garnishee is properly served and appears, the return may be amended during the trial to show it, under 1 Sayles' Civ. St. art. 1239, authorizing any mistake or informality in a return to be corrected by the officer at any time, under the court's direction.

Appeal from district court, Galveston county; William H. Stewart, Judge.

Action by J. M. Pringle against C. E. Fleming and others. There was a judgment for plaintiff, and certain defendants appeal. Reversed.

James B. & Charles J. Stubbs, for appellants. M. L. Stewart and J. W. Campbell, for appellees.

GARRETT, C. J. The appellee J. M. Pringle, as assignee of A. M. Pringle, brought this action against A. H. Casteel and his wife, Mary J. Casteel, for the recovery of a certain sum of money which it was alleged the said A. H. Casteel had promised to pay A. M. Pringle. Casteel and his wife answered that they had been served with writs of garnishment at the suit of C. E. Fleming and J. C. McBride, and asked that Fleming and McBride, as well as A. M. Pringle, be made parties to the suit. Fleming and McBride both appeared and answered, and prayed judgment for the amount of their respective claims against Casteel and wife. No answer was filed by A. M. Pringle, and it does not appear that he was ever served with process, except by a recital in the judgment to that effect, and that he had made default. The facts adduced at the trial below show that Casteel was the owner and holder of two vendor's lien notes against two tracts of land, of 320 acres each, with deed of trust for the enforcement of the payment of the notes. These tracts of land, known as the "Robert Hoppel and A. H. Jackson Surveys," were situated in Galveston county, and had been sold in a body to one Dennis, whose notes for the unpaid purchase money had been transferred to Casteel. Dennis conveyed the land, subject to the purchase-money notes, to A. M. Pringle, who assumed the payment of the notes, and afterwards conveyed the Jackson survey to his sons, C. R. and H. H. Pringle, and the Hoppel survey to C. E. Fleming, through a meane conveyance. Fleming undertook to pay, in part consideration of the conveyance, about one-half of the purchase money outstanding against both tracts of land, which had been assumed by A. M. Pringle. When Casteel was about to foreclose his deed of trust, A. M. Pringle procured an agreement from him that if he became the purchaser of the land at the trustee's sale, and Pringle would produce a purchaser therefor within a stipulated time, Casteel would convey the land to such purchaser, and pay to A. M. Pringle the surplus of the purchase money over the amount of his debt, interest, and an agreed amount to cover expenses. Pringle procured one Bush to purchase the land at \$10 per acre, which left a surplus of about \$2,800. This money Casteel deposited to the credit of his wife with Adoue & Lobit, bankers. James Fleming, the father of the appellant C. E. Fleming, who is a feme sole, testified that A. M. Pringle made the agreement

with Casteel with his knowledge and assent, acting for his daughter, and promised to share the surplus proceeds received from Casteel equally with her. A. M. Pringle, by another conveyance, and in an entirely separate transaction, conveyed to the said C. E. Fleming another tract of 100 acres of land, in consideration of property then conveyed to him of the value of \$2,500, by a deed in which he warranted the title to the land conveyed. It turned out that C. E. Fleming lost and was ousted of this land by reason of an incumbrance placed thereon by A. M. Pringle before his conveyance to C. E. Fleming, and there was a breach of Pringle's warranty. The money which Casteel had promised to pay to Pringle came into his hands April 8, 1897. On March 30, 1897, the appellant C. E. Fleming filed suit in the district court of Galveston county against A. M. Pringle for damages for breach of warranty of title to the 100-acre tract of land, and applied for a writ of garnishment against the said A. H. Casteel. A writ was issued April 19, 1897, and placed in the hands of the sheriff, and by that officer returned with the following indorsement: "Received this writ on the 19th day of April, A. D. 1897, at 11:30 o'clock a. m., and executed the same on the 19th day of April, 1897, at 11:40 o'clock a. m., by serving a true copy thereof upon the within-named A. H. Casteel, garnishee, in person, in the county of Galveston, Texas. [Signed] Henry Thomas, Sheriff Galveston County, Texas, by John A. Kirlicks, Deputy." To this writ Casteel answered, denying any liability to A. M. Pringle. Another writ was applied for against A. H. Casteel and Mary J. Casteel on September 25, 1897, and was issued on October 16, 1897, and returned by the sheriff with an indorsement as to service on Mary J. Casteel in the same form as above recited. J. C. McBride also brought suit against A. M. Pringle in a justice's court for \$150, and garnished the said Casteel. The suit of C. E. Fleming against A. M. Pringle, A. H. Casteel, and Mary J. Casteel, garnishees, was pending in the district court of Galveston county, undisposed of, when this case was tried below. McBride had obtained judgment before the justice of the peace for his debt and costs, but the garnishment was pending. A. M. Pringle made the assignment of the money held by A. H. Casteel for him, to J. M. Pringle, on the 9th day of July, 1897. Upon the trial below the court directed the jury to return a verdict in favor of J. C. McBride for \$150, but against C. E. Fleming, and in favor of J. M. Pringle against A. H. Casteel and his wife, Mary J. Casteel, for the balance of the fund, and judgment was entered accordingly.

While the garnishment suits of Fleming and McBride against A. M. Pringle were not consolidated with the suit of J. M. Pringle against A. H. Casteel and wife, yet all of the parties were before the court, the said Fleming and McBride having been brought in up-

on the interpleader of Casteel and wife; and, the pleadings of Casteel and wife and of Fleming and McBride having brought all of the issues into this suit, they could be properly determined herein. It would not be proper to try this suit, and shut off C. E. Fleming from resort to the fund garnished by her, because her suit against A. M. Pringle, with Casteel as garnishee, was still pending and undisposed of. All of the cases and issues were therefore tried in one suit, and will be so treated.

The right of the appellant C. E. Fleming to one-half of the money in the hands of Casteel was based in the evidence upon the promise of A. M. Pringle to her father, James Fleming, to pay her one-half of the surplus. While the evidence tended to show such a promise, there was nothing in the pleading to support it; and consequently there could be no issue, in that respect, to submit to the jury. We are of the opinion, however, that the attitude of the parties with relation to the land and the incumbrance thereon, as shown by the evidence, would be sufficient to support such a promise. We do not think that the allegations of the petition are full enough to disclose such a trust relation between A. M. Pringle and C. E. Fleming as would hold him as trustee for her for any part of the surplus proceeds of the sale of the land, independent of the promise sought to be shown by the testimony of James Fleming.

Writs of garnishment were served upon A. H. Casteel prior to the assignment of the claim by A. M. Pringle to the plaintiff. If these were valid writs, they would be sufficient to charge the garnishee, as against the assignment. A. H. Casteel was indebted to A. M. Pringle, and it could make no difference where he deposited, or what disposition he made of, the money. So the fact that Mary J. Casteel was not garnished until after the execution of the assignment cannot affect any question here involved. She owed Pringle nothing, and was no more liable to him than were Adoue & Lobit, with whom the money had been deposited.

Some question is made about a variance between the pleading in the suit of Fleming against Pringle on the breach of warranty and the evidence, it having been alleged in the petition that the purchase money was paid in "lawful money of the United States"; but the answer and cross bill of C. E. Fleming in this suit amends that averment, so that there is no variance. Damages for breach of warranty are sufficiently certain to support attachment and garnishment. The rule for ascertaining such damages is a recovery of the purchase money and interest from the time of the ouster. *Bank v. Fuchs*, 89 Tex. 197, 34 S. W. 206; *Hochstadler v. Sam*, 73 Tex. 315, 11 S. W. 408; *Stiff v. Fisher*, 2 Tex. Civ. App. 346, 21 S. W. 291; 3 Am. & Eng. Enc. Law, p. 188, and note 4. The rules of law applicable to a recovery upon a breach of the contract of warranty of title to land render the amount

thereof ascertainable with certainty. There was no variance between the petition and the writ. The petition averred a liability for \$2,500, with 6 per cent. interest from February 21, 1896, and the amount stated in the application for garnishment and the writ was for the principal and interest. The evidence showed that C. E. Fleming paid for the land property of the value of \$2,500, and this was supported by the pleading. A. M. Pringle does not appear to have been served with process in the original suit, in which it was alleged that he was a transient person, temporarily to be found in Galveston county. But in this suit, while no answer was filed by him, and there is no citation in the record and return to show service on him, and the answer of Casteel making him a party alleges that he is a transient or nonresident person, the judgment recites that, "though personally served with citation herein, came not, but wholly made default." If he was before the court, it was proper to try the question between him and C. E. Fleming of his liability on his warranty to her, in order that it might be determined whether or not she was entitled to money in the hands of Casteel by reason of the garnishment, notwithstanding the fact that he had not been served in the original suit. The court erred in not permitting the return of the officer upon the writs of garnishment to be amended. Any mistake or informality in a return may be corrected by the officer at any time under the direction of the court. 1 Sayles' Civ. St. arts. 224, 1239, and authorities cited. In refusing leave to amend, the court held that the request came too late. It was made during the progress of the trial, and the garnishee having answered, and being personally before the court, leave should have been granted. After judgment by default, no amendment will be allowed, without an opportunity to answer, because the defendant is entitled to a proper service of the writ before being required to answer. While judgment against a garnishee cannot be supported without proper service of the writ, although he may personally appear and answer, and the return should show proper service, yet, if in fact he was properly served and has appeared, there is no reason for not allowing the amendment of the return to show that he was in fact properly served. See, also, 1 Batts' Rev. St. art. 1239, and notes.

J. C. McBride should have had judgment for the interest on the \$150, but should not have recovered the \$25 costs expended by him in his garnishment suit, for the reason that he did not ask for it in his pleading. Judgment of the court below will be reversed, and the cause remanded. Reversed and remanded.

On Motion of Casteel for a Rehearing.

(June 8, 1899.)

In his motion for a rehearing, counsel for Casteel complains that, from the language of the court in the opinion, it might be presumed

that Casteel was wanting in "truth, fairness, and honesty" with respect to the money in controversy. We think not. In the opinion it was inadvertently stated that he answered the writ of garnishment served upon him at the suit of Fleming, April 19, 1897, "denying liability." There also appears in the record what purports to be an alias writ issued April 12, 1897, which goes to show that a writ issued prior to that time, but no such writ is contained in the record. Casteel received the money April 8, 1897. His answer is not set out. So it may be true, as stated by counsel, that Casteel had not received the money when he answered the first writ, and that on controversy of this answer he answered further, on April 19th, after he received the money, all the facts with regard thereto. There is no disposition on the part of the court to put Casteel in an improper attitude with respect to the fund, and the correction is made that the record does not support the statement that he "answered denying any liability to Pringle." There is nothing in the record to impeach Casteel's impartiality as a stakeholder.

STATE v. BLACK'S ESTATE.

(Court of Civil Appeals of Texas. May 18, 1899.)

ESCHEAT—ADMINISTRATION PENDING.

Rev. St. 1895, art. 1821, providing for escheat of lands of a decedent who dies without will or heirs, and article 1822, declaring that when the district or county attorney shall discover that no letters of administration on the estate of an intestate who has died without heirs have been granted, or where such attorney finds any estate, real or personal, in the condition specified in preceding article, he shall file a petition to escheat such property, do not authorize an action to escheat an estate where administration is pending.

Appeal from district court, Victoria county; James C. Wilson, Judge.

Action by the state of Texas against the estate of August Black to escheat a tract of land. From a judgment dismissing the suit, the state appeals. Affirmed.

J. V. Vandenberg, Dist. Atty., and Geo. M. Thurmond, Co. Atty., for the State.

GARRETT, C. J. This action was brought by the district attorney of the Twenty-Fourth judicial district and the county attorney of Victoria county, in behalf of the state of Texas, to escheat a tract of land situated in Victoria county formerly belonging to August Black, deceased. The suit was filed October 30, 1897. The petition averred that Black died September 8, 1897, seised of the land, that he had made no devise thereof, that he had no heirs, that there were no persons in actual possession of the land, and that no one was claiming the same within the knowledge of the petitioners. When the cause was called for trial, the court dismissed it because there was then pending in the

county court of Victoria county administration upon the estate of Black. The judgment dismissing the petition recites that citation by publication had been duly made; but the record does not otherwise show such to have been the case. It is claimed by the attorney representing the state that the amendment of article 1771, Rev. St. 1879, which was the act of March 20, 1848, by the act of March 24, 1885, as it appears in article 1822, Rev. St. 1895, authorizes the state to escheat the land, notwithstanding the fact that administration may be pending. The language relied on is as follows: "Or where such attorney finds any estate real or personal in the condition specified in the next preceding article." This language, however, refers to the conditions under which the owner of the land would be presumed to have died without a will, and under which the period of seven years would be presumptive of death. In no event does the law authorize an escheat where administration is pending. Even if the amendment did authorize escheat independent of pending administration, where the estate was in the condition specified in article 1821, that would require nonassertion of claim for a period of seven years. It is alleged in the petition that Black died September 8, 1897; so the period of time which would create the condition had not elapsed. The language of the statute scarcely needs any construction. The holding of the court in *Wiederanders v. State*, 64 Tex. 133, that the state must show that there is no administration upon the estate, is not affected by the amendment of the law. The court did not err in holding that it was without jurisdiction on account of the pending administration, and in dismissing the suit. The judgment of the court below is affirmed. Affirmed.

MONTAGUE COUNTY v. MEADOWS.

(Court of Civil Appeals of Texas. May 13, 1899.)

MORTGAGES—FORECLOSURE—SALE—POSSESSION BY VENDOR—NOTICE—LIMITATION—EXTENSION OF TIME BY MORTGAGEE—EFFECT ON LIENS.

1. A sale by a trustee, at the request of the maker, of a deed of trust after the debt secured by it has been paid, simply as a means of conveying the title to a creditor in payment of a debt in preference to other creditors, who do not complain, passes the legal title.

2. Where the maker of a deed of trust requests its sale by the trustee after the debt secured by it has been paid for the benefit of another creditor, the fact that the tenants of such maker remain in possession as tenants of the creditor is no notice that the purchaser holds it as a trustee merely for such creditor to one who in good faith takes a mortgage from him on the assumption that he holds the legal title.

3. The four-years period of limitation is no bar to an action on a note which has been kept alive, as provided by Rev. St. 1895, art. 3370, by a written acknowledgment of its justness, made subsequent to the time it became due.

4. An extension of time on a note secured by a mortgage on land, given by the mortgagee to the mortgagor without the consent of a subsequent

owner of the land, does not release it from the lien, where it was the primary security when the mortgage was given, and the mortgagee had not consented to a change in that respect.

Appeal from district court, Montague county; D. E. Barrett, Judge.

Action by I. A. Meadows against Montague county. From a judgment for plaintiff, defendant appeals. Affirmed.

J. M. Chambers and W. S. Jameson, for appellant. S. W. Stewart and D. M. Smith, for appellee.

STEPHENS, J. This is the second appeal by Montague county in this case. 42 S. W. 326. On the last trial the court instructed the jury to return a verdict for appellee. It therefore becomes necessary to consider, not the sufficiency of the evidence to warrant the verdict, but whether it raised any controverted issue of fact material to the defenses interposed by appellant, which were, besides the general denial, a title in her superior in equity to the mortgage lien which appellee sought to foreclose on the land in controversy, and limitation of four, five, and ten years.

The substance of the testimony is thus given in appellee's brief: "The evidence showed that one A. G. Crowell, being the owner of the land in controversy, executed a deed of trust thereon to J. M. Chambers, as trustee, on the 27th day of November, 1884, to secure A. L. Matlock and others in the payment of certain indebtedness that he owed said parties; that on October 6, 1885, the said Chambers, as trustee, sold said property under said deed of trust, and at which sale A. L. Matlock became the purchaser, and the trustee made to the said Matlock on said date a deed to said property; that on November 25, 1885, following, the said Matlock, being joined by C. C. Hyatt, executed to appellee, I. A. Meadows, a deed of trust on said property and other property to secure the said Meadows in the payment of the note hereinbefore referred to, which said deed of trust was duly executed, filed, and recorded in the county clerk's office of Montague county, Texas, on the 3d day of December, 1885; that afterwards on, to wit, May 22, 1886, the said A. L. Matlock conveyed said land to one Charles F. McCray, who on March 15, 1888, conveyed the same, or that portion thereof in controversy, to Montague county for a consideration of \$2,100 in cash paid. A. G. Crowell, the maker of the deed of trust under which Matlock became the purchaser of said property, testified substantially that he gave the deed of trust to secure Matlock in the payment of money he owed them, and that he afterwards paid every cent of the debts to secure which the deed of trust had been given; that he was anxious to pay honest men who had no hand in crushing him; that Matlock promised to buy in the land, and deed it to McCray; that Matlock had done as he promised, and even more, for he mortgaged it. This witness further testified that

he directed the property to be sold by the trustee, and that the debts to secure which the deed of trust had been given had been paid off at the time he directed the trustee to make the sale; that Matlock paid nothing for the land at the trustee's sale, and that he [Crowell] paid the trustee's fee of \$20 for making the sale; and that Matlock well knew that he [Crowell] was selling it to McCray to settle a debt which he owed him. This witness further testified that he was in possession of the property by tenants before and at the time of the trustee's sale at which Matlock bought, and that he remained in possession of the property after the trustee's sale by tenants for McCray, and that Matlock was never in the actual possession of the property. The evidence also showed that this witness Crowell was wholly insolvent at the time of the sale of said property by Chambers as trustee. H. Newman, a witness for appellant, testified that the tenants on the land in controversy at the time A. L. Matlock bought the same at trustee's sale, October 6, 1885, remained on the same until Matlock deeded it to Charles F. McCray, May 22, 1886. A. L. Matlock testified that A. G. Crowell gave a deed of trust on the land in controversy and some other lands to secure him and others in the payment of certain debts; that at the trustee's sale made thereunder he bought the property in, and afterwards told Crowell that all he wanted was his money, and when that was paid he would reconvey the property to him or any one else he might name, and that after he had mortgaged the land to Meadows, appellee herein, at the request of Crowell he deeded the land to Charles F. McCray, and that McCray paid him nothing for such conveyance; that, Crowell having satisfied the claims he held against the property, he deeded the property to McCray as requested by Crowell. Matlock further testified that he had possession of the land in controversy by tenants, and that Crowell knew at the time he [Matlock] made the conveyance to McCray that he had given the deed of trust to said Meadows on said lands. S. W. Stewart testified that he was the attorney of the plaintiff, Meadows, and had had exclusive control of the matter in controversy from its beginning; that Meadows, the plaintiff, was a farmer, and was living in Tarrant county at the time the loan was made; that he made the loan for the plaintiff; that Meadows was not acquainted with Matlock until after the loan was made; that he [Stewart] made particular inquiry into the title and value of the property at the time the loan was made; that he inquired particularly of Matlock and John H. Stephens as to these matters, and was assured by them that the entire land included in the deed of trust was worth on an average of \$10 per acre, and that the title was good and perfect. He further testified that he had no knowledge whatever of any claim of Crowell or C. F. McCray to the land in question, and did not know that Montague

county was claiming any part of it until about the 1st of March, 1893." It may be added that Montague county held continuous possession, as owner of the land, from the date of her purchase, March 15, 1888, to the institution of this suit, December 30, 1895, and that she purchased and took possession in ignorance of appellee's mortgage, though the same was then on record in Montague county, and remained so in ignorance until made a party to the foreclosure suit in Tarrant county, brought in 1893, after the expiration of the period of extension granted November 21, 1892, by appellee to Matlock and others on the debt secured by the mortgage.

Conclusions of Law.

It thus appears that the case made by the evidence on the last trial was not materially different from that considered on the former appeal, from which it results that, according to the views then expressed in the opinion of Chief Justice Tarlton, which need not now be repeated, the defense of five and ten years' limitation was of no avail. There is nothing in the contention, under the peculiar facts of this case, that the sale by the trustee to Matlock was void because the debt secured by the deed of trust had already been paid. This sale was made at the instance of Crowell, the maker of the deed of trust, who was still the owner of the property, simply as a means of conveying the title to McCray in payment of a debt due him in preference to others; and as it was his own property, and no creditor of his complains, we see no reason why he could not do so. It therefore passed the legal title to Matlock, who acted in the premises as agent of the owner, and warranted appellee in lending money upon the faith of it. It matters not that after the deed to Matlock the tenants of Crowell may have remained in possession as tenants for McCray. Through the foreclosure sale the legal title passed regularly to Matlock, and such possession was no notice to appellee that Matlock took the title in trust merely. Having thus clothed him with the fee-simple title, and held him out as the absolute owner, neither Crowell nor McCray could be heard to dispute his title, and assert a secret equity, as against one taking a mortgage in good faith on the assumption that the title was where the deed made at the instance of Crowell and for the benefit of McCray showed it to be. Nor can appellant, as their vendee subsequent to the mortgage, occupy a better position.

The further contention must also be overruled that limitation of four years was a bar to this action. The debt was kept alive by written acknowledgment before it was barred, as provided in Rev. St. art. 8370. This has been held to be sufficient. *Flewellen v. Cochran* (Tex. Civ. App.) 48 S. W. 39, and cases there cited. See, also, *Hays v. Tilson* (Tex. Civ. App.) 45 S. W. 490. These con-

clusions cover all the propositions submitted in appellant's brief.

At our request, the further question, treated as fundamental, has been argued, whether or not the definite and valid extension of time given by appellee to Matlock and others on the note secured by the mortgage, without the consent of appellant, had the effect of releasing the land in controversy from the lien. That such an extension, if made without the consent of a personal surety, will release him, has been expressly decided. *Benson v. Phipps* 87 Tex. 578, 29 S. W. 1061. The same principle evidently applies where land when mortgaged occupies the position of surety merely. But what effect should be given to such an extension of time in a case like this, where the land when originally mortgaged was not a mere surety, does not seem to have been so clearly decided in this state. In *Dalton v. Rainey*, 75 Tex. 516, 16 S. W. 34, the question was raised in the briefs and considered by the court; but its decision was avoided on the ground that, as the superior title to the land remained with the vendor in that case, the express lien was more than a security for the purchase money. In the more recent case of *Willis v. Sanger*, 40 S. W. 229, decided by the court of civil appeals at San Antonio, in which writ of error was denied, the question seems to have been presented by the facts of that case, but it was not discussed in the opinion, that is, the precise question now under consideration. It was, however, held that the renewal of the notes by the mortgagor did not affect the security, in support of which *Jones, Mortg.* §§ 355, 924, was cited; and it may be that, in view of the facts of that case, this should be treated as a decision of the question. Be this as it may, we are of opinion that in the case of *A. F. Shapleigh Hardware Co. v. Wells*, 37 S. W. 411, the very principle here involved was discussed and determined by our supreme court. It was there held, in accordance with the weight of authority, though very respectable authority was found to the contrary, that two or more principal debtors could not, by agreement among themselves, without consent of the creditor, change the character of liability to such creditor from principal to surety. Applying that principle to this case, we must hold that, inasmuch as the land in controversy was the primary security when the mortgage was taken by appellee, and he never consented to any change in this respect, it remained so as to him, no matter what change may have taken place between other parties. Since, then, appellee was not required, on account of the subsequent transactions between Matlock and others, to which he did not consent, to treat the land in the hands of appellant as surety merely for the debt of Matlock, the doctrine that a binding extension without the consent of the surety will release such surety, or without the consent of the owner of property occupying the position of surety will in like manner release

such property, is inapplicable. The right of appellant to redeem the land from the mortgage was, of course, not affected by the extension. That right could have been exercised at any time after the debt originally fell due. The judgment is therefore affirmed.

HUNTER, J., disqualified, and not sitting.

FT. WORTH & R. G. RY. CO. v. KIME et al.

(Court of Civil Appeals of Texas. May 6, 1899.)

ACCIDENT TO BRAKEMAN—OVERHEAD BRIDGES—WARNINGS—DAMAGES.

1. Testimony of the yard master that he told the head brakeman, who a few hours after his employment, while standing on a car of ordinary height, was killed by a bridge, that the bridge would not clear a person standing on a low car, and that it was just at the end of the yard limits, when taken in connection with the testimony of the conductor and a brakeman that they afterwards told him the bridge "would not clear a man on a high box car," and that he asked of the brakeman where the bridge was, does not require a finding that he had been adequately warned.

2. A brakeman does not absolutely assume the risk of a low bridge, so as to relieve the railroad company of liability for failure to warn him.

3. Verdict for \$15,000 for death of a head brakeman 30 years old, in good health and industrious, and earning \$75 a month, of which at least \$45 went to support of his wife and young children, will not be held excessive.

Appeal from district court, Parker county; J. W. Patterson, Judge.

Action by Mattie Kime and others against the Ft. Worth & Rio Grande Railway Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

Newton H. Lassiter, for appellant. J. H. Barwise, Jr., H. W. Kuteman, and J. T. Montgomery, for appellees.

STEPHENS, J. February 6, 1897, H. J. Kime entered appellant's service as head brakeman on a freight train, and was killed a few hours afterwards, as the train started on its first regular trip to Brownwood, at or near Hill Street Bridge, in the city of Ft. Worth, which is about a quarter of a mile west but in sight of appellant's roundhouse, from which the train started. He left a widow and two small children, who sued appellant on account of the loss so sustained, and recovered damages in the sum of \$15,000, from which judgment this appeal is prosecuted.

The errors assigned are numerous, but the real questions at issue are few, involving mainly the sufficiency of the evidence to sustain the verdict, and the amount thereof. It is contended that the evidence failed to show, as alleged, that H. J. Kime was struck and killed by the overhead Hill Street Bridge; but, while no witness saw the collision, the evidence warranted the finding that the bridge was low enough to strike the head of deceased, and the circumstances negated the ex-

istence of any other cause of death. It is further and strenuously insisted that, if the low bridge caused the fatal collision, it was one of the risks assumed by deceased when he entered the service, and especially in view of the warning given him of this danger, particularly by the yard master that morning; and this we think is the most difficult question in the case. The testimony of the yard master on this point was, briefly, this: "Mr. Kime met me about 5 o'clock, February 6, 1897, and we walked together to the Ft. Worth & Rio Grande yards. We talked in regard to the road on our way over, and I told him and located the iron bridges on line of road, and told him they would not clear a man standing on a high car, and to look out for them. I also called his attention to the Hill Street Bridge; told him it would not clear a man standing on a low car, and to look out for it; that the bridge was just at the west end of the yard limits." The conductor of the train upon which deceased was brakeman, however, testified that he notified deceased that the bridge in question "would not clear a man on a high box car," but according to his testimony it would clear a man on a low or ordinary car, and he evidently so believed when he warned deceased. To the same effect was the testimony of Brakeman McGehee. Early that morning, and while it was yet dark, deceased had made a trip with this conductor and brakeman to Belt Junction, four miles out, on a train of empty stable cars, returning upon the pilot of the engine. McGehee thus states what passed between himself and deceased on this trip: "As we were pulling out for Belt Junction, Mr. Kime climbed on top of the train about two car lengths behind the engine. I climbed up also about five car lengths from the engine, and waited until Mr. Kime came to me. I noticed while on top that he was coming towards the rear end, and we met. I told Mr. Kime that there was a low bridge about two blocks west of where we were, and that it would hit a man on a high car, and to look out for it. Mr. Kime thanked me, and says, 'You say about two miles?' I replied, 'No;' and told him it was about two blocks." The inquiry so made by deceased, it will be noted, at least tended to rebut the testimony of the yard master. It also appears that his testimony was in conflict with that of the conductor as to the height of this and other bridges on the road. The evidence tended to show that deceased was standing on a car of ordinary height, and not on a high car, when he was killed; that he was a prudent and skillful brakeman of long experience; and that he must have been ignorant of the danger to which he was exposed. It does not appear that it was the duty of the yard master, any more than of the conductor or brakeman, to warn the deceased. The superintendent of transportation, who employed him, was not offered as a witness, which warranted the inference that he gave no warning. No warning was given of the near approach of a dan-

gerous overhead bridge by means of suspended cords, as was the general custom of railroads having low bridges.

Under these circumstances, we are of opinion that the jury were not required to accept as an uncontroverted fact the statement of the yard master that he warned deceased of the danger of passing under the bridge in question on an ordinary car as well as on a high car, or at least that they were not required to find that deceased had been adequately warned of the danger which resulted in his death. We overrule without hesitation the contention that the deceased is held, in law, to have absolutely assumed the risk of his life in passing under a low bridge, and hence that appellant was not liable for a failure to warn him of such impending danger. See 3 Elliott, R. R. § 1271, where this question is discussed and the conflicting authorities are cited. We conclude, therefore, that the evidence not only raised the issues, but warranted the jury in finding—First, that appellant, knowing that it had not constructed its roadbed under Hill Street Bridge low enough to allow its head brakeman to safely pass beneath it in the discharge of his duty, was guilty of negligence causing his death in not sufficiently warning him of the impending danger; second, that being ignorant of the danger, and it not being obvious, he did not assume the risk involved; third, that he took such care for his own safety, under all the circumstances, as a person of ordinary prudence would have done. If there was error in submitting any of these issues to the jury, either in giving or refusing charges, it is not available to appellant, under any of the propositions submitted in its brief, as will readily appear from the propositions themselves, read in connection with the entire charge, in the light of the foregoing conclusions of fact. The objections to the admission and exclusion of evidence, and to the argument of counsel, are likewise untenable, as will readily appear from an examination of the bills of exception set out in appellant's brief to support the objections made.

The remaining question is that of the alleged excess in the verdict, and, but for the precedents found in our supreme court reports, we would be inclined to sustain this assignment and require a remittitur. The deceased was an expert railroad man, 30 years old and in good health, with a life expectancy of 35 years, and presumptively with the usual prospects of promotion, earning regularly about \$75 per month, of which at least \$45 went to the support of his wife and his two infants, one and two years old. He seems to have been industrious, and provided well for his family, evincing some measure of thrift, in that he had already provided a comfortable home. No proof was offered of the wife's age or expectancy, nor was any effort made to show what sum of money would be sufficient to purchase in any form the equivalent of the pecuniary benefit which the widow and children might naturally and reasonably have ex-

pected to receive had the deceased lived. In this state of the record, while it seems to us that a less sum than \$15,000 might have covered the pecuniary loss involved, we are constrained to overrule the assignment complaining that the verdict is excessive, since, in respect to the extent of the loss and the amount of the verdict, we are unable to distinguish this case from the following death-loss cases: *Railway Co. v. Smith*, 85 Tex. 167; *Railway Co. v. Ormond*, 64 Tex. 485; *Railway Co. v. Lehmberg*, 75 Tex. 61, 12 S. W. 838. In the case first cited a verdict for \$15,000 was approved; in the second, \$12,000; and in the third, \$10,000. The judgment must therefore be affirmed.

CAUDLE v. WILLIAMS et al.

(Court of Civil Appeals of Texas. April 15, 1899.)

TRESPASS TO TRY TITLE—OUTSTANDING TITLE—CERTIFIED COPIES—ACKNOWLEDGMENT.

1. A bond executed by S., reciting sale by him of 1,000 acres of land to which he is entitled by virtue of his headright from the public of Texas, and conditioned to be void if he makes a good title to such 1,000 acres, on demand, after he receives his title from the government of Texas, is not a conveyance, and not having been acted on, cannot be pleaded, by persons not connecting themselves therewith, as an outstanding title, against one to whom, after execution of the bond, S. conveyed all his interest in his headright certificate.

2. Where, at time of presentation of a conveyance for record, it was the duty of the clerk to see that the certificate of acknowledgment was attested by the proper seal, and he in fact received and recorded the instrument, it will be presumed that the certificate was so attested, and that the officer so executing it was authorized to do so; so that a copy of the instrument, showing by a scroll that the original certificate had a seal, may be received as a certified copy.

Appeal from district court, Denton county; D. E. Barrett, Judge.

Action by Fannie Caudle against W. A. Williams and others. Judgment for defendants, and plaintiff appeals. Reversed and rendered.

A. L. Beaty, for appellant. H. C. Ferguson and J. R. McCormick, for appellees.

CONNER, C. J. This was a suit, in the ordinary form of trespass to try title, instituted in the district court of Denton county by appellant on the 7th day of May, 1897, against W. A. Williams, C. B. Riddle, and a number of others, to recover the title and possession of two tracts of land in Denton county, one being a survey of 497 acres, and the other of 160 acres; both having been patented to William Stoneham, his heirs and assigns. Each defendant claimed separate portions of the above surveys, disclaiming as to the portions not severally claimed by them. The defendants also pleaded, among other things, "Not guilty," and the statute of limitations. The trial resulted in a judgment for appellees. Appellees Williams and Riddle

claim specific portions only of the survey of 497 acres involved, and, in the view we have taken of the case, it will not be necessary to discuss all of the several interesting questions presented on this appeal.

The land in controversy was located and patented by virtue of an unlocated balance of headright No. 249, for one league and labor of land, granted to William Stoneham by the board of land commissioners for Red River county on the 3d day of February, 1839. Appellant herein claimed title as the heir of William A. Park, by virtue of the following conveyance: "Republic of Texas, Red River County. Know all men by these presents that I, William Stoneham, of the republic and county above mentioned, have this day, for the consideration of \$1,000 to me in hand paid, the receipt whereof is hereby acknowledged, bargained and sold, and do by these presents bargain, transfer, sell, and deliver, unto William A. Park, of the same republic and county, all my right, title, and interest in and to my headright certificate No. 249, granted to me by board of land commissioners for Red River county, for one league and labor of land, to have and to hold — him and his heirs and assigns forever, and do further warrant against any and all persons claiming the same or any part thereof. Witness my hand and seal this November 6, A. D. 1839. William Stoneham." It appeared in evidence on the trial below that prior to the execution of this instrument said William Stoneham had executed a conveyance for 2,446 acres of land to Nall & Nall, which appears from the record to have been afterwards located in Red River county, and in a suit between the assignee of Nall & Nall and the heirs of William Stoneham adjudged to such assignee. It further appeared in evidence that on April 20, 1889, William Stoneham made the following instrument: "Republic of Texas, County of Red River. Know all men by these presents that I, William Stoneham, am held and firmly bound unto Absalom J. Meredith in the penal sum of \$750, lawful money of this republic, which payment well and truly to be made I bind myself, my heirs, executors, and administrators firmly by these presents. Sealed with my seal and dated this the 20th day of April, A. D. 1839. The condition of the above obligation is such that whereas I, the above-named William Stoneham, have this day bargained and sold unto Absalom J. Meredith 1,000 acres of land, which I am entitled to by virtue of my headright from the government of Texas: Now, if I, the above-bounden William Stoneham, shall well and truly make or cause to be made unto the said Absalom J. Meredith a good and sufficient title in fee simple to the aforesaid 1,000 acres of land, on the reasonable demand of the said Absalom J. Meredith, after I shall have received my title from the government of Texas, free from expense of survey or office fees, then this obligation shall be void and of no effect; otherwise, to remain in full

force and virtue. William Stoneham." It also appeared in evidence that, prior to the institution of this suit, appellant had conveyed 1,340 acres of land in Young county and 160 acres in Denton county, located and patented by virtue of this certificate No. 249, exclusive of the land in this suit; and the judgment of the court below in appellees' favor, as shown by his honor's conclusions of fact and of law, seems predicated upon the finding that the foregoing instrument to William A. Park, executed on November 6, 1839, was but a quitclaim deed, and that thereunder William A. Park acquired such interest only as William Stoneham at that date had not theretofore conveyed, and that it having been further shown that, prior to the execution of that instrument, William Stoneham had conveyed to Nall & Nall 2,446 acres in Red River county, and by the execution of the foregoing instrument to Absalom J. Meredith a further interest of 1,000 acres, and appellant having sold some 1,500 acres of land located by virtue of the Stoneham certificate, she had therefore appropriated all the interest that in fact had been conveyed to her ancestor by the conveyance of November 6, 1839.

It is insisted by appellees in support of the judgment below that the conveyance to William A. Park is but a quitclaim deed, in the strict sense of that term. There was no allegation or proof that appellant's ancestor was a purchaser for value, and without notice of prior conveyances, and we have not found it necessary to determine that question; for, whether the conveyance to Park was or was not a mere quitclaim deed, it was certainly sufficient to convey all interest in the Stoneham certificate not theretofore conveyed. It seems to be unquestioned that in fact Stoneham had conveyed to Nall & Nall 2,446 acres in Red River county, but we are unable to assent to the proposition that the instrument executed to Absalom J. Meredith was a conveyance of any land. It did not purport to convey any specific land. The instrument was invoked on behalf of appellees on the trial below. There was no proof that said instrument had ever been acted upon by the grantee therein or his heirs, or that any claim had ever been made thereunder; and we think that, at most, this instrument conferred no more than an equitable right in the grantee therein, his heirs or assigns, to have required William Stoneham, under the circumstances named therein, to convey to them 1,000 acres of land when patented by virtue of said certificate. *Lewis v. Cole*, 60 Tex. 343. It does not appear in the record that ever thereafter there was any application of the land located by virtue of the certificate therein named to the contract. We think it but an equity. Appellees in no way connected themselves therewith, and they cannot plead it as an outstanding title in defense against appellant's right or interest. If the 1,000 acres mentioned in the Meredith bond for title be excluded, then it is clear, even upon the theory of the court be-

low, that appellant had not appropriated all the land conveyed or all of the land acquired by virtue of the William A. Park conveyance, so that she was certainly entitled to recover of appellees such interest in the land in controversy as the proof showed in her, and that had not been lawfully acquired by appellees, either by virtue of proper conveyances, or of the statute of limitations as pleaded by them. As was said in *Porter v. Hill*, 30 Tex. 530, "the court will not, in order to defeat a recovery, regard a possible although doubtful equity in a third party." It therefore follows that the judgment of the court below was erroneous, unless, as suggested in the brief of appellees, the title acquired under the William A. Park conveyance was but an equity, and that the principle of stale demand applied thereto. This contention we cannot agree with, under the circumstances of this case. Stale demand is not pleaded by appellees Williams and Riddle. They in no way connect themselves with title emanating from the grantee in the certificate. It is undisputed that appellant is one of the heirs of William A. Park, who died in 1859, and as such heir is entitled to a two-thirds interest in lands owned by him at his death. The court below found, in effect, that an interest in the certificate was in fact conveyed by William Stoneham to William A. Park. This conveyance was with a general warranty. *Johnson v. Newman*, 43 Tex. 628; *Satterwhite v. Rosser*, 61 Tex. 172, 173; *Lindsay v. Freeman*, 83 Tex. 267, 18 S. W. 727.

It is also contended in appellees' brief that the court below erred in permitting the introduction of the William A. Park conveyance as a certified copy, because of an alleged defective certificate of acknowledgment, and that the proof was insufficient to admit the copy offered as an examined copy, because of a want of proof of the execution of the original. The loss of the original was proven. The court below found as a fact that William Stoneham executed to William A. Park the conveyance hereinbefore set out. It appears that, on the trial below, appellees excepted to the action of the court in admitting said instrument; but they have filed no cross assignment of error to such action, either in admitting the instrument or in the finding aforesaid. In the absence of an assignment of error, we have not felt called upon to determine this question. In view of another trial, however, we think it perhaps not amiss to call attention to the cases of *Coffey v. Hendricks*, 66 Tex. 678, 2 S. W. 47, and *Railway Co. v. Carter*, 5 Tex. Civ. App. 675, 24 S. W. 1083, on the question as to the acknowledgment, and to suggest that, so far, we have been unable to find any case of our own courts modifying the doctrine of those cases. As to the necessity of proving the execution of the original before the introduction of an examined copy, we call attention to the case of *Schunior v. Russell* (Tex. Sup.) 18 S. W. 489.

Other questions raised we do not consider it necessary to discuss, as they will not probably arise upon another trial. But for the errors indicated the judgment below in favor of appellees W. A. Williams and C. B. Riddle is reversed, and the cause remanded; but as to all other appellees it is in all things affirmed, it having been so agreed.

On Motion for Rehearing.

(June 8, 1899.)

On the original hearing we reversed and remanded this cause for another trial, as will be seen from the opinion filed herein. Though not stated, such direction was given because, while not so decided, as therein indicated, we inclined to the opinion that the copy of the original transfer from William Stoneham to William A. Park had been erroneously admitted in evidence as a certified copy, in that the certificate of acknowledgment thereto did not show that the party taking it was authorized to so do; citing Coffey v. Hendricks, 66 Tex. 676, 2 S. W. 47, and Railway Co. v. Carter, 5 Tex. Civ. App. 675, 24 S. W. 1083. On this motion for rehearing, however, we have more carefully considered this question, and are of opinion that said instrument was properly admitted as a certified copy. To state more fully than was stated in the original opinion, and for the sake of clearness, we again give the certificate, as follows: "The Republic of Texas, County of Red River. This day personally came before the undersigned authority William Stoneham, to me well known, whose name appears to the foregoing transfer of land certificate bearing date Nov. 6th, 1839, and acknowledged that he signed the same for the purposes therein contained and expressed. Given under my hand and official seal this Nov. 6th, 1839. J. G. Wright, Clk." And on the space below the above certificate on said copy were the letters 'L. S.,' surrounded by a scrawl or crooked mark, all made with a pen, apparently made to indicate the place of the seal." In connection therewith, one T. A. Eubanks testified "that from 1838 to 1842 James G. Wright was the county clerk of Red River county, Texas, which fact he knows from the records of said county; that witness obtained from the county clerk of Denton county, Texas, four or five years ago, the original transfer made by William Stoneham to W. A. Park to his headright certificate for one league and one labor of land, issued by the board of land commissioners of Red River county, Texas, and delivered it to plaintiff's attorney, and has not since seen it, and that he never saw said transfer until he found it in the clerk's office as above stated; that said instrument appeared to be old, the paper on which it was written looked yellow, and the writing dim and pale, and there were no interlineations or erasures that he remembered, and that the writing all appeared alike; that, to the best of his recollection, the certificate of acknowledgment had on it the impress

of the seal of the county court of Red River county. And plaintiff further proved that her attorney's office was destroyed by fire three or four years ago, and that said instrument was destroyed with said office. Said Eubanks further stated that the copy which was attached to his depositions (it being the same offered in evidence by plaintiff) appeared to be a true copy of the original transfer which he delivered to plaintiff's attorney.' It thus appears from the copy offered that the original certificate had a seal impressed thereon. In speaking of the effect to be given to such fact, Judge Henry, for the court, in the case of Stephens v. Motl, 81 Tex. 120, 16 S. W. 732, says: "This seal, if attached, would properly be looked to by the officer who made the record to aid the certificate of acknowledgment; and, as the record was made, it must be presumed, especially after so great a lapse of time, that the seal used showed that the certificate was made by an officer of the proper county in this state." And the certificate there in question was held properly admitted. In the case of Chamberlain v. Pybas, 81 Tex. 511, 17 S. W. 50, it appeared that the certificate had been attested by the impression of a seal, though its character was not shown in the record; and it was held that such fact was presumptive and sufficient evidence to show that the officer signing was an officer of the proper county, and was acting within his jurisdiction. While these cases may not be precisely in point, yet we are unable to say that the case before us does not fairly fall within the principle decided by these cases. The instrument in question was recorded in Denton county January 6, 1879,—something over 18 years before the institution of the suit. At the time of the presentation of the original for record, it was the duty of the clerk to see that the certificate of acknowledgment was attested by the proper seal. He in fact received and recorded the instrument, and we must presume that it was so attested, and that the officer so executing was authorized to so do. If correct in this, it follows that this cause should be reversed and rendered.

Appellees Williams and Riddle plead the five-year statute of limitation. There is no proof in the record that either Williams or Riddle claims under deeds duly recorded. The parcel claimed by Williams has never been inclosed, occupied, or improved. The proof is undisputed that appellant was a feme covert from January 7, 1839, to April 8, 1895, and that this suit was filed May 7, 1897. The court found as a fact that William Stoneham executed the transfer of the certificate to appellant's ancestor. The sufficiency of the evidence to sustain this finding is not questioned by cross assignment of error. We have held that this transfer was sufficient to convey all interest in William Stoneham not theretofore conveyed. It affirmatively appears that appellees in no way connect themselves with such title. There is no sugges-

tion in the evidence that appellees, or those under whom they claim, were purchasers for value and without notice. It thus appears that there is no further "matter of fact to be ascertained, nor damages to be assessed," and it therefore becomes our duty to proceed to render such judgment or decree as the court below should have rendered. Rev. St. art. 1027. It is accordingly ordered that the former order herein reversing and remanding this cause be so reformed as that the judgment below be reversed, and here rendered for appellant.

BOONE v. THORNSBURY et al.¹

(Court of Appeals of Kentucky. June 2, 1899.)

DESCENT AND DISTRIBUTION—ADVANCEMENTS.

Payments made by the ancestor for the tuition of the children of a deceased son, and for a house and lot conveyed to their mother, are not chargeable as advancements against the grandchildren, though entries were made by the ancestor in a book kept by him to the effect that they were to be considered as advancements.

Appeal from circuit court, Larue county.

"Not to be officially reported."

Action for a settlement of the estate of H. S. Johnson, deceased. Judgment for settlement of estate in favor of Lillie Thornsburg and others, and A. Laura Boone appeals. Affirmed.

D. H. Smith, for appellant. Twyman & Handley, for appellees.

GUFFY, J. H. S. Johnson died intestate in Larue county. The appellant is his only child. The appellees Lillie Thornsburg, Laura Johnson, and W. W. Johnson are grandchildren of decedent, being the children of his deceased son, Sylvester Johnson, who died before the father, H. S. Johnson. This action may be taken for a settlement of the estate of H. S. Johnson, and the only question presented for decision is whether or not appellees should be charged with \$938.60, or any sum, as an advancement paid to them by their grandfather. A paper called a "statement of account" is filed in support of the claim for an advancement. There is one account, of date 5th of October, 1889, showing that decedent paid out \$40 for appellee Lillie, and a like amount on October 11, 1889; and February 15, 1890, he paid \$138.60. In January, 1891, there is a charge for tuition paid for appellee Laura, amounting to \$75, and another entry as follows: "Cash advanced to grandchildren and mother for house and lot New Haven, Ky., and improvements, \$700.30; total amounting to \$983.60." Then the following entry follows: "The above is to be considered as an advancement to my grandchildren." The foregoing statement is not signed by the decedent, but it is stated that the entries were in some kind of a book kept by him, and that they are in his

handwriting. The court below adjudged that no part of said sum should be held to be an advancement to the grandchildren, and from that judgment this appeal is taken.

It is shown from the record that the deed to the house and lot referred to in the foregoing statement was made to the mother of these grandchildren. It is also clearly shown that the land was paid for by the decedent, H. S. Johnson. The contention of appellant is that the foregoing amounts should be charged as an advancement under the law. The contention of the appellees is the reverse. We deem it unnecessary to enter into a general discussion of the law applicable to advancements, nor the circumstances relied on as evidence in this action. Taking the entire record into consideration, we are of the opinion that the judgment of the court below is sustained by the law and facts, and the same is affirmed.

MARSHALL v. KENDRICK.¹

(Court of Appeals of Kentucky. June 3, 1899.)

WILLS—UNDUE INFLUENCE.

Where a will by which testatrix devised all her property to her husband was drawn by a notary at the request of her father-in-law, when she had not expressed any desire to make a will and was executed by her when in a weak condition, and in the presence of no one but members of the family of her father-in-law, at whose home she was staying, the jury were warranted in finding against the will; there being no other evidence that she desired to make such a disposition of her property.

Appeal from circuit court, Grant county.

"Not to be officially reported."

Contest by Joseph L. Kendrick of the will of Laura B. Marshall. Judgment for contestant, and W. T. Marshall, the contestee, appeals. Affirmed.

C. C. Cram, for appellant. W. W. Dickerson and H. Clay White, for appellee.

HOBSON, J. Laura B. Marshall died on February 13, 1896. On the 9th of March following a paper purporting to be her will was probated in the Grant county court. From this judgment her father, appellee, Joseph L. Kendrick, took an appeal to the circuit court of the county, and on the trial in that court the jury to whom the case was submitted found by their verdict that the paper was not her last will. From this judgment her husband, W. T. Marshall, the appellant, prosecutes this appeal, insisting that the verdict is palpably against the evidence.

The proof shows that the deceased was about 24 years of age; that she and the appellant had been married something over 2 years; that she owned about 40 acres of land, received from her mother; and she had consumption, from which she died, after being confined to her room something over two months. They had no children, and in De-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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ember, 1895, she and her husband moved to his father's, where they remained until she died. On the 31st of January, his father went to a notary, and asked him to write a will for the deceased, devising all her property to appellant. She had not requested him to do this, or, so far as the evidence shows, expressed any desire to make a will, or intimated how she wanted her property disposed of. The notary drew the paper as requested, and the father-in-law took it home with him to dinner. Appellant was there at dinner, but the matter was not mentioned, and he knew nothing of it. After dinner the deceased signed the paper as her will, the father-in-law and his daughter witnessing it, and nobody else but his wife being present. There were many neighbors around, parties living in a town, but none were called in to witness the paper, and the deceased, so far as appears, never mentioned the subject of her will to any one out of the family, and only to her husband, as he testifies, on the day she died. Her father, the appellee, was to see her frequently, but heard nothing of it until after it was probated. It does not appear that the paper, from the time it left the possession of the notary until after her death, was ever in her possession or control, or in the possession of any one but appellant's father, nor is there any other evidence that she wished to dispose of her property in this way. Under such circumstances, we cannot say that the jury was not warranted in concluding that this paper was not her will, considering her weak condition at the time, and her situation at his house, with no one present but his family. Judgment affirmed.

TAULBEE v. MOORE.¹

(Court of Appeals of Kentucky. June 3, 1899.)

EVIDENCE—INTRODUCTION OUT OF ORDER—BREACH OF BUILDING CONTRACT—MEASURE OF DAMAGES—HARMLESS ERROR.

1. Where the parties differ essentially as to the terms of a verbal building contract, for breach of which damages are sought to be recovered, the contractor, after giving his version of it, may testify that the work has been performed in accordance therewith.

2. It was not a palpable abuse of discretion to refuse to permit defendant, who had first introduced his testimony, to introduce his son as a witness in chief after plaintiff had introduced his testimony.

3. Where there was a substantial compliance with a building contract, the principal breach consisting in failing to make the inside of a brick wall as smooth as the outside, the measure of damages is the difference between the value of the building constructed as it is and what it would have been if constructed according to the contract, and not the cost of removing the wall, and replacing it according to the contract.

4. Instructions giving undue prominence to certain portions of the testimony were properly refused.

5. An error in instructions as to the measure of damages on defendant's counterclaim was harmless where the jury found that he was not damaged at all.

Appeal from circuit court, Montgomery county.

"To be officially reported."

Action by George W. Moore against J. B. Taulbee to recover money due upon a contract. Judgment for plaintiff, and defendant appeals. Affirmed.

E. C. O'Rear, for appellant. W. A. De Haven and Tyler & Apperson, for appellee.

BURNAM, J. This suit was instituted by appellee to recover a balance of \$258.68 alleged to be due upon a contract made with appellant to build an addition to his house at an agreed price of \$458.68, \$200 having been paid in cash. Appellant, in his original answer to appellee's claim, said that the work was not done in a workmanlike manner, and alleged that it was a part of the parol contract between them that the brickwork was to be executed so as to leave the inside surface of the walls as smooth as the outside; that the joints were all to be struck and pointed, so as not to require plastering, and that appellee had violated this provision of the contract, and left the inside surface of the wall so rough and unsightly as to require it to be plastered, which would cost him at least \$40; that he had been damaged in the sum of \$25 by reason of the lintels put in the building not being of good material; that the guttering had been changed, so as to cause him to spend \$3; that appellee failed to make a valley in the roof, which caused the water to run down into the building, to his damage in at least the sum of \$10, and that he had allowed rubbish to fall into his cellar, to his damage of \$2.50; that appellee was indebted to him for \$45 for medical services rendered to one Hill, at his special instance and request, and for an account due the firm of Taulbee & Hayden, which had been assigned to him, for \$29; and by an amended petition appellant alleged that it would cost him at least \$300 additional expense to take down the brick walls erected by appellee and rebuild them with struck joints on the inside, as provided by the contract,—all of which he pleads by way of set-off and counterclaim against appellee. The trial resulted in a verdict and judgment for appellee for the amount sued for, which we are asked to reverse on account of several alleged errors to appellant's prejudice.

It is contended that the court erred in permitting appellee to state to the jury that the work was done according to the contract. As the contract was a verbal one, and the parties differ essentially as to its terms, it seems to us, after giving his version of it, appellee was entitled to state to the jury that the work had been performed in accordance therewith. Another ground relied on is that the trial court erred in refusing to allow appellant to introduce his son as a witness to testify to

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

facts which should have been properly introduced in chief after appellee had closed his testimony. The only reason assigned why this witness was not introduced at the proper time is that counsel for appellant did not know what his testimony would be at that time. This is a matter that rests very largely in the discretion of the trial judge, and will not be interfered with here unless it is manifest that there has been a palpable abuse of discretion, which fact does not sufficiently appear from the testimony in the record. But the chief ground of complaint is that the trial court erred, to appellant's prejudice, in the instruction as to the measure of damages, which reads as follows: "The measure of damages in the case is the difference, if any, between the value of the building constructed as it is and what it would have been if it had been constructed according to the contract." Appellant insists that it was the duty of the court to have told the jury "that, if they believed from the evidence that plaintiff was to so construct the building as to make the inside of the wall as smooth as the outside, and of first-class material, and had not done so, that they should find for appellant, and fix the damages at such sum as they believed from the evidence would be necessary to take away said walls and replace them by walls of first-class material and workmanship, and as smooth on the inside as on the outside." There is no testimony in this case which conduces to show that the walls erected by appellee for appellant were not a reasonably good job, and fitted for the purpose for which they were intended. There were no plans or specifications for appellee's guidance in their construction, and they seem in the main to conform to the designs testified to by both parties. The proof shows that it is impracticable to build a brick wall only one brick thick so as to leave the surface on both sides perfectly straight and smooth. The usual building brick is twice as long as it is wide, and it is therefore manifest that when laid laterally in the wall there is bound to be a space between them for mortar to hold them together, and that bricks laid in this way will necessarily project a little further on one side than header courses of the same size brick. This difficulty can be easily overcome in thicker walls, but it is not apparent how it could be accomplished in a wall only nine inches thick. Besides, the testimony shows that appellant paid \$200 on the job, after the greater part of the brickwork had been completed, without objection to the manner in which it was being done.

We do not think the measure of damages contended for by appellant is a sound or just one. "The rule of law is that, where a party sustains loss by reason of a breach of contract that he is, so far as money can do it, entitled to be placed in the same situation with respect to damages as if the contract had been performed, and that these damages should be

limited to such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." See *Lawson*, Cont. p. 259. If appellant is right in his theory, appellee might be mulcted in damages in a sum equal to the entire contract price agreed to be paid to him for the job of work on account of a comparatively inconsequential failure to literally comply therewith, and which did not affect the real value of the work done by him. While it may be true that if a contractor should disregard the plans and specifications under which a building was to be erected, and erect one substantially dissimilar, the owner might refuse to receive or pay for the property, but where there has been, as in this case, a substantial compliance, it seems to us that the true criterion of damages is that laid down by the court. We think the instructions offered by appellant were objectionable, for the reason that they gave undue prominence to certain portions of the testimony. Besides, as the jury found that appellant was not damaged at all in the erection of the building, it does not appear that he was prejudiced by a mere error in the standard for the measurement of damages; and, after a careful consideration of the case, we are disposed to think that there was no error in appellant's prejudice in the instructions given the jury. For the reasons given, the judgment is affirmed.

REDMOND v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. June 6, 1890.)

HOMICIDE—DYING DECLARATIONS—SELF-DEFENSE—MISCONDUCT OF PROSECUTING ATTORNEY IN ARGUMENT—CONTRADICTION OF WITNESSES.

1. The dying declaration of deceased that he had no pistol was admissible in rebuttal.
2. Where the deceased was killed while in the act of entering the store of accused, his dying declaration that he had been sent to the store to make a purchase was admissible to show that he did not go there to renew a previous difficulty.
3. The jury being instructed that accused might use such means as appeared to him necessary, or apparently necessary, to protect himself from impending danger, it was not necessary to further instruct them that he had the right, being in his own house, to stand his ground.
4. Where an affidavit for a continuance was admitted as the testimony of an absent witness, it was error to permit the prosecuting attorney to state in argument that the testimony of the absent witness was only what the defendant swore in an affidavit for continuance.
5. Where the killing occurred in a difficulty arising from a dispute as to the ownership of a broom, it was error to admit testimony in rebuttal contradicting the testimony of accused as to the ownership of the broom, which had been brought out by the commonwealth on cross-examination.

Appeal from circuit court, Nicholas county. "Not to be officially reported."

Jordan Redmond was convicted of manslaughter, and he appeals. Reversed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Winfield Buckler, John J. Williamson, and John F. Morgan, for appellant. Hanson Kennedy and W. S. Taylor, for the Commonwealth.

WHITE, J. The appellant was indicted in the Nicholas circuit court for the crime of willful murder by shooting James Tyler, and upon trial was convicted of manslaughter, and his punishment fixed at five years in the penitentiary. From that judgment this appeal is prosecuted.

It is insisted for the appellant that the trial court erred in admitting as evidence certain parts of the dying declaration of Tyler. The objectionable part is: "I was sent by Henry Hutchings to Jordan Redmond's oyster saloon to get some fish. * * * I had no pistol when I was shot." The latter statement was excluded in chief, but admitted in rebuttal. The first statement was admitted in chief. Appellant testified in his own behalf, and stated that, a short while before the shooting of Tyler, appellant and deceased had had a difficulty, each claiming the ownership of a whisk broom. On cross-examination the commonwealth was permitted to ask the accused concerning the ownership of the broom, as to where he got it, and how he got it. In rebuttal the commonwealth was permitted, over objection, to contradict the appellant as to how and where he got the broom, and to show by witness in rebuttal that the appellant committed a trespass in taking the broom, or actually stole it. To this action of the court appellant objected and excepted, and now complains. The shooting is shown to have taken place while the appellant was in his own house, a restaurant, in which he also resided, and while deceased Tyler was in the act of entering the door, at about 9:30 o'clock p. m., though before the place of business was closed for the day. Appellant complains that the trial court refused to instruct the jury that appellant, being in his own house, had the right to stand his ground, and take such steps as were apparently necessary to protect himself and family from impending danger.

We are of opinion that there was no error in admitting the statement of deceased as dying declarations. The statement that he had no pistol was only admitted in rebuttal. The statement that deceased was sent to appellant's restaurant for fish is admissible to show deceased's intention in going there at that time. If this was true, it was not for the purpose of renewing the difficulty.

We are of the opinion that there was no error in the instructions given. They state the law of this case. While the jury is not told that accused, being in his own house, may stand his ground, they are also not told that accused must, if safe means of escape from the impending danger existed, have taken such means, and avoided the difficulty. The appellant was given the full benefit of

the rule that a person may, in his own house, stand his ground, as the jury were told he might use such means as appeared to him necessary or apparently necessary to protect himself from impending danger; and if, in so doing, he shot and killed Tyler, he, the accused, is excusable on the grounds of self-defense.

In the argument to the jury the attorney for the commonwealth said: "The testimony of the witness Wm. Purcell is only what the defendant swore in an affidavit for a continuance; that the commonwealth admitted that Purcell would so testify if he were here; but that Purcell's testimony was contradicted by the evidence of Hutchings, who testified that Tyler was in his store all that day." In our opinion, this statement by the prosecuting attorney was prejudicial to appellant. This affidavit was admitted as the statement of the witness Purcell, and the jury should not have been told it was but the affidavit of appellant, made for continuance. He was entitled to the full benefit of the statement therein as coming from Purcell. This same practice is indulged in to some extent by prosecuting attorneys throughout the state, but should not be permitted by the court.

We are also of opinion that the court erred in admitting the testimony of the witness Hutchings, in rebuttal, contradicting the accused as to the ownership of the broom. In testifying in chief for himself, appellant only stated that both he and Tyler claimed the broom, and had the first difficulty at the barber shop over it. The commonwealth then brought out the testimony from appellant as to how and where he got the broom. The witness Hutchings is then permitted to contradict the accused on a collateral issue, besides contradicting proof introduced by the prosecution. Appellant was asked these questions with the evident purpose to contradict him, but the issue thus raised was collateral, and outside the case. This evidence was clearly erroneously admitted. Its effect on the jury we do not know. The prosecution expected it to have effect, or else would not have introduced it over objections. It may have affected the verdict, and was calculated so to do.

There are other errors suggested, but on another trial they may not occur, and we omit a discussion of them. For the errors indicated, the judgment is reversed, and cause remanded, with directions to grant a new trial, and for proceedings consistent herewith.

SHAW v. REVEL et al.¹

(Court of Appeals of Kentucky. June 2, 1899.)
CHAMPERTY—PLEADING—PROOF UNDER
GENERAL ISSUE.

Under Ky. St. § 212, the defendant in ejectment may, under the general issue, prove that he

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

was in the adverse possession of the land in controversy at the time of plaintiff's purchase, and thus defeat the action.

Appeal from circuit court, Campbell county.

"Not to be officially reported."

Action of ejectment by Joseph M. Shaw against Sarah Revel and others. Judgment for defendants, and plaintiff appeals. Affirmed.

E. P. Simmons and Wright & Anderson, for appellant. T. Hill and John D. Ellis, for appellees.

WHITE, J. This is an action of ejectment brought by appellant, claiming a strip of ground 15 feet wide on Highland avenue, and 40 feet wide at the other end. The defense was a denial of title and adverse possession of the land in controversy for 15 years, and possession, with paper title, for 7 years. A trial before a jury resulted in a verdict for appellees, defendants below, and hence this appeal.

The evidence on the trial shows clearly that appellant is the owner of lot No. 3, in a division of lands by William Steele, and title was acquired by appellant from one Frances, in 1889. It is also in the proof that Thomas Revel, husband and father of appellees, acquired title to lots Nos. 1 and 2, in 1856, although the title to lot No. 2 is not traced further than the immediate vendor of Revel. The proof also shows that, prior to 1878, there was a fence between the lots 2 and 3. In 1878 Revel had his lot No. 2 surveyed off, and that year built a fence some two or three feet over on No. 3 from where the other fence stood. Since 1878 the appellees' ancestor kept up the fence, and claimed the land inclosed till his death, and these appellees have been in like possession since. In fact, in the description given in the petition of appellant, this fence is called for as one of his boundary lines. The record shows that the court gave three instructions. One is that the jury should find for appellant if they believed the land in controversy is included in the boundary of his deed from Frances; another is that, if the jury believe that the land in contest is within the boundary of the deeds tracing title from appellant back to the commonwealth, they should find for appellant, unless they should believe appellees had held adverse possession for 15 years next before the action was brought; the third was a direction as to the form of the verdict. After the verdict the appellant moved for judgment, notwithstanding the verdict, for the whole of the land claimed, and, separately, for the two or three feet covered by the fence built in 1878. These motions were overruled.

We are of opinion that the instructions given are more favorable to appellant than he was entitled to, under the proof. The contradicted proof shows that appellee built the fence in 1878, and kept it there ever since, and that the land inside the inclosure was em-

braced in his deed. This shows an adverse holding for more than 15 years before the action was brought, in 1895. It is equally clear that this fence was there, and the land held adversely, when appellant bought. This would bring so much of his deed as embraced land in the inclosure void, and as to that part his title would fail. This question was before the court by proof, and it does not have to be pleaded, as section 212, Ky. St., specially provides it may be proven under the general issue. There appears no error in the judgment, and the same is affirmed.

TURNER v. EASTIN.¹

(Court of Appeals of Kentucky. June 8, 1899.)

BONDS—FAILURE TO ISSUE EXECUTION—LIMITATIONS.

Ky. St. § 4869, providing that "if the plaintiff in any bond having the force of a judgment shall, at any time for the space of a year, whilst he is entitled to have execution, fail to issue execution," the surety in such bond shall be released from liability, does not apply to a bond payable to the master commissioner, who has no authority to collect it without an order of court.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Rule against H. F. Turner to show cause why he should not pay to R. Scrogin Eastin, commissioner, the amount of a bond in which he was surety. Judgment making the rule absolute, and H. F. Turner appeals. Affirmed.

Yeaman & Yeaman, for appellant. Clay & Clay and S. B. & R. D. Vance, for appellee.

BURNAM, J. At the July term, 1892, of the Henderson circuit court, R. S. Eastin, as commissioner of the court, was directed to loan out a fund in the custody of the court for the period of one year, taking bond payable to himself as commissioner, with good security, and having the force and effect of a judgment. Pursuant to this order on the 5th day of September, 1892, he loaned to W. W. Shelby, with H. F. Turner as security, \$363.06, taking from them this obligation: "\$363.06. Twelve months after date, we, or either of us, promise to pay R. Scrogin Eastin, commissioner, or order, the sum of three hundred sixty-three and ⁰⁶/₁₀₀ dollars, it being for money loaned by order of the Henderson circuit court at its July term, 1892, this day loaned by R. Scrogin Eastin, commissioner of the Henderson circuit court, in the consolidated actions of Hugh Kerr, &c., vs. G. J. Beatty, &c., and Hugh Kerr, &c., vs. David Clark, &c., and borrowed by W. W. Shelby, with six per cent. interest from date until paid, and having the force and effect of a judgment. Witness our hands this 5th day of September, 1892. W. W. Shelby. H. F. Turner, Security." No execution was issued on this bond, or steps taken for its collection, until the Sep-

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tember term, 1897, when this order was entered: "On motion of the attorneys for A. Gilmour's adm'r and Hugh Kerr's ex'r, H. F. Turner is hereby ruled to show cause, if any he can, on or before the sixth day of the present term, why he should not be required to pay R. Scrogin Eastin, commissioner, the sum of three hundred and sixty-three dollars & $\frac{00}{100}$, with interest thereon at the rate of six per cent. per annum from the fifth day of September, 1892,—being the amount of a bond for money borrowed herein by W. W. Shelby, with said Turner as security,—or, upon his failure to pay same, why execution should not be issued on said bond." Turner, in response thereto, says, in substance, that he was only bound as surety thereon; that the principal was, for more than 12 months after its maturity, able to pay it, but had subsequently become insolvent; that for more than 1 year after the maturity of the bond, and while the payee was entitled to have execution thereon, he had failed to issue execution, or take other steps for the collection thereof,—and pleads and relies upon section 4669 of the Kentucky Statutes as releasing him from all liability thereon. The section of the statute relied on is as follows: "If the plaintiff in any bond having the force of a judgment shall, at any time for the space of a year, whilst he is entitled to have execution, fail to issue execution, and in good faith prosecute the collection thereof, the surety in such bond shall be released from all liability as such, and any execution thereafter issuing on the bond shall be so endorsed."

It will be observed that the bond in question is not payable to the plaintiff, or to any person who is a party to the action, or who is the owner of the money and entitled to collect same. In the case of *Barbee v. Pitman*, 3 Bush, 259, Judge Robertson, in considering this section of the statute, said: "This enactment applies only to bonds to beneficial creditors, who alone may control the collection by execution. It cannot be constructively applied to such judicial bonds as that in this case, the collection of which the court alone could control. The forbearance of the party who has a right to the money, and to either forbear or enforce the collection by execution, is the only reason for the enactment. But here not only was the bond made payable to the officer of the court, but the suit was still pending, the party entitled to the money had not been ascertained by judgment, and no execution could be issued without an order by the court, which might enforce the bond either by rule or execution. There was no creditor who could issue execution, and none, therefore, who could release the surety in the bond." And in the case of *Rankin v. White*, Id. 545, which is identical with the case at bar, it was held by this court that: "The surety in a bond having the force and effect of a replevin bond, executed to a commissioner for money in litigation, deposited in court and loaned by order of court, is not released from

liability thereon by failure to issue execution on the bond for more than one year after its maturity. Neither the letter nor spirit nor aim of this section applies to judicial bonds, the collection of which by execution, rule, or attachment must be controlled by the court alone, as to the time and manner of enforcement, and might be prudently suspended for much more than a year, and even during the pendency of the litigation between the creditors claiming the fund." It is insisted by appellant that the effect of the cases of *Turner v. Rankin*, 80 Ky. 179, and *Bowen v. Helm* (Ky.) 41 S. W. 239, is to overrule these earlier cases. We think not, as in both of these cases the securities relied for release upon an entirely different provision of the statute; and the cases of *Barbee v. Pitman* and *Rankin v. White* were expressly referred to in the case of *Turner v. Rankin*, and distinguished therefrom, the court holding that the seven-years statute, without a suit, released the security absolutely, but that the one-year statute only applied to cases in which the payee in the bond could have controlled its collection, and was authorized to have execution issued thereon without authority from the court. As the bond in this case was payable to the master commissioner, who had no authority to collect it without an order of the court so authorizing it, we think it falls within the rule laid down in the case of *Rankin v. White*, and the judgment is therefore affirmed.

CINCINNATI, N. O. & T. P. RY. CO. v. COMMONWEALTH (three cases).¹

(Court of Appeals of Kentucky. June 7, 1899.)
JOINDER OF DEFENDANTS—RECEIVERS—LEVY OF TAXES—ASSESSMENT OF RAILROADS.

1. The receiver of a railroad and the railroad company may be joined as defendants in an action to recover taxes on the railroad.
2. Two levies may be made in one year, provided they are made for different years.
3. Railroads cannot be assessed for graded-school purposes by an assessor appointed by the school board.

Appeals from circuit court, Boyle county.
"Not to be officially reported."

Actions by the commonwealth against the Cincinnati, New Orleans & Texas Pacific Railway Company to recover taxes. Judgments for plaintiff, and defendant appeals. Reversed.

Simrall & Galvin, for appellant. Robt. Harding and J. W. Rawlings, for the Commonwealth.

HOBSON, J. These three appeals have been heard together, as they involved substantially the same facts. The board of trustees of the Junction City graded school, organized under an act approved April 2, 1890, to establish a system of public graded schools in Junction City, Boyle county, levied a tax for the years 1893, 1894, 1895, pursuant to that

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

act, for school purposes. Appellant refused to pay the tax on the railroad, and this suit was brought to force its collection. Appellant demurred to the petition, and, its demurrer being overruled by the court, it declined to plead further, and judgment was entered in favor of plaintiff for the amount of the claim.

It is insisted that the petition was insufficient, because the receiver and the railroad company could not both be sued; but we see no objection to this, as it is the duty of the receiver to pay the taxes, and it was proper to make the railroad company defendant also.

It is also insisted that the levies were not properly made, because one was made on the 10th of January, 1893, and the second on the 30th of December, 1893. It is said that two levies could not be made in one year. This may be true, but the school board is not required to make the levy at any special date. The first levy was made for the year 1893, and the second for the year 1894, and we see no substantial error in this regard.

The petitions are all based upon a local assessment made by an assessor appointed by the school board. It is insisted that this is unwarranted. The law regulating the assessment of railroad property for the year 1893 is found in Gen. St. pp. 1042-1045. Section 4 provides: "No county, city or incorporated town in this state shall hereafter assess, levy or collect any taxes on the property of railroad companies in this state, except as provided by this article." Section 4102 of the Kentucky Statutes contains the same provision. Section 4009 provides for the reports of school districts, so that the proper assessment may be made. Section 4100 requires the money paid to the superintendent of public schools for the benefit of the district entitled thereto. Under these provisions, appellees could not assess the property of the railroad company, nor recover the taxes based upon an assessment so made. But, their levy being valid, the amount of the tax may be computed upon the assessment made according to law. The court erred in overruling the demurrer to the petition for this reason. On the return of the case, appellees may have leave to amend their petition, if they desire to do so. Judgment reversed and cause remanded for further proceedings in conformity to this opinion.

GATEWOOD v. LONG et al.¹

(Court of Appeals of Kentucky. June 1, 1899.)

JUDGMENT—BAR—SPLITTING CAUSE OF ACTION.

As plaintiff, after judgment for part of the relief sued for, cannot maintain another action for the remainder of the relief sought in that action, a judgment on a note in an action brought

for that purpose, and also to enforce a mortgage lien, is a bar to a subsequent action to enforce the lien, not only as to the life tenant of the mortgaged land, against whom personal judgment was rendered, but as to infant remaindermen.

Appeal from circuit court, Barren county.

"Not to be officially reported."

Action by L. W. Gatewood against Ed. Long and others to enforce a mortgage lien. Judgment for defendants, and plaintiff appeals. Affirmed.

W. H. Holt and D. R. Carr, for appellant.
W. L. Porter and Geo. T. Duff, for appellees.

HOBSON, J. Ed. Long and his wife, Fanny Long, on December 30, 1885, executed to J. S. Gatewood their note for \$300, and a mortgage on a tract of land belonging to the wife to secure its payment. On February 2, 1888, Gatewood filed his petition in equity against Ed. Long and his two infant children (his wife being dead), seeking judgment upon the note, and a foreclosure of the mortgage on the land. Long filed an answer pleading a failure of consideration. To this answer the plaintiff filed a reply, and by consent the allegations of the reply were taken as controverted. Some proof was taken by the parties, and on September 25, 1889, the action was submitted for trial and judgment. On October 12, 1889, the following judgment was entered: "The court being fully advised, it is adjudged by the court that the plaintiff, J. S. Gatewood, recover of the defendant Ed. Long \$300, with interest from the time it was due until paid. It is further adjudged that the plaintiff pay the costs herein expended, as between him and defendant Ed. Long." At the next term of the court the action was stricken from the docket. On January 17, 1894, L. W. Gatewood brought this action, alleging that J. S. Gatewood had given the note and mortgage to B. Lawless, Sr., and that he had bought it from Lawless by a written assignment filed with his petition, the consideration of which, as shown by the assignment, was \$25. He prayed judgment against Long and his children for the debt of \$300 and interest, and the foreclosure of the mortgage. To this suit they pleaded the proceedings in the former action as a bar, alleging that the judgment therein rendered was by consent, and was entered in settlement of the whole matter. Appellant denied that there was any agreement that the judgment referred to should be a full settlement; and the case having been submitted without any proof on behalf of appellees, except the record itself, the court below dismissed the petition. The correctness of this judgment is the only question on this appeal.

The judgment in the original action quoted above shows on its face that it must have been rendered by consent; for by it the plaintiff recovers the full amount he sued for, and yet it is adjudged that he pay the costs as between him and Ed. Long, which included all the costs made in the case; for Ed. Long

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only had appeared in the action. The whole cause of action was sued on in that case, and the question arises, can the plaintiff in that case, after taking judgment for a part of the relief sued for, maintain another action for the remainder of the relief sought in that action, but not embraced in the judgment? In *Freem. Judgm.* § 272, the rule is thus stated: "The omission of a court to award relief prayed for is an adjudication, in effect, that the complainant is not entitled thereto. Hence, if in an action on a note, without any order of sale, this is conclusive that the plaintiff has no lien, and he cannot afterwards maintain an action to foreclose his mortgage." He then goes on to show that this is a necessary corollary from the well-settled doctrine that a judgment is conclusive upon all matters presented by the pleadings which the parties might have litigated and had decided in the cause. The same doctrine is laid down in *Van Fleet, Former Adj.* § 114, and *Francis v. Wood*, 81 Ky. 16; *Steam-Packet Co. v. Sickles*, 24 How. 333; 1 *Herm. Estop.* §§ 123, 469. Under these authorities, we think it clear that the plaintiff in that action, after taking the personal judgment against Ed. Long, at his own costs, as the final judgment in that action, should not be permitted to maintain another action against Ed. Long to subject his life estate in the land to the debt; for this would be to allow him to prosecute two actions on the same cause of action, and recover part of the relief on one by consent, and then the balance in the other action. The same reasons make the first action a bar to the second action, as against the infants, who owned the remainder in the land subject to the life estate of their father, Ed. Long, as tenant by the curtesy. Besides, it would be manifestly unjust to throw the whole debt upon the infants' remainder; and we know of no principle authorizing it to be apportioned, and part of it charged to the remainder-man. In a case like this. It seems to be clear from the evidence that Ed. Long had little or no property, and that the land was worth much more than the amount of the debt. The long delay in bringing the second suit, the fact that J. S. Gatewood gave the claim to B. Lawless after this judgment was entered, and that Lawless sold it to L. W. Gatewood for a recited consideration of \$25, are persuasive that it was then considered that the lien on this land had been released; and we are satisfied that the chancellor's judgment meets the ends of substantial justice. Judgment affirmed.

AMBROSE v. NOELL et al.¹

(Court of Appeals of Kentucky. June 8, 1899.)
HUSBAND AND WIFE—LIABILITY OF WIFE'S LAND FOR HUSBAND'S DEBTS.

Where a creditor of the husband seeks to subject the wife's land to the payment of the husband's debt on the ground that the husband paid for the land, the mere fact that the wife

cannot show where every dollar came from that she used in paying for the land does not entitle plaintiff to the relief sought.

Appeal from circuit court, Boone county.

"Not to be officially reported."

Action by U. C. Ambrose against J. L. Noell and Kate M. Noell to subject a tract of land to the payment of a debt due by J. L. Noell. Judgment for defendants, and plaintiff appeals. Affirmed.

J. G. Tomlin and O. C. Cram, for appellant.
D. E. Castleman, for appellees.

PAYNTER, J. For a debt due by J. L. Noell, husband of the appellee, Kate N. Noell, the appellant, sought to subject a tract of land in Boone county, the title to which is in her name. The proof in the case shows that the contract price of the land was \$1,600, and that it was paid for with money which was obtained by her from Sleet & Bros. and a building association, but the appellant claims that the sums which were subsequently paid on the notes executed by her for the borrowed money were in part furnished by her husband. The testimony shows that she has paid to Sleet & Bros. and to the building association part of the respective debts due them. She shows conclusively that most of the money which she used in making payments on the notes which she executed belonged to her. She does not show with mathematical certainty where she got every dollar of the money which she paid on the notes, but testifies that it all came from money made keeping a tollgate, from rents of other lands which belonged to her, from money given her by her mother, from the sale of milk and butter from her cows, etc. The evidence fails to show that any of the money which she used for the purpose belonged to her husband. Her inability to show where every dollar came from that she used will not justify the court in subjecting the land to the payment of her husband's debt. We think, under the facts developed in this case, the court properly adjudged that the land could not be subjected to the payment of the appellant's debt. The judgment is affirmed.

WEAKLEY v. HANNA et al.¹

(Court of Appeals of Kentucky. June 8, 1899.)
CONSTRUCTION OF WILL—"DYING WITHOUT CHILDREN."

Under a devise of land to testator's wife for life, remainder to his son, with a provision that, "should he die, leaving no children or descendants, the said estate must revert to my legal heirs," the son, having survived the widow, takes the fee, as the words, "should he die leaving no children," refer to a dying before the death of the life tenant.

Appeal from circuit court, Shelby county.

"Not to be officially reported."

Action by Joseph C. Hanna and others against Lena May Hanna and others for the

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

construction of a will. Judgment construing the will, and C. S. Weakley appeals. Affirmed.

P. J. Foree, for appellant. G. G. Gilbert, for appellees.

GUFFY, J. Joseph C. Hanna and others instituted this action in the Shelby circuit court against Lena May Hanna and others, the object being to obtain a construction of the will of Adam Hanna, and also to obtain a judgment for the sale of certain real estate mentioned in the will for the payment of a certain mortgage lien thereon. The particular clause of the will to be construed reads as follows: "All the balance of my estate, real and personal, of every nature and kind, I will and bequeath to my beloved wife, Henrietta Hanna, with full power and authority to use and dispose of the personal estate as she may deem best, except * * *." The fourth item reads as follows: "After the decease of my wife, I will and devise to my foster son, Joseph C. Hanna, the entire farm upon which I now reside [describing same]. Should he die, leaving no children or descendants, the said estate must revert to my legal heirs." After the cause was prepared for trial, the court adjudged as follows: "This cause being now submitted for judgment, and the court being sufficiently advised, it is ordered and adjudged that, as the widow, Henrietta Hanna, survived her husband, Adam Hanna, the clause of testator's will now involved for construction must be construed with reference to that fact. By this will the home farm was devised to said widow for the term of her natural life, and after the death of said widow to his foster son, Joseph C. Hanna, the plaintiff; and the will further provided that, should said Joseph C. Hanna die, leaving no living children or descendants, then said land should revert to the testator's legal heirs. This clause was meant by the testator to mean that should said Joseph Hanna die, leaving no children or descendant, during the lifetime of the first taker, Henrietta Hanna; and as it appeared that said Joseph C. Hanna has still living issue and descendants which survive the duration of the intermediate estate, the land vested absolutely in fee in Joseph C. Hanna, and thus they, J. C. Hanna and his wife, Sallie B. Hanna, can, by proper deed or deeds of conveyance, pass a good title to all or any of said land."

It is further alleged that J. C. Burnett, as guardian, had a lien upon the land for a certain sum of money, and a sale of the land was adjudged to pay the same, and the same was sold, and purchased by the appellant herein, and report of sale duly made and filed, and to the confirmation of which the appellant excepted upon the ground and for the reason that Joseph C. Hanna was not invested with the fee-simple title to the land, which exceptions were overruled by the court, and report of sale confirmed, and appellant required to

pay the purchase money; and from that judgment of confirmation this appeal is prosecuted.

The only question presented for decision is whether or not, under the will and the facts proven in the case, Joseph C. Hanna became invested with the fee-simple title to the land in controversy. It seems to us that the judgment of the court below is fully sustained by numerous decisions of this court, and that the will was properly construed. The judgment of the circuit court is in accordance with the decisions of this court construing similar provisions found in various wills submitted for decision. See *Birney v. Richardson*, 5 Dana, 424; *Cornwall's Assignee v. Bank*, 92 Ky. 381, 18 S. W. 452; *Thackston v. Watson*, 84 Ky. 209, 1 S. W. 398; *Crozier v. Cundall* (Ky.) 85 S. W. 546. All the foregoing cases clearly and unmistakably sustain the judgment appealed from. Judgment affirmed.

STANDARD OIL CO. v. FIDELITY & CASUALTY CO. OF NEW YORK.¹

(Court of Appeals of Kentucky. June 6, 1899.)

INDEMNITY INSURANCE—BILL OF PARTICULARS—ACCOUNT BOOKS AS EVIDENCE—SECONDARY EVIDENCE.

1. In an action on a contract to indemnify plaintiff for any pecuniary loss sustained by it by reason of any fraudulent or dishonest acts of B., one of its employees, in which the defense was that the shortage in B.'s accounts occurred prior to the term covered by the bond, it was error to require plaintiff to file a bill of particulars on the trial of the cause, none having theretofore been required.

2. Entries in books kept under the supervision of B. were admissible as evidence for plaintiff.

3. As no rule was taken requiring plaintiff to file the books, secondary evidence as to their contents was admissible.

4. Evidence as to the reception and indorsement of checks by B. was competent.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by the Standard Oil Company against the Fidelity & Casualty Company of New York on a contract of indemnity insurance. Judgment for defendant, and plaintiff appeals. Reversed.

W. B. Dixon and E. P. Humphrey, for appellant. Phelps & Thum, for appellee.

GUFFY, J. The appellant sought to recover judgment for \$2,000 against the appellee on account of an undertaking by the appellee to indemnify the appellant to the extent of \$2,000 for any pecuniary loss sustained by the appellant by reason of any fraudulent or dishonest acts of one S. H. Broughton which might be committed during one year, commencing the 1st day of March, 1893. Broughton had been employed by the appellant for some time prior to the 1st of March, 1893, and continued up to the 18th of March, 1893, when he left. It is claimed that at the time he quit

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the service of the appellant he was short in his accounts to an amount exceeding \$3,500. The appellant claims that, of this shortage, \$2,245.42 occurred during the first 18 days of March, 1893. It was finally admitted by appellee that \$300.67 of the loss occurred after the 1st of March, 1893; but it was claimed that the other loss, if any, occurred prior to the 1st of March, 1893. The court below sustained appellee's contention, and rendered judgment for the amount admitted, and dismissed the petition as to the residue of the claim; and from the judgment so dismissing appellant's petition this appeal is prosecuted.

It appears that the court below sustained certain exceptions to the deposition of Albin L. Jones, a witness for appellant. The testimony so excluded related to what the books kept in Broughton's office showed. The appellant also excepted to the first answer of cross-examination of Jones, on the ground that this answer was incompetent, it being a statement merely of what the books showed. Appellant claimed that it did this for the purpose of having all the book read in evidence, or none of it. The court below sustained the exceptions of appellee, but overruled the exceptions of appellant, and allowed introduced in part what the books showed, and excluded all other book evidence; and of this ruling appellant complains. It is insisted for appellant that the court erred in requiring it, upon the hearing of the cause, to file a bill of particulars, none having been required before that time; and it seems that the court below was of the opinion that the evidence failed to sustain the bill of particulars filed, and appellant complains of the action of the court in this respect. It is insisted for appellant that it is illegal and unjust to require the appellant to file a bill of particulars in a case of this sort, for the reason that it is frequently impossible to show just what items the defaulter has misappropriated, because his accounts are nearly always falsified for the purpose of covering up the items misappropriated. It is argued for appellant that all it should be required to show was that, during the life of the bond sued on, the defaulter collected more money than he accounted for. Appellant earnestly insists that the judgment appealed from is not sustained by the law or facts, and that it was entitled to a judgment for \$2,000; that being the limit of appellee's liability by the terms of the bond. It is the contention of appellee that the judgment and rulings of the court are sustained by the law and facts, and that the judgment should be affirmed. It is the further contention of appellee that the decision of the lower court upon the facts is equivalent to the verdict of a well-instructed jury. It has been repeatedly decided by this court that no such rule applies on the trial of appeals from judgments in equity causes.

After a careful consideration of the law and facts in this case, we are of the opinion that the court erred in requiring appellant to file

a bill of particulars at the time and under the circumstances under which it was required to file the same. We are further of the opinion that, if any of the testimony of Jones as to what the books referred to showed was competent, his entire testimony in respect thereto should have been admitted and considered; and, inasmuch as there was no rule taken requiring the appellant to file the books referred to, the statement of the witness in regard to what the books showed was competent, and should have been considered by the court. The evidence as to the reception and indorsement of the various checks received and indorsed by Broughton was competent evidence. It may be further remarked that the evidence produced showed that the books in question were kept by Broughton, or were under his supervision or control, and it was therefore competent to show the entries in the books. The fact that Broughton invested certain sums of money in New York exchange, payable to the appellant, is by no means conclusive evidence that such checks were received or collected by the appellant, for the reason that Broughton, under his power of attorney, could legally indorse such checks, and collect and receive the money therefrom; and it is worthy of note that he does not pretend to say that all such exchange was in fact transmitted by him to the appellant, or collected by it.

It seems to us that the competent evidence in this case sustained the claim of the appellant that Broughton did in fact by dishonest or fraudulent means appropriate to his own use after the 1st of March, 1893, as much as \$2,000 of money received by him, due to the appellant, and for which it was entitled to judgment. The judgment appealed from is reversed, and the cause remanded, with directions to enter judgment in favor of appellant for the amount claimed, including the \$300.67 heretofore adjudged to appellant, and for proceedings consistent herewith.

FLANNERY v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. June 6, 1899.)

CRIMINAL LAW—REVERSIBLE ERRORS—WITNESSES.

1. There can be no reversal in a criminal case for an error in overruling a motion for a new trial.

2. A child 12 years of age was a competent witness, though she refused to state whether she and her father and mother had agreed upon what they should each state on the trial; the weight to be given her testimony being a matter for the jury.

Appeal from circuit court, Lee county.

"Not to be officially reported."

J. H. Flannery was convicted of the offense of conspiring with others for the purpose of intimidating, disturbing, and robbing another, and he appeals. Affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

White & Roberts and Sutton & Harris, for appellant. W. S. Taylor and M. H. Thatcher, for the Commonwealth.

HAZELRIGG, C. J. The appellant, with three others, was indicted for conspiring and confederating for the unlawful purpose of intimidating, disturbing, and robbing Houston Brandenburg, and on his separate trial was found guilty, and sentenced to the penitentiary for two years. On appeal he assigns as error: (1) The overruling of his motion for a new trial because of newly-discovered testimony; and he established by his own affidavit and that of his co-defendants that they alone committed the crime charged to him, and this proof he did not know he could make until after his trial. (2) That the court ought to have excluded the testimony of the daughter of the prosecuting witness, because she declined to answer certain questions put to her by his attorneys on her cross-examination.

As to the first alleged error, it is sufficient to say that, under the express provisions of the Criminal Code of Practice (section 281), decisions of the trial court upon motions for a new trial are not subject to exception. See *Kennedy v. Com.*, 14 Bush, 340; *Forman v. Com.*, 86 Ky. 605, 6 S. W. 579. As to the second complaint it appears that the witness, a child of some 12 years, testified intelligently enough on her main examination with respect to the material facts of the visit of the appellant and his associates to her father's house on the night of the alleged robbery; but on cross-examination she was asked whether she and her father and mother had not agreed upon what they each would state on the trial. She could not be induced, either by counsel or the court, to make any answer. We think the testimony of this child was competent, but what weight was to be given it, under all the circumstances, was a matter for the jury. If it had stood alone, the jury would probably not have convicted, or, if so, the trial court might well have granted a new trial. There was, however, other testimony abundantly showing the guilt of the accused. The judgment is affirmed.

PARKER v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. June 7, 1899.)

CRIMINAL LAW—SEPARATION OF WITNESSES—HOMICIDE—DECLARATIONS OF DECEASED AS EVIDENCE—IMPEACHMENT AS WITNESS—SELF-DEFENSE.

1. Where the court, after putting the witnesses under rule, permitted one who was jointly indicted with accused to remain in the court room, supposing that he was not to be used as a witness, it was error to refuse to permit him, for that reason, to testify for accused, he being the only eyewitness besides accused offered on his behalf.

2. Declarations of deceased prior to the killing, not made in the presence of accused, were not admissible as evidence.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

3. On a trial for manslaughter, it was error to permit the commonwealth to show, upon the cross-examination of accused as a witness, that he had been indicted for carrying a pistol, and for shooting from ambush.

4. While previous threats by deceased, and the fact of his going armed and lying in wait, may be shown by accused, the court should not single out any of these facts, and tell the jury that they would give the accused the right to slay the deceased.

Appeal from circuit court, Clay county.

"Not to be officially reported."

Dan Parker was convicted of manslaughter, and he appeals. Reversed.

B. B. Golden, J. H. Wilson, Ed. Parker, and W. B. Hansford, for appellant. W. S. Taylor and M. H. Thatcher, for the Commonwealth.

HOBSON, J. Appellant was indicted, jointly with Thomas Whitmore, for the murder of Abner O. Turner, Jr., and, having been tried separately, was found guilty of manslaughter, and his punishment fixed at seven years in the penitentiary. Several errors are relied on for a reversal of the judgment.

After the jury were sworn, the witnesses were placed under rule, and Whitmore was ordered back to jail. Thereupon counsel for defendant said to the court, as he understood, that the defendant desired the presence and assistance of defendant Whitmore during the trial. The court then remanded the order ordering Whitmore to jail, and directed the jailer to bring him out each time he brought out the defendant, Parker, from jail to the court room, which was done. Whitmore heard all the trial, and at the conclusion of the defendant's own testimony was offered as a witness for him. His testimony was objected to. Defendant's counsel then explained to the court that they had asked for him to remain with the expectation of using him as a witness. While the court had no reason to dispute the statement, or to doubt the attorney in the least, still, not having so understood at the time he allowed the witness to remain in the room, he refused to allow him to be sworn, or to testify on the trial. This was very prejudicial to the accused, because Whitmore, though jointly indicted, does not appear to have any connection with the trouble out of which the shooting grew. He was an eyewitness to the whole thing, and the only eyewitness besides appellant offered in his behalf. It being apparent that there was simply a misunderstanding between the court and counsel, it was error to refuse to allow the witness to testify, where the defendant's life was at stake, and it was plain, from all the circumstances, that he relied on this testimony. Although the witnesses had been placed under rule, and the witness had remained in the court room under a misapprehension, the court had power to allow him to testify. Otherwise the ends of justice might be de-

feated, and punishment inflicted upon an innocent man.

The proof showed that the accused and Whitmore, as they returned home from Bengetown on last Christmas Eve, passed the deceased Turner's house; that, after they passed, the deceased and his brother-in-law, Murray, followed them down the road, stopping at witness York's house, and borrowing two pistols; that York then cut across to where he thought they would overtake defendant and Whitmore, to see what would happen, and, as soon as the deceased and Murray came in sight, they opened fire with both pistols. In the fusillade that followed, Turner was shot through the stomach by the accused, and died of his wound a few days later. The court allowed John A. Murray, the father-in-law of the deceased, to testify to a conversation between them before the deceased started down the road, and he allowed the witness Buck York to state a similar conversation between him and the deceased at his house, in regard to his purpose in going down the road. This evidence was incompetent. The accused was not present, and evidence could not be made against him by statements not in his presence, and not in any way connected with the shooting or throwing any light on it. The testimony, also, by Buck York, of what appellant did or said at his house, should not have been admitted, as there was no sufficient connection between this and what followed; it being apparent that all this had nothing to do with Turner, or the subsequent difficulty.

On cross-examination appellant was asked by counsel for the prosecution, and was required to answer, over his objection and exception, as follows: "Q. Have you ever been indicted for anything? A. Yes, sir. Q. Tell the jury, now, Mr. Parker, what all you have been indicted for? A. I was indicted for carrying a pistol, and for shooting from ambush." The court then said to the jury that they would not consider this statement about the indictment for any purpose against the defendant, except in so far as it might affect the credibility of the witness; that he was not upon trial for either of those offenses. It is hard to conceive how an indictment against the accused for carrying a concealed deadly weapon, or shooting from ambush, could have thrown light on his truthfulness, and we are satisfied that the questions were not asked for this purpose. Section 597 of the Civil Code of Practice provides that a witness may be impeached by evidence that his general reputation for untruthfulness or immorality renders him unworthy of belief, or by evidence showing that he has made statements different from his present testimony, but "not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness or record of a judgment that he has been convicted of a felony." The defendant in a criminal case, when offered as a witness, stands on precisely the same

ground as any other witness, and is equally within the protection of this salutary statute. Precisely such cross-examination as this was condemned by this court in *Leslie v. Com.* (Ky.) 42 S. W. 1095, and *Baker v. Com.* (Ky.) 50 S. W. 54, and it should not have been allowed.

The instructions of the court properly presented the law of the case, containing the usual instructions on self-defense. Counsel complains that no instruction was given upon the principle announced in *Oder v. Com.*, 80 Ky. 32. But in this the court did not err. All the facts attending a homicide, including the character of the deceased, previous threats, bad feeling, going armed, lying in wait, and the like, may be shown by the evidence before the jury; but the court should not single out any of these facts, and tell the jury that these would give the accused the right to slay the deceased. The right of self-defense is only the right of present necessity, real or apparent; and whether it exists or not in a particular case is a question for the jury on all the evidence. Judgment reversed, and cause remanded, with directions to the court below to grant appellant a new trial, and for further proceedings not inconsistent with this opinion.

HEFT v. MASDEN et al.¹

(Court of Appeals of Kentucky. June 3, 1899.)
BREACH OF MARRIAGE PROMISE—EVIDENCE—RES GESTÆ.

Where the defense, in an action for breach of marriage promise, was that plaintiff had voluntarily discharged defendant from his promise, and had given back to him their engagement ring, declarations of plaintiff, subsequent to the return of the ring, as to her purpose in returning it, were not admissible as a part of the *res gestæ*.

Appeal from circuit court, Bullitt county.

"Not to be officially reported."

Action by Ada Masden and others against Christ Heft for breach of marriage promise. Judgment for plaintiffs, and defendant appeals. Reversed.

Fairleigh & Straus, for appellant. Chapeze & Halstead, for appellees.

BURNAM, J. The plaintiff alleges that the defendant entered into a contract of marriage with her on the — day of —, 1896, which, by mutual agreement, was to have been consummated about the 14th day of October thereafter, but that defendant failed and refused to comply with his agreement. The defendant admits the alleged contract of marriage, but says, by way of defense, that some time after he and plaintiff had agreed to marry each other plaintiff voluntarily broke this contract, and discharged him from all obligations growing out of same, refused to have anything further to do with him, and, in the presence of a number of persons, gave

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

back to him their engagement ring. Plaintiff admits that she gave back the ring, but denies that she did it for the purpose of breaking the engagement, or that she ever broke the contract, or released defendant from his obligation to marry her; that she surrendered the engagement ring to defendant at his instance and request, that he might have certain defects in it repaired.

The trial resulted in a verdict and judgment for plaintiff, which we are asked upon this appeal to reverse for a number of alleged errors, the chief of which being that the trial court erred in permitting plaintiff to testify that she had told her father and mother, and her aunt Mrs. Luther Masden, subsequent to the time when she gave the ring to defendant, that she had given it to him in order to have it mended, and that he had promised to bring it back to her on the following Sunday; and also in permitting her father and mother and her aunt to testify as to what plaintiff had told them about the circumstances under which she surrendered the ring, and for what purpose. Appellant was not present at any of these alleged conversations, and none of them were contemporaneous with the alleged surrender of the ring. This testimony becomes very important, in view of the facts relied on by way of defense. The defendant testifies that on the 2d day of October, 1896, the plaintiff rode up to where he was standing, with a number of other persons, and asked him if he had made the trip to West Point with the girls visiting Dr. Barnett's, and that in response to this he said, "Yes, I did;" that thereupon she said to him, "Don't come to see me any more; I have got no use for a fellow that comes to see me, and then goes off with other girls,— either for you or your ring;" and that she thereupon threw the ring at him, and rode off; that he regarded these words and actions of plaintiff as discharging him from all obligations growing out of the contract of marriage. This testimony is corroborated in its essential details by that of some four other persons, and also in some degree by that of Miss Lulie Hall, who testifies that plaintiff informed her that she had given defendant's ring back to him, and notified him not to come to see her any more; also by that of Miss Katie Johnson, who testifies that plaintiff told her that, if defendant went to West Point with those girls, she intended to give his ring back to him, and said that she did not love him, but loved Jack Hawkins better, which was the same day on which she surrendered the ring. It is evident from this testimony that the surrender of the ring by plaintiff to defendant, the circumstances under which it was done, and the purpose in view, are very controlling facts in determining the question of the alleged repudiation of the marriage agreement by plaintiff, and her declarations made with respect thereto are not competent unless they constitute a part of the *res gestae*. Mr. Greenleaf on Evidence (section 108) says:

"There are other declarations which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances so intimately interwoven as to hardly be separable from each other. Each owes its birth to some preceding circumstance, and, in its turn, becomes the prolific parent of others; and each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances, constituting parts of the *res gestae*, may always be shown to the jury, along with the principal fact, and their admissibility is determined by the judge according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description. The principal points of attention are whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character." The rule is that the circumstances, facts, and declarations must grow out of the main fact, and be contemporaneous with it. See Black, Law Dict. p. 1028. They must have been made at the time of the act done which they were supposed to characterize. In this case it is not contended that the declarations were contemporaneous with the alleged surrender of the ring, or that they were in the presence of the defendant, and it seems to us that, under the rules of evidence, these statements were clearly incompetent. It is insisted for plaintiff that, even if incompetent, they are not material or prejudicial to defendant, but we cannot concur in this view. In a case of this character, such testimony is calculated to have produced a very controlling impression upon the minds of the jury, and to have been extremely prejudicial to the rights of defendant; and on account of the admission of this testimony the judgment is reversed, and the cause remanded for a new trial consistent with this opinion.

CALDWELL et al. v. FELTON.¹

(Court of Appeals of Kentucky. June 6, 1899.)
CARRIERS—VERBAL CONTRACT—MISTAKE IN
WRITTEN CONTRACT—RULE TO REQUIRE
DEFENDANT TO FILE—EVIDENCE.

1. Where plaintiff sued for breach of a contract for the through shipment of cattle, and defendant, by its answer, relied on a written contract, by which it undertook merely to deliver the cattle to a connecting line at an intermediate point, in reply to which plaintiff pleaded that he signed the written contract, after the cattle had been shipped, on defendant's representation that it was the same as the verbal contract, the court erred in overruling

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

plaintiff's motion to require defendant to file the written contract.

2. It was error to refuse to permit plaintiff to testify as to the terms and conditions of the verbal contract.

3. It was for the jury to determine, from all the testimony, as to what the contract really was, and it was therefore error to give a peremptory instruction for defendant.

Appeal from circuit court, Boyle county.

"Not to be officially reported."

Action by J. C. Caldwell and others against S. M. Felton, as receiver of the Cincinnati, New Orleans & Texas Pacific Railway Company, to recover damages for the breach of a contract for the shipment of live stock. Judgment for defendant, and plaintiffs appeal. Reversed.

Chas. C. Fox, for appellants. Simrall & Galvin, for appellee.

GUFFY, J. The plaintiff instituted this action in the Boyle circuit court against S. M. Felton, as receiver of the Cincinnati, New Orleans & Texas Pacific Railway Company. The substance of the petition is that plaintiffs contracted with the defendant to ship or transport from Danville, Ky., to Jersey City, N. J., 40 head of cattle, which were placed in two cars 36 feet long, said cattle being then in good order, and were to be transported to Jersey City in said cars. It is further alleged in the petition that the defendant failed to so transport or carry said cattle to Jersey City, and that by reason of gross carelessness and negligence of the defendant the cattle were greatly damaged to an extent of more than \$400, for which plaintiff asked judgment. The substance of the defense is that the defendant, by a written contract, signed in duplicate, only agreed to carry said cattle to the Union Stock Yards in Cincinnati, and there, as agent of the consignor, deliver them to a connecting line, to be shipped or transported to the point of destination, and that they did in said cars deliver said cattle at said point in good condition, and that no damage or injury occurred after they were received at Danville up to the time of the delivery to the connecting line aforesaid. The plaintiffs, by reply, alleged, in substance, that their contract with the defendant was verbal, and that, after the same was entered into, and the cattle delivered to defendant, and after the same had left Danville, defendant did produce a written contract in substance as claimed by it to plaintiffs, and by false representations induced plaintiffs to believe the written contract was the same as that entered into, and which was then being executed; and that the plaintiffs, without reading the contract, and without knowing of its provisions, and believing that it was in accordance with the verbal contract, did sign same. This reply was controverted of record. The plaintiffs asked for a rule upon the defendant requiring him to file the written contract pleaded in the answer, which motion was overruled by the

court. After the issues were fully made up, and testimony of plaintiffs introduced, the court, upon motion of the defendant, gave a peremptory instruction to the jury to find for the defendant, which was accordingly done; and judgment rendered dismissing plaintiffs' petition, and, plaintiffs' motion for a new trial having been overruled, they prosecute this appeal.

Upon the trial, Monte Cox, one of the plaintiffs, was introduced as a witness. He testified that he had an interest in the two car loads of 40 head of cattle which were shipped about January 18th. Witness made a verbal contract with Monroe, agent of defendant at Danville, for the shipment of the cattle, and afterwards signed a written contract for the shipment of the cattle. At this point the court, over the objection of plaintiffs' attorney, required the witness to produce before the court and jury the written contract referred to, to which ruling and order of the court the plaintiffs at the time excepted, and still except. The written contract was then produced, which is as follows: (Then follows the writing relied on by the defendant in its answer.) Witness then stated: "After the cattle had been loaded and shipped, and after they had left the Danville depot on their journey, that he was passing through the depot, and Agent Monroe said, 'Here is the contract; sign it,' and handed me a paper, of which the above is a copy; and I signed it without reading or having it read to me, or knowing its contents, but signed it believing it was the verbal contract which he had made for the shipment of the cattle reduced to writing. I only made one contract for the shipment of the cattle, and that was the verbal contract, and when Agent Monroe presented the written contract for my signature I signed it believing that it was the verbal contract we had made reduced to writing. I never read the written contract until some days after the cattle had been shipped, and I then saw that it was not the contract made for the shipment of the cattle, nor did it contain any of the provisions of the verbal contract, being entirely different." Witness was then asked to state the verbal contract made for the shipment of the cattle; to which the defendant objected, and the court refused to allow the witness to state what the verbal contract was, or its terms, to which ruling of the court the plaintiffs at the time excepted and objected, and still except. Plaintiffs then made the following avowal as to what the witness would have said in answer to this question. The answer of the witness would have been as follows: "I made the contract with the defendant for the shipment of the cattle. The contract was made with Agent Monroe, and the contract was that defendant was to ship and carry the cattle from Danville, Ky., to Jersey City, N. J., and they were to be shipped through from Danville to Jersey City in the same two cars in which they were loaded at Dan-

ville, being what is known as 'Hicks Cattle Cars,' thirty-six feet long; and Agent Monroe said that, if witness would use the two Hicks cars, then at Danville depot, that the cattle would go through in those two cars to Jersey City; and the cattle were loaded in these same cars, nothing being said about freight to Cincinnati, but we discussed the line over which the stock would be shipped from Cincinnati, and agreed that it should go over the Big Four Line, over which line it did go, but nothing was said as to shipment or contract to Cincinnati." The evidence conclusively shows that the cattle were not shipped all the way to Jersey City in the Hicks cars, and that they were injured by reason of being placed in smaller cars. The chief question involved in the controversy was whether the defendant agreed to ship said cattle to Jersey City, N. J., and perhaps, incidentally, whether, under the contract, they should go through in the Hicks cars. It will be seen the contention of plaintiffs is that they had a verbal contract under which the cattle were to be shipped, and the cattle were received under said contract, and really started from Danville under that contract, and that the written contract was presented afterwards, and signed by plaintiffs under misrepresentation as to what it contained; and it will be further seen that the plaintiffs were not allowed to prove what the verbal contract was, which was clearly error upon the part of the court below. If the cattle were to be shipped according to the terms of the verbal contract, and had been accepted and had in fact left Danville under such contract, the signing of the written contract was without consideration, unless it was signed as a substitute for the verbal contract; and therefore invalid, even in the absence of any fraudulent misrepresentations as to its contents. The defendant had the right to contract for the shipment of the cattle to Cincinnati to be delivered to a connecting line. If it made such a contract, the plaintiffs must abide by it. But the defendant also had the right to contract for the shipment of the cattle to Jersey City, and, if it made such a contract, it must abide by and perform the same; and, if it failed to comply therewith, it must respond in damages to the plaintiffs. But the plaintiffs should have been allowed to state the terms and conditions of the verbal contract with the defendant, and it was then for the jury to determine from all the testimony as to what the contract really was. If the written contract was signed by mistake, it results, therefore, that the court erred in refusing to require the defendant to file the written contract. It erred in refusing to allow the plaintiffs to prove what the verbal contract was, and erred in giving the peremptory instruction asked for by the defendant. Judgment appealed from is reversed, and cause remanded, with directions to award plaintiffs a new trial, and for proceedings consistent with this opinion.

51 S.W.—87

LOUISVILLE & N. R. CO. v. ADAMS'
ADM'R.¹

(Court of Appeals of Kentucky. June 14, 1899.)

MASTER AND SERVANT—INJURY TO BRAKEMAN COUPLING CARS—CONTRIBUTORY NEGLIGENCE.

Though a brakeman injured in coupling cars was guilty of contributory negligence in unnecessarily assuming a position more than ordinarily dangerous, yet if the engineer backed the moving cars at an unusual speed, whereby he caused the injury, when he might, by the exercise of ordinary care, have known of the dangerous position of the brakeman, the company is liable; actual knowledge of the brakeman's danger not being necessary to impose the liability.

Appeal from circuit court, Lincoln county.
"To be officially reported."

Action by the administrator of C. M. Adams against the Louisville & Nashville Railroad Company to recover damages for the death of plaintiff's intestate. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Alcorn and E. W. Hines, for appellant. W. G. Welch, for appellee.

HAZELRIGG, C. J. While coupling cars in the service of the appellant, the appellee's intestate received injuries from which he died. This action, brought by his administrator to secure damages for his death, resulted in a verdict and judgment for \$5,000; hence this appeal.

The evidence is abundant that the moving cars which were backed upon the standing or dead one for the purpose of effecting the coupling were moved back at an unusual speed, and came upon the standing car "with a terrible crash," as put by one witness, and with the "loudest noise" ever heard in such work, as said by another, who had lived in the vicinity for nearly 20 years, and had seen such work night and day. Others, who lived from 75 to 275 yards away, were "alarmed" at the noise of the collision. The chief defense was a plea of contributory negligence on the part of the decedent. The issues on this behalf, as well as on the whole case, were very lucidly submitted to the jury by the learned trial judge. The real points of the defense are thus submitted: "If you believe from the evidence in the case that (1) the deceased undertook to make a coupling between the moving and the dead cars without using a coupling stick, and that such omission of this stick was a want of ordinary care or prudence for his own safety; or (2) that in attempting to make the coupling the deceased stood with one foot between the rails, and that such position was a want of ordinary prudence for his own safety; or (3) that in attempting to make the coupling the deceased did so at a point of time when the cars were in motion, and that he knew or had reasonable grounds to know that this was more than ordinarily dangerous; or (4)

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

that for the purpose of making the coupling the deceased entered between the cars from the left side of the train, when the entry from the left side was a want of ordinary prudence for his own safety,—then, on either of such states of fact, the deceased was guilty of ordinary neglect of means and opportunities for his own safety. So, therefore, you are further instructed that, although you may believe from the evidence that defendant's engineer was grossly negligent in the respects mentioned in the first instruction (that is, in moving the cars back at the unusual rate of speed), yet if you further believe from the evidence that the deceased was ordinarily negligent of his own safety in any or all of the respects set forth in this instruction, and that the injury to him would not have happened if he had not been, then you will find for the defendant, unless you further believe that the engineer knew, or might by the exercise of reasonable diligence have known, of the position and conduct of Adams, as herein set forth, in time to have avoided running the cars against him by the use of such available means as were at hand at the time, in which latter state of case you cannot find for the defendant on the grounds of Adams' negligent position or conduct." It seems to us that these instructions covered fully the grounds of the defense, and stated the case very favorably for the company.

It is contended that the engineer was not bound to exercise reasonable diligence to know the dangerous position of the brakeman; but he must have had actual knowledge of it, and failed to use reasonable effort to arrest the danger, before a recovery can be had on this branch of the case. But, while this is the rule generally as to trespassers and wrongdoers, it does not apply to a case when the engineer is backing his train for the purpose of having a coupling made. In that state of case, it is his duty to look out for the danger in his rear, and watch the movements of the brakeman, and use all reasonable care and diligence in ascertaining any danger in which the brakeman may be placed. *Railroad Co. v. Earl's Adm'r*, 94 Ky. 375, 22 S. W. 607. We perceive no error in the case, and the judgment is therefore affirmed.

BRIGHT'S EX'RS v. SWINEBROAD et al.¹ (Court of Appeals of Kentucky. June 2, 1899.)

WITNESSES—HUSBAND AND WIFE—TRANSACTIONS WITH PERSONS SINCE DECEASED.

1. Under Civ. Code Prac. § 606, either husband or wife, but not both, may testify for the wife in an action brought by her alone; but, if the wife elects to have the husband testify, he may not testify as to transactions with a person since deceased, as the wife herself would not be a competent witness as to such transactions.

2. One to whom a note was given in trust for

another by a person, since deceased, is a competent witness for the cestui que trust to establish the gift.

Appeal from circuit court, Garrard county. "To be officially reported."

Action by Kate B. Swinebroad and others against the executors of Greenberry Bright to enforce a trust. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. G. Welch and Hill & McRoberts, for appellants. R. P. Jacobs and R. H. Tomlinson, for appellees.

GUFFY, J. Kate B. Swinebroad instituted this action the 15th of July, 1897, in the Garrard circuit court, against G. B. Swinebroad, trustee, S. Hubble, R. L. Hubble, William Hubble, committee for S. Hubble, and the executors of Greenberry Bright. The claim of the plaintiff is, in substance, that the first-named Hubbles executed their note to Greenberry Bright November 3, 1896, for \$444.06. It also appears from the petition that Greenberry Bright departed this life the 3d of December, 1896, and that during his lifetime, to wit, on the 13th of November, 1896, he gave and delivered to the defendant G. B. Swinebroad, in trust for the plaintiff, the aforesaid note, together with one certain other note; and that said Bright, by his act in giving and delivering said note to said Swinebroad, and by his instructions given at the time of the delivery of the said note on the 13th day of November, 1896, made and constituted the said G. B. Swinebroad trustee for the plaintiff to the amount of \$1,000 in said notes; and that in pursuance to said trust and instructions given to him by the said Greenberry Bright the defendant Swinebroad, on or about January 1, 1897, collected and paid over to plaintiff the proceeds of one note, amounting to \$795.45, but said Swinebroad has not paid over to her the balance of the said \$1,000 of trust money, and that he has now in his possession said note against defendants Hubble, and that there is a balance due to the plaintiff of said \$1,000 to the amount of \$204.55, with interest from the 13th of November, 1896; and that Swinebroad, in not collecting and paying to plaintiff the said \$204.55, with interest, aforesaid, has failed to execute fully the trust imposed on him by said Greenberry Bright, and that he has failed to fully execute the provisions of said trust; that after the execution of said trust there will be a balance of said note against said defendants Hubble going to the executors of said Bright. Plaintiff finally prayed for process against defendants, and that the court compel the said Swinebroad to collect said note, and pay to her the amount aforesaid, and for judgment against Hubbles on said note, and that, after the payment to this plaintiff of the sum aforesaid, the balance on said note to be paid according to the directions of the court; and prays for all proper relief. The court sustained the demurrer of Bright's executors to the petition, with leave

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to plaintiff to amend. The Hubbles indicated their readiness to pay the debt, and also pleaded that they tendered the amount of the note to the executors of Greenberry Bright on the 8th of February, 1897, and demanded the note, which they failed to produce, and announced their readiness to pay the money according to the judgment of the court. An amended petition alleged that the said Bright's acts, in giving and delivering said note to said Swinebroad, and instructing him at the time of said delivery that he gave to said plaintiff \$1,000 of same, the same to be paid out of the proceeds of said note, directed said Swinebroad to collect said note, and, when collected, to pay the \$1,000 to the said plaintiff out of the proceeds of said notes aforesaid, and thereby constituted said Swinebroad trustee for that purpose. A demurrer was sustained to the petition as amended. A second amended petition was filed, making more specific the transaction hereinbefore referred to, and the demurrer of Bright's executors thereto was overruled. The answer of Bright's executors is a denial of the gift or transaction set up by the plaintiff, and pleaded that the said note was placed in the hands of said G. W. Swinebroad, who was an attorney at law, for collection, and for no other purpose; and that as executors they are the owners of and entitled to the possession of said note. Wherefore they make this answer a cross petition against the defendant Swinebroad, and ask that plaintiff's petition be dismissed, and that they be adjudged to be the owners of said note, and finally pray for their costs. The reply of plaintiff is a denial of the affirmative allegations of the answer and cross petition. The answer of G. W. Swinebroad to the cross petition of Bright's executors substantially shows that the notes were placed in his hands for the purpose and under the conditions claimed by plaintiff. The answer of G. W. Swinebroad to the petition of plaintiff shows that he received the notes under the circumstances and directions stated in plaintiff's petition, and prays judgment against the Hubbles on the note in question, and that same be paid over to him, as trustee for Kate Swinebroad, and for all proper relief. After the issues were fully made up, and the proof taken, the court, upon final hearing, overruled the exceptions of Bright's executors to the deposition of G. A. Swinebroad, taken by plaintiff, who, it appears, was the husband of the plaintiff. The court sustained the exceptions of Bright's executors to the deposition of G. B. Swinebroad, the alleged trustee. It further appears from the judgment that plaintiff only read upon the trial so much of G. A. Swinebroad's deposition as was taken in chief, and only that part of Mrs. George Wood's deposition as was taken in chief. Bright's executors declined to read any of the depositions taken in their behalf. The court then adjudged that certain notes, including the note on the defendants Hubble,

were placed in the hands of G. B. Swinebroad to be held by him in trust for plaintiff's use and benefit, and that it appeared that the trustees had collected the sum of \$795.45, which had been paid to plaintiff, leaving a balance of \$204.55, with interest from November 13, 1896; and that the trust to this amount, to wit, \$204.55, with interest aforesaid, attaches to the said Hubble note. The court then adjudges that the Hubbles pay to Swinebroad said sum, with interest as aforesaid, which shall be held by said Swinebroad in trust for the use and benefit of plaintiff, and when said sum is so paid the payment shall operate as a credit to said Hubbles on said note. The case is retained on the docket for the purpose of enforcing this judgment. The counterclaim of Bright's executors is dismissed, and the plaintiff adjudged her costs as against them to be made of assets unadministered. To the judgment adjudging this trust and dismissing Bright's executors' counterclaim Bright's executors except, and pray an appeal to the court of appeals, which is granted.

One of the questions of importance in this case is to determine as to the competency of G. A. Swinebroad, the husband, as a witness. It will be seen from his deposition that he testifies as to conversations, etc., upon the part of Greenberry Bright during his lifetime, which statements and conversations upon the part of Bright tend to sustain plaintiff's claim. It does not appear that the transaction or contract was made with the witness. It will be seen from the deposition of G. A. Swinebroad that he testified, in effect, that the decedent, Bright, told witness' wife and the witness repeatedly that he had \$1,000 to give her, and that she was provided for in his will. These statements were made at different times and places. One of the statements of Swinebroad is as follows: "He (meaning Bright) said to my wife at that time, 'Now I will give you the \$1,000 I have been talking about giving you, and you are also provided for in the will.' He made that statement to my wife in my presence. That statement was made while going to Middlesborough, in July, 1895. All of the statements were made to me and to my wife in my presence." In answer to another question by plaintiff witness says: "He told me on the 12th of November, 1896, or about that date, to tell Bright Swinebroad to come up to his room the next morning, that he had made up his mind, and planned as to how he would give Kate the \$1,000 that he had been promising to her; that he had some notes that he would turn over to him to collect and pay over to his mother. I told Bright Swinebroad what his grandfather had told me, and for him to go and see him the next morning, and he did go." It will be seen from an examination of the transcript that the testimony of the witness in question is very material, and, if it had been excluded, no doubt the court would have rendered a different judgment.

It is earnestly insisted for appellant that the court erred in overruling the exceptions to the deposition of the husband. It is earnestly insisted for appellee that under the law as it now stands the husband was a competent witness; that the property sued for was the individual property of the plaintiff, and that the husband had no control nor pecuniary interest at all in the recovery sought; and we are referred to section 606 of the Civil Code of Practice, which, in effect, provides that in actions which might have been brought by or against the wife, if she had been unmarried, that in such actions either but not both husband and wife may testify. Under the act known as the "Weissinger Act" this suit was prosecuted in the name of the plaintiff alone; and it may be well said that as a matter of law the husband had no pecuniary interest in the controversy, and was not a party to the suit, and inasmuch as the wife did not testify, under the provisions of the Code, *supra*, the husband would be entitled to testify; and to a certain extent this contention is tenable. Under the common law neither the husband nor the wife could testify for or against each other, but the Code of Practice has modified or changed the rule of the common law to the extent indicated in the section hereinbefore referred to. But it is also provided in the same section that no person shall testify for himself concerning any verbal statement, or any transaction with, or any act done or omitted to be done by, one who is dead when the testimony is offered to be given, except for the purpose and to the extent affecting one who is living, and who, when over 14 years of age, and of sound mind, heard such statement, or was present when such transaction took place or when such act was done or omitted to be done; subject, however, to certain other exceptions, which follow in the same section, none of which are applicable to this case. It is clear that the husband was entitled to testify to any fact within his knowledge that the wife could have been allowed to have testified to if the same fact had been within her knowledge, and she had elected to testify instead of her husband. Upon a careful consideration of the authorities and the reason of the law, we are of opinion that the husband could only testify as to such transactions as the wife could have testified to if the same had been within her knowledge. It is clear that the wife was incompetent to testify to the conversations or transactions had with the decedent, or to the promises made by him, and, this being true, we are of the opinion that the husband could not testify to such transactions or conversations; and to that extent he was incompetent, and the court below should have so held.

We are further of the opinion that the court below erred in excluding the deposition of G. B. Swinebroad. He was not a party plaintiff in the action, and had no pecuniary interest whatever in it, and although, in a sense, the trustee of the plaintiff, he was not her agent

in the conversation or transaction had between him and the decedent; hence it seems clear to us that he was a competent witness, and for the purpose of this appeal we will consider his testimony so far as the same is otherwise competent. Taking the competent evidence together, we think the judgment of the court below is sustained by the law and facts, and said judgment is affirmed.

LOUISVILLE & N. R. CO. v. BOWCOCK.¹
(Court of Appeals of Kentucky. June 3, 1899.)

MASTER AND SERVANT—ORDINARY RISKS—
DEFECTIVE RAILROAD TRACK—INJURY TO
BRAKEMAN—DISOBEDIENCE OF RULES AS
CONTRIBUTORY NEGLIGENCE.

1. The risk of injury to a brakeman from the track not being ballasted to the surface at a switch outside the yards of the company is one of the ordinary risks of the service, provided the track is substantially in the same condition as at similar places along the road.

2. Where the ballast has been temporarily removed from between the ties at a switch, and cannot be replaced before dark, either notice should be given to servants having occasion to use the track in discharge of their duties, or a light should be placed there to warn them of the danger, and for injury to a brakeman, resulting from the failure to take such precaution, the company is liable.

3. Ordinary care required to be used by a brakeman for his own safety is such as may be usually expected of persons of ordinary prudence under like circumstances, considering the perils attendant on the business.

4. A brakeman is bound by a rule forbidding brakemen to get between the rails to couple or uncouple cars while in motion, if he knew, or by the exercise of ordinary care ought to have known, it; the company not being required to read the rule to him, but only to give him a reasonable opportunity to learn it, and having a right to presume, especially after he had been for a long time in its service, that he knew how he was required to discharge his duties.

5. Evidence that the rule was habitually violated, with the assent of the company or its officers in charge of plaintiff, is admissible, it being then a question for the jury whether plaintiff was in the proper discharge of his duties, and free from contributory negligence, in going between the rails to uncouple cars.

Appeal from circuit court, Bell county.

"To be officially reported."

Action by J. S. Bowcock against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

J. W. Alcorn and C. W. Metcalf, for appellant. Wm. Lowe, for appellee.

HOBSON, J. Appellee was a brakeman in appellant's service. While in the discharge of his duty in making a coupling, he was caught between the cars of the train, and his leg cut off. For this there was a verdict and judgment in his favor for the sum of \$5,000. The railroad company seeks by this appeal a reversal of the judgment, chiefly on the

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ground that the facts did not warrant a recovery, and that the instructions of the court below did not properly give the law of the case to the jury. The injury occurred at Asher's Mill, which is just south of the station of Pineville. There was a side track there. The train had in it some cars to be left on this side track. Appellee got off at the switch, and opened it, and then walked up by the side of the train to the car next to the tender, to uncouple it, so as to shove it and two other cars onto the side track. When he stepped in between the cars, his lantern was lighted, and hanging on his left arm. The train was moving slowly backwards. He pulled out the pin with his left hand to uncouple the car, and as he did so his lantern went out. He then started to get out from between the cars, and in doing so stumbled, and the brakebeam of the tender ran upon his left foot. He fell, and was dragged 30 or 40 feet. His leg and ankle were crushed to above the knee joint. It was dark, and he says the cause of his fall was his stepping into a hole in the track after his lantern went out. It is earnestly argued for appellant that it was negligence in appellee, and contrary to its well-known rules, to go in between the moving cars for the purpose of uncoupling them, and that, at any rate, his injury occurred from a risk incidental to the service; the proximate cause of it being his lantern's going out, so as to leave him in the dark, and unable to see how to guide his movements. The cause of the lantern's going out is not explained, but was probably due to his having it on the arm with which he pulled the pin while the train was in motion. On the other hand, it is argued for appellee that the proximate cause of his injury was the fact that the place where he was called upon to discharge his duties was not safe for this purpose, and that his fall was due to the hole into which he stepped in the dark, which defendant should not have suffered to be there. The rule is well settled that in its station yards or yards where trains are made up the railroad company should have its track reasonably safe for the discharge of such duties as its employes are there required to perform, and to this end such places should be surfaced up, and free from holes endangering the safety of its employes in the ordinary discharge of their duties. But this rule does not apply to the track of the railroad at other places than such yards. It is notorious that railroad tracks are not usually surfaced up in this state at side tracks for small stations, mills, etc. There is evidence in this case that the track at this point was in the condition as at other similar places along the road, with no holes in it, except the ends of the ties were not surfaced up. In entering appellant's service appellee assumed the risks ordinarily incidental thereto. This would include risk of injury from the track not being surfaced up if the place where appellee was hurt was substantially in the same condition

as similar localities along the road. *Ragon v. Railway Co.*, 97 Mich. 265, 56 N. W. 612; *Batterson v. Railway Co.*, 53 Mich. 125, 18 N. W. 584; 8 Elliott, R. R. §§ 1272, 1296; 2 Shear. & R. Neg. § 406, notes. But there was proof for appellee which tended to show that on the day before the accident the section men were at work on the track at this point, and had taken out all the filling or tamping between the ties; that they went away, and left it in this condition, and, after appellee was hurt, came back the next morning, and filled it up again. If all the tamping was taken out from between the ties, it would leave a deep hole there, which would well cause a man to fall if he stepped in it in the dark while uncoupling a moving train. Such a hole would be peculiarly dangerous, because, the track having been theretofore, according to the evidence for appellant, in good condition, appellee would have no reason to apprehend the danger, as the tamping was not taken out when he went over that part of the track on his last trip. In *Railroad Co. v. Kier*, 41 Kan. 661, 21 Pac. 770, a brakeman sued for injuries received from his stumbling while going in to uncouple a moving train. For a long time before the time of his injury the ground where the switch was located had been solid and hard. He was well acquainted with its condition, and on the morning of that day, as he went out, had used the switch in its usual good and safe condition; but before his return the company had deposited about the switch several car loads of cinders, and left them in great heaps and piles upon either side of the track, so spongy and soft that a person stepping upon them would sink into them to a considerable depth. On his return, which was after dark, he stepped upon the ground, in ignorance of its changed condition, and by reason of the cinders tripped, and fell between the cars. The cause of his fall was his sinking in the cinders, which rendered it dangerous for him to discharge his duties in the usual way at that switch. It was held by the court that it was the duty of the railroad company to keep its track in a reasonably safe condition, and that it was under obligation to its servants not to induce them to work in a place of danger under the notion that it was safe; that the master assumes the duty towards his servant of exercising reasonable care to provide him with a reasonably safe place at which to work, and that, if the dumping of the cinders left the roadbed in a dangerous condition, and Kier, while in the discharge of his duty to uncouple the car, while moving slowly, without any notice of the recent change in the condition of the roadbed, was thrown under the train on account of the dangerous condition of the ground at the switch, the railroad company would be liable. After citing several cases supporting this conclusion, the court says: "Counsel contended that if the plaintiff was entitled to be notified of the

changed condition of the roadbed or yard, then every other employé would be equally entitled to like notice, and therefore that the company would be seriously embarrassed in the operation of its road. As we have already decided that a railroad company is liable to any one of its servants operating its road for the negligence of either one of its servants whose duty it is to keep the road in a reasonably safe condition, and who culpably fails to perform such duty, or to give proper warning, we deem it unnecessary in this case to give further or additional reasons for the support of the law as declared by this court. It would seem to us, however, not very difficult or expensive, if a bridge, track, roadbed, or yard of a railroad company is in a dangerous condition, for the foreman having charge of the section or work to place thereon at night danger signals like red lights so as to give warning to all the servants or employés of the company." A similar ruling was made in *Lewis v. Railroad Co.*, 59 Mo. 495, where a deep hole had been dug by the side of the track to set a post a day or two before the accident, and left open so that a brakeman in discharge of his duty, without notice of the danger, stepping into it, stumbled, and, falling between the cars, was injured. The court said: "The legal implication is that the roads will have and keep a safe track, and adopt suitable instruments and means with which to carry on their business. They can provide all these by the use of the requisite care and foresight, and, if they fail to do so, they are guilty of a breach of duty, and are liable for the consequences."

* * * Under this rule it is held that the companies are liable for the existence of all defects which they knew, or by reasonable care and diligence might have known." In this quotation the court used substantially the language of Chief Justice Bigelow in *Snow v. Railroad Co.*, 8 Allen, 441, where a brakeman had been injured by reason of a hole in a plank laid down between the rails at a point where a highway crossed the track, he having stepped into the hole, and fallen, in the discharge of his duty, by reason of it.

The removal of all the ballast or filling from between the ties at the switch where appellee was injured made it necessarily dangerous for a man to go in between the cars at that point, while they were moving, to make a coupling, because, if he did not know that the tamping had been taken out, and in moving along with the car should place his foot between the ties in the dark, he would be very liable to stumble and get hurt. Such a condition of the place where he was required to discharge his duty should not have been left without notice to him of the change, because he had a right to assume, until he learned to the contrary, that the place was in its normal or usual condition. If the tamping is removed from such places, and cannot be replaced before dark, either notice should be given to those servants having occasion to use it in discharge of their

duties, or a light should be placed there to apprise them of their danger. The duties of a brakeman are peculiarly perilous, and proper regard for human life will not permit that the places where they are to work shall be left in such condition, without their knowledge, as to imperil their lives in the necessary rendition of the services assigned them.

The instructions given on the trial were not in accord with the principles we have stated. The proof showed that appellee had been in the service of appellant for several years, and was familiar with the track at this point. There was no proof of the existence of any hole or defect in the track for which appellant would be liable if it was in its usual condition. Whether it was in its usual condition, or the tamping had all been taken out from between the ties, with no filling left between them, as above described, the proof was very conflicting. Under the evidence the court should have told the jury that in entering appellant's service appellee assumed all the risks usually incidental to it, and that, if he was caught and injured by reason of the track not being surfaced up, when it was in its usual condition, as it had been theretofore, appellant was not liable; but that if, shortly before the injury, appellant took the tamping from between the ties, and, without notice to him, left it in a more dangerous condition for the necessary discharge of his duties than might be reasonably expected from the exercise of ordinary care on the part of appellant, and that if, by reason of this, the injury occurred, appellee was entitled to recover, unless he failed to use at the time ordinary care for his own safety, and, but for this, he would not have been injured. Ordinary care is such as may be usually expected of persons of ordinary prudence under like circumstances, considering the perils attendant upon the business. On the return of the case to the court below appellant may be allowed to file its amended answer heretofore tendered so as plead contributory negligence by appellee in going between the cars and uncoupling the train as he did.

Appellant offered in evidence a rule forbidding brakemen getting between the rails to couple or uncouple cars while in motion. Appellee denied knowledge of the rule, and said it was habitually disregarded by appellant. The rule may be admitted in evidence on another trial, for appellee cannot recover if he got between the rails, and so got hurt, in violation of his duty. He was bound by the rule if he knew, or by the exercise of ordinary care ought to have known, it. Appellant was not required to read the rule to him, but only to give him a reasonable opportunity to learn it; and had a right to presume he understood, especially after he had been so long in its service, how he was required to discharge his duties. *Alexander v. Railroad Co.*, 83 Ky. 589. If, however, the rule was habitually disregarded by appellant or its officers superior in authority to appellee, and he was expected by his superior officer to go in between the rails,

while the cars were in motion, to couple or uncouple them, the rule would be no bar to a recovery in this action. 3 Wood, R. R. § 382; Railroad Co. v. Foley, 94 Ky. 220, 21 S. W. 866. The rule may be given in evidence, and the testimony that it was habitually violated, with the assent of the company or its officers in charge of appellee, may also be admitted, and it will then be a question for the jury on all the evidence whether appellee was in the proper discharge of his duty, and free from contributory negligence, in going between the rails at the time in question to uncouple the cars. Judgment reversed, and cause remanded for a new trial and further proceedings not inconsistent with this opinion.

TILFORD et al. v. DOTSON.¹

(Court of Appeals of Kentucky. June 6, 1899.)

VENUE OF ACTION—ENFORCEMENT OF LIEN ON STANDING TREES—CONSTRUCTION OF CONTRACT FOR SALE OF TREES.

1. Service of process in the county in which the action was brought gives jurisdiction to render judgment for the price of logs sued for, and to enforce a lien on the logs, though it be also sought to enforce a lien on real estate situated in another county.

2. Standing trees marked and designated and sold in contemplation of immediate severance from the soil are personal property, and an action to enforce a vendor's lien thereon may be brought in a county in which none of the trees are situated.

3. Plaintiff sold trees to defendants, who undertook "to cut at the rate of one hundred trees and deliver the same on the banks of floating water every thirty days, and to float the same to some point of the railroad"; the contract stipulating that, "as soon as said logs can be floated and delivered to a line of railroad, they are to be paid for at the rate of ten dollars per tree for every lot of 100 trees delivered as aforesaid," and that, if the defendants "shall at any time fail to cut and deliver on floating water as many as one hundred trees within every thirty days, then they are to pay at the expiration of the thirty days the same sum as if the said hundred trees required to be delivered on floating water had been delivered on a line of railroad, unless they are prevented from so delivering by reason of the fact that said streams will not float said logs." *Held*, that defendants were bound to cut and deliver on the bank of floating water 100 trees every 30 days, regardless of whether there was sufficient water to float them to a railroad or not, but the purchase price not to be paid till the logs were floated to a railroad, unless defendants delayed the floating when there was sufficient water, the several sums to bear interest from the date at which they were due.

Appeal from circuit court, Breathitt county.
"To be officially reported."

Action by N. B. Dotson against F. V. Tilford and others to recover the price of trees sold, and to enforce a vendor's lien thereon. Judgment for plaintiff, and defendants appeal. Affirmed.

Stone & Sudduth, John C. Miller, and Alex G. Barrett, for appellants. Beckner & Jouett, for appellee.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

WHITE, J. This action was brought by appellee, Dotson, in the Breathitt circuit court, to recover of appellants \$15,000, balance alleged to be due for walnut trees sold to them, and to enforce a vendor's lien retained on the trees, logs, and lumber therefrom. Some of the logs and lumber were in Breathitt county, and personal service was had in Breathitt county. At the time of the contract neither the appellee nor appellants resided or were in Kentucky, and the trees were standing in the counties of Pike, Knott, Letcher, Perry, and Leslie. The trees were all marked, and the written contract of sale describes them so that they may be found. The contract provides for the sale of some 2,000 trees, any loss to be deducted, at the price of \$10 per tree. A cash consideration of \$5,000 was paid, and for the balance the contract provides: "And it is agreed and understood by and between the parties hereto that the said second parties [appellants] are to cut at the rate of one hundred trees and deliver the same on the banks of floating water every thirty days from this date, and are to float the same to some point of the railroad, and, as soon as said logs can be floated and delivered to a line of railroad, they are to be paid for at the rate of ten dollars per tree for every lot of one hundred trees delivered as aforesaid; and if the second parties [appellants] shall at any time fail to cut and deliver on floating water as many as one hundred trees within every thirty days from this date, except as to the first one hundred trees to be delivered under this contract, then the said second parties are to pay the said first party at the expiration of the said 30 days the same sum as if the said hundred trees required to be delivered on floating water had been delivered on a line of railroad, unless they are prevented from so delivering by reason of the fact that said streams will not float said logs." This contract was made January 16, 1894, and this action was filed May 10, 1895. It was alleged that, although all the trees had not been cut and delivered as the contract provided, yet the appellants were at fault for this not having been done, as sufficient water had been in the streams to float same as was contemplated. There was no attachment, but the action sought a judgment for the balance due, and for a decree of foreclosure of the vendor's lien on the trees and logs, giving full description. There was a special demurrer to the jurisdiction of the Breathitt circuit court, which was overruled and exceptions reserved. The answer presents the defense of no title to many of the trees, destruction of others of the trees, and a claim for rebate or deduction on that account, and a denial that there is due appellee anything according to the contract; denying that the trees had been cut and delivered, or that there was floating water sufficient to have carried them if cut and on the banks of the streams; also, pleaded several suits whereby they were prevented from removing

trees embraced in the contract; also, pleaded a counterclaim for damages by reason of the fact, as alleged, that the trees in the contract are not the trees actually shown appellants before it was made, and are worth much less in value; and for this difference in value damages were sought. Upon these questions issues were formed, and much proof was taken. During the progress of the case, by an agreement, two persons were selected by the parties to take the contract, and go and find the trees called for, and measure them, and ascertain the number in existence, or that had been cut by appellants, and to report to court. These persons filed a report, and to this report exceptions were filed by appellants. On hearing before the court, the exceptions filed to the report as to the number of trees was overruled, and the court found that the total number of trees, as embraced in the contract, including 105 supplied in lieu of others, was 1,838 trees, and gave judgment for \$18,380, less the \$5,000 cash payment; also, found that there were 73 defective trees, not included in the contract, but which were cut and taken by appellants, and of the value of \$225. In rendering judgment, interest was allowed on \$3,000 from March 13, 1896, and on \$1,000 from each of the months of July, August, September, October, November, and December, 1894, and from January, February, and March, 1895, and on the balance, \$380, from April, 1895, and on \$225 from March 13, 1896. The court also decreed a sale of the trees and logs to satisfy the judgment, and from that judgment this appeal is prosecuted.

It is seriously insisted by counsel for appellants that the Breathitt circuit court did not have jurisdiction of the action, and that the special demurrer should have been sustained. Counsel urge that the action, being in equity to enforce a vendor's lien on standing trees, duly marked, and to be removed in the immediate future, is an action for the sale of real property under a lien, and is governed by subsection 3, § 62, Civ. Code, providing that such actions must be brought, except for debts of decedents, in the county in which the subject of the action, or some part thereof, is situated; that the only part of the property sought to be subjected that was in Breathitt county was the logs that had been cut and removed,—personalty. We are of opinion that the Breathitt circuit court, upon service of process in that county, had jurisdiction of the person of the appellants, to render a personal judgment for the amount found to be due, and to decree a sale of such logs—personalty—as were found in that county. This proposition can hardly be questioned. This would be true although it were sought to subject realty in other counties, also, to the payment of the debt. We are also of the opinion that the court had jurisdiction to decree a sale of the trees embraced in this contract standing in the counties of Leslie, Perry, Letcher, and Pike. We do not assent to the

proposition that standing trees, marked and designated and sold in contemplation of immediate severance from the soil, are realty. In our opinion, these trees embraced by this contract are personalty. In the case of *Cain v. McGuire*, 13 B. Mon. 341, and in the case of *Byassee v. Reese*, 4 Metc. (Ky.) 372, this question was expressly determined. In the latter case the court said: "The first question is whether or not a sale of standing trees is embraced by that provision of the statute of frauds which relates to contracts for the sale of land. This question has produced some conflict of opinion. But, according to the weight of authority, a sale of standing trees, in contemplation of their immediate separation from the soil by either the vendor or vendee, is a constructive severance of them, and they pass as chattels, and consequently the contract of sale is not embraced by the statute." In the subsequent case of *Moss v. Meshew*, 8 Bush, 187, this court, construing the case of *Byassee v. Reese*, said: "The court says that a sale of standing trees, in contemplation of immediate separation from the soil, is a constructive severance of them, and they pass as chattels. As the title to trees standing upon land and sold in this way vests in the purchaser, as in the sale of any other personal chattel, this contract relied upon by the appellee as a defense must be regulated and determined by the well-established principles of law applicable to the sale and delivery of personal property." These authorities were followed by the superior court in the case of *Cardwell v. Atwater*, 15 Ky. Law Rep. 570. It may be, as counsel contend, that the weight of authority outside of this state is against this view; but we consider the question well settled in this state, and we would not feel authorized to disturb this rule at this day, if we differed from the opinions above. The fact that the contract of sale is made in the form of a deed signed by appellee and wife does not change the character of the property from personalty into realty, no more than did the fact that appellants did not have the contract recorded as a deed change or affect the character of the property.

From the proof and report of the two disinterested persons who went on the ground and measured the trees and counted the number, we are of opinion that the judgment of the lower court as to the number of trees embraced in the contract (1,838) is correct. We are also of opinion from the proof that the amount found as the value of the 73 defective trees (\$225) is not error. We are also of opinion that by the terms of the contract the appellants were bound to cut and deliver on the bank of floating water 100 trees every 30 days; this to be done regardless of whether there was sufficient water to float them to a railroad or not. The purchase price was not to be paid till the logs were floated to a railroad, unless these appellants delayed the floating when there was sufficient water. The lower court, taking this view of the contract,

fixed the dates from which the several deferred payments of \$1,000 each should bear interest. As to these findings there is no error. We are also of opinion that there was no failure of title as to the 1,838 trees, and the judgment of the court on this question was for the number of trees actually in existence, and those theretofore cut by appellants and embraced by the contract, at the contract price of \$10 per tree. Finding no error, the judgment is affirmed.

LOUISVILLE & N. R. CO. v. BRANTLEY'S ADM'R.¹

(Court of Appeals of Kentucky. June 13, 1899.)

LIMITATION OF ACTIONS—DELAY OF PERSONAL REPRESENTATIVE TO QUALIFY.

Under Ky. St. § 2516, providing that an action for an injury to the person of plaintiff shall be commenced within one year next after the cause of action accrued, "and not thereafter," and section 2526, providing that if a person entitled to bring such an action "dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, the action thereon may be brought by his representative after the expiration of that time, if commenced within one year after his qualification," the death of the person injured does not stop the running of the statute; and, if one year elapses after the injury before the qualification of a personal representative, the bar is complete, section 2526 having no application except where the personal representative qualifies before the expiration of the period of limitation.

Appeal from circuit court, Christian county.

"To be officially reported."

Action by the administrator of John L. Brantley against the Louisville & Nashville Railroad Company to recover for pain and suffering. Judgment for plaintiff, and defendant appeals. Reversed.

B. D. Warfield, Joe McCarroll, and H. W. Bruce, for appellant. E. W. Hines, Breathitt & Fowler, and Cullop & Kessinger, for appellee.

HAZELRIGG, C. J. In July, 1891, John L. Brantley, while in the service of the appellant, received injuries from which he died within a few hours. In May, 1895, this action was brought by his administrator for damages to his intestate by reason of his pain and suffering. The statute of limitations was pleaded, but held by the trial court not to apply, and this is the controlling question in the case. It will be seen that some three years and 10 months elapsed from the accrual of the cause of action until the institution of the suit, whereas the section under which the limitation in such actions is fixed provides as follows: "An action for an injury to the person of the plaintiff, or his wife, child, ward, apprentice, or servant, or for injuries to person, cattle or stock by railroads, or by any company or corporation; an action for a malicious prosecution, conspiracy, ar-

rest, seduction, criminal conversation or breach of promise of marriage; an action for libel or slander; an action for the escape of a prisoner arrested or imprisoned on civil process, shall be commenced within one year next after the cause of action accrued, and not thereafter." Gen. St. c. 71, art. 3, § 3; Ky. St. § 2516. The words "and not thereafter" are not found in the corresponding section of the Revised Statutes fixing the limitation of the actions indicated above, and it is contended they were added for the express purpose of precluding the application of the following provision of the General Statute: "If a person entitled to bring any action mentioned in the third article of this chapter dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, the action thereon may be brought by his representative after the expiration of that time, if commenced within one year after his qualification." Gen. St. c. 71, art. 4, § 3; Ky. St. § 2526. The "third article" referred to in the section last quoted contains numerous provisions as to the limitation of actions other than the provision fixing the limitation of actions for personal injuries, malicious prosecution, etc.; and it is said there is therefore ample room for the operation of section 3, art. 4, as to the limitation of actions. The words "and not thereafter" do not occur in any other of these sections of article 3, and the nature of the actions in these other sections are not such as to demand so speedy a settlement of the issues of the suit, if any were to be instituted. Inasmuch as it is permissible under our statutes to grant original administration during a period of 20 years after the death of the testator or intestate, the application of the section last quoted to the causes of action mentioned in section 3, art. 3, would give, it is argued, a right of action for personal injuries, injuries to cattle, etc., for a period of 21 years from the accrual of the cause of action. We cannot believe that the legislature intended to elongate the time for bringing actions on demands of the character indicated to such an unreasonable period. But whether the words "and not thereafter" were added to the section for the purpose of making the limitations as to these actions an exception to the provisions of the subsequent section is at least very doubtful. In *Carden v. Railroad Co.* (March 25, 1897) 39 S. W. 1027, this court held that, when the action was for the death of the person, the limitation was one year, under the section we have first quoted, and being the same section which controls in this case. The court said in that case: "It is admitted by plaintiff that if the cause of action had accrued to his intestate in her lifetime, the running of the statute would not be stayed by her death until the grant of administration, but, having begun, would have continued; and it is not easy to see why, on principle, any distinction should be made between the case where

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

cause of action accrued in the lifetime of an intestate and where it does not accrue until after her death. The only reason that can be given why the statute should not run in any case is that there is no person to sue, and no person to whom laches can be imputed. But it seems to us that the reason applies to one case as well as to the other, and, if an exception is allowed in favor of the one, it ought to be extended to the other." From necessity and the reason of the thing, the statute of one year was applied in the Carden Case, although logically, as must be admitted, the cause of action did not accrue until after the death of the intestate; and it never accrued to the deceased at all, but to the personal representative. There is no such difficulty in applying the statute in the present case. The cause of action confessedly accrued to the injured person in his lifetime, and confessedly, too, his death did not stop the running of the statute. But, while the addition of these words "and not thereafter" might seem significant as argued, and might, indeed, be held sufficient, if absolutely necessary, to support appellant's contention that the same period of limitation was intended to be prescribed in actions growing out of the same transaction, yet in view of a construction of the two sections, to be suggested presently, which accomplishes the same result substantially, we do not feel authorized to give the words quoted the importance contended for. To do so would certainly lead us to ignore entirely the provisions of the last section, if they are held to apply; and that they do apply can hardly be denied. It seems to us, however, that the true meaning of the sections, when taken together, is plain enough. Under the first section quoted the limitation is one year from the injury. The death of the injured party does not stop the running of the statute; therefore, unless a personal representative shall qualify within one year from the injury, the action is barred. If he does so qualify, he is given another year within which to bring the action. The last section is entirely silent as to when there is to be a qualification. It permits the personal representative to bring his suit after the first year is out, but it in no way affects the question as to when he is to qualify in order to stop the running of the statute. As we have already seen, the bar is complete unless there is a qualification within a year from the accrual of the cause of action. Taking the two sections together, there is, we believe, no difficulty whatever as to the meaning. As we have seen, the death does not stop the running of the statute. This is held in an unbroken line of decisions. Without a qualification, then, the bar is complete. Therefore the qualification, to be effectual, must be within the year, and that, being within the year, the suit may be brought, as the last section says, after the expiration of the year, if commenced within one year after the quali-

fication. No suit can be maintained by one who has waited until the bar is complete before bringing his action. Only his qualification within the year stops the statute from running, and this does stop it under the last section, because, the moment he qualifies, that section interposes to give him another year in which to sue. This action is barred by time, and the case is remanded for judgment accordingly.

FARMER v. BANK OF WICKLIFFE.¹

(Court of Appeals of Kentucky. June 9, 1899.)

PARTNERSHIP—POWER OF PARTNERS TO BIND FIRM—QUESTION OF LAW.

1. In commercial partnerships, the extent of a partner's power to bind the firm is a question of law.

2. The partnership being a commercial one, an agreement with a bank, by a partner in the tobacco commission warehouse business, that the firm would pay promptly drafts drawn by a certain person on the firm if the bank would cash them, was within the apparent scope of his authority, and therefore binding on the firm, especially when the agreement was ratified by the payment of a large number of drafts so drawn.

Appeal from circuit court, Ballard county.

"Not to be officially reported."

Action by Bank of Wickliffe against L. D. Burton on a draft. Judgment for plaintiff, and John W. Farmer, who intervened claiming attached property, appeals. Affirmed.

Bishop & Hendrick and Thos. E. Moss, for appellant. Bugg & Wickliffe, for appellee.

BURNAM, J. In July, 1896, appellee cashed a draft for \$750 drawn by L. D. Burton on Farmer & Ethridge, who were conducting a tobacco commission warehouse business in the city of Paducah, which, upon proper demand, they refused to pay; whereupon appellee instituted this suit against Burton, asking a personal judgment against him for the amount of the draft, and also sued out an attachment, which was levied upon a lot of tobacco stored in a warehouse in the possession of Burton, in Ballard county. About the time of the commencement of this suit, John W. Farmer instituted a suit against his partner, C. L. Ethridge, in the McCracken circuit court, alleging that Ethridge had abandoned his residence in this state, and was largely indebted to the firm of Farmer & Ethridge, and prayed for a dissolution of the partnership, and for a judgment against Ethridge for the amount due; and he also sued out an attachment against Ethridge, which was levied upon the same tobacco in the warehouse in Ballard county as the property of Ethridge; and, on the 10th day of August thereafter, Farmer intervened in the suit which had been instituted in Ballard county, set up his attachment and the levy thereof on the tobacco as the property of Ethridge, and alleged that, in 1893, he and Ethridge had formed a partnership, under the firm name of Farmer &

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Ethridge, to carry on, in Paducah, Ky., a general tobacco warehouse commission business, which they had since conducted; that, while this partnership was in full force and operation, Ethridge, on his individual account, had employed the defendant Burton to buy, handle, prize, and ship tobacco to the firm of Farmer & Ethridge, in Paducah, Ky., to be sold by the firm for him, and that, by agreement between appellant and Ethridge, the firm of Farmer & Ethridge was to furnish Ethridge all the money necessary for this purpose; that, pursuant to this contract, Burton purchased the tobacco covered by the attachments for Ethridge; and asked that the tobacco be subjected to the payment of the debts due the firm of Farmer & Ethridge by Ethridge. Whereupon appellee amended his petition, and said that when defendant, L. D. Burton, first began buying tobacco in the town of Wickliffe, in February, 1896, that C. L. Ethridge, a member of the firm of Farmer & Ethridge, came with defendant to their banking house, and informed them that Burton was authorized to draw on the firm of Farmer & Ethridge drafts not to exceed, in the aggregate, \$40,000, and agreed with them that, if they would cash these drafts so made by Burton on the firm of Farmer & Ethridge, they would honor each and all of them; that immediately thereafter Burton began drawing his drafts for various sums through appellee bank on the firm of Farmer & Ethridge, all of which were promptly paid, except the one sued on; and they charge that this agreement made with Ethridge had never been countermanded by the firm. All of these allegations were denied by appellant. A trial before a jury resulted in a verdict and judgment in favor of appellee for the amount of the draft sued on, and, a motion for a new trial having been overruled, the case is brought here for revision.

It is insisted that none of the facts upon which the verdict of the jury was made to turn by the instructions were pleaded or proven by appellee. The testimony bearing upon the issue raised by the pleading is confined to the testimony of T. M. Dickey, the cashier of the bank, on one side, and Farmer, on the other. Dickey testifies that "in February, 1890, Ethridge came to his place of business in company with Burton, and informed him that he wanted to make some arrangement for the bank to advance money to Burton or cash drafts drawn by him on the firm of Farmer & Ethridge on 30 days' time; that the bank declined to do this, but finally agreed to cash said drafts drawn by Burton on Farmer & Ethridge for one-fourth of 1 per cent. commission; that this agreement was made wholly with Ethridge; that Ethridge informed him that Farmer & Ethridge were doing business in Paducah, Ky.; that, pursuant to this agreement, Burton commenced drawing drafts on Farmer & Ethridge in February or March, all of which were paid except the one sued on; that these drafts

amounted, in the aggregate, to about \$10,000, and were drawn from time to time as needed, and promptly paid." Farmer testifies that, "under agreement between himself and Ethridge, he was to manage the finances, and all loans, advances, and sales made by the firm; that Ethridge was to solicit business, and act under his direction, but that no loans should be made except by his direction; that, in the latter part of 1895, he agreed that the firm would loan to Ethridge money to be used in buying tobacco in the neighborhood of Wickliffe, upon the condition that the tobacco should be shipped to the warehouse of the firm to be sold; that, under this agreement, Burton bought the tobacco attached as the agent of Ethridge; that Burton had no interest in it, nor did the firm of Farmer & Ethridge; that he had not authorized Ethridge to make any arrangements or contracts with the Bank of Wickliffe to cash drafts drawn or to be drawn by Burton, and that Ethridge was not authorized to make such arrangements; that the firm frequently advanced money on tobacco in the warehouse, and did loan money to farmers on their tobacco, and to other persons to buy tobacco, with the understanding that it was to be shipped to their warehouse and sold by them; that it was the habit and custom of the firm of Farmer & Ethridge to make arrangements with parties to buy tobacco in the country and ship to them, and that they loaned and advanced money to those parties, with a view of promoting and extending their business as warehousemen; that the firm had no account with Burton, and that he was only known as the agent of Ethridge, to buy the tobacco." The testimony of appellant shows clearly that he and his partner were carrying on the business of tobacco warehousemen, in the usual and customary manner in which such ventures are conducted; and while he testifies to a private understanding, between himself and partner, that he was to have exclusive charge of the finances of all the business, there is no pretense that the public or appellee had any knowledge of this understanding. The rule, in all such partnerships, is that each partner possesses prima facie full and absolute authority to bind all the partners by his acts or contracts in relation to the business of the firm, in the same manner, and to the same extent, as though he was expressly authorized by power of attorney from them; and as between the partners and third persons who deal with them in good faith, without notice of limitation upon his apparent authority, it is immaterial whether the partner is acting fairly with his co-partners or not. The simple question is whether he acted within the scope of his apparent power, professedly for the firm. See *Colly. Partn.* p. 650. In commercial partnerships, such as the one we have here, the extent of the partners' power to bind the firm is a question of law; and we are of opinion that the contract entered into by Ethridge

with appellee to cash these drafts drawn on the firm, under an agreement that they would be paid promptly, was one within the scope of his apparent authority, and is binding upon the firm, especially when this agreement was ratified by the payment of a large number of drafts so drawn. The jury were told by the instructions in this case that it was necessary that Ethridge should have had permission from his partner, Farmer, to enter into the contract with appellee, or that Farmer subsequently ratified it, before he was liable. This is not the law of commercial partnership, and, while the instructions were erroneous in this particular, they were not prejudicial to the rights of appellant, but, on the contrary, they were more favorable to him than the law authorized. We are of the opinion that the verdict in this case is in accordance with the law and rights of the parties; wherefore the judgment is affirmed.

BELMONT'S EX'R v. TALBOT et al.¹

(Court of Appeals of Kentucky. June 9, 1899.)

PRINCIPAL AND AGENT—AUTHORITY OF AGENT TO MAKE WARRANTY.

1. The superintendent of a stock farm owned by a nonresident, having authority to sell a horse on the farm belonging to his principal, had authority to make a warranty.

2. Where an agent to sell a horse entered him at a public sale, the principal is bound by the agent's representations as to soundness, which were repeated by the auctioneer, though there was no custom to warrant at such sales.

Appeal from circuit court, Fayette county.

"Not to be officially reported."

Action by William Talbot and others against August Belmont's executor for breach of warranty in the sale of personal property. Judgment for plaintiffs, and defendant appeals. Affirmed.

Breckinridge & Shelby, for appellant.
Bronston & Allen, for appellees.

HOBSON, J. August Belmont, appellant's testator, a resident of New York, owned a stock farm, known as the "Nursery Stud," four miles from the city of Lexington, in Fayette county. He had placed in charge of this establishment, as superintendent, Mr. Speigelthal. The business of the Nursery Stud was the breeding and raising of thoroughbred horses for sale, including a number of stallions kept for breeding purposes. Among the stallions was one called Prince Leopold. On December 3, 1889, there was a public sale of horses at Lexington, and this stallion was entered in this sale beforehand by Mr. Speigelthal, under authority from Mr. Belmont. At the time of the sale Mr. Speigelthal, the superintendent, was present with two other persons who had the care of the horses at the farm. At the time of the sale it was noticed that the scrotum of Prince Leopold was enlarged, and, attention being

called to this, it was stated that a short time before he had been operated on for hydrocele, but had recovered, and was sound. These statements were made according to the testimony both by Speigelthal and one of the other persons with him in charge of the horses, and repeated by the auctioneer. On the faith of these statements, appellees bought the stallion for \$2,000, and, he proving unsound, they brought this suit upon the warranty. The jury having found all the issues of fact in their favor, the only question before us on this appeal is the correctness of the instructions of the court below.

It is insisted for appellant that he is not bound by the statements of the auctioneer, as Mr. Belmont had not authorized a warranty of the horse, and it was not usual for the auctioneer to warrant horses sold at such sales. There being no custom to warrant at this public sale, it may be that a warranty by the auctioneer would not bind Mr. Belmont, if that had been all. But Speigelthal was his superintendent, in charge of the farm, with possession of the horse, and authority to sell him. The representations having been made both by Speigelthal and his assistant, the auctioneer, in repeating them, was only their mouthpiece, and we think it clear that the superintendent of the farm should be held to bind his principal, when, upon his assurances that the horse was sound, an innocent party was induced to pay \$2,000 for a horse that was in fact unsound. It was at least within the apparent scope of his authority. He was not a special agent, but a general agent having charge of his principal's business in this state. In *Schuchardt v. Allens*, 1 Wall. 359, the court said: "Authority without restriction to an agent to sell carries with it authority to warrant. *Andrews v. Kneeland*, 6 Cow. 354; *The Monte Allegre*, 9 Wheat. 616."

In *Story*, Ag. § 59, it is said, citing many authorities: "So a servant intrusted to sell a horse is clothed by implication, unless expressly forbidden, to make a warranty on the sale." If Mr. Belmont had been present at this sale, it would not, of course, be contended that he could keep appellees' money, and repudiate his own statements on the faith of which the money was paid. But Speigelthal, within the apparent scope of his authority, represented his principal; and appellees, having in good faith acted on his statements, and having a right to do so, the same rule must be applied as if these statements had been made by Mr. Belmont in person. Speigelthal was his factotum in the state so far as this sale was concerned; for Mr. Belmont had no communication with the auctioneer, and Speigelthal was at the sale to have the horse sold, and with full power to control the terms of the sale. It is very clear that, if a loss here must fall on either appellees or appellant, it should fall on him whose agent misrepresented the horse, and so got for him money which would not otherwise have been

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paid to him. There was no error in the admission or rejection of evidence. The instructions fairly presented the case to the jury, and the testimony warranted their finding. Judgment affirmed.

CLARKE et al. v. SEAY (two cases).¹

(Court of Appeals of Kentucky. June 8, 1899.)
LIMITATION OF ACTIONS—DISCOVERY OF FRAUD—TRUSTS—ABSENCE FROM STATE.

1. Plaintiff's action for her share of the money collected by defendants, her co-heirs, on a judgment for mesne profits, on the ground that her name was by fraud omitted as plaintiff from the action in which the judgment was rendered, is barred by limitation, more than five years having elapsed since she might by ordinary diligence have discovered the fraud, if any.

2. If the money collected on the judgment was a trust fund the trust was an implied one to which the exception of the statute of limitations does not apply.

3. Plaintiff's right of action against defendants for her share of the mesne profits collected by them was not postponed until her share of the land had been allotted to her in partition.

4. Ky. St. § 2531, providing for the suspension of the statute of limitations during the debtor's absence from the state does not apply to non-resident debtors.

Appeal from circuit court, Carter county.

"Not to be officially reported."

Action by Louisa L. Seay against James L. Clarke and others to recover money collected by defendants on a judgment. Judgment for plaintiff, and defendants appeal. Reversed.

Lewis M. Dembitz, for appellants. E. B. Wilhoit, for appellee.

DU RELLE, J. Cary L. Clarke had three daughters and one son. The three daughters brought an ejectment suit in the United States circuit court at Covington against the Lexington & Carter County Mining Company, the Norton Iron Works, and the Eastern Kentucky Railroad Company, for a tract of land of about 7,000 acres in Carter county. After a nonsuit and reinstatement, a trial was had, resulting in a judgment for defendants, which was reversed by the supreme court of the United States upon a writ of error (*Applegate v. Mining Co.*, 117 U. S. 255, 6 Sup. Ct. 742), and a second trial resulted in a verdict and judgment for the plaintiffs. Three actions for mesne profits were instituted in the United States circuit court. In the third action, against the Norton Iron Works, the appellants in this case and James L. Clarke were made parties plaintiff, as descendants of James Clarke, the fourth child of the ancestor Cary L. Clarke, under whose title the suits were brought. It is presumable that they were supposed, and supposed themselves, to be the only heirs of James Clarke; James L. Clarke being a son, and appellant Thomas L. Clarke a grandson, the appellant Lizzie D. Clarke being the latter's tutrix. The third action resulted in a verdict and judgment

against the Norton Iron Works for \$29,620.38, whereof one-eighth, \$3,702.55, was awarded to the tutrix of Thomas L. Clarke, and one-eighth to James L. Clarke. Thomas L. and James L. Clarke do not appear to have been parties to the other two suits against the Norton Iron Works, nor does it appear that they received any part of the amount recovered. The judgments were rendered in May, 1887. Appellee, Louisa L. Seay, claims in this suit as representing a one-twelfth interest in the estate of Cary L. Clarke. It appears that James, the fourth child of Cary L. Clarke, had three children, the deceased father of appellant Thomas L. Clarke, James L. Clarke, and a third son, Henry, who married the appellee Louisa L. Seay, and died before his father, leaving two children, who died, and whose interest in the estate, having come directly from their grandfather, passed at their death to their mother, Louisa L. Seay. After the actions had been prosecuted to judgment, Mrs. Seay, in a partition suit in the Carter circuit court, was allotted one-twelfth of the tract of land recovered in the ejectment suit, without being subjected to costs or legal expenses for its recovery. Nearly six years after the judgment for mesne profits had been recovered and paid, she brought the present suit against James L. Clarke and the appellants to recover one-third of each of the judgments paid to them, alleging that James L. Clarke had received \$3,361, and the tutrix of Thomas L. Clarke a like sum. Attachments were levied upon the shares of the land allotted to James L. and appellant Thomas L. Clarke. The petition is stated to be in the nature of an action for money had and received for the benefit of appellee; and it is charged that by fraud, and for the purpose of concealment from appellee, and without her knowledge or any notice to her or her husband, the action for mesne profits against the Norton Iron Works was instituted in the United States circuit court, the plaintiffs therein claiming to be the sole heirs of Cary L. Clarke, deceased, and fraudulently leaving out the appellee as one of the parties plaintiff. In an amended petition it is alleged that, upon the allotment of the land to appellee, she discovered for the first time that timber, ore, coal, etc., had been taken from the land, for which the recovery was had in the suit for mesne profits. The appellants denied the fraud and concealment alleged; alleged that appellee had full knowledge of the pendency both of the action of ejectment and of those for the mesne profits long before the judgments for mesne profits were rendered; pleaded the statute of limitations of five years; and alleged that in the action for the recovery of the land and for the mesne profits great expense was incurred in traveling and for lawyer's fees, which amounted to fully as much as the mesne profits recovered, and to none of which appellee contributed, by reason of which appellee received her share of the land

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

free from any fees or outlay for its recovery, and without the expenditure of any labor, time, or care. Appellee's reply denied any knowledge of the pendency of the suits, charged that ever since the collection of the mesne profits appellants had been continuously absent from this state and process could not be served on them therein, and denied the outlay for legal services, etc. If the plea of the statute of limitations be sustained, the other questions raised need not be considered. We shall therefore first consider that question.

The claim of fraud is utterly unsustained by the evidence. As early as March, 1886, appellee knew of the proceedings for the recovery of the land, through her brother-in-law, Campbell, who was an attorney, and examined the record; and in June, 1888, when the suit for the partition of the lands was instituted, she was advised by her attorney, Campbell, to establish her heirship to the lands before bringing any suit for her proportion of the mesne profits. In June, 1888, her attorney knew of the recovery of the mesne profits and of the payment of the money, except that portion which was reserved for further litigation between counsel. It is perfectly evident, from the evidence on behalf of appellee, that she had knowledge sufficient of the pendency of the litigation more than five years before the bringing of the present suit, which was not instituted until October, 1893, to enable the bar of the statute to be interposed against her claim. Moreover, the actions for mesne profits were public records. Appellee had such knowledge of the litigation, if she did not know of the actual pendency of those suits, as to put her upon notice. By the exercise of the most ordinary diligence, she ought to have discovered the fraud, if any there was, or the mistake, if there can properly be said to have been any. The statute runs from the time the mistake, by ordinary diligence, ought to have been discovered. *Dye v. Holland*, 4 Bush. 635; *Railroad Co. v. Bridges*, 7 B. Mon. 556; *Woods v. James*, 87 Ky. 511, 9 S. W. 513; *Brown v. Brown*, 91 Ky. 639, 11 S. W. 4; *Fritschler v. Koehler*, 83 Ky. 78.

An attempt is made to bring the case within the statute now embodied in Ky. St. § 2531. But that statute applies only to actions against a resident of this state, which is not here averred, and the contrary of which is proven in the evidence.

Nor is it available, as against the plea of the statute, that the recovery of mesne profits was a trust fund. If a trust fund at all, it was an implied trust, to which the exception of the statute does not apply.

The suggestion that the cause of action did not accrue until after the recovery of appellee's share of the land is not tenable, and would not be under our Code, even had her recovery been in an action of ejectment, which it was not. It appears to have been merely a suit for partition, and there was no reason why a suit for appellee's proportion

of the mesne profits could not have been prosecuted at the same time. For the reasons stated the judgment is reversed, with directions to dismiss the petition.

GILBERT v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. June 7, 1899.)
CRIMINAL LAW—INTERROGATION OF WITNESS
—CHALLENGE TO JURORS—REVERSIBLE ERRORS.

1. It was harmless error to permit the prosecuting attorney to propound to a witness questions which assumed that property found in the possession of accused was taken from the house he was accused of breaking.

2. It was harmless error to overrule a challenge to a juror for cause, and thus to compel accused to use one of his peremptory challenges to excuse the juror, as all of his peremptory challenges were not exhausted.

3. There can be no reversal in a criminal case for an error in overruling a challenge to a juror.

4. It was not an abuse of discretion to keep the jury together after they had reported a failure to agree, the entire time they were kept together being less than 30 hours.

5. A judgment of conviction cannot be reversed on the ground that it is not supported by the evidence, if there is any evidence conducing to show guilt.

Appeal from circuit court, Breathitt county.
"Not to be officially reported."

Asa Gilbert was convicted of the offense of housebreaking, and he appeals. Affirmed.

Marcum & Pollard and Guy H. Briggs, for appellant. W. S. Taylor and M. H. Thatcher, for the Commonwealth.

BURNAM, J. This is an appeal from a judgment sentencing appellant to the penitentiary for the term of two years for the crime of housebreaking. Two grounds are relied on by appellant for reversal; the first being that he did not receive a fair trial, and, second, that the verdict is not sustained by the evidence.

The first error complained of is that the court permitted the commonwealth's attorney to ask Mrs. Rose this question: "Did you see the bed after it was found at defendant's house and brought back to Spurlock's?" and, second, that he was permitted to ask Robert Rose the question, "Did you see the bed that was taken from the house after it was found at Asa Gilbert's?" The form of these questions is objectionable, but the error is not of sufficient importance to authorize the reversal of the judgment complained of.

Another alleged error is that William Smith, a juror, stated upon the preliminary examination that he had formed an opinion in the case, and that it would require evidence to remove that opinion; that defendant challenged said juror for cause, and the court then asked him if he could give defendant a fair trial and render a verdict according to the law and evidence notwithstanding that opinion, and the juror answered in the affirmative, and thereupon the challenge for cause was overruled, and the defendant was forced

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

to use one of his peremptory challenges to excuse the juror. The record shows that the defendant did not exhaust his peremptory challenges, and consequently he was not prejudiced by being forced to use one of these challenges to excuse the juror complained of. Besides, it has often been held that this is not an error for which reversal will be had.

It is also alleged that the court erred in keeping the jury together too long after they had reported a failure to agree, thereby coercing a verdict. The record shows that the jury were kept together less than 30 hours, and this is a matter which must necessarily be left to the discretion of the trial court. There is nothing in the record which indicates that the jury were coerced into rendering a verdict not in accordance with their convictions as to defendant's guilt or innocence; and, while it is the duty of the trial judge to see that a defendant charged with a crime is given a fair and impartial trial, it is also his duty, after such trial, to give the jury every reasonable opportunity to arrive at a verdict.

But the main ground relied upon is that there was no proof to support the verdict. The testimony shows that Spurlock and his wife left their home, in Breathitt county, and went on a visit to Clay county, leaving their dwelling house in the charge of Mr. and Mrs. Rose; that during their absence it was broken into during the nighttime, and two feather beds and several other articles of household plunder carried away; that several witnesses locate defendant, in company with one Salyer, near the house of Spurlock late in the afternoon of the day on which the dwelling house was broken into. And Ed. Spicer testified that he saw defendant and Salyer pass along the road with large bundles, which had the appearance of feather beds, in front of them, on their mules, after dark, and coming from the direction of Spurlock's house; and two other witnesses (Sophia Davidson and Mary Gilbert) positively identify one of the feather beds found in the possession of defendant as the property of Spurlock, Sophia Davidson saying that she was enabled to identify it by reason of a darned hole in the tick. While, on the other hand, quite a number of witnesses testify to facts which contradict the witnesses for the commonwealth, and which conduce to show the unreliable character of said witnesses, yet, under the construction which has been given section 340 of the Criminal Code in numerous decisions, this court has no power to reverse a judgment of conviction in a criminal case upon the sole ground that there is not sufficient evidence to sustain the verdict, being restricted to the inquiry whether there was any evidence before the jury conducing to show the guilt of the accused. If the statements made by Spicer and the two women, *supra*, are credible, it cannot be contended that there was no evidence before the jury conducing to show the guilt of accused,

and the jury are made by law the sole judges of the weight and credit which should be attached to the testimony of any witness. As the record does not show any substantial error of law to appellant's prejudice occurring on the trial, the judgment must be affirmed.

LOUISVILLE & N. R. CO. v. PROCTER.¹
(Court of Appeals of Kentucky. June 8, 1899.)
CORPORATIONS—VENUE OF ACTION—ATTORNEY'S LIEN FOR FEE—COMPROMISE WITHOUT ATTORNEY'S CONSENT.

1. Under Civ. Code Prac. § 72, an action against a corporation other than such actions as are excepted therefrom may be brought in any county in which the corporation has an office or place of business and an agent.

2. Where the client agreed to pay his attorney a fee "equal to the net one-half of any sum of money recovered by suit or compromise," the attorney has a lien on a judgment recovered by him for the client for one-half the amount thereof, which cannot be defeated to any extent by a compromise made by defendant with the client without the attorney's consent.

3. In addition to the lien for his own fee, the attorney has a lien for one-half the fee of additional counsel which he has paid, where the client was to pay one-half of such fee.

Appeal from circuit court, Warren county.
"Not to be officially reported."

Action by B. F. Procter against the Louisville & Nashville Railroad Company to enforce a lien on a judgment. Judgment for plaintiff, and defendant appeals; plaintiff prosecuting a cross appeal. Affirmed.

J. A. Mitchell, H. W. Bruce, and Wm. Lindsay, for appellant. Guy H. Herdman and Grider & Moss, for appellee.

WHITE, J. In March, 1895, one Jordan Buford recovered a judgment for damages for personal injuries in the circuit court of Barren county for the amount of \$1,000. In that action appellee, Procter, was attorney for Buford, and in the judgment in favor of Buford this appears: "It is further ordered that B. F. Procter and Boles & Duff, attorneys for plaintiff, have and retain a lien on this judgment for a reasonable attorney's fee." That case was prepared for appeal, but in May, 1895, the same was compromised by the payment to Buford of \$300, and the judgment was accordingly indorsed satisfied. Of this compromise the appellee, Procter, had notice, but declined to agree to same, but protested against its consummation by letter and telegram. In August, 1895, the appellee, Procter, brought this action against the appellant alone in the Warren circuit court, seeking to recover of appellant \$600, the alleged reasonable value of appellee's services in behalf of Buford, alleging in the petition the judgment and the lien to appellee and the compromise by appellant with Buford without appellee's consent and over his protest. To this petition, which was at law, the appel-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

lant filed a special demurrer to the jurisdiction of the court, and also special demurrer because of a defect of parties; it being suggested by the demurrer that Jordan Buford, the plaintiff in the compromised judgment, and for whom the services were rendered, and Boles & Duff, co-counsel with appellee, were necessary parties. On the question of jurisdiction, the court overruled the demurrer and held it had jurisdiction, and on the question of defect of parties held that Boles & Duff, co-counsel, were necessary, but that Buford was not a necessary party. To these rulings exceptions were reserved. Appellee, Procter, in conformity to the ruling of the court, filed an amended petition, and Boles & Duff filed answer and asked the court to dismiss as to them, for the reason, as alleged, that the services tendered by them for Buford were separate and independent of any charge made or to be made by appellee, Procter, and they alleged that as to their claim the Barren circuit court had jurisdiction. This motion to dismiss as to Boles & Duff was sustained, and to this ruling appellant excepted. Appellant then filed an answer, admitting the rendition of the judgment in favor of Buford in Barren county and of the payment by appellant to Buford, in full satisfaction thereof, the sum of \$300 and the costs of that action, and admitting that to the settlement and compromise appellant did not agree. Appellant alleges that, before the institution of the action by appellee as attorney for Buford, the appellee and Buford entered into a written contract and agreement as to the amount of the fee to be charged by appellee in case of recovery by action or compromise, and that by this contract, alleged to be in the possession of appellee, Procter was to receive an amount equal to one-half of the amount recovered by suit or compromise. Appellant then offered to confess judgment for that sum, the same to be in full of attorney's services for Buford in that action, and appellant, to settle the whole matter, made this answer a cross petition against Boles & Duff. Appellant then moved a transfer of the case to the equity docket, which was ordered by the court after the reply of appellee was filed. In the reply a contract was admitted to have been made, and it was set out in full. The material parts are: "I agree to give him [Procter] up absolute control of the claim, and not to interfere with its prosecution in any way, and not to entertain any proposition for a compromise, except through my said attorney, B. F. Procter, * * * and for his services I agree to pay him a sum equal to the net one-half of any sum of money recovered by suit or compromise." Appellee, then, in the reply, alleged that he was entitled as a fee to the sum of \$500, being one-half of the judgment, and also his personal expenses in attending the court and the case the sum of \$100,—\$600 in all. By an amendment this sum was reduced to \$525 on account of an adjustment of

the claim of Boles & Duff. There was a motion by appellant to require an election by appellee as to whether he would prosecute the action as on contract with Buford, or on quantum meruit for the reasonable value of his services. This motion to elect was overruled. Appellant offered in open court to confess judgment for \$150 in full satisfaction of appellee's claim, which offer was refused by appellee. The court upon trial of the issues on proof by deposition rendered judgment for appellee for \$537.50, and, upon being requested, separated his conclusions of law and fact. From that judgment this appeal is prosecuted. The question first to be determined is as to the jurisdiction of the Warren circuit court.

It is insisted by appellee that the action is ex contractu and transitory, and may, under section 78 of the Civil Code of Practice, be brought in any county where service may be had. On the other hand, it is insisted for appellant that the action is governed by section 72 as to its venue. Section 72 provides that an action against a corporation may be brought in the county in which it has an office or place of business, or in the county of its chief office, or in the county of the residence of its chief officer or agent of a corporation; or, if the action be upon a contract, in the county in which the contract is made to be performed, in addition to the general provision first above; or, if it be for tort, in the county where the tort is committed, in addition. Section 73 provides for actions against common carriers upon a contract to carry, or for injury to a passenger, or other person or his property. It is not contended that section 73 governs the venue of this action. We are of opinion that it is immaterial whether section 78 or 72 of the Civil Code governs the venue of this action. The Warren circuit court has jurisdiction. The appellant has an office and place of business and an agent in Warren county. By section 72 the action against a corporation may be brought in any county where the corporation has an office and place of business, or in the county where the chief officer in the state resides. By section 73 there are some additional counties given jurisdiction against common carriers; but that section cannot be held to abridge the venue given by section 72. Section 78 was made to cover all other cases not specially provided for. It is admitted in the pleadings that Buford had, by compromise with the appellant, ceased to have any interest in the judgment, and appellee, Procter, was not seeking to hold Buford liable for any sum, but was only seeking his rights of lien as given by the judgment. Appellant has no right to complain of this lien, as the appellee gave due notice of his claim, and that he would claim \$600 before the compromise settlement was made; yet, with full knowledge of this claim and of the judgment lien, appellant settled with Buford. In our opinion, this settlement could not affect ap-

pellee's rights to compensation, or prejudice the amount of his fee for services.

On the question of the value of the services we think the judgment of the lower court was fair and not excessive, in view of the number of trials of the case and the contest. We will not disturb his finding.

On the cross appeal by appellee as to the amount of the finding, appellee insists that the appellant should not be allowed to retain the balance of the judgment, \$700, while the attorney's fees remain unpaid, and that this balance should be adjudged to appellee. We are of the opinion that appellee has by the judgment recovered all that his contract permits him to receive; i. e. an amount equal to 50 per cent. of the judgment recovered and one-half of the fee of Boles & Duff, which appellee has paid. By the contract of appellee with Jordan Buford, each was to pay one-half the fee of additional counsel.

Judgment affirmed on both original and cross appeal, with damages on the original appeal.

ALLISON et al. v. COCKE'S EX'RS et al.
SAME v. PRESTON'S EX'RS.¹

(Court of Appeals of Kentucky. June 8, 1899.)

VENDOR AND PURCHASER—EXCUSE FOR FAILURE TO PERFORM CONTRACT—VALIDITY OF CONTRACT BY EXECUTOR BEFORE QUALIFICATION—OPTIONS—RELIEF AGAINST FORFEITURE.

1. The existence of a mortgage to secure a debt due in 18 months, without the privilege of payment before maturity, did not justify the purchaser's refusal to accept a deed when tendered, no objection on that account having been offered when the mortgage was discussed prior to that date, and it being manifest that it was not considered an objection.

2. Though Gen. St. c. 39, art. 1, § 1, provided that a person named as executor in a will should not act "to any extent" under the will until it should be probated and he should qualify, a contract by a foreign executor for the sale of land in Kentucky before he had qualified in Kentucky was voidable merely, and his subsequent qualification related back so that the purchaser, having failed to repudiate the contract before that time, could not thereafter do so.

3. A contract purporting to be for the sale of land, which provided for the forfeiture of a 5 per cent. cash payment amounting to \$12,500 in the event the second payment should not be made at the time stipulated, cannot be regarded as a mere option.

4. Equity will relieve against such a forfeiture, where the damages resulting from nonperformance are readily ascertainable, and the penalty fixed cannot, therefore, be regarded as liquidated damages.

Appeals from circuit court, Jefferson county, law and equity division.

"To be officially reported."

Actions by F. H. Allison and J. C. Fawcett against Elizabeth Cocke's executors and others, and against J. T. L. Preston's executors, to rescind a contract for the sale of land and to recover money paid thereon. Judgment

for defendants, and plaintiffs appeal. Reversed.

Helm & Bruce, for appellants. R. H. Blain, Bullitt & Shield, W. Marshall Bullitt, and H. R. Preston, for appellees.

DU RELLE, J. The records on these appeals show that Mrs. Elizabeth Cocke was the owner of about 600 acres of land, and her brother Col. Preston was the owner of about 320 acres immediately adjoining it, on the Preston Street road, south of Louisville. About two years before the contracts here involved were made, Mrs. Cocke died, a resident of Virginia, leaving a will, by which her three sons were made executors. Some six months before the making of the contracts, Col. Preston died, a resident of Virginia, leaving a will, by which his two sons were appointed executors. All of the devisees under both wills lived in Virginia or Maryland. Each will gave to the executors the power to sell the land in Kentucky, for the purpose of paying debts and of making distribution of the proceeds. For some time previous to the making of the contracts, the Cocke executors had made efforts to sell the land in their hands, and had given a number of successive options thereon to agents who were endeavoring to effect sales. The Preston executors had also given options to the Cocke executors, it being supposed that the two tracts lying together could be sold as one tract to better advantage. Prior to the making of the contracts, the Cockes, controlling the sale of both tracts, had been considering a scheme to sell the land through a projected land and improvement company, but the corporation was never formed, and little or no progress appears to have been made in putting the scheme into operation, except that some persons had verbally agreed to take stock in the corporation when formed. The agent of the Cocke executors in Louisville was Mr. John A. Stratton, and appellant Fawcett was acting with him in the effort to dispose of the land. With a view of effecting a sale of the land through a syndicate, appellants Fawcett and Allison arranged a meeting with the executors of both wills, at Richmond, Va., on February 12, 1891. After considerable negotiation as to the price to be paid for the land, an agreement was finally reached; the Preston executors being induced to agree to the price fixed upon by a side agreement of the Cocke executors to pay them \$2,500 for making the contract. The contracts, which were written upon the same paper,—the Cocke contract being first, and referred to in the Preston contract,—are as follows:

"This agreement, made this 12th day of February, 1891, between F. H. Allison and J. C. Fawcett, of Louisville, Ky., parties of the first part, and T. P. L. Cocke, Edmund R. Cocke, and Preston Cocke, executors of Mrs. Eliza R. Cocke, deceased, of the state of Virginia, parties of the second part, witnesseth as

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

follows, to wit: The said Allison & Fawcett hereby agree to purchase from said Cocke's executors the following real estate, located in the county of Jefferson, Kentucky, to wit, a tract of land containing 809 acres, more or less, bounded on the south by Bickler's lane, on the west by the Preston street turnpike, on the east by the Poplar Level road, and on the north by a line common to Cocke and Preston, which was established by deed of partition between said Cocke and Preston dated May, 1836, by deed recorded in the Jefferson county clerk's office, Kentucky, D. B. S. S., p. 494, except 3,724 acres sold to H. Bickel, by deed of February 14, 1873, for the sum of two hundred and fifty thousand dollars (\$250,000), to be paid as follows, one-fourth cash, and the balance on or before one, two, and three years, with interest at six per cent. per annum from date until paid; said deferred payments to be secured by deed of trust on said land. The said Allison & Fawcett hereby agree to pay five per cent. of said cash payment, said five per cent. amounting to the sum of twelve thousand five hundred dollars, on or before the first day of March, 1891; and they agree further to pay the residue of the said cash payment, with six per cent. interest thereon from date till paid, on or before the first day of May, 1891. The said Allison & Fawcett hereby also agree that, in the event that they do not pay the residue of said cash payment by May 1, 1891, then said sum of twelve thousand five hundred dollars, paid by them on or before the first day of March, 1891, shall be wholly forfeited to said Cocke's executors, without recourse on the part of said Allison & Fawcett. And said Cocke's executors hereby agree that, in the event that the residue of said cash payment is paid on or before May 1, 1891, and the notes for the deferred payments and said deed of trust are executed and delivered to them, then they will convey said tract of land to Allison & Fawcett, or their assigns, by good and sufficient deed of conveyance, with general warranty. It is further agreed by said parties of the first and second parts that, in the event that the residue of said cash payment is not paid on or before May 1, 1891, then this contract is to be null and void and of no effect, except as to the payment of the said twelve thousand five hundred dollars to said Cocke's executors by said Allison & Fawcett. Witness the following signatures: [Signed] F. H. Allison. J. C. Fawcett. Edmund R. Cocke, Preston Cocke, Executors of Mrs. Elizabeth R. Cocke. T. P. L. Cocke, by Preston Cocke."

"We, F. H. Allison and J. C. Fawcett, hereby agree to purchase the land belonging to the estate of J. T. L. Preston, deceased, adjoining the Cocke land on the north, containing three hundred and twenty acres, more or less, for the sum of one hundred and sixty thousand dollars (\$160,000), payable in the same manner as the purchase price of said

Cocke's land. And we also agree to make a deposit of five per cent. on said purchase price before the first day of March, 1891, which is to be wholly forfeited to said J. T. L. Preston's estate in the event that the residue of said cash payment is not paid on or before May 1, 1891. And we, T. L. Preston and Herbert R. Preston, executors of said J. T. L. Preston, deceased, hereby agree to convey said property in accordance with the provisions of the above contracts for the conveyance of said Cocke's land. And all of said parties hereby agree that all the provisions in the above contract with said Cocke shall be treated and considered as a part of this contract, except as to the area of tract sold and amount of purchase money to be paid. Witness the following signatures: T. L. Preston and Herbert R. Preston, Executors of J. T. L. Preston. Witness as to Herbert R. Preston: Luke Boyd."

Before the date at which the 5 per cent. cash payments were to be made, one of the Preston executors wrote Mr. Helm Bruce to employ him to represent the estate in the settlement of the matter, informing him at the same time that the Preston will had not been probated nor the executors qualified in this state. Mr. Bruce replied that he had been employed by Fawcett on behalf of the other side; that his client would be ready to pay the money, but expected the will to be probated and the executors qualified before payment was made, referring to the statute in that behalf; and suggesting that appellants were willing to pay the money to his (Bruce's) firm as trustees, to be paid over when the will was probated and the executors had qualified, or that the time of making the payment might be extended until the probate and qualification.

The payment of \$12,500 to the Cocke executors was made to Stratton, as their agent, on February 28, 1891, and \$8,000 was paid to Helm Bruce as trustee, to be paid over to the Prestons when the Preston will should be probated and the executors qualified. The Cocke will had been already probated, though the executors had not qualified in this state. Some question is made of whether the latter fact was known to appellants, but we do not regard that as very material. They did qualify on March 23, 1891, and the Preston executors probated their will and qualified on April 1st, when Bruce paid over to them the \$8,000 held by him as trustee. A deed was prepared for the Cockes by their agent, Stratton, the form of which was objected to by them, and by mutual consent, at whose suggestion is immaterial, deeds were prepared for both the Cockes and the Prestons by appellants' attorneys, and forwarded to Virginia. On May 1st, the remainder of the cash payments was to be paid,—\$50,000 to the Cockes and \$32,000 to the Prestons. The Preston deed had gone astray in the mail, and the time for its tender was extended to June 1st. The Cocke deed was tendered on that date, and refused by

appellants; the ground of refusal being stated to be that there was a mortgage of \$12,000 upon about 100 acres of the tract lying next to the pike, due about 18 months thereafter, and with no privilege of payment before maturity. The Cocke executors thereupon declared the whole transaction closed, declared a forfeiture of the \$12,500 previously paid, and, in order to effect a sale to other parties, gave an option upon the land to others. The Prestons did not make tender of their deed until August 11th, when they offered to waive the forfeiture if appellants would immediately pay the remainder of the cash payment on the purchase price.

It is unnecessary to go over the discussions with regard to the mortgage upon the Cocke property, or the evidence in regard to it, further than to say that it is perfectly evident that the existence of this mortgage was not the real reason for appellants' failure to complete their cash payment, and had no effect whatever upon their action in this behalf. The reason they declined to make the payment was their inability to raise the money. The existence of the mortgage was a mere excuse, offered by them at the time, and which, under the circumstances of this case, we do not consider a valid one. The mortgage seems to have been discussed prior to that date, was known to appellants, who made no objection, and, had they been in any position to comply with the contract on May 1st, was rather an advantage to them. At all events, it was not regarded by them as an objection, and we think they had waived whatever excuse its existence might have otherwise afforded.

There was some attempted negotiation looking to an adjustment of the controversies between the appellants and appellees, which resulted in nothing. Appellants then brought these two suits, alleging, in substance, that the Cockes were not able to make a clear title; that appellants could not use the property with the mortgage upon it; and that the Cockes had no right to insist on the performance of the contract, or to forfeit the sum already paid, when they could not themselves comply. As to the Prestons, it was claimed that the purchase of both of the tracts was practically one transaction, their property not being available without the Cocke property, and that it would be inequitable to permit the Prestons to forfeit the \$8,000 paid them on the supposition that both tracts could be acquired, when it proved impossible to obtain a clear title to the Cocke property. As we have said, we do not regard this contention as tenable.

The main contention is that the contracts for the sale of Kentucky lands were made, and purported to be made, solely by virtue of powers of sale to appellees as executors,—in one case under a will which had never been probated in Kentucky, and in both cases under wills as executors of which they had not qualified in Kentucky; that the contracts were

absolutely void, and not susceptible of ratification, and the money paid on them was paid without consideration, and should be returned. It is further contended that the retention of the \$20,500 was a plain and simple forfeiture, whereby appellees seek to regain this large sum of money for which nothing was given. The learned chancellor below, in a brief opinion, held that the contract was fully executed, without fraud, misrepresentation, duress, or mistake of law or fact, and was unimpeachable. He further held that it was not necessary to a valid execution of the powers under the wills that the persons named as executors, who were also donees of the powers, should qualify as executors in Kentucky, but that they possessed a duality of capacity,—executors and donees of the trust power; and, while it was necessary to a valid performance of any of their executorial duties in Kentucky that they should qualify, it was not so as to the trust power.

Were the contracts void for want of capacity to their execution, or were they merely voidable, so that the subsequent acquirement of capacity related back to and validated their original execution, if they were not repudiated in the meantime? We shall consider this question without reference to the proposition that, under the wills in question, the executors possessed a duality of capacity which enabled them, as donees of the power, to enter into a valid contract for the sale of the lands, without qualification as executors in Kentucky. It is conceded that, at common law, the person named in the will as executor was considered to derive his power from the will, and not from the order of probate, which was deemed merely to be conclusive of his authority, but not its source. If he acted in an executorial capacity, and the will was subsequently probated, the probate was conclusive evidence his precedent act as executor was valid. As said in *Gilbert v. Bartlett*, 9 Bush, 54 (under the Revised Statutes): "At common law, the powers of an executor were derived from his appointment by the deviser, and not from the probate of the will. Almost any act belonging to such an office could be exercised by the executor before the probate, except to sue and defend." The Kentucky Statutes have, from time to time, made changes in the common law as to executors, though it seems clear, under the Revised Statutes, the executor was regarded as deriving his power from the will. Gen. St. c. 39, § 1, provided: "The person named in the will as executor of it shall not act as such to any extent until the will, or an authenticated copy of it, is admitted to record, and he has executed bond and taken the oath required by law, in the court in which the record is made; but he may provide for the burial of the testator, pay the reasonable funeral expenses, and take care of and preserve the estate." The words "to any extent" were here first inserted into the stat-

ute. It is claimed that this provision of the statute makes every act of an executor for which he would be responsible on his executorial bond absolutely void and incapable of ratification, if done before probate and qualification. *Pryor v. Mizner*, 79 Ky. 232, cited by appellants, and *Marrett v. Babb's Ex'r*, 91 Ky. 93, 15 S. W. 4, do not sustain this proposition. The former case was as to the right of an executor to appeal from a judgment refusing probate of the will under which he was appointed, and it was held that he had such interest as gave him the right. The only question decided in the latter case was that qualification as executor in a sister state did not authorize the executor to administer assets here or act in our courts as such representative. Nor does the case of *Rutherford's Heirs v. Clark's Heirs*, 4 Bush, 27, seem to us to settle the question. In that case a foreign administrator made a contract of sale of lands in Kentucky, agreeing to convey the legal title whenever he should satisfy the vendees that the sale was necessary for the payment of debts. Ten years later, after probate and qualification in Kentucky, he conveyed the land. A suit was brought to set aside this conveyance, on the ground that the sale was not made for debts, and was made by a fraudulent combination with the vendees. The sale was set aside upon the ground that the consideration was so glaringly inadequate as to amount to constructive fraud. The court there said, it is true, that the executory contract of sale was void for want of authority to sell the land in Kentucky, "and, as a void sale could not be confirmed, the conveyance was the first and only valid sale; and not only the possession, but the adequacy of the consideration, must be tested by that, as the only contract of sale which passed any right, or can be judicially recognized for any purpose." But in that case the sole authority of the administrator was by reason of his appointment as such in another state. The decedent's will had not been probated in Kentucky. His power to sell depended solely upon the failure of personal assets to pay debts, and was held to be a peremptory, and in no sense a discretionary, power. Whether any attempt at ratification of the original contract was made before the probate, and while the administrator's incapacity to act in Kentucky continued, does not appear. The sale was abortive, not only because of a failure to probate the will and qualify in Kentucky, but also because of the nonexistence of the facts necessary to authorize a sale at all. It may be that the record presented an attempted ratification. But, be that as it may, the question presented was as to the validity of the deed. That alone was under consideration. And as said by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264: "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go be-

yond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision."

Assuming that the Kentucky Statute, by its requirement of a bond from an executor or administrator with the will annexed to well and truly administer, not only the goods, chattels, credits, and effects that may come into his hands, but also "the proceeds of any sale, and the rents and profits of any estate, which may come to his hands, or any one for him, by color of his office, which the will empowers him to sell," etc., converts a power of sale, such as those under which appellees in these cases acted, into a strictly executorial power, we are still of opinion that the statute forbidding an executor to act as such, until after probate and qualification, does not abrogate what we conceive to be the general rule, that a subsequent probate and qualification will relate back to and validate acts done prior to the qualification, "which came within the scope of rightful executors' or administrators' authority, and which were in their nature benefiting to the estate, or, at least, such as other persons had no reason to complain of." 7 Am. & Eng. Enc. Law, tit. "Executors." In *Williams, Ex'r's*, p. 557, the rule is thus stated: "So, where the goods have been sold after the death of the intestate, and before the grant of letters of administration, avowedly on account of the estate of the intestate, by one who had been his agent, it was held that the administrator might ratify the sale and recover the price from the vendee in assumpsit for goods sold and delivered; and accordingly it should seem that whenever any one, acting on behalf of the intestate's estate, and not on his own account, makes a contract with another before any grant of administration, the administration will have relation back, in order not to lose the benefit of the contract, so the administrator may sue upon it as made to himself." In *Hatch v. Proctor*, 102 Mass. 351, the court said: "By the laws of this state, as laid down by Hoar, J., in *Alvord v. Marsh*, 12 Allen, 603, the letters of administration, by operation of law, make valid all acts of the administration in settlement of the estate from the time of the death. They become, by relation, lawful acts of administration, for which he must account. And this liability to account involves a validity in his acts which is a protection to those who have dealt with him." In *Vroom v. Van Horne*, 10 Paige, 549, Chancellor Walworth says: "The grant of administration has relation to the death of the intestate, and it legalizes all intermediate acts of the administrator." It has ever been held that probate and qualification before judgment would validate the institution and prosecution of a suit. *Dearborn v. Mathes*, 128 Mass. 194. It is hardly necessary to multiply authorities upon this subject. Under statutes similar in effect to ours, the doctrine has been laid down that,

while the executor's powers before qualification are limited to the burial of the testator and the preservation of the estate, nevertheless his acts, within the proper scope of executorial authority, will be legalized by relation back, upon subsequent probate and qualification. This seems to be the rule in Missouri, Arkansas, Indiana, Maine, and Iowa. The underlying reason would seem to be that such statutory provisions are for the benefit of the estate of the decedent; and, while the other contracting party to such a contract might, before qualification of the executor, repudiate the contract, lack of qualification at the date of the contract affords no ground for such repudiation, if the qualification takes place before the performance is demanded. We conclude, therefore, that the contracts were valid during the month of April, 1891, and were undoubtedly so regarded and treated by both parties thereto; appellants claiming the right to control the land, and appellees recognizing their right to do so.

The next question necessary to be decided is whether the contracts for the sale of land were mere options. It is most earnestly contended on behalf of appellees that while, in form, contracts for the sale of the land, they were in reality mere options, and that the provision for the forfeiture of the 5 per cent. cash payments was merely a mode of expressing the consideration agreed to be paid for an option for the purchase of the property from February 12th to May 1st, which was to be treated as part of the purchase money in case appellants elected to take advantage of their option. In our opinion, all the circumstances of the case combine to show that such was not the intention. Undoubtedly, appellants did not expect to put up all the money themselves. But it is equally beyond doubt that they believed their arrangements to raise the money were certain to be successful, and that they were buying the property, and not paying \$20,500 for a mere option to buy, given for a little over two months and a half. This view is strengthened by the fact that the vendors had given numerous options previous to this transaction, without any payment therefor, for as high as four months at a time, without any consideration except the hope of effecting a sale of the property. The language of the contracts is not apt for the creation of an option. It is apt—and it was drawn under the supervision of men skilled in the law—to express a contract for the sale of land. Circumstances far stronger than any shown by appellees should appear to justify us in wresting the language from its natural and obvious meaning.

It remains to be considered whether the forfeiture clause is such a forfeiture as equity will relieve against. The general rule seems to be conceded that equity will not enforce a forfeiture, but will relieve against it. But it is insisted that these contracts were fully executed on both sides; that the appellants re-

ceived and retained the consideration for the 5 per cent. cash payments; that it is impossible for them to return the consideration or restore the status quo; and, under such circumstances, money paid, even under a void contract, cannot be recovered. In the application of the authorities cited and the argument adduced to the cases at bar there seems to be some confusion. Had these been options, it may be conceded that, though the price paid for them was excessive, the contract for the option being separable from the other contract, the money paid could not be recovered. But having reached the conclusion that these were not mere contracts for options, setting forth the terms upon which the options might be exercised, but contracts for sales of land, did the declaration of a forfeiture separate that part of the contract from the remainder? We have executory contracts for the sale of lands providing for a small cash payment, which was to be forfeited for noncompliance with the other provisions of the contracts. This provision of forfeiture, and that the contract should be void for nonpayment of the remainder of the cash payment agreed upon, was not, in our view, inserted for the benefit of appellants, but for that of appellees. Appellants could not take advantage of it. To hold that they could do so would be to authorize them to take advantage of their own wrong, and, by failing to comply with one provision of the contract they had executed, release themselves from the remaining provisions. On the other hand, the appellees had the right either to sue for the enforcement of the contract, or to declare it annulled for nonperformance. Appellees, having this right secured to them to declare the contract at an end, availed themselves of their privilege. That they did so made the payment none the less a payment upon the original contract, and none the less a penalty, unless it can be construed to be an amount fixed as liquidated damages. It did not change the original contracts into mere executed contracts for options. Whenever the conclusion is reached that these contracts were not options, but contracts for sale, with provision for the forfeiture of the first payment for failure to make subsequent payments, the contention of appellees that they were executed contracts must fail; for, otherwise, the power of a court of equity to relieve against a forfeiture would be made to depend upon the situs of the thing forfeited, and, if the penalty had already been paid when the forfeiture was declared, no relief could be afforded. The cases, therefore, cited upon this question cannot apply.

Was this a forfeiture, or was it an agreement for liquidated damages? The contract itself expressly denominates it a forfeiture. It is true that "the words 'liquidated damages' or 'penalty' are not conclusive as to the character of the sum stipulated to be paid, which must be determined from the matter of the

agreement." Pol. Cont. 447. As stated in Sedg. Meas. Dam., p. 250, note: "First, the language of the agreement is not conclusive; second, the court endeavors to get at the true intent of the parties; third, it seeks to do justice between them." In following these canons of construction, it very frequently occurs that a stipulation for liquidated damages is held to be a penalty; and, on the other hand, it is not often that a stipulation for a penalty or a forfeiture is construed by the courts to be one for liquidated damages, for the reason that, as a rule, such stipulation, being inserted at the suggestion of the party to be benefited thereby, is expressed in language effective to make the stipulation operate for his benefit, so far as language can be made to do so. After careful consideration of the terms of these contracts, we are of opinion that the true intent of the parties was stated by the language used, and that the part of the cash payment first to be paid over was agreed to be and was a penalty for the nonpayment of the second. The amount fixed, the circumstances, and the language used all point to this conclusion. Upon this question the case of *Woodbury v. Turner, Day & Woolworth Mfg. Co.*, 96 Ky. 461, 29 S. W. 295, is relied on by appellees. In that case an effort was made to effect the purchase of all the ax-handle factories in this country, and combine them all in one concern. A contract was made for the purchase of appellee's plant. Twenty-five thousand dollars was deposited with a trust company as a guaranty for the performance of the contract by the purchaser, and it was provided that, in the event of his failure to complete the contract, that sum was to be paid by the trust company to the vendor, "by whom it is to be received in full satisfaction of all claims against said party of the second part, or his assigns, for any damages arising from such breach of contract," with a proviso that, in the event of the completion of the contract, it was to be deducted from the purchase money agreed to be paid. Under the peculiar circumstances of that case, this stipulation was held not to provide for a penalty, but for liquidated damages, and the ruling was based in the opinion upon the fact that the limit of damages to be recovered by the vendor was fixed at \$25,000; that the contract was for the sale of a going concern, valued at from \$350,000 to \$375,000, with an average annual output amounting to some \$350,000; and that "this vast business was put into the hands of the manager of a rival enterprise, and its extent and detail laid open to his inspection, yet in no state of the case, as we understand the contract, could the appellee recover a greater sum in damages to its business for the risks incurred than the sum of \$25,000." It was there held that, "if the appellee had instituted its suit for specific performance, the answer would have been that the contract had already been performed, because it provides that, if the sale is not consummated, the sum of \$25,-

000 already paid to the seller is to be the price of that failure." Not so in the case at bar. Here, as we have seen, the vendor had the option either to bring suit for specific performance, or rescind the contract and rely upon the provision for forfeiture. In the *Woodbury Case* the court, through Judge Hazelrigg, said: "It cannot be said that the sum paid is so excessive in amount, as liquidated damages, when the nature of the transaction is considered in all its parts, and the impossibility of estimating the damages to defendant by reason of the default of plaintiff, by any known rule of law, is fully considered, as to require the court to disregard the terms of the contract in order to relieve plaintiff from hardship." That case is not in the same class as the cases at bar. In these cases it would seem that the amount of damage inflicted by the nonperformance of the contract on the part of appellants should be readily ascertainable. The general rule which we think applicable in such cases is thus stated in *Bradford v. Parkhurst* (Cal.) 30 Pac. 1106: "When a contract of sale and purchase of lands is abandoned or rescinded by the parties, the vendee, though in fault, may recover back installments paid for the purchase money, less the actual damage to the vendor occasioned by his breach of the contract." We do not deny that, as said in *Eastman v. Plumer*, 46 N. H. 464, "when circumstances justify the belief that his intention was to perform the contract, only in case it suited his interest, he will forfeit all claim to equitable relief." But here appellants were not only willing, but anxious, to perform the contract. Nothing prevented their doing so but absolute inability. We are of opinion, therefore, that a court of equity should relieve against the penalties sought to be enforced under these contracts, and compel the restitution of the purchase money paid, less the actual damage to the vendors occasioned by the breach.

It is objected that this particular relief was not sought by the pleading. The recovery of the specific amounts paid is expressly prayed for in the petitions, and it is averred that appellees claim those amounts were forfeited to them as penalties. There are also prayers for general relief. Under these prayers and averments, we think the relief sought can be granted in these actions. The question of granting this relief has been fully argued on both sides.

But, as to the question of damages, we are not inclined to take the roseate view contended for by counsel for appellants, that the amount is limited to the expenses incurred by the executors in coming from Virginia to qualify. They are entitled to deduct whatever amount they can show they have been damaged by the breach of what is conceded to have been an advantageous contract. For the reasons given the judgments are reversed, and the causes remanded, with directions for further proceedings consistent herewith.

FRANKFORT WATER CO. v. GAINES.¹

(Court of Appeals of Kentucky. June 10, 1899.)
PLEADING—VARIANCE BETWEEN ALLEGATION
AND PROOF.

Where plaintiff sued for damages for breach of a contract, alleging that he agreed to deliver, and defendant agreed to receive, a year's supply of steam coal, consisting of about 50,000 bushels, at an agreed price, and plaintiff's testimony showed that he was to deliver some coal to be tested, and, if it came up to the desired test, he was to have the privilege of furnishing the coal alleged to have been contracted for, and that the coal proved, when tested, to be of the requisite quality, there was a fatal variance.

Appeal from circuit court, Franklin county.
"Not to be officially reported."

Action by Noel Gaines against the Frankfort Water Company to recover damages for breach of contract. Judgment for plaintiff, and defendant appeals. Reversed.

J. W. Rodman and J. B. Lindsay, for appellant. W. H. Holt, for appellee.

GUFFY, J. The appellee instituted this action against appellant, seeking to recover \$877.62 as damages sustained by him by reason of the failure of the appellant to accept compliance from the appellee of a contract to deliver coal. It is substantially alleged in the petition that on the 30th of January, 1895, the appellee entered into a contract with appellant by the terms of which he agreed to furnish to the defendant, and defendant agreed to receive, a year's supply of steam coal, consisting of about 50,000 bushels Beattyville nut and slack, at the agreed price of six cents per bushel. That appellant asked plaintiff in writing for a proposal to furnish said coal, and plaintiff made a proposition, and it was accepted; the terms of the contract being as above stated. It is further alleged that, pursuant to the terms of said contract, plaintiff at once began to and did deliver to the defendant 7,491 bushels, for which the defendant paid him. It is averred that appellee was able and willing to deliver the balance of the year's supply, and that while he was proceeding to do so the said appellant notified him to discontinue the contract, and refused to receive any more coal, to his damage as aforesaid. A demurrer to the petition, as well as a motion to make it more definite, was overruled by the court. The answer may be taken as a traverse of the entire petition, so far as any contract was concerned, or any damages done to appellee by any breach of contract. A jury trial resulted in a verdict and judgment in favor of the appellee for \$375, and, appellant's motion for a new trial having been overruled, it prosecutes this appeal.

The grounds relied on for a new trial are, in substance: (1) That the court erred in permitting incompetent testimony to go to the jury, and erred in permitting plaintiff to read from his letter book what purported to be a

bid or proposition to the appellant of date of January 30, 1895; (2) error of the court in permitting the plaintiff, Gaines, and his witness Robert Wallace, to testify as to the test of the coal, or under what condition he was to get to furnish the coal to the defendant; (3) because of misconduct of plaintiff's attorney in arguing the case to the jury, specifications of which are set out at great length; (4) error of the court in overruling motion of defendant for a peremptory instruction at the close of plaintiff's testimony; (5) error in giving instruction No. 1, asked for by plaintiff; (6) verdict of the jury is not sustained by sufficient evidence; (7) verdict of the jury is contrary to the law and to the evidence.

It will be seen, from the testimony of the appellee, that he received a paper by mail notifying him to put in a bid for steam coal. He was permitted to testify that his clerk, through a mistake, did on the 28th of January, 1895, file a proposition to furnish nut coal at a certain price. It further appears from his testimony in the case that the agreement or contract between the parties was that appellee was to deliver some coal to be tested, and, if it came up to the desired test, that he was then to have the privilege of delivering the coal claimed to have been contracted for in the petition; and he also testified to facts conducing to show that the coal proved, when tested, to be of the quality that appellant was to receive. It is earnestly insisted for appellant that the testimony was so variant from the contract declared on, and no amendment being offered to conform the pleadings to the proof, that the court should have sustained the motion made for a peremptory instruction to find for the defendant. It is evident, from the allegations of the petition, that the suit was brought on a completed contract as of the 30th of January, 1895, when in fact appellee's own testimony showed that the contract depended upon certain contingencies and events to occur thereafter. It seems to us that taking the allegations of the petition, and the pleadings as made up, the testimony varied materially from the allegations of the petition. And it is worthy of note, too, that the testimony upon the part of the defendant tended strongly to show that no contract was in fact ever made, and we can readily understand how the appellant might be greatly prejudiced by allowing testimony to be introduced so variant from the averments of the petition.

We do not deem it necessary to pass upon the question of misconduct upon the part of plaintiff's attorney in the argument of the case, but, if it be a fact that the attorney did make the statement in regard to Harper's testimony as alleged by appellant to have been made, it would have been proper for the court, upon objection, to have told the jury that they must take the statements of the witness himself, and not simply take the statement of the attorney, as to what the witness did say.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

It is further earnestly insisted for the appellant that the verdict of the jury is against the evidence, or, in other words, that it is not supported by sufficient evidence. It may be true that the preponderance of the evidence is for the appellant. But it has often been said by this court that the jury were the judges as to the weight of the testimony, and what credit should be given to the evidence of the various witnesses testifying in a case; hence we do not feel authorized to reverse upon the grounds that the verdict is flagrantly against the testimony. But, taking all the facts and circumstances into consideration in this case, we are of the opinion that the testimony was so different from the pleadings that the court ought to have given the peremptory instruction asked for. But upon the return of this case each party may, if they so desire, amend their pleadings, to the end that justice may be done. For the reasons indicated, the judgment is reversed, and cause remanded, with directions to set aside the judgment and verdict, and award appellant a new trial, and for proceedings consistent herewith.

COOK v. UNION TRUST CO. et al.¹

(Court of Appeals of Kentucky. June 10, 1899.)
LIMITATION OF ACTIONS—LIENS—PAYMENTS—
EFFECT AS TO PURCHASERS.

Payments on a note secured by vendor's lien on land extend the period of limitation not only as between the parties, but as against a subsequent purchaser of the land in lien.

Guffy, J., dissenting.

Appeal from circuit court, Mason county.

"To be officially reported."

Action by Harriett W. Cook against A. M. Bramel and others to enforce a vendor's lien. Judgment giving priority to a mortgage lien of the Union Trust Company, and plaintiff appeals. Reversed.

A. M. J. Cochran, for appellant. Thos. R. Plister, for appellee.

WHITE, J. In January, 1875, the executors of A. Hord sold and conveyed to A. M. Bramel certain lands in Mason county for a consideration in cash and with some deferred payments, payable in one and two years from date. The deed to Bramel reserves a lien for these unpaid notes. These two notes were assigned to appellant, Cook. In March, 1891, Bramel executed a mortgage on this land to appellee, the Union Trust Company, to secure a loan made by it. In September, 1892, Bramel executed a deed of general assignment of all his property for the benefit of all his creditors. Payments were made on these two notes of appellant annually up till 1892. In July, 1893, this action was brought by appellant, Cook, seeking a judgment and decree of foreclosure to sat-

isfy the vendor's lien. Appellee trust company was made a party as well as the assignee under the deed of assignment. No defense was made by Bramel or his assignee; but appellee trust company filed its answer and cross petition, and asserted its mortgage lien as being prior to that of appellant by reason of the fact that more than 15 years had elapsed since the notes of appellant had become due. Appellant, by reply, denied the priority of appellee's mortgage lien, and alleged the fact of payments made by Bramel each year since 1877, and that her notes were not barred, and, further, when appellee took its mortgage 15 years had not elapsed from the maturity of the notes for which a lien was retained in the deed to Bramel. The court sustained a demurrer to this reply, and, appellant failing to plead further, judgment was rendered for the sale of the property, giving the appellee trust company priority. From that judgment this appeal is prosecuted. It is conceded that as to Bramel and his assignee in trust for the benefit of creditors the appellant has a lien on the land by reason of the payments made by Bramel, and that as to part of the judgment there is no contest.

It is contended for appellant that the payments made by Bramel operated to extend from that date the notes, and that the lien is but an incident of the debt, and as long as the debt is not barred the lien exists, and, being a vendor's lien, is superior to all other liens.

On the other hand, it is contended that as to vendees and mortgagees without actual notice, as appellee is alleged to be, the lien does not exist longer than the statutory time that will bar the debt. That the vendee or mortgagee is entitled to know by an inspection of the records for a period of 15 years next before whether there exists any liens, and, if none, within that time then as to such vendee or mortgagee no lien will exist. It is insisted that the payments on the note operate to extend the statutory bar only as between the payor and payee, and will not extend it as to vendees and mortgagees without at least actual notice of such payments and extensions. To support the contention of appellee, and which was followed by the lower court, we are referred to the cases of Tate v. Hawkins, 81 Ky. 578, and Kendall v. Clarke, 90 Ky. 179, 13 S. W. 583. The facts of the case of Tate v. Hawkins, as stated by the court in the opinion, are: In 1862 Hawkins executed a note due March, 1863, to one Jennings, his vendor, for the balance of purchase price of land. In 1864 this note was assigned to Tate. On the date of this assignment of the note Hawkins sold and conveyed the land for cash consideration to Basket. In 1875 Basket sold for cash consideration the land to Milner. In 1881 an action was brought by Tate against Hawkins and Milner, seeking to recover the note and enforce the vendor's lien claimed. Indorse-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ments on the note showed that there was payment made March, 1873, and another March, 1878. Thus the note as to Hawkins was not barred by limitation. The court, per Lewis, J., said: "By the terms of the statute, the action of appellant on the note was barred fifteen years after the note matured, and he had then lost his right to maintain the action for the enforcement of the lien. If appellee Milner is now to be deprived of the safeguard provided by law, and upon the faith of which he purchased and paid for the land, it is to be done by an obstruction to the running of the statute, and a recognition of the cause of action after it had by law ceased to exist, made by Hawkins without his consent or notice to him. * * * The lien is a charge upon the land, which it is not the policy of the law, nor in accordance with the analogy of the law, should exist longer than the statutory existence of the note; and, if reasons were necessary to justify this salutary and necessary principle, they are afforded by the circumstances of the case."

In the case of *Kendall v. Clarke* the court, by Lewis, J., said: "It is obvious more than fifteen years had elapsed from the time the note fell due until the action was instituted; but, to avoid the plea of limitation, a credit of \$18.80 indorsed on the note as of January 2, 1882, is relied on, and seems to have been considered by the lower court sufficient for the purpose. Whatever may be the operation of the credit so far as Royse, while living, and his personal representative and devisees afterwards, might have been, it certainly did not nor should have the effect to continue, beyond the period of 15 years, the lien on that part of the land purchased by appellant Campbell; for it was expressly decided by this court in *Tate v. Hawkins*, 81 Ky. 577, that, while a partial payment made by the original vendee on a note for the purchase money within 15 years would have the effect, as to him, to suspend operation of the statute of limitation between accrual of cause of action on the note and date of payment, the rule could not be applied to the prejudice of a remote vendor nor a party to the transaction. Consequently the statute of limitation is, as to Campbell, clearly a bar, and it was error to enforce the alleged lien on, and subject to satisfaction of the note, any portion of the original tract owned by him." The note in the *Kendall Case* was payable December, 1869, and the action was brought May, 1885. The date of Campbell's purchase, as shown by an examination of the record, was before the statutory bar and before the payments that elongated the statute of limitation as a bar,—facts similar in every way to *Tate v. Hawkins*.

These cases, appellee contends, are conclusive of the question that the judgment of the lower court is the law. We are referred by appellant's counsel to the cases of *McCracken Co. v. Mercantile Trust Co.*, 84 Ky. 344,

1 S. W. 585; *Hughes v. Edwards*, 9 Wheat. 489; *Ewell v. Daggs*, 108 U. S. 149, 2 Sup. Ct. 408; *Perkins v. Sterne*, 23 Tex. 561; *Duty v. Graham*, 12 Tex. 427; *Flanagan v. Cushman*, 48 Tex. 241; and *Sanger v. Nightingale*, 122 U. S. 176, 7 Sup. Ct. 1109.

In the case 84 Ky. 344, 1 S. W. 588, it is said: "There is no statute of limitations as to liens. If the claim becomes barred, the lien dies with it. If the claim could be made an incident of the lien, then the statute of repose would be defeated. As the claim no longer legally existed, the lien had nothing to support its existence." This case was a tax lien, which was barred in five years. In the case of *Bank v. Thomas* (Ky.) 3 S. W. 12, the court said: "The mortgage was a mere incident to the debt, and given to secure its payment; and, when the right of recovery as to the debt itself is gone, the lien to secure it necessarily goes with it. The stipulations of the mortgage are not independent covenants upon which a recovery can be had regardless of the debt, to secure the payment of which the mortgage was given. The liability of appellee is on the original paper as the drawer; and, when that liability ceases, the covenants in the mortgage, having created no new right, except the lien, cannot be looked to as extending the liability from 5 to 15 years." In the case of *Prewitt v. Wortham*, 79 Ky. 287, the court said: "The rule in this state in reference to mortgages, whether on personal or real estate, is that they are mere securities for the debt. No title passes to the mortgagee and no right is acquired by the mortgagee, except as an incident to the debt. When the debt to secure which the mortgage was given is barred by statute, the incident goes with the principal, and the mortgage ceases to be enforceable." Likewise it has been repeatedly held a mortgage or vendor's lien is an incident of a debt, and that an assignment of the principal obligation carries the right of lien. All this proposition as to the lien being an incident of the debt and lives with the debt it secures is conceded to apply as between the payor and payee of the debt. But it is contended that as to vendees and mortgagees the same rule does not apply; that as to vendees and mortgagees the lien is barred when the period fixed by statute will bar the debt,—this, regardless of any elongation of the debt by payments or new promises.

We are of opinion that as to vendees and mortgagees the same rule does not apply as between the parties; but we do not assent to the doctrine that as to vendees and mortgagees all liens are barred in 15 years after the accrual of the right of foreclosure. We are of opinion that after the payee of the note has sold the property in lien, or, as in this case, mortgaged the property, a subsequent payment by Bramel would not elongate the lien on the lands as to the appellee trust company, for then the trust company would be subject to the action of Bramel, over whose

actions it had no control, and against which it could not guard. However, we are of the opinion that, as to the appellee trust company, mortgagee, the lien of appellant for purchase money existed for the full length of time from the date of the last payment or last promise by Bramel made before the execution of the mortgage to appellee trust company, which payment, as stated in the reply of appellant, was January 6, 1892, the mortgage being executed in September, 1892. Wood, Lim. § 229: " * * * Any act of the mortgagor which operates to keep the mortgage debt on foot also operates to keep up the mortgage lien, as an acknowledgment of the debt by the mortgagor in the mode and with the formalities required by law. A part payment of principal or interest made by the mortgagor or his agent revives the mortgage, and gives it a new lease of validity from the date of such payment. * * * But, in order to have that effect, the payment must be made while the mortgagor owns the equity of redemption, and a payment made after he has parted with the same does not revive or keep on foot the mortgage security, as, from the time when he parts with his interest in the land, his power to bind it in any manner is gone, either as to past or future debts." Jones, Mortg. (5th Ed.) § 1201, lays down this rule: "Moreover, any purchaser from the mortgagor, with actual or constructive notice of the mortgage, is bound by any previous acknowledgment of the debt by his grantor,"—citing *Heyer v. Pruyn*, 7 Paige, 465; *Hughes v. Edwards*, 9 Wheat. 489; *Carson v. Cochran* (Minn.) 53 N. W. 1130. The same author, continuing (section 1202), says: "A purchaser with actual notice of the mortgage, or constructive notice by means of a registry, can avail himself of the presumption of payment from lapse of time only when the mortgagor could avail himself of it under the same circumstances. The grantee succeeds to the estate and occupies the position of his grantor. He takes subject to the incumbrance, and his title and possession are no more adverse to the mortgagee than were the title and possession of the mortgagor. The purchaser is bound by the acts and declarations of the mortgagor * * * while he retains the equity of redemption, or any part of it; as, for instance, the purchaser of a part of the mortgaged premises cannot claim a presumption of payment of the mortgage from lapse of time when this presumption is repelled by payments of interest made by the mortgagor within twenty years, or by his admissions within that time that the mortgage was then subsisting. A purchaser from the mortgagor stands in no better position than the mortgagor himself as to gaining title by possession and lapse of time, if the mortgage be recorded. The record is notice of the mortgage to a subsequent purchaser, and the mere fact that he has had actual possession under his purchase for the statute period of limitation is no bar to a foreclosure of the mortgage,"—citing

Herndt v. Porterfield (Iowa) 9 N. W. 322; *Johnson v. Association* (Tex. Civ. App.) 21 S. W. 961; *Whittacre v. Fuller*, 5 Minn. 508 (5 Gil. 401); *Ware's Adm'rs v. Bennett*, 18 Tex. 794.

In the case of *Hughes v. Edwards*, 9 Wheat. 497, the supreme court said: "It is objected, in the third place, that the respondents are barred of their right to foreclose by length of time. It is not alleged or pretended that there is any statute of limitations in the state of Kentucky which bars the right of foreclosure or redemption, and the counsel for the appellants place this point entirely upon those general principles which have been adopted by the courts of equity in relation to this subject. In the case of a mortgage coming to redeem, that court has, by analogy to the statute of limitations, which takes away the right of entry of the plaintiff after 20 years' adverse possession, fixed upon that as the period, after forfeiture, and possession taken by the mortgagee, no interest having been paid in the meantime, and no circumstances to account for the neglect appearing, beyond which a right of redemption shall not be favored. In respect to the mortgagee who is seeking to foreclose the equity of redemption, the general rule is that, where the mortgagor has been permitted to retain possession, the mortgage will, after a length of time, be presumed to have been discharged by the payment of the money or a release, unless circumstances can be shown sufficiently strong to repel the presumption, as payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing, and the like. Now this case seems to be strictly within the terms of this rule. The two letters from the mortgagor to the female plaintiff (1803 and 1808) admit that the mortgage was then subsisting, that the debt was unpaid, and they contain promises to pay it when it should be in the power of the writer. In addition to these circumstances, credits were indorsed on the bond for payments acknowledged to have been made, which, though blank, the court below ascertained to have been made on the 15th of January, 1798, the 15th of May, 1803, and the 2d of August, 1808. The mortgagor, then, cannot rely upon the length of time to warrant a presumption that his debt has been paid or released; the circumstances above detailed having occurred from eight to thirteen years only prior to the institution of this suit. But it is insisted that, although these acknowledgments may be sufficient to deprive the mortgagor of a right to set up the presumption of payment or release, they cannot affect the other defendants, who purchased from him parts of the mortgaged premises for a valuable consideration. The exclusive answer to this argument is that they were purchasers with notice of this incumbrance. It must be admitted that it was but constructive notice; but, for every purpose essential to the pro-

tection of the mortgagee against the effect of those alienations, it is equivalent to a direct notice, and such is unquestionably the design of the registration laws of Kentucky. A purchaser with notice can be in no better situation than the person from whom he derives his title, and is bound by the same equity which would affect his rights. The mortgagor, after forfeiture, has no title at law and none in equity, but to redeem upon the terms of paying the debt and interest. His conveyance to a purchaser with notice passes nothing but an equity of redemption, and the latter can no more than the mortgagor assert that equity against the mortgagee without paying the debt, or showing that it has been paid or released, or that there are circumstances in the case sufficient to warrant the presumption of those facts, or one of them. The court is therefore of opinion that this objection cannot be sustained by either of the appellants." But when the obligor has parted with title to the property, either by sale absolute or by mortgage, his right to further bind the property ceases, except as his interest therein exists; and the elongation of the debt by payments or new promises can only operate as against the obligor and his property, for no act of his would work an estoppel against his vendee or mortgagee. This principle is not in conflict with that of *Tate v. Hawkins*, but accords therewith. In that case Hawkins sold the land by deed in 1864 to Basket. The lien notes then had some 14 years to run. Tate could at any time within the 14 years have enforced his lien on the land. The subsequent payments by Hawkins in 1873 and 1878, made after the alienation of the land by Hawkins, operated to elongate the note, but could not extend to the land, for the reason that at the date of these payments Hawkins had no control over the land, and could not bind it further than he had done so while he was the owner. The same is true in the case of *Kendall v. Clarke*.

In this case the notes given, if no payments had been made, were not barred by limitation at the date of the mortgage to appellee trust company, and any inspection of the record would have put it on notice concerning appellant's debt. At the date of the mortgage to appellee, the appellant, by reason of the annual payments made by Bramel, had 14 years in which she could collect her notes and enforce her lien, and it cannot be said that, by reason of the fact that Bramel executed a mortgage to appellee trust company, this right to enforce collection and her lien was reduced to 15 years from the original date of maturity. To so hold would allow a debtor to defeat the collection altogether of a debt, if by payments he had been indulged beyond the period of limitation, on the idea that, being the payor and owner of the property, he could by payments elongate both note and lien. For after the lapse of 15 years from the date of maturity, when

it would be barred, except for the payments, the debtor could sell the property free of lien. This cannot be the law. The vendee or mortgagee accepts the position as it is when his conveyance is executed. The holder of the lien has all the time to enforce the lien, as the facts of the case at that time give him no more. It follows that the appellant's lien for purchase money is not barred by limitation, and she is entitled to have same enforced, even as against the mortgagee trust company. Being a vendor's lien, it is prior to the mortgage lien. The trial court, therefore, erred in sustaining a demurrer to her reply. For the reasons indicated, the judgment appealed from is reversed, and cause remanded for proceedings consistent herewith.

GUFFY, J., dissents.

BRIDGES et al. v. McALISTER.¹

(Court of Appeals of Kentucky. June 9, 1899.)

APPEAL AND ERROR—LIABILITY FOR ACTS DONE UNDER JUDGMENT SUBSEQUENTLY REVERSED—PERSONS BOUND BY JUDGMENT—SECOND APPEAL—LAW OF CASE.

1. The reversal of a judgment which has not been superseded does not give a right of action for damages for acts done in obedience to the judgment while in force, the extent of liability being the duty to make restitution of what has been received under the judgment. *Hays v. Griffith*, 3 S. W. 431, 11 S. W. 306, and 85 Ky. 375, overruled.

2. A judgment against an agent requiring a ditch to be filled binds the principal, so that upon the reversal of the judgment he cannot recover damages against the plaintiffs for injury to his property resulting from the filling of the ditch in obedience to the judgment while it was in force.

3. The estoppel of a judgment is mutual, and, if it binds one of the parties so as to prevent him from showing the truth, it binds the other.

4. An opinion on a former appeal that plaintiff was not bound by a judgment in a former action, because he was not a party or privy to that action, is not the law of the case on a second appeal, an amended answer having been filed after the former appeal, in which it was alleged for the first time that the judgment relied on was rendered against plaintiff's agent, thus raising a new issue, and showing that plaintiff was bound by the judgment, though not a party or privy.

Appeal from circuit court, Daviess county.
"To be officially reported."

Action by W. M. McAllister against Martin Bridges and others to recover damages to his land from the closing of a ditch. Judgment for plaintiff, and defendants appeal. Reversed.

G. W. Jolly, Horace Jolly, and R. G. Hill, for appellants. Sweeney, Ellis & Sweeney and Walker & Slack, for appellee.

HOBSON, J. Appellants and appellee own neighboring farms. Between their lands there was a ridge, which prevented the water

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

falling on appellee's land from flowing down naturally over appellants' land. Both farms lie in a very level section, where there is difficulty about drainage. Some years ago the owners of the land above the ridge, and some of those below, united in an undertaking to cut a ditch in a southerly direction, through the ridge, to Panther creek, for the purpose of draining all their land. The ditch was cut through the ridge, but, for want of means to complete it, there stopped. The result of this was that the lands above the ridge were drained and the lands below were flooded by water that did not by nature flow upon them. The work upon the ditch was abandoned. It caved in. Trees and other things fell in it, until in many places it was nearly filled up. The owners of the land above the ridge after some years employed William Miller to clean it out, and, he having begun to do so, appellants and others, owning land below the ridge, filed suit against him for the purpose of enjoining him from cleaning out the ditch. On the hearing of this case the circuit court entered a mandatory order requiring the ditch to be filled up so that no water could pass over the ridge that did not flow over it naturally. On appeal from this judgment to this court it was held that the injunction should have prohibited the appellants from cleaning out the ditch, or from reconstructing it in any way so as to increase the flow of water on the land below it, and that it was error to require the ditch to be filled up. See *Miller v. Hayden*, 91 Ky. 215, 15 S. W. 243. On the return of the cause a judgment was entered in that action pursuant to the mandate of this court. This was something over two years after the entry of the original judgment requiring the ditch to be filled up. There had been no supersedeas of that judgment, and, in obedience to it, the ditch had been filled up as therein required. By reason of the filling up of the ditch under the judgment, the water which had passed through it from appellee's land could no longer escape in this way, and was thrown back on it. After the ditch had been opened to the extent indicated by the judgment entered in obedience of the opinion of this court, appellee brought this suit for damages to his land from the closing of the ditch for the two years it had remained stopped up under the judgment. Appellants pleaded, in defense of the action, that the ditch had been stopped up in obedience to the order of the court, and relied upon that judgment as a protection to them for damages sustained by reason of what was done in obedience to it, there being no supersedeas. They did not allege, however, that appellee was party or privy to the case in which the judgment was rendered, and the court sustained a demurrer to this plea. There was then a trial, and verdict for defendants, which, on appeal to this court, was set aside. The opinion of this court pointing out that the judgment pleaded was no bar, because it was not averred that

appellee was party or privy to that action. *McCallister v. Bridges* (Ky.) 40 S. W. 70. There was no cross appeal in that case, and from the nature of the case there could be none; so the only question before the court was whether there had been a fair trial before the jury. Nothing more was considered or decided. On the return of the case the defendant tendered an amended answer, in which he set out that Miller, while cleaning out the ditch, was acting as the agent and servant of appellee, McCallister; that appellee, with others, employed him to dig the ditch, and knew of the suit, testified in it as a witness, and that Miller was only their agent in the transaction. The court below refused to allow the amended answer to be filed, holding, in effect, that the judgment was no protection as to acts done under it, though not superseded. There was then another trial, resulting in a verdict for \$1,000 in favor of appellee.

The main question arising on this appeal is as to the effect of the reversed judgment on acts done under it and in obedience to it before its reversal, when it was not superseded. In *Freem. Judgm. § 482*, it is said: "But a subsisting judgment, though afterwards reversed, is a sufficient justification for all acts done by plaintiff in enforcing it prior to the reversal. Thus, if the defendant be taken in execution, the subsequent reversal of the judgment will not render the plaintiff liable to an action for false imprisonment; for the act of imprisonment, when directed by the plaintiff, was sanctioned by a then valid judgment." And in section 104b the same author says: "The case of a judgment set aside for irregularity differs materially from that of one reversed upon appeal. In the latter case the error for which the judgment is ultimately avoided is imputed to the court, and the parties are not left without protection for the acts which they have done, based upon the judgment, and upon their confidence in the correctness of the decisions of the court." The same principles are laid down in *Black, Judgm. §§ 170, 355*. In *Kaye v. Kean*, 18 B. Mon. 847, Kean obtained a mandamus against Kaye, which he refused to obey, and, being imprisoned for disobedience, brought suit against Kean, upon a reversal of the judgment awarding the mandamus, for damages for his imprisonment. His petition was dismissed. The court said: "The judgment of the circuit court is not void, but merely erroneous. * * * So long, therefore, as the judgment remained in force unsuspended and unreversed, it was the duty of the appellant to have rendered obedience to it. His contumacy subjected him to be proceeded against for a contempt, and as, therefore, there was sufficient cause for his imprisonment, he cannot maintain an action therefor against the appellee." In *Clark v. Rodes*, 12 Bush, 16, again this court said: "A judgment is a final and conclusive determination of the rights of the parties to the litigation, and until it shall be reversed, vacated, or

modified in some one of the modes provided by law the parties cannot refuse to obey it; nor can they, by subsequent litigation, indemnify themselves against its legal consequences." In *Fraser's Ex'r v. Page*, 82 Ky. 73, an executor who had paid out a fund under a judgment which was not superseded, and afterwards reversed, was held protected by it for acts done in obedience to it while in force. The same ruling was made in *McKee v. Smith's Adm'r*, 5 Ky. Law Rep. 224; *Shultz v. Beatty*, 6 Ky. Law Rep. 662; *Showalter v. Simmons*, 5 Ky. Law Rep. 423; *Dudley v. Beatty*, Id. 773. These cases proceed upon the principle that what was lawful when done does not become unlawful by reason of subsequent acts. The chancellor, in entering the judgment in the case referred to, did not act as the agent of either of the parties. The judgment was the act of the law. Neither party could control the court, and neither was responsible for his actions. The law constituted a tribunal to determine the rights of the parties. That determination, proceeding from a power above them, was in no sense their act. A litigant in this court does not procure the judgment entered in any such sense as to render him responsible for the consequence of the judgment, or its reversal by the United States supreme court. We have been referred to no case, and can find none, where an action for damages has been sustained upon the reversal of a judgment for acts done pursuant to it, as for tort. The fact that there are no precedents for such recovery seems at this day conclusive that it has not been recognized as admissible by either the bench or the bar. When a judgment is reversed, restitution must be made of all that has been received under it, but no further liability should in any case be imposed. The case of *Hays v. Griffith*, 85 Ky. 375, 3 S. W. 431, and 11 S. W. 306, is not supported by the weight of authority, and cannot, in our judgment, be maintained on principle, so far as it lays down a greater liability. The quotation made from *Freeman on Judgments* is from a sentence omitted altogether in the last edition. The opinion is supported only by some cases in Illinois and California, and is contrary to the rule followed by the United States supreme court and all the other state courts, so far as we have seen. It is also in conflict with the well-settled rule that the court, in ordering or confirming a judicial sale, and the commissioner, in making it, do not act as the agent of the plaintiff. *Bank of U. S. v. Bank of Washington*, 6 Pet. 9; *Rorer, Jud. Sales*, §§ 1-12; *Forman v. Hunt*, 3 Dana, 621. Appeals may be taken from judgments, ordinarily, within two years, but sometimes within five or twenty years; and it would not do to hold a litigant responsible for the consequences of an erroneous judgment under such circumstances. The object in having trust estates, including those of decedents, or those assigned for the payment of debts, settled in equity under the direction of the chancellor, is to protect the parties in the payment of the money,

as well as to secure to every one his rights. A creditor with a small claim, who moved for a distribution of the fund, would, under the rule referred to, be responsible for the entire fund upon a reversal of the judgment, although he had received only a few dollars of it. Such a rule would destroy all confidence in judgments of courts, and make them the prolific parent, in many cases, of ruinous litigation. Our system of courts and the principles governing them are derived from the common law. But in England the tribunal was called the "curia" or "court," because it was held by the king himself originally. The judgments of the courts read as the judgments of the king, and when he ceased to hold the court in person, and delegated this function to one of his officers, the character of the judgment was the same. Manifestly, there the subject was not responsible for damages for the act of the king. In this country the power vested in the king vests in the body of the people, and the courts sit as their representative. The law, from principle and policy, requires that full confidence should be given to their judgments while in force. It tends to prevent the troubles incident to the settlement of disputes by the act of the parties, often bringing about breaches of the peace or bloodshed. It is the duty of every good citizen to obey the mandates of the law, and no one should incur any responsibility by doing that which it was his duty to do. It is also the duty of every citizen to uphold the authority of the courts, and maintain respect for their judgments; and when, in doing this, he obeys a judgment of the court, it is a sound and safe rule that no liability for damages should arise therefrom. The case of *Hays v. Griffith* is disapproved so far as it may be construed to lay down a different rule.

It remains to determine whether appellee was bound by the original judgment while it was in force. In *Freem. Judgm.* § 174, the rule is thus stated: "Neither the benefits of judgments on the one side nor the obligations on the other are limited exclusively to parties and their privies. Or, in other words, there is a numerous and important class of persons who, being neither parties upon the record nor acquirers of interest from those parties after the commencement of the suit, are nevertheless bound by the judgment. Prominent among those are persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person." In *Herm. Estop.* §§ 150-152, it is said: "One who is benefited by the prosecution of an action of which he has notice is to be regarded as a party in interest, although his name does not appear therein. A master or principal is in privity with his servant or agent when the latter defends an action in the right of the former, and a judgment is an estoppel to a renewal of the principal or master in the suit on the ground that he is considered the real party, and especially when the principal expressly or impliedly au-

thorized or ratified the acts of the agent, virtually rendering him a party to the proceedings instituted by or against the other. In such cases the technical rule that a judgment can only be admitted between the parties to the record or their privies expands so as to admit it when the same question has been decided and judgment rendered between parties responsible for the acts of others." These conclusions are sustained by *Emery v. Fowler*, 63 Am. Dec. 627; *Hill v. Bain* (R. I.) 23 Atl. 44; *Robbins v. City of Chicago*, 4 Wall. 672,—where many other authorities are collected. This subject was fully considered by this court in the case of *Schmidt v. Railway Co.*, 99 Ky. 143, 35 S. W. 135, and 36 S. W. 168, and under the principles settled in that opinion and in the previous case of *Warfield v. Davis*, 14 B. Mon. 33, appellee was clearly bound by the judgment against his agent, Miller, in the original action. That action was clearly brought to settle the rights of the parties. It has since been recognized by them as settling their rights. Appellee brought no suit for damages for the filling up of the ditch until that judgment was reversed, and it may be safely assumed that he would not have sued at all if that judgment had been affirmed. The action has proceeded upon the assumption of both parties that the judgment in that case finally settled their rights, and that appellant could not relitigate here the right to stop up the ditch entirely, which was determined against him there. But the estoppel of a judgment is always mutual. If it binds one of the parties, so as to prevent him from showing the truth, it also estops the other. If the judgment referred to did not bind appellee until reversed, then it constituted no estoppel upon appellant in this action, and he might have shown all the facts, and had the jury pass on the question of fact determined there. Appellee has not proceeded with his case upon this theory, but both parties have recognized the judgment in the equity case as settling finally their rights in the ditch. This was, we think, a correct view of the law. The judgment finally rendered in that action is conclusive on both parties as to the right to maintain the ditch; and the chancellor's judgment, until reversed, was equally conclusive, and, not having been superseded, neither can maintain an action against the other for acts done in obedience to it while it was in force. This question was not before the court on the last appeal of the case, and what was said then must be taken in reference to what was before the court. There was no plea then of any facts showing that appellee was party privy to the judgment relied on in bar, or bound thereby in any way. These facts having been pleaded on the return of the case, the question is now before the court for the first time. Then there had been a verdict for the defendant. There was no cross appeal, and could be none, and the only question was whether there had been a fair trial under the issues

presented. The rule is well settled that a question not in issue, though passed upon in the opinion on a prior appeal, is not res judicata on a subsequent appeal, where the issue was properly made by pleadings filed after the first appeal. See note to *City of Hastings v. Foxworthy* (Neb.) 34 Lawy. Rep. Ann. 344 (s. c. 63 N. W. 955), and cases cited. Thus, in *O'Brian v. Com.*, 6 Bush, 563, it was held that a discharge of a juror after the jury was sworn, without the defendant's consent, did not operate to acquit him. But when this opinion was rendered there had been no plea of former jeopardy. On the return of the cause to the lower court the defendant put in this plea, and, having been again convicted on a second appeal, the former opinion was held not to conclude the question, and the defendant was discharged. 9 Bush, 333. This rule has the indorsement of the United States supreme court, and seems to us sound, and necessary to the proper administration of justice. *Barney v. Railroad Co.*, 117 U. S. 228, 6 Sup. Ct. 654. The judgment complained of is therefore reversed, and cause remanded, with directions to the court below to grant appellants a new trial, to allow the amended answer to be filed, and for further proceedings not inconsistent with this opinion.

HOOVER et al. v. HAWKS et al.¹

(Court of Appeals of Kentucky. April 26, 1899.)
FRAUDULENT CONVEYANCES — PREFERENCE OF CREDITORS — HUSBAND AND WIFE — RIGHTS OF WIFE AS AGAINST HUSBAND'S CREDITORS.

1. A sale cannot be set aside as fraudulent as to creditors, though the purpose of the seller to use the proceeds in paying one creditor to the exclusion of others be known to the buyer; the only remedy of the excluded creditors being to have the transaction declared to operate as an assignment under the statute.

2. Where a grandfather advanced money for his granddaughter for the purchase of a stock of goods jointly with her husband, intending to retain in himself the title to her interest in trust for her, he may assert that interest as against the husband's creditors, though the business was conducted in the husband's name.

Appeal from circuit court, Barren county.
"Not to be officially reported."

Action by Mary E. Hawks and others against Samuel L. Hoover and others to enforce a judgment and to set aside a conveyance as fraudulent. Judgment for plaintiffs, and defendants appeal. Reversed.

Baird & Dickey, Craddock & Sandridge, and Sims & Covington, for appellants. W. L. Porter and Boles & Duff, for appellees.

PAYNTER, J. The evidence in this case clearly shows that J. S. Jordan, the grandfather of Mattie M. Hoover, furnished \$600-odd for her in purchasing a stock of merchandise in connection with her husband, S. L. Hoover; that the business was carried on in the name of S. L. Hoover; that the public

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

was not aware of the fact that the grandfather had furnished for his granddaughter the sum stated in the purchase of the stock of merchandise. On or about July 1, 1895, S. L. Hoover and his wife sold to Elijah Hoover, a brother of S. L. Hoover, the stock of merchandise which was invoiced at \$1,206.97. To pay for the stock of merchandise, he agreed to pay \$375, for which he was liable as surety for his brother, S. L. Hoover, to certain attorneys, and in writing assumed to pay to J. Q. Parker \$300, the sum which he had loaned S. L. Hoover to invest in the stock of merchandise, and to pay Mrs. Hoover for the interest which she claimed in the stock of merchandise. He gave her a check on a bank for \$600, which was subsequently paid. It further appears that on January 1, 1895, S. L. Hoover made a contract with one Fant, by which he purchased from him real property in consideration of (in round numbers) \$950. He did not have the money with which to pay for the land, and J. S. Jordan advanced the money for that purpose, and he executed his notes to him to secure him in the payment of the money thus advanced. The deed from Fant and wife to S. L. Hoover recited the fact that Jordan had furnished the money to pay for the land, and a lien was retained thereon to secure him in its payment. About the time (a little after) Elijah Hoover purchased the merchandise, Mrs. Hoover, her husband, and her grandfather, Jordan, made a contract by which Jordan accepted the \$600 check given by Elijah Hoover to Mrs. Hoover and a certain tract of land (or its proceeds), which he had previously given Mrs. Hoover, in satisfaction of the notes which he held of S. L. Hoover, executed for the purchase money. This arrangement was made in consideration that the deed which Fant made Hoover (but had never been acknowledged or recorded) should be canceled, and a deed made by Fant and wife to Mrs. Hoover for the land. About the middle of January, 1895, it was claimed that S. L. Hoover made an assault upon the appellee Mary E. Hawks, and she instituted an action against him to recover damages therefor, a trial of which resulted in a verdict and judgment against him for \$1,000. An execution issued upon the judgment, and a return of no property found was made thereon, and this action was instituted to have adjudged fraudulent the sale of the merchandise to Elijah Hoover and the transaction with reference to the Fant land. This action is not for the purpose of having the court adjudge that the sale of the merchandise and the transaction with reference to the land were a preferential act, under the statute of 1856. It is insisted that S. L. Hoover sold his merchandise and entered into the other transaction for the fraudulent purpose to cheat and hinder the appellee in the collection of her judgment. The evidence in this

case tends to establish the fact that the value fixed upon the stock of merchandise was fair and that Elijah Hoover paid it. He paid the debt of \$375 to the attorneys which he assumed to pay, except, perhaps, \$15, which he is still obligated to pay, and he assumed in writing to pay the Parker debt, which the proof in the case leaves no doubt was a valid and just debt of S. L. Hoover. The most that can be said with reference to the sale of the merchandise to pay those debts was the purpose upon the part of S. L. Hoover to pay them in preference to any judgment which the appellee might recover against him, for at the time of the transaction she had not recovered a judgment against him. A sale cannot be set aside because a debtor sells his property for the purpose of paying debts, though he apply the proceeds in a preferential way to his creditors. When such is the case, the remedy of a creditor who suffers by such preferential act is to institute a suit to have it treated as an assignment for the benefit of all the creditors. A debtor may sell property to pay one creditor in preference to another, and a knowledge of such intention by the purchaser will not vitiate his purchase. *Brown v. Smith*, 7 B. Mon. 364. Such a transaction can only be attacked under the act of 1856. *Beatty v. Dudley*, 80 Ky. 381.

It is not even suggested in this record, much less proven, that J. S. Jordan did not have the ability to supply his granddaughter with money to purchase an interest in the stock of merchandise and the son-in-law the money with which to buy the Fant land. It is admitted by the pleadings that he is a wealthy man. We see nothing in this record to suggest that he lacks integrity or had a desire to do anything except to protect his granddaughter in what he conceived to be her legal rights. He charged his children and grandchildren with advancements which he made them and always retained the title to the property given them, and it is evident that he endeavored to retain in himself, in trust for his granddaughter, the interest which he purchased in the stock of merchandise, and he, the granddaughter, and S. L. Hoover believed that the wife had an interest in the stock of merchandise to the extent of \$600 at the time Elijah Hoover purchased it. If the grandfather held such an interest in trust for the granddaughter as could be asserted as against a creditor of S. L. Hoover, then, of course, the appellee could not complain at the sale of her interest in the merchandise to Elijah Hoover. We are of the opinion that he held such an interest in trust for the granddaughter. If that be true, then she had the right to receive the check and invest it in the land as she did do. It appears that S. L. Hoover had not paid anything on the land himself. The judgment is reversed for proceedings consistent with this opinion.

PRITCHETT v. HAPE et al.¹

(Court of Appeals of Kentucky. June 7, 1899.)

VENDOR AND PURCHASER — LIEN — LIABILITY OF PURCHASER AS ASSIGNOR OF NOTE — DILIGENCE REQUIRED.

1. Where notes are assigned by the purchaser to the vendor as consideration for land, the lien retained in the deed secures only the implied liability of the purchaser as assignor, and, when he is released from such liability, the lien is discharged.

2. A delay of more than four months to have execution issued on a judgment on an assigned note discharged the assignor from liability.

3. The fact of the obligor's insolvency is not sufficient to fix the assignor's liability, but the assignee must, with due diligence, obtain a return of no property.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Action by Green W. Pritchett against Louis Hape and others to enforce a vendor's lien. Judgment for defendants, and plaintiff appeals. Affirmed.

Montgomery Merritt, for appellant. Yeaman & Lockett, for appellees.

BURNAM, J. On the 21st day of August, 1893, appellant sold and conveyed to appellee a store house and lot of ground in the town of Corydon, Ky. The consideration was \$1,800, \$1,500 of which being represented by four land notes executed to appellee by one J. M. Pendleton, and due, respectively, in January, 1894, 1895, 1896, and 1897. Each of these notes bears this indorsement: "I assign within note to Green W. Pritchett, as per deed to me of this date, August 21, 1893." For the balance of the purchase money appellee executed his three promissory notes of \$100 each, and the deed to Hape retains a lien on the land for the purchase money. Appellee paid his three notes, and this litigation arises from the Pendleton notes. Appellant sued Pendleton on the first note at its maturity, and, defense being interposed, the case was continued until the second note fell due, in 1895; and at the January term, in 1895, he took a personal judgment on the two notes, aggregating \$700, with interest, appellee being a party to said suit. By consent a judgment was rendered to sell the tract of land as a whole to pay the four notes, and it was purchased by plaintiff for the sum of \$801.06, being less than the amount of the two first notes, with costs, on the 26th day of August, 1895. This sale was confirmed, and the land conveyed to plaintiff at the January term, 1896. Appellant obtained a judgment against Pendleton for the note due January 1, 1896, at the January term, 1896, and also, by consent of Pendleton, for the note due January 1, 1897, and on the 17th day of November thereafter had execution of fieri facias issued thereon, which directed the sheriff of Henderson county, being the county in which the land was situated, and the sheriff of Davless county, to which last-named

county Pendleton had moved since the rendition of the judgment, and both executions were returned no property found by the sheriffs to whom they were directed. Thereupon appellant, upon the 3d day of December, 1896, instituted this action, seeking to enforce his lien on the store house sold appellee for the balance remaining unpaid after the sale of the Pendleton land, alleging that Pendleton had no property in either county subject to execution at any time after the rendition of the judgment, and had remained wholly insolvent from that date. Appellee, by way of defense, says that appellant took the four notes of Pendleton as a cash payment without recourse, but that by mistake and oversight the assignment was not in accordance with agreement. He also pleads that appellant lost recourse, if he ever had any, by his failure to promptly sue out executions of the judgment rendered in January, 1896, for the two last notes. Appellant's reply denies that the notes were assigned without recourse, or that he has lost such recourse by failure to use diligence, relying upon the uncontroverted allegation that Pendleton, the payee, was insolvent, and that appellee was not prejudiced by the failure to sue out executions promptly upon the judgment rendered in 1896. The case being called for trial, the court, on its own motion, ordered an issue out of chancery and had a jury impaneled to pass upon this question: "Did Pritchett, in the sale of the house and lot in Corydon, agree to accept the notes of Pendleton as payment, and to look to Pendleton and the land alone for which the notes were given for their satisfaction?" The jury found for defendant, and subsequently the court rendered a judgment in conformity with that verdict, and dismissed the petition. Appellant now insists that the verdict of the jury was palpably against the weight of the evidence on the question of the assignment, and that the court erred to his prejudice in holding that his recourse on the land sold appellee was lost by failure to promptly sue out an execution against an insolvent party. And it is insisted that the lien retained in the deed made to appellee to secure the payment of the assigned notes recited, as part of the unpaid purchase money, may be enforced against the property, even if recourse against the assignor has been lost.

The first question to be considered, and one which is really decisive of the case, is, did appellee assign the notes of Pendleton to appellant without recourse? This question of fact has been passed upon both by the jury under the issue out of chancery and subsequently by the chancellor, and this would seem to be decisive of the question. Appellee testifies that appellant agreed to take the Pendleton notes without recourse, and he is corroborated in this statement by the testimony of his son, and more strongly by his uncontradicted statement that this property was offered to him by a former owner, shortly before his purchase from appellant, for \$1,600 cash, and that he refused to give it; and parol

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evidence was competent to establish the fact that the notes were taken without recourse, notwithstanding the fact that they were transferred by written assignment in the usual form (see *Butler v. Suddeth*, 6 T. B. Mon. 542); and while there is some conflict in the testimony on this point, and appellant is sustained in his contention by the language of the assignment, still, as the jury and chancellor both heard the witnesses testify, we think that their finding on this question should not be disturbed.

As to the other question, appellee by his assignment guaranteed the genuineness of the notes, and that the amount thereof could be made out of Pendleton by the exercise of proper diligence, and the lien retained in the deed only secured this implied liability. It was held in *Green v. Cummins*, 14 Bush, 174, that: "The assignee of a note taken in part payment for land must use due diligence to collect it, in order to preserve his lien retained in his deed, as against the vendee, who made the payment by the assignment of the note; that the lien retained by the vendee exists, in such case, only so long as the assignor remains liable on his assignment." The undertaking on the part of appellant when he accepted the notes, with appellee's assignment as partial payment for the purchase price of his house and lot, was that he would pursue the proper legal and equitable remedies against the obligor therein in order to collect them, and that when these remedies had been exhausted, and the debt was still unsatisfied, appellee would be liable. The judgment in this case was obtained in January, and appellant alleges in his petition that no execution was issued thereon until the following November; but in his reply this averment is corrected, and he says execution issued in May. No explanation is given for this long delay in suing out execution, and the fact that Pendleton was insolvent does not affect the diligence required of him. This question arose in the case of *Francis v. Gant*, 80 Ky. 190, and the court in that case said: "In establishing the rule creating the implied liability of the assignor, a corresponding duty was made to rest upon the assignee, and that was to coerce by suit the payment of a debt assigned, and to use proper diligence in its prosecution. When this is done, the assignee's cause of action arises, and such a record is not only evidence of the liability of the assignor, but it is the foundation of the assignee's right of recovery; * * * that the fact of insolvency existing not only at the time of the assignment, but continuously since that time, did not constitute a cause of action or authorize a recovery against the assignor; that the liability of the assignor could only be fixed by obtaining with due diligence a return of no property." And the diligence required to hold the assignor is that suit should be instituted at the first term after the debt falls due, prosecuted to judgment, and that an execution should issue thereon in due course. If there is no personal li-

ability on the part of appellee to pay the debt, and no judgment of law can be obtained against him, it necessarily follows that his property cannot be subjected thereto, as the lien retained on the property is only a collateral to the personal covenant. When the personal obligation dies, the lien is discharged. See *Vandiver v. Hodge*, 4 Bush, 538; *Yeates v. Weeden*, 6 Bush, 438; *Pack v. Carder*, 4 Bush, 121. For reasons indicated, the judgment is affirmed.

LEBUS v. BOSTON et al.¹

(Court of Appeals of Kentucky. June 7, 1899.)

EASEMENTS—IMPLIED RESERVATION OF PASSWAY—WAIVER BY VERBAL AGREEMENT.

Though the law might imply the reservation of an existing notorious and open passway "as a way of necessity" over land conveyed for the benefit of land retained by the vendor, yet the vendor may, by verbal agreement, waive such right of way.

Appeal from circuit court, Harrison county.

"Not to be officially reported."

Action by Clarence Lebus against Margaret A. Boston and others to recover damages for the obstruction of a passway, and to enjoin defendants from further interference with plaintiff's use of the passway. Judgment for defendants, and plaintiff appeals. Affirmed.

Blanton & Berry, for appellant. Collier & Dedman, for appellees.

DURNAM, J. This action was brought by appellant against appellees to recover damages for obstructing a passway leading from a public highway over lands of appellees to those of appellant, and to enjoin the further interference of the use of said passway by appellant. The facts necessary to be stated, and about which there seems to be no dispute, are these: In November, 1871, Henry Cox and his wife conveyed to Charles Ann Cosby, for life, with the remainder to her children, a tract of 80 acres of land, and subsequently, in November, 1872, the same grantors conveyed to Judge Redmond, the father of Mrs. Cosby, a tract of 103 acres of land, which was located between the 80 acres conveyed to Mrs. Cosby and the public road. There was no passway to or from the 80 acres conveyed to Mrs. Cosby and her children to the public highway, and in the fall of 1872 Redmond gave to his daughter a passway over his tract, and Mrs. Cosby and her family used this passway over the 103 acres until the death of her father, Judge Redmond, from whom she inherited the 103 acres. On the 14th day of November, 1890, Mrs. Cosby and her husband sold and conveyed by general warranty deed the tract of 103 acres to N. W. Frazier, which deed contained this reservation: "The first party is to give possession March 1, 1891, and it is further understood that the 80 acres above

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named is to bear its part of expenses as to gate," etc., "to the said 80 acres by the passway." A short time thereafter,—in December, 1890,—Frazier also purchased the 80 acres deeded to Mrs. Cosby and her children, which were sold under a judgment of the Harrison circuit court; thus becoming the owner in fee simple of both tracts of land, which he continued to own until the 24th of February, 1896, when he sold and conveyed by general warranty deed 93.54 acres of the land to appellee Margaret Ann Boston. Frazier died in 1897, and on the 2d day of October, 1897, his heirs sold and conveyed the remainder of the 183 acres, consisting of 90.11 acres, to appellant. It is alleged and shown by the proof that during the time that Frazier was the owner of both tracts of land he used the passway to get to the 80-acre tract. The land conveyed to Mrs. Boston included that portion of the 103 acres occupied by the passway, but there was no reservation thereof in the deed to her, while in the conveyance of the residue by the heirs of appellant this passway was expressly conveyed. It is alleged by appellee that at the time of the sale and conveyance of the 93.54 acres by Frazier to her it was expressly agreed and understood, and was a part of the consideration for said conveyance, that no passway should remain over the land sold to her in favor of the residue of the tract retained by the vendor. This averment is denied, but is proven by W. R. Gregory; and Durbin (who examined the title of this land for Mrs. Boston) testifies that it was agreed that there was to be no passway over the land, and that Frazier stated that there was no necessity for such passway, as he had another outlet to another pike, and other ways to get out; and that it was only with this understanding that Mrs. Boston accepted the deed. In 1890 the unity of possession and title to both tracts was in Frazier, and continued in him uninterruptedly until the sale, in 1896, to appellee. It is the contention of appellee that Frazier could not have an easement in his own land, as the uses of an easement are covered by the general right of ownership; that the easement was merged and suspended in the larger estate; and, having sold and conveyed that portion of the boundary occupied by the passway by unqualified grant, there is no implied reservation of the use of it for the benefit of the grantor. While on the other hand, it is contended by appellant that as Frazier, during the time that he was the owner of both tracts of land, continuously used the passway over the 103 acres in traveling to and from the 80-acre tract, and at the time of the sale it was notorious, visible, and well marked, and the purchaser took subject to its continued use, without express reservation to that effect, the parties are presumed to contract in reference to the condition of the property at the time of the sale; and neither has the right, by altering arrange-

ments then openly existing, to change materially the relative value of the respective parts,—relying upon Jones, *Easem.* § 141. The legal question, then, is, does the law attach to the unqualified grant from Frazier to Boston of the 93.54 acres, which includes the whole of this passway, an implied reservation of the use of it for the benefit of the 90.11 acres which he still retained? An examination of this question shows that: "There is a general concurrence of authority, both in England and in this country, in support of the proposition that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed there will pass to the grantee those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted; but upon the question whether, upon such a grant, the law will ingraft reservation of such easements in favor of the part retained by the grantor, the authorities, until quite recently, have been very conflicting," but the latter cases hold that, "if the grantor intends to reserve any right from the right of any tenements granted it is his duty to reserve it expressly in the grant, and to this the only exception is ways or easements of necessity." See *Mitchell v. Seipel*, 53 Md. 262, and cases cited; *Strohmier v. Leahy* (Ky.) 9 S. W. 238. All the text writers and decisions have drawn a distinction between implied grants and implied reservations. Jones, in his work on *Easements*, discusses this difference in chapter 3, citing numerous decisions, and states the general rule to be that, "where one conveys a part of his estate, he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which are reasonably necessary for the use of that part" (see section 129), but holds that: "There is no implied reservation of an easement in case one sells a part of his land over which he has previously exercised a privilege in favor of the land he retains unless the burden is apparent, continuous, and strictly necessary for the enjoyment of the land retained. A grantor cannot derogate from his own grant, and, as a general rule, he cannot retain a right over a portion of his land conveyed absolutely only by express reservation. Thus, if a man makes a lane across one farm to another, which he is accustomed to use, and then conveys the farm without reserving a right of way, it is clearly gone. A man cannot, after he has absolutely conveyed his land, still retain the use of it for any purpose, without an express reservation. It is only in the cases of the strictest necessity that the principle of implied reservation can be invoked." See section 136. The fact that one has been in the habit of using certain land in connection with his adjoining premises does not create an ease-

ment upon the first-named land, which, upon a conveyance of that land without words of exception or reservation, will be annexed to such other premises. But there are numerous exceptions to this rule, and the author refers to the case of a man having a field, which he does not sell, in the midst of land which he sells. Of course, it is implied that he intends to have the power of using the field not sold, and not to give the exclusive right or control over it to the person to whom he sells the surrounding land; and a way over that is said to be a way of necessity, and that is reserved without express words, as implied reservation. It seems to us, under the facts of this case, that at the time Frazier sold the land to appellee, if nothing had been said on the subject of a passway, the law would have implied a reservation of the existing notorious and open passway "as a way of necessity" for the benefit of the land reserved, but it is in the proof that this very question was a matter of consideration between Frazier and appellee, and that Frazier expressly agreed to surrender all rights thereunder, and that appellee refused to purchase on any other condition. This testimony is not successfully contradicted or impeached, and it is not objectionable on the ground that it varies from the terms of the deed; but, on the contrary, it is not in conflict with the conveyance. Mr. Jones, in his work on Easements (section 321), lays it down as a principle that "a purchaser is not entitled to a way of necessity in case he has agreed with his grantor, even verbally, not to claim a way." And in the case of *Ewert v. Burtis* (N. J. Ch.) 12 Atl. 893, it was held that: "Where a bill was filed to secure a way of necessity, it appeared that at the time of the purchase a way of necessity would have passed as an incident, except that the grantor refused to sell if the grantee was to have the right of way over his land; that the grantee declared there was no occasion for such right of way, because he could have one over a railroad company's lands to a highway; that the conveyance was made, and that the grantee had a license to pass over the railroad company's lands, which license was subsequently revoked. It was held that the court would not aid the complainant in establishing a way of necessity by issuing a preliminary injunction." And certainly, if a purchaser could verbally waive a way of necessity by implied grant, there is much greater reason why a grantor, who seeks to retain a way of necessity by implied reservation, should lose his right of such way by verbal agreement with the purchaser. The permissive use of this passway by Frazier subsequent to his sale to appellee did not have the effect to vest in him any legal title thereto. The testimony shows that appellant has access to a public road over his lands in another direction, and certainly after the acquisition of the land the passway could not be claimed as one of necessity. But upon

the whole case we are disposed to think that Frazier voluntarily surrendered his right to the passway over the land in question, and that appellant can have no higher or better right than belonged to him. For these reasons the judgment is affirmed.

STANDARD FURNITURE CO. v. STANLEY.¹

(Court of Appeals of Kentucky. June 8, 1899.)
APPEARANCE—GENERAL DEMURRER.

By filing a general demurrer to the petition at the same time he filed a special demurrer to the jurisdiction, defendant entered his appearance, and waived objection to the jurisdiction of his person.

Appeal from circuit court, Greenup county.
"Not to be officially reported."

Action by J. M. Stanley against the Standard Furniture Company to recover damages for breach of contract. Judgment for plaintiff, and defendant appeals. Affirmed.

B. F. Bennett, for appellant. W. J. Worthington and A. E. Cole & Son, for appellee.

WHITE, J. In April, 1896, the appellee and appellant entered into an agreement by which appellee was employed to cut, peel, cure, and load on the cars all the tanbark on a certain parcel of land in Greenup county. In June, 1896, this action was brought by appellee, in which he sought to recover \$915, made up of these items: \$300 for cutting and peeling the bark at \$1 per cord; \$450 as profit he would have made under the contract in hauling, and \$215 loss on appellee's teams being out of employment. Appellant filed answer and counterclaim after a general demurrer to the petition and special demurrer to the jurisdiction of the court had been overruled. The answer admitted the contract, and admitted that appellee had cut, peeled, and cured tanbark under the agreement, but denied that the quantity had exceeded 150 cords, and then pleaded a counterclaim for damages in not cutting and peeling all, and in improperly piling same in the woods, whereby it was injured. The contract provided that appellee should have \$4.50 per cord for cutting, peeling, curing, hauling, and loading on cars, payable \$1 per cord when cut, peeled, and cured, \$1 when loaded on cars,—these to be paid on estimates,—and the remainder, \$2.50, to be paid when the bark was shipped and the exact number of cords ascertained. The pleadings presented an issue as to the meaning of the term "ricking" in the contract, and on the trial this was the main point on which proof was taken. Pending the action the bark was sold, and bought by appellee, and was by him shipped. The proof of the weights shows there were from 143 to 152 cords of the bark shipped by appellee; the difference being that in some markets 3,000 pounds is a cord, and in others

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2,600 pounds is a cord. There was a counterclaim of \$66.25, which was admitted. The jury returned a verdict for appellee for \$605.50, less the counterclaim of \$66.25. After reasons and motion for new trial had been overruled, this appeal is prosecuted.

There is no order confirming the report of sale of the bark, nor is this appeal from the order directing such sale. This appeal is only from the final judgment on the verdict. The record shows that on the 20th day of July a demurrer to the petition was filed. Afterwards, on the 21st day of July, a motion to quash the summons was entered and overruled. The demurrer filed was in its first paragraph a general demurrer, and in others a special demurrer to the jurisdiction. Thus, it is clear that the question of jurisdiction and of the quashal of the summons was waived by appellant in first filing a general demurrer to the petition. The verdict of the jury is not excessive, and is not flagrantly against the evidence; the evidence showing that appellee cut as much as 152 cords, and this, at \$4.50, would exceed the amount allowed. The instructions fairly present the law of the case. We perceive no error in the judgment appealed from, and the same is affirmed, with damages.

LOUISVILLE & N. R. CO. v. SEMONIS.¹

(Court of Appeals of Kentucky. June 8, 1899.)

MASTER AND SERVANT—INJURY TO BRIDGE CARPENTER—DUTY TO FURNISH TIMBERS FREE FROM SPLINTERS—INSUFFICIENT FORCE TO HANDLE TIMBERS.

1. A railroad company is liable to a bridge carpenter employed by it for an injury to his hand resulting from furnishing for his use timbers which were so covered with splinters as to render the handling of them dangerous, provided the company could, and the servant could not, by the exercise of ordinary care, have known of the danger.

2. A railroad company is liable to a bridge carpenter for an injury to his hand resulting from its failure to furnish a sufficient number of hands to handle the timber, provided the company could, and the servant could not, by the exercise of ordinary care, have known the danger of handling the timber with the force furnished.

Appeal from circuit court, Franklin county. "Not to be officially reported."

Action by Millard Semonis against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Ira Julian, for appellant. Jas. Andrew Scott, for appellee.

GUFFY, J. The appellee instituted this action in the Franklin circuit court against the appellant, seeking to recover judgment for damages for injuries received while in the employment of the defendant as a bridge carpenter on the line of defendant's railroad near Benson station, in Franklin county, Ky.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

It is substantially alleged in the petition that while so engaged he was, by the gross and willful negligence and carelessness of the defendant, its agents and servants then in charge of said track, greatly and permanently injured in his right hand, to such an extent as to deprive him of the use thereof, and to cause him to suffer great pain and mental anguish, and to incur \$50 expense in and about the cure thereof. It further alleged defendant's negligence in failing to provide, by rules and regulations, for the stoppage of trains during the progress of said work, which extended through several months, and over two miles roadbed, which had been washed out by a flood in Benson creek, and that defendant made such rules for the government of trains during the progress of such work, at the time of plaintiff's injury, as prevented the stopping of trains, no matter what the condition of said work or danger to said hands might be. Plaintiff says his injuries were caused solely by the gross and willful negligence of the defendant aforesaid, whereby he sustained damages in the sum of \$15,000. The answer of defendant is a substantial denial of all the averments in the petition showing a right to recover. In the second paragraph it is substantially alleged that, if there were splinters in the piece of timber which plaintiff alleges he was handling when he was injured, the plaintiff had as much or more opportunity to see and know thereof as did the defendant, and that plaintiff did see said splinters, or by the exercise of ordinary care could have seen same; that when the plaintiff accepted employment he well knew the usual and ordinary risks of said employment, and undertook and agreed to assume same, and the sticking said splinter in his hand while handling a rough piece of timber used in the prosecution of the work, or reconstructing or building a railroad trestle, was one of the usual accidents daily happening in this character of work, and plaintiff assumed this risk, and this defendant is in no wise liable therefor. The reply may be treated as a traverse of the answer. After the filing of an amended petition and amended answer, and the issues being fully made up and evidence heard, a jury trial resulted in a verdict and judgment in plaintiff's favor for \$2,500. It may be further remarked that the defendant substantially alleged in an amended answer that the injury resulted to plaintiff by his negligence in having his hand properly treated and cared for after the same was hurt. Appellant's motion for a new trial having been overruled, it prosecutes this appeal.

The grounds relied on for a new trial are, in substance, (1) that the court erred in giving instructions Nos. 1, 2, and 3, and in refusing instruction No. 4, asked for by the defendant; (2) the court erred in refusing to give the peremptory instruction asked for by defendant at the conclusion of plaintiff's testimony; (3) the verdict of the jury is excessive, and

is not sustained by sufficient evidence, and is contrary to the law and evidence.

It may be conceded that the evidence introduced is conflicting, but there was evidence introduced on behalf of plaintiff which tended to show a right to recover. It therefore follows that the court did not err in refusing to instruct the jury peremptorily to find for the defendant. The instructions given by the court on motion of plaintiff are as follows:

"No. 1. The court instructs the jury that if they believe from the evidence that the injury to plaintiff was caused by the negligence of defendant, its agents and servants in charge of the work upon the trestle, as defined in the other instructions herein, they ought to find for the plaintiff such damages as will compensate him for his loss of time, physical pain, and mental anguish, and his disability to labor, if any, caused by said injury, not exceeding fifteen thousand dollars.

"No. 2. The court instructs the jury that it was the duty of the defendant to furnish the plaintiff and his co-laborers, who were then and there engaged with him in putting the timber in the trestle at washout No. 1, with timber suitable to be handled by its employes, and to use reasonable care to see that it was free from such defects as would make the handling of the same with ordinary care free from danger; and if they believe from the evidence that the defendant, its agents and servants, then in charge of said work, knew, or by the exercise of ordinary care could have known, that the timber which was put in said trestle was in such a defective and dangerous condition as to make its handling by the plaintiff hazardous and dangerous, and that the injury to the plaintiff was caused by the failure of the defendant to furnish timber reasonably free from such defects as would make the handling of the same reasonably safe, considering the circumstances under which it was being handled, the law is for the plaintiff, and the jury will find as directed in instruction No. 1, unless the jury shall believe from the evidence that the plaintiff knew, or by the exercise of ordinary care could have known, that handling the same, under the circumstances then and there surrounding him, would probably be attended with danger to himself, and in that case they ought to find for the defendant.

"No. 3. It was the duty of the defendant to furnish a sufficient number of hands to handle the piece of timber which injured the plaintiff in a reasonably safe manner, and if the jury believe from the evidence that the defendant failed to do so, and knew, or by the exercise of ordinary care could have known, that the handling of said timber, with the force of hands that were then handling it, would be attended with danger, and that the injury to plaintiff was caused by the failure of the defendant to furnish a sufficient number of hands to handle said timber with reasonable safety, considering the nature of

the work then in hand, and the condition of said timber, they shall find for the plaintiff, as directed in instruction No. 1, unless the jury shall further believe from the evidence that the plaintiff knew, or by the exercise of ordinary care could have known, of the existence of said danger, and in that event they ought to find for the defendant.

"No. 4. 'Ordinary care' is that which an ordinary prudent person would exercise in the same or similar circumstances, and this rule or definition applies equally to the plaintiff and the employes of the defendant."

And on motion of defendant the following instructions were given:

"No. 1. The court instructs the jury that plaintiff, when he accepted employment on the railroad, assumed the ordinary risks of said employment; and if they believe from the evidence that plaintiff's injury was an accident which occurred in the ordinary course of his labor, and without negligence on the part of the employes of the railroad company, in furnishing a dangerous timber to handle, or failure to furnish a sufficient force of hands, they should find for the defendant.

"No. 2. Unless the jury believe from the evidence that the piece of timber in question was so covered with splinters as to be dangerous and hazardous to handle it, and this condition of the piece of timber was known to the defendant (or by the exercise of ordinary care could have been known by it), and was not known by the plaintiff, and could not, by ordinary care, have been known by him, then the jury should find for the defendant on this issue.

"No. 3. If the jury believe from the evidence that the present injured condition of plaintiff's hand was caused by the negligence of the plaintiff himself, and the want of skill and negligence of his physician in treating the hand after the splinter was received in the hand, and not by the negligence of defendant's servants and employes, then they should find for the defendant."

It seems to us that the instructions given were quite as favorable to the appellant as it was entitled to, and the jury being the judges of the credibility of the witnesses, and other facts and circumstances as detailed by the witnesses, we are not authorized to disturb the finding of the jury. Judgment affirmed, with damages.

DEBOE et al. v. RUSHING et al.¹

(Court of Appeals of Kentucky. June 9, 1899.)

HOMESTEAD—CONVEYANCE BY WIDOW—
RIGHT OF INFANT CHILDREN—DOWER.

1. The widow, by selling and conveying the homestead of the decedent, cannot defeat the right of the infant children to its occupancy during their minority.

2. Where the widow has for several years used as a homestead the land on which the husband

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

resided with his family, at his death she must be deemed to have elected to hold it as a homestead; and her vendee will not be allowed to claim an allotment of dower for her, as against the infant children.

Appeal from circuit court, Crittenden county.

"Not to be officially reported."

Action by Ida and Thomas H. Rushing, by guardian, against J. P. Deboe and others, to recover land. Judgment for plaintiffs, and defendants appeal. Affirmed.

James & James, for appellants. A. C. & John A. Moore, for appellees.

HOBSON, J. W. T. Rushing died intestate in the year 1893, in Crittenden county, owning a small tract of land, worth less than \$1,000, on which he resided with his wife and two infant children. His widow remained on the land with the two children, occupying it as a home, until June 10, 1897, when she conveyed it to appellant, and on the same night left the state with one Logue Belt; making no provision for the children, who were too small to take care of themselves. A guardian was appointed for them, who employed attorneys, and had this suit brought to recover the land for them. On final hearing the court below held that the purchaser from the widow took the land subject to the rights of the infants; that they were entitled to it until they were 21, and after their majority he would be entitled to hold the land during the widow's life. We see no error in this conclusion. The statute provides for the infant children. The widow could not defeat their rights; and, by conveying the property to appellant and going off as she did, she abandoned her right in the property.

The action was properly brought in the name of the infants by R. B. Gass, as their guardian.

It was immaterial that neither dower nor homestead had been set apart to the widow. By remaining on the land and using the whole of it for several years, treating it as a homestead, she must be deemed to have elected to hold it as a homestead, and her vendee will not be allowed now to claim an allotment of dower out of the place for her. It is too late for this claim to be asserted. Judgment affirmed.

SHACKELFORD et al. v. WILLIAMS et al.¹
(Court of Appeals of Kentucky. June 9, 1899.)
INJUNCTION—DISSOLUTION ON FINAL HEARING—PARTITION—ADVERSE CLAIM.

1. Where the petition was dismissed under a submission for judgment, a temporary injunction was properly dissolved, without notice or proof.

2. In an action for partition, in which adverse claimants of the land, who were made defendants, with a prayer that they be enjoined from committing trespass on the land, asserted title by their answer to certain parts of the land, it was proper, before decreeing a partition, to de-

termine the issue between plaintiffs and the adverse claimants.

Appeal from circuit court, Lee county.

"Not to be officially reported."

Action by S. D. Shackelford and others against P. M. Williams and others for partition, and to enjoin certain of the defendants from committing trespass on land. Judgment for the defendants, who claim the land adversely, and plaintiffs appeal. Affirmed.

H. L. Wheeler, for appellants. G. W. Gomley, for appellees.

PAYNTER, J. S. D. Shackelford and others, as plaintiffs, instituted this action against certain persons, whom it is alleged owned, together with them, jointly, a certain boundary of land. To that petition the appellees P. M. Williams, John Baker, W. M. Shoemaker, and Leander Critzer were made defendants, and it is averred that they were committing trespass upon the boundary of land described, and an injunction was sued out restraining them from the alleged acts. Williams, Baker, Shoemaker, and Critzer filed answers, in which they denied plaintiffs had title to the land, and further alleged that they were the owners of certain parcels of land described in the petition. The plaintiffs never took any proof showing that they were the owners of the land or had any interest in it; neither were any title papers filed for that purpose. The case was submitted without objection, and the court dismissed the petition as to the defendants named. The plaintiffs asked, in addition to restraining the defendants named from committing trespass upon the land, for a partition of it among the persons alleged to be the owners. That branch of the case was not disposed of by the judgment. It is hardly necessary to state that the burden was upon the plaintiffs to show their right to recover against the defendants, who were adverse claimants of the land.

It is insisted that the court should not have dissolved the injunction without notice and proof. When the plaintiffs' petition was dismissed, relief of any kind was refused, and necessarily the injunction should have been dissolved. In our opinion, the cases of Simrall v. Grant, 79 Ky. 436, and Pendergest v. Heekin, 94 Ky. 385, 22 S. W. 605, have no application to this question. In Simrall v. Grant, the court held that the answer was not taken as true on a motion to dissolve the injunction. There was no motion here to dissolve the injunction before the submission of the case for judgment. It was submitted on the merits, and the petition dismissed; hence the dissolution of the injunction must follow. In the case of Pendergest v. Heekin, the court simply held that, where the petition was dismissed and the injunction dissolved by the same order, an appeal could be taken from that order; just what the appellants have done.

It is insisted, however, that the court should not have disposed of the issue between

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the adverse claimants and the plaintiffs until it disposed of the case between the plaintiffs and the other defendants, who are alleged to be joint owners with them. In this we cannot agree with counsel, because the court could not properly make an order partitioning the land until the question was adjudged as to whether any part of it was owned by the defendants, who are claiming the land adversely. The court should not have assigned the parts in dispute to any of the joint owners until the issue between the plaintiffs and claimants was tried. The authorities relied upon by counsel to support a contrary view do not apply to a case like this. The judgment is affirmed.

MILLER et al. v. SOMERSET CEDAR POST & LUMBER CO.¹

(Court of Appeals of Kentucky. June 9, 1899.)

SALES—PASSING OF TITLE—ATTACHMENT.

Where goods were to be delivered to the buyer at N., their delivery to a carrier consigned to the buyer at N. did not pass title, so as to make them subject to attachment for his debts.

Appeal from circuit court, Pulaski county.
"Not to be officially reported."

Action and attachment by D. F. Miller & Co. against M. S. Daniels. Judgment for the Somerset Cedar Post & Lumber Company, which interpleaded, claiming the attached property, and plaintiffs appeal. Affirmed.

James Denton and J. R. Cooke, for appellants. C. H. Waddle, for appellee.

PAYNTER, J. The appellants instituted an action against M. S. Daniels upon an alleged claim against him, obtained an order of attachment, and had it levied upon a car load of staves which had been delivered to the Cincinnati, New Orleans & Texas Pacific Railroad Company by appellees, who were doing business under the firm name of the Somerset Cedar Post & Lumber Company. The appellees interpleaded, claiming that the staves belonged to them. The sole question here is whether the staves belonged to the appellees or the defendant Daniels. The appellants claim that when the staves were delivered to the railroad company, consigned to Daniels, they were delivered to it for him, and thus became his property. On the other hand, the appellees contend that they, under their contract with Daniels, were to deliver the staves to him at Newark, N. J., to be inspected and counted by him. If the latter claim be true, then, of course, the staves belonged to the appellees at the time the order of attachment was levied upon them, and they could not be taken to pay the debt of Daniels. We think the evidence in this case shows that the staves were to be delivered to Daniels, at Newark, N. J., by the appel-

lees. The appellees could not have recovered, upon the contract, their purchase price, unless the staves had been delivered to Daniels at Newark, N. J. The judgment is affirmed.

CLAY CITY NAT. BANK v. CONLEE.¹

(Court of Appeals of Kentucky. June 9, 1899.)

BANKS AND BANKING—PAYMENT OF CHECKS BY MAIL—FAILURE TO REGISTER PACKAGE.

1. Under Civ. Code Prac. § 113, a reply alleging that defendant bank either did not mail to plaintiff the money in payment of a check sued on, or, if it did so, it did not register the package, and that one or the other of these allegations is true, and plaintiff does not know which, is good.

2. Where a bank received a check by mail, with directions to send "cash for same," it should have adopted the usual method of transmitting money to the point indicated, which was by registered package; and therefore the deposit of the money in the postoffice without having the package registered or taking a receipt for it did not constitute a payment, though the bank may have notified the postmaster that it wished to have the package registered.

Appeal from circuit court, Powell county.
"To be officially reported."

Action by John Conlee against the Clay City National Bank on a check. Judgment for plaintiff, and defendant appeals. Affirmed.

John D. Atkinson, for appellant. J. J. C. Bach and W. S. Pryor, for appellee.

PAYNTER, J. Cole & Rigsby had money deposited to their credit in the appellant bank, and they drew a check on it for \$100; and the appellee, Conlee, was the holder of it. The bank was located at Clay City, Powell county, Ky.; and the appellee seems to have lived at Swamton, Magoffin county, Ky. He wrote the appellant, and inclosed the check, with directions to send him cash for same; and, having failed to receive it, he sued the bank, alleging that it was indebted to him on account of its failure to send him the money. The bank filed an answer, in which it admitted that it had received the check, and averred that "it mailed to him, at Swamton, Ky., the amount of said check, in currency, by placing same in an envelope addressed to John Conlee, Swamton, Magoffin county, Ky., and putting the necessary amount of stamps on same, and placing same in the mail box of the postoffice at Clay City, Ky." It will be observed that it is not averred in the answer that the envelope containing the money was sent as a registered package. The plaintiff replied to the effect that, if the money was sent at all, it was not by registered package. Subsequently the plaintiff filed an amended reply, in which he stated the defendant either did not mail to him the money as averred in the answer, or, if it did do so in the manner claimed in the answer, it neglected to send the same

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by registered letter; that one of these statements was true, but he did not know which one. Under section 113, Civ. Code Prac., it was proper to plead in the alternative, as was done in this case, provided the amended reply was not a departure from the original cause of action. A departure in a subsequent pleading is not permissible at common law; neither is it under our Code of Practice. The cause of action here was the alleged failure to pay the money on the check. The plaintiff did not present the check for payment in person, but requested the money to be sent to him; and the defendant neglected to do so. In order to constitute a payment to the plaintiff, it was necessary that the bank should have selected, in the absence of the instructions, the usual agency for the transmission of money to the point where the plaintiff directed it to be sent. There is no question in this case but what the proper method was to send it by registered package. The bank does not claim that it handed the package to the postoffice official in Clay City, and requested him to register it, but claims in evidence that it was deposited in the postoffice box, and that it notified the assistant postmistress that there was a package, in the bundle of letters which it deposited, to be registered. This is denied by the assistant postmistress. The testimony in the case shows that there was no record of the registration of the package. We are of the opinion that it was the duty of the bank to have delivered the package to the postoffice, and have taken a receipt for it. If a receipt had been taken, then here would have been no difficulty in showing that the package was actually deposited in the postoffice. The taking of a receipt for the package was as much its duty as to have deposited the money; and its failure to do so appears to have been the proximate cause of the loss, if the money was deposited there as claimed by the bank. If a receipt had been taken, then the postmaster would have been compelled to show that he delivered the money to the carrier whose duty it was to take it to the next postoffice, where a record would have been made of it. In the first place, we do not think the evidence of the defendant was sufficient to exonerate it from liability to the plaintiff for the amount of the check. Besides, the answer presented no defense. The bank did not pay the money by simply placing the money in an envelope, putting necessary stamps on it, addressing it to plaintiff, and depositing it in the postoffice. It is not even alleged in the answer that a stamp was put on it which entitled it to go as a registered package. The pleader might have considered ordinary postage stamps necessary stamps. Even if the amended reply could be adjudged to be a departure from the original cause of action, the bank was not prejudiced thereby. If the bank had delivered the money to the postmaster or his assistant at Clay City, and taken a receipt therefor, it could not be held liable in case the money had failed to reach the plaintiff. The judgment is affirmed.

COX v. ADELSDORF et al.¹

(Court of Appeals of Kentucky. June 9, 1899.)
ATTORNEY AND CLIENT—AUTHORITY TO COMPROMISE—CONSIDERATION FOR RELEASE.

1. An attorney has no right to compromise his client's claim, and take less than the full amount, without special authority.
2. An inquiry by plaintiff of his attorney as to the probability of getting "a fifty per cent. cash settlement" did not authorize the attorney to make a settlement on that basis.
3. The payment of half a debt is no consideration for a release of the other half.

Appeal from circuit court, Graves county.
"Not to be officially reported."

Action by Adelsdorf, Bobbitt & Co. against B. Cox on an account. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. W. Robertson, for appellant. Robbins & Thomas, for appellees.

HOBSON, J. Appellant, a merchant of Mayfield, Ky., fell in debt to appellees, who were wholesale merchants in Baltimore, Md., and while so indebted he made an assignment for the benefit of his creditors. Appellees then sent the claim, through a commercial agency, to R. O. Hester, an attorney, for collection. He accepted 50 cents on the dollar in full settlement; but appellees refused to accept the money, on the ground that Hester was not authorized to make the settlement, and that they were unwilling to accept so little for the debt. The court below, to whom the case was submitted on the law and facts, found that Hester had no authority to make the settlement, and gave judgment for the debt. The correctness of this finding is the only question on the appeal.

It is perfectly clear from the evidence that appellees conferred no authority on either the commercial agency or on Hester to compromise the claim. The contention is that the commercial agency conferred this authority on Hester, and that the presumption must be in favor of their authority. But, from the original letters which are given in the transcript, it seems to us that the conclusion of the circuit court was undoubtedly correct. The letter of October 19th, from the commercial agency to Hester, which is relied on as conferring this authority, concludes as follows: "Let us know what you think of the settlement, which the clients now tell us they are not disposed to accept; and also let us know what you think of the chances of getting more, or of getting, say, a fifty per cent. cash settlement. Please advise us, and write us as fully as possible." This was distinctly a request for information, and not an authority to the attorney to make any settlement. In the next letter, of October 29th, after saying that the clients declined the proposed settlement, they add: "Let us know what you can do in the way of a cash settlement or better terms. Please acknowledge receipt of the notes, and let us have a report

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as soon as possible." In the last letter, of November 3d, they say: "We have not been able to get Messrs. A., B. & Co. to decide what they will do, as yet. We must wait awhile. Trust to be able to advise you of their wishes in a short time." After this, on November 17th, Hester sent them a check for one-half of the money, and they declined to accept it. It is very clear from the above that the commercial agency at no time went further than to ask for information to be submitted to the clients, and that appellees had not committed themselves as to a settlement of the claim. An attorney has no right to compromise his client's claim, and take less than the full amount, without special authority; and this authority, when denied, will not be inferred from such expressions as are contained in the letters in this case. Besides, the payment of half a debt is no consideration for a release of the other half, and nothing is shown in this case to take it out of the general rule on the subject, as there was no other consideration, and all the other creditors had been settled with previously. Judgment affirmed.

CONN et al. v. LOUISVILLE & N. R. CO.¹
(Court of Appeals of Kentucky. June 9, 1899.)

CARRIERS—VENUE OF ACTION.

Under Civ. Code Prac. § 72, an action against a common carrier to recover an excess of freight charged may be brought in the county in which the contract of shipment was made, though the freight was not paid there.

Appeal from circuit court, Simpson county.
"Not to be officially reported."

Action by N. T. Conn & Co. against the Louisville & Nashville Railroad Company to recover an excess of freight charged. Judgment for defendant, and plaintiffs appeal. Reversed.

Goodnight & Roark, for appellants. W. D. Hines and J. A. Mitchell, for appellee.

HOBSON, J. Appellants brought this action to recover an excess of freight charged them on tobacco shipped from Franklin, Ky., to Louisville. Appellee appeared specially in the action, and demurred to the jurisdiction of the court. The court sustained the demurrer and dismissed the action. The only question, therefore, on the appeal, is whether the Simpson circuit court had jurisdiction of the case. The freight on the tobacco was paid by the consignee in Louisville, it being consigned to one of the warehouses, and that being a custom of the trade. The right of action to recover the excess of freight may be treated as growing out of an implied contract on the part of the company under the statute to refund the money so paid. It may, therefore, be called an action on contract. This right of action grew out of the contract of shipment, and, though it was not perfect-

ed until the warehouse paid the freight in Louisville, still, as the whole contract was made in Simpson county, when the tobacco was shipped, and the money paid pursuant thereto, the action may be treated as an action on a contract made in Simpson county. Section 72 of the Civil Code of Practice provides that an action against a corporation like appellee, if on a contract, may be brought in the county in which the contract is made or to be performed. The only contract made between the parties having been made in Simpson county, and the action being for an excessive sum collected under that contract, as has been, in effect, held by this court in several previous cases, the Simpson circuit court had jurisdiction, and the court erred in sustaining the demurrer and dismissing the action. Judgment reversed, and cause remanded, with directions to the court below to overrule the demurrer, and for further proceedings not inconsistent herewith.

LONDON & LANCASHIRE FIRE INS. CO.
v. GERTESON.¹

(Court of Appeals of Kentucky. June 13, 1899.)
FIRE INSURANCE—KNOWLEDGE OF AGENT AS
TO TITLE—AUTHORITY OF SOLICITOR
—FAILURE TO KEEP WATCHMAN.

1. The company cannot rely on a condition that the policy shall be void if the title is not absolute, or if the property shall cease to be occupied or operated, if it knew at the time it issued the policy that the title was not absolute, and that the property was not to be occupied.

2. Knowledge of the agent who represents the company in the transaction is the knowledge of the company.

3. Where the company issues a policy upon an application taken by a solicitor, it is estopped to deny his agency, though the agent who employed him had no authority to do so.

4. The condition in a policy requiring a watchman to be kept on duty during all hours of the night requires the use of only ordinary care in keeping a watchman; therefore, where a watchman had gone around less than half an hour before the fire, it was not prejudicial error to instruct the jury that they should find for defendant only in the event the loss occurred by reason of the failure to keep a watchman on duty at all hours of the night.

Appeal from circuit court, Daviess county.
"To be officially reported."

Action by Peter Gerteson against the London & Lancashire Fire Insurance Company on a policy of insurance. Judgment for plaintiff, and defendant appeals. Affirmed.

Chapeze Wathen and C. B. Rudd, for appellant. Hill & Hill, for appellee.

HOBSON, J. Appellant issued to appellee on July 9, 1896, a policy by which it insured appellee's distillery to the amount of \$700 for 12 months from that time. On the 17th of November following, the property insured was destroyed by fire, and, appellant refusing to pay the policy, appellee instituted this

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action on May 8, 1897. Appellant defended the action on the ground that appellee had leased the ground on which the distillery stood, and that it was not in operation at the time of the fire; the policy providing that it should be void in case the insured was not the absolute owner of the property, and that it should not be in effect if the distillery was not in operation for 10 consecutive days. The policy also provided that appellee should keep a night watchman on duty during all hours of the night, and it was alleged that he had failed to do this. It appeared from the proof that George Hawes solicited the insurance, and got appellee to take it out. Hawes got a description of the property, and sent the application for the insurance, with three other applications he took that day, to J. C. Rudd & Son, for whom he was soliciting insurance. Rudd & Son were agents for appellant, and made out the policy, and Hawes notified appellee, and he went and got it, and paid the premium. The arrangement between Hawes and Rudd was that Hawes was to make out applications to secure insurance, and receive one-half of the commission for his services. Rudd did not tell him what company he would place these risks in, but said he would place them in a first-class company. At the time the application was made, Hawes was informed of the condition of the title. The property was not then in operation, and he was told that it would not be operated until fall. Rudd was not made acquainted with these facts, appellee having no transaction with him, the business being done with Hawes. It is well settled that if a policy of insurance is issued containing provisions that the policy shall be void if the title is not absolute in the assured, or if the property should cease to be occupied or operated, the company will not be allowed to rely on these conditions if, at the time it issued the policy, the facts were known to it, for in this event the policy would have no operation; and the company taking the money of the assured has been properly held estopped to say that the policy had no operation at all. *Insurance Co. v. Downs*, 90 Ky. 236, 13 S. W. 882. It is also well settled that knowledge of the agent who represents the company in the transaction is the knowledge of the company. It is insisted, however, that Rudd alone was appellant's agent, that Hawes had no authority from it, and that it is not chargeable with facts known to Hawes, unless communicated to Rudd. This is the decisive question in the case. According to the testimony, Hawes was, in effect, the partner of Rudd in effecting this insurance. The rule that a delegated authority cannot be delegated has some limitations. It is usual for insurance agents who issue policies to send out solicitors to take applications on which the policies may be issued, and authority to do so may be

inferred, nothing appearing to the contrary, for this is the common way the business is done. When Hawes came to appellee professing to be an insurance agent, and took his application, and obtained for him the policy of insurance, he had a right, without notice of a defect in his powers, to regard him the agent of the company for this purpose; and appellant, by accepting the application, issuing the policy, and keeping the premium, is estopped to say his act was unwarranted, and must take the benefit with the burden. In *Insurance Co. v. Splers*, 87 Ky. 297, 8 S. W. 453, this court laid down the rule that the party soliciting the insurance and taking the application, in the absence of notice to the contrary, should be held the agent of the company. This rule was recently approved by this court in the case of *Rogers v. Association*, 50 S. W. 543. These cases are in accord with the weight of authority, and are conclusive here. See *May*, Ins. § 143, and cases cited.

The only remaining question in the case is the defense that the appellee did not keep a watchman at all hours of the night. The proof shows that there was a watchman, who had gone around and seen that everything was all right less than an hour before the fire, and at the time of the fire was sitting down, reading a newspaper. The court instructed the jury that it was the plaintiff's duty to keep a watchman on duty at all hours of the night, and that, if they believed from the evidence that he failed to keep a watchman on duty at all hours of the night, and by reason of such failure the loss occurred, they should find for the defendant. It is insisted that the jury should have been told that the plaintiff could not recover if he failed to keep a watchman on duty at all hours of the night, although the loss would have occurred just as it did notwithstanding this. The contention is that this stipulation in the policy was an absolute warranty, that there can be no recovery if it is broken, and that it was broken unless the watchman was kept constantly watching at all hours of the night. In *Wood*, Ins. § 186, the rule is thus stated: "When a policy requires a watchman to be kept on the premises, the insured is not required to keep one there constantly; but only at such times and during such periods as men of ordinary care and skill in such business employ one, and in this respect the usage of similar establishments is admissible." The proof fully warranted the jury in concluding that appellee had used ordinary care in keeping a watchman on duty at night, and, though the phraseology of the court's instruction is not exactly the same as that in which the rule is usually stated in the text-books, under the facts of the case we do not see that there was any substantial error to the prejudice of appellant. Judgment affirmed.

LOUISVILLE & N. R. CO. v. McEWAN.¹
(Court of Appeals of Kentucky. June 13, 1899.)

EXCESSIVE VERDICT — CARRIERS — INJURY
FROM SHOT FIRED BY FELLOW PASSENGER—MISCONDUCT OF COUNSEL IN ARGUMENT.

1. A verdict for \$12,000 for an injury to a woman from a gunshot wound, causing great pain and suffering, and affecting the spinal column, will not be set aside as excessive; a former verdict for a larger amount having previously been set aside.

2. Where the conductor of an excursion train, instead of compelling drunken and disorderly negroes to be seated in the rear car, in which there were empty seats, permitted them to roam at will through crowded cars, in which persons were standing in the aisle, and after a fight occurred, and a race collision seemed imminent, merely put them out of the car where the fight took place, leaving them on the platform, to renew the conflict when opportunity offered, the company is liable for an injury to a passenger from a shot fired by one of the negroes.

3. Statements of counsel for plaintiff in argument as to the wealth of defendant corporation were improper, but as defendant, though objecting to the statement, did not ask the court to make any ruling on the matter, and as it is manifest the statement did not affect the verdict, a new trial will not be granted.

Appeal from circuit court, Franklin county.
"Not to be officially reported."

Action by Christine McEwan against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed. For former report, see 31 S. W. 465.

J. W. Rodman and Wm. Lindsay, for appellant. J. A. Scott, W. H. Holt, John Young Brown, and Knott & Edelen, for appellee.

HOBSON, J. This is the second appeal of this case. For the opinion on the former appeal, see *Railroad Co. v. McEwan* (Ky.) 31 S. W. 465. The facts of the case are fully stated in that opinion, and need not be repeated here. A new trial was had as therein directed, resulting in a verdict for the plaintiff for \$12,000. The evidence does not appear to be essentially different from what it was on that appeal, and it was then held sufficient to warrant the submission of the case to the jury. The proof is conflicting, but, as the jury found a verdict for the plaintiff after being out only 20 minutes, it is evident that they believed the witnesses for appellee. Conceding this testimony to be true, we cannot say that the verdict is unwarranted, and, while it is large, it is not so large as to justify us in setting it aside as excessive, where there has already been a previous verdict in the case, and there is evidence tending to show that appellee has received an injury causing great pain and suffering, and that the spinal column has been affected, producing results which have overshadowed, if not blighted, her life. The instructions of the court to the jury fairly presented the law of the case. We do not think the jury could

have misunderstood them. There were five drunken and disorderly negroes on the train. It was impossible for people who did not know them to remember with distinctness what each one of them separately did; but the proof is very clear that they acted together; that they were drunk, obscene, and disorderly; that, though the conductor was appealed to several times, he did not take any active step to prevent the consequences which followed, and which a man of ordinary sense must have apprehended was likely to result from the way the negroes were carrying on in the train. This was an excursion train, at night, and when the defendant had notice that these five negroes were drunk, and that the passengers deemed themselves in danger at their hands, it should have taken some adequate steps to have prevented the results that followed and that were the natural consequences of the state of facts known to it and called to its attention by the passengers. The cardinal fault of the appellant was that it crowded the people in the front cars, so that many could not get seats, while the rear part of the train was not filled. The five negroes who created the disorder were standing up in the aisle with a number of white men, unable to get seats, from the time the cars were opened until the accident happened, something like an hour afterwards. When the conductor was so often urged to put these drunken, disorderly, and obscene negroes off the train, and it was apparent to any one that the cause of disturbance must continue while they had no seats, and were doing as drunken negroes might be expected to do, the conductor should, at least, have sent them to the rear cars, where there were empty seats, and made them stay there. Instead, they were left to roam the cars at will, impressed with the conviction that they were martyrs on account of their color, and that it was a condescension on their part to take liberties with any one on the train. When the row began in the car where appellee was, and a race collision was imminent, the conductor put the five negroes out of that car into the next, and left them there, to go through the same performance in that car; and when the fight there was on, and the battle was waged from that car to the next, he simply again put the negroes out of the car, leaving them on the platform, to renew the conflict as soon as opportunity offered. Under such circumstances, it seems to us the jury were warranted in concluding that the subsequent shooting, in which appellee was struck, was a result reasonably to be apprehended from the surrounding circumstances, and that might have been avoided by ordinary care on the part of appellant.

The statements of the counsel for appellee in his concluding argument were unjustifiable, and should not have been made; but it does not appear that the court's attention was called to it, or that he was asked to make any ruling on the matter. We see no

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

other irregularity in the trial, and are unwilling to reverse for this, when we are satisfied from the record that the jury believed appellee's version of the matter; that their verdict was governed by the view they took of the case, rather than by the statement of the counsel; and that another jury would do the same thing. The litigation has now been prolonged many years, and we think it is to the interest of both parties that it should cease. Judgment affirmed.

JOHNSON v. MASON LODGE NO. 33.¹

(Court of Appeals of Kentucky. June 13, 1899.)

CORPORATIONS—CHARITABLE ORGANIZATIONS—FAILURE TO DESIGNATE AGENT ON WHOM PROCESS MAY BE EXECUTED—ESTOPPEL TO PLEAD DISABILITY OF CORPORATION TO CONTRACT.

1. Ky. St. § 883,—part of the act relating to corporations organized for charitable purposes,—which provides that corporations "organized under this act" shall not be subject to any of the laws relating to corporations having a capital stock, or organized for pecuniary profit, "except that requiring an agent on whom process may be executed," applies to corporations organized for charitable purposes, whether organized before or after the passage of that act.

2. That section does not exempt corporations organized for charitable purposes from the duty imposed by Ky. St. § 571, upon every corporation, of filing in the office of the secretary of state a statement, signed by its president or secretary, giving the location of its office, and the name of its agent thereat upon whom process can be served.

3. One who is sued upon a contract which he has made with a corporation is estopped to plead the disability of the corporation to make the contract because of its failure to file a statement giving the location of its office and the name of its agent upon whom process could be served, though the statute expressly provides that it shall not be lawful for any corporation to carry on any business in this state until it shall have filed such a statement.

Appeal from circuit court, Mason county.

"To be officially reported."

Action by Mason Lodge No. 33 against Milton Johnson on a promissory note. Judgment for plaintiff, and defendant appeals. Affirmed.

L. W. Robertson, E. L. Worthington, and J. N. Keboe, for appellant. L. W. Galbraith, for appellee.

BURNAM, J. Appellee alleges that it is duly incorporated under the laws of this commonwealth, with power to contract and be contracted with; that the appellant, Johnson, borrowed from them the sum of \$750, for which he on the same day executed and delivered to them his promissory note, by which he agreed to pay them the sum loaned, with interest, on demand; that he paid thereon \$52.50 August 17, 1897, and that demand had been made for the balance of the debt, and payment refused. Appellant, in his answer, admits the execution of the note

sued on, and that it was for borrowed money, but seeks to evade the payment thereof on two grounds: First, he denies the corporate existence of appellee; and, second, he states that at the time the note sued on was executed, and for several years prior thereto, appellee had been engaged in the business of lending money and trafficking in property for profit in this state; that its residence is and had been in Mason county; and that at the time of the execution of the note sued on and of the commencement of this suit appellee had not filed with the secretary of state a statement giving the location of its office, and the name of its agent upon whom process could be served, as required by section 194 of the constitution and section 571 of the Kentucky Statutes, and for this reason the obligation sued on was illegal and unenforceable. A general demurrer was sustained to this answer, and, appellant declining to amend, judgment was rendered in favor of appellee for the amount sued for, from which this appeal is prosecuted.

Section 194 of the constitution reads as follows: "All corporations formed under the laws of this state, or carrying on business in this state, shall, at all times, have one or more known places of business in this state, and an authorized agent or agents there, upon whom process may be executed, and the general assembly shall enact laws to carry into effect the provisions of this section." And the section of the statute relied on provides that: "All corporations except foreign insurance companies formed under the laws of this * * * state, and carrying on any business in this state, shall at all times have one or more known places of business in this state, and an authorized agent or agents thereat, upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this state, until it shall have filed in the office of the secretary of state a statement, signed by its president or secretary, giving the location of its office or offices in this state, and the name or names of its agent or agents thereat upon whom process can be served; * * * and if any corporation fails to comply with the requirements of this section, such corporation, and any agent or employé of such corporation, who shall transact, carry on or conduct any business in this state, for it, shall be severally guilty of a misdemeanor, and fined not less than one hundred nor more than one thousand dollars for each offense." It is claimed by appellee that as it is a purely charitable institution, without capital stock, or organized for pecuniary profit, it is not subject to any of the laws relating to corporations organized for the purposes of gain, and rely to support this claim upon section 883 of the Kentucky Statutes, which reads as follows: "Corporations, associations, or societies organized under this act shall not be subject to any of the laws relating to corporations having a capital stock or organized for pecuniary profit, except that

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requiring an agent on whom process may be executed." It is evident that the legislature has made a marked difference in its requirements of charitable, educational, and religious corporations and those organized for private gain and having a fixed capital stock, and intended to exempt them from all the laws relating to corporations of the latter class, except that requiring an agent upon whom process may be executed. While the language of section 883 limits its exemptions to corporations organized under that act, we think it was intended to apply to all corporations of this character, whether they were organized previous to the passage of that law or subsequently thereto; and this opinion is confirmed by the provisions of section 882, which immediately precedes the one in question. But it seems to us that, giving a fair and reasonable construction to section 104 of the constitution, and the two provisions of the statute referred to, it was not intended to exempt any corporation organized under the laws of this state from the duty of filing in the office of the secretary of state a statement, signed by its president or secretary, giving the location of its office, and the name of its agent thereat upon whom process could be served. If we are wrong in this construction of the statute, it seems to us that there can be no doubt that the demurrer was properly sustained on the grounds that appellant, having contracted with appellee, and received from it \$750, which he retains, is, in an action on the note executed for that money, estopped to deny the existence of appellee as a corporation, or its power to contract for failure to comply with the statute. Section 566 of the Kentucky Statutes provides: "No corporations organized under this chapter shall be permitted to set up or rely upon the want of legal organization as a defense to an action against it, nor shall any person, transacting business with such corporation, in suit for injury done to his property, be permitted to rely upon such illegal organization as a defense." And this provision of the statute only announces the common-law principle which has been repeatedly recognized by former adjudications of this court. In the case of *Railroad Co. v. Leavell*, 16 B. Mon. 363, the court said: "In general, where a defendant deals with a corporation, and recognizes its existence, he is not permitted to raise the question whether it has been legally organized or not." In the case of *Wight v. Railroad Co.*, 16 B. Mon. 4, the court said: "Whether an incorporated company has been regularly organized, so as to give it power to act, cannot be inquired into in a collateral, but must be asserted in a direct, proceeding against the incorporation." The same doctrine was announced in *Hughes v. Bank*, 5 Litt. 635. And it has been repeatedly held by this court that by executing a note payable to a corporation the payor is estopped to deny its existence or authority to do business at that time. See *Depew v. Bank*, 1 J. J. Marsh.

380; *Bank v. Trimble*, 6 B. Mon. 601; *Jones v. Bank*, 8 B. Mon. 123. Under these cases we think the appellant is clearly estopped from denying the corporate existence of appellee, or of pleading any disability to contract existing at the time the note was given; and they are in harmony with the decisions of other courts and the doctrine of the leading text writers. See *Andes v. Ely*, 158 U. S. 312, 15 Sup. Ct. 954; *Close v. Cemetery*, 107 U. S. 466, 23 Sup. Ct. 267; *Andrews v. Pipe Works*, 23 C. C. A. 454, 77 Fed. 774; *Sniders' Sons' Co. v. Troy*, 91 Ala. 224, 8 South. 658, citing 4 Am. & Eng. Enc. Law (1st Ed.) 198; *Bank v. Boyd*, 99 Cal. 604, 34 Pac. 337; *Plummer v. Mercantile Co.*, 23 Colo. 190, 47 Pac. 294; *Hickox & Read Pub. Co. v. Dawes Mfg. Co.*, 64 Ill. App. 630; *Hause v. Mannheim* (Minn.; 1897) 69 N. W. 810; *Bradley v. Reppell*, 183 Mo. 545, 32 S. W. 645, and 34 S. W. 841, citing 4 Am. & Eng. Enc. Law (1st Ed.) 198. Mr. Cook, in his work on Corporations, says: "A person who borrows money from a corporation cannot defeat an action for the money by alleging that the corporation had no power to make the loan. He must pay back the money." Bigelow, *Estop.* § 464, says: "In ordinary cases it is not allowed an individual to escape his obligation by showing the incapacity of the other party to the contract to act as he had assumed to act. We have elsewhere seen that this is a broad rule of law, and it is quite as true of persons liable in a contract to corporations as in other cases." *Thomp. Corp.* § 5274, says: "The modern doctrine is coming to this: That one who enters into a contract with a corporation is, when sued by the corporation upon such contract, estopped to deny that the corporation had power to make the contract. The obvious reason of the rule is that a person ought not to be allowed to oppose such a dishonest defense to a bargain which is fair so far as he is concerned. The rule of public policy, which aims to keep corporations within the limits of their chartered powers, yields to the justice of the particular case, and the wrong which the corporation has done to the public by transcending its powers is left to be redressed in a public prosecution against the corporation. Hence, if a national bank lends money on the security of a mortgage or of a nonnegotiable note, the obligor in the contract, when proceeded against to enforce it, cannot escape the payment of the debt which he has thus contracted by pleading that the bank had no power to make the contract." And in section 6021 the same author says: "Where the corporation is plaintiff in the action, and is seeking to enforce a contract into which it had no power to enter, if the defendant has received the benefit of the contract he will not be allowed to defend on the ground that it was ultra vires, until he restores the benefits which he received. The simplest illustration of this is where a corporation has exceeded its power in lending its

money on a promissory note, but nevertheless seeks to get its money back by bringing an action on the note. Here the maker of the note will not be heard to defend on the ground that the corporation had no power to lend him the money." And in section 5712 the same author said: "Those decisions which upheld the rascally borrower in keeping the money which he had borrowed from the corporation, on the ground that the corporation had no power to lend it,—the very reason why he ought to be compelled to restore it,—form strange blots upon the pages of American jurisprudence. If a collection of individuals, having no corporate powers at all, lend their money, and take a promissory note as evidence of the debt, in which they describe themselves as a corporation, then, when they sue the borrower upon the note, he is estopped, under theories prevailing in all American jurisdictions, from setting up the defense that they are not a corporation. Yet, according to these decisions, while he cannot plead that they are not a corporation, he can plead that they do not possess the power to lend their money, and he can plead this as a justification for his keeping it." But it is insisted for appellant that this doctrine has no application to the question involved here, for the reason that the contract sued on is not simply ultra vires, but is actually forbidden by the statute, and is contrary to public policy; that the cases of *Vanmeter v. Spurrier*, 94 Ky. 22, 21 S. W. 337, and *Vannoy v. Patton*, 5 B. Mon. 248, support this doctrine. In the case of *Vanmeter v. Spurrier* the statute under consideration was one to protect the public against worthless fertilizers, and in the case of *Vannoy v. Patton* from the sale of liquor without license; and the case of *Franklin Ins. Co. v. Louisville & A. Packet Co.*, 9 Bush, 590, is, we think, in line with these. As the vice was in the contract itself, they are therefore distinguished in this respect from this case, which only involves the idea of disability to sue; and it appears to us that the defenses relied on in this case are inconsistent, and neither of them tenable. For reasons indicated, the judgment is affirmed.

TUNKS v. VINCENT.¹

(Court of Appeals of Kentucky. June 13, 1899.)

ELECTIONS—NOTICE OF CONTEST—PURGING POLLS OF ILLEGAL VOTES—EVIDENCE AS TO CANDIDATE VOTED FOR—DECLARATIONS AS EVIDENCE.

1. The averment, in a notice to contest an election, that the contestant was the Democratic candidate, and was "duly and legally elected," is sufficient, without an express averment of his eligibility.

2. The statement in the notice of the number of illegal votes polled, for whom polled, and when and where polled, is sufficient, without

specifying the names of the illegal voters, in the absence of a motion to make more specific.

3. The returns of precinct election officers stating the number of votes received by the Democratic and Republican candidates, respectively, for a particular office, are sufficient, without stating the names of the candidates.

4. The decision of election officers as to the qualifications of voters is not final.

5. An inquiry, in an election contest, as to how illegal votes were cast, does not violate the secrecy of the ballot; and every illegal vote should be thrown out, if it appears by competent evidence for whom it was cast.

6. Where the ballot of an illegal voter which was kept out of the ballot box was counted, the testimony of the election officers as to the candidate for whom it was counted was competent.

7. The testimony of an illegal voter that he was a Republican, coupled with the fact that he was prevented only by the objection of the contestee, the Republican candidate, from testifying how he voted, affords prima facie ground for concluding that he voted for contestee.

8. The declarations of an illegal voter as to how he voted are inadmissible as being mere hearsay.

Guffy and Du Relle, JJ., dissenting.

Appeal from circuit court, Edmonson county.

"To be officially reported."

Contest by Gillis Vincent of the election of Trenton Tunks to the office of county court clerk. Judgment for contestant, and contestee appeals. Affirmed.

Mitchell & Du Bose, Sims & Covington, and E. W. Hines, for appellant. J. S. Lay and J. M. Williams, for appellee.

HAZELRIGG, C. J. Appellant and appellee were opposing candidates for the office of county court clerk of Edmonson county at the regular November election, 1897. On the face of the returns, as found by the canvassing board, appellant, Tunks, was elected by one vote, and he was accordingly given a certificate of election by that board. Appellee, Vincent, at once gave notice of contest, to which Tunks responded by demurrer to the notice, and by specific denial of the facts alleged in the notice. He also gave a counter notice, charging various irregularities in the vote received by Vincent. After preparations and final hearing, the board of contest, by the concurrence of a majority, held as had the canvassing board, and adjudged in favor of Tunks. On appeal by Vincent the regular circuit judge deemed himself disqualified by reason of having been a candidate at the same election, and an agreement was made by which the case was heard and determined by a special judge, the Honorable C. U. McElroy, who, in an able and elaborate opinion, held that Vincent was entitled to the office.

The first question to present itself is that raised by the demurrer. The notice is said to be insufficient (1) because it does not state that Vincent was eligible to the office he was contesting; and (2) because it is indefinite, and fails to specify the grounds relied on. It was held by the learned judge below that the notice was indefinite, but, in the absence of a motion to make more specific, it should

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

be held sufficient. The notice is to the effect that Tunks, who is averred to be the Republican candidate for the office, while the contestant, Vincent, was the Democratic candidate for the same office, did not receive, but that Vincent did receive, a majority of the legal votes cast in the county of Edmonson at the election of November 2, 1897, and that, receiving such majority, he (Vincent) was duly and legally elected clerk of the Edmonson county court. Before passing to a consideration of other terms of the notice, we may say here that we regard the foregoing specifications of the notice as substantially meeting the objections first above indicated. In *Ledbetter v. Hall*, 62 Mo. 423, it was said that, even if it was necessary to allege eligibility, the statement in the notice that the contestant has been duly and legally elected to the office in controversy, necessarily implied his eligibility for the official position. This is substantially the effect of the decision of this court in *Cellopy v. Cloherty*, 95 Ky. 330, 25 S. W. 497. See cases to same effect in 7 Enc. Pl. & Prac. 381, notes 5, 6. We are to bear in mind also that the statement that the contestant was a candidate of one of the political parties has force in view of our election laws providing for party nominations. When one is such a candidate, he must be presumed to be entitled to have his name go on the official ballot, and is *prima facie* eligible to the office for which he is a candidate. The mere averment of his candidacy under these circumstances implies eligibility. *Edwards v. Knight*, 8 Ohio, 375; *Batterton v. Fuller* (S. D.) 60 N. W. 1071. Continuing, the notice charged that the precinct officers of the election permitted divers illegal votes to be cast for Tunks and against Vincent as follows: 25 at Parker precinct, 20 at the Capital Hill precinct, etc., and that at the Fork and Bee Spring precincts especially the officers illegally counted to Tunks and against Vincent about 10 votes that did not vote for either Tunks or Vincent; that the officers refused to allow about 10 legal voters to vote who would have voted for Vincent had they been allowed to vote; and that Vincent had lost 6 votes at the Fork and Parker precincts because the officers there refused to count for him all the legal votes cast for him at those precincts. Our statute provides that "the notice shall state the grounds of the contest, and none other shall afterwards be heard as coming from such party." Ky. St. § 1535, subsec. 1. We are of opinion that the notice in question does state the grounds of the contest within the meaning of the statute. The object of the notice is, of course, to put the contestee upon a proper defense, and prevent any surprise being practiced upon him; and, while it would have been incumbent on the contestant, at the time he gave his notice, to give the names of illegal voters if he knew them, he was not asked to make his notice more specific. In discussing the sufficiency of such notice under a federal law which required that

the contestant should, within 30 days after the election, "give notice in writing to the member whose seat he intends to contest, and in such notice shall specify particularly the grounds on which he relies." Judge McCrary, in his work on Elections (section 394), says: "It seems to be settled by the decisions of the house of representatives that a notice is good under the law if it specify the number of illegal votes polled, for whom polled, and when and where polled, without specifying the names of the illegal voters." And the learned author, continuing, says, "The same rule prevails in cases brought under statutes providing for the contest of elections;" citing the cases of *Sheppard's Case*, 65 Pa. St. 36; *Batturs v. Megary*, 1 Brewst. 162; *State v. Hilmantel*, 21 Wis. 566. The statute requires the grounds merely of the contest, and not the evidence in support thereof. And so we may say, in this connection, that, although we find much in the record and in the argument for contestant in support of the rejection of certain alleged illegal ballots counted for contestee, there is nothing in the notice apprising appellee of such a ground of contest. We think the demurrer to the notice was properly overruled.

Disposing of Tunks' counter notice first, and which does rely on defective ballots and returns as well, it appears that at the Parker precinct the officers made out their return in the usual form, except that they failed to fill in the blanks provided for the names of the various candidates; that is, the returns were made saying that the candidate for county judge, candidate for county clerk, and the various other candidates voted for received the number of votes certified to and set opposite their names; but the names of the various candidates were not given. It is therefore insisted for Tunks that the precinct be excluded entirely. The trial court, as to this, said: "As there was only one Republican candidate and one Democratic candidate for county clerk and county judge, I take it there can be no reasonable doubt about the fact that the 98 votes returned for the Republican candidate for judge and the Republican candidate for clerk, respectively, and the 182 votes returned, respectively, for the Democratic candidates for county judge and county clerk, were intended for Dorsey and Tunks, and for Edwards and Vincent, and I am unwilling, therefore, to throw that precinct out." We think the conclusion is sound, and is supported by ample authority. 10 Am. & Eng. Enc. Law, 732, and notes. The trial court reached its conclusion that Vincent was elected by holding that out of 34 Tunks votes attacked by Vincent 2 of them were illegal votes, because the voters were not qualified electors under our statute. This elected Vincent by 1 vote, and left the Republican candidate for county judge, whose election was contested by his opponent, elected by 3 votes, instead of 5, as found by the canvassing board. The latter contest was

heard on the same proof and record, but from this finding there is no appeal.

It is insisted for appellant, at the threshold, that under our election system there can be no inquiry as to the casting of illegal votes, because the action of the precinct officers is final. We cannot think so. The question in all election cases is, which candidate has received the highest number of legal votes? and, except so far as the investigations of judicial tribunals on his behalf is restricted by positive mandate, the usual and ordinary methods of ascertaining the truth should be followed; and, where it can be done, every illegal vote should be thrown out. The two votes rejected by the lower court were those of Dick Dunn and Jesse Crawley. The proof as to the legality of each of these votes is conflicting, and we find no good reason for disturbing the findings of fact as certified by the trial judge. The preponderance of the proof is that Dunn was not a resident of the precinct when he voted, and, if Crawley was,—which is doubtful,—it is clear he was under 21 years of age at that time. A more difficult question is presented when we seek to ascertain for whom Crawley voted. As to Dunn, there is no difficulty. His vote was challenged, and, while he was permitted to vote, his ballot was not put in the ballot box. It was preserved until the close of the election, and then counted for Tunks. The testimony as to this is uncontradicted, and we think it is competent. Dunn was an illegal voter, and the law as to the secrecy of the ballot cannot be invoked to protect his ballot. As aptly held by the learned judge below, an illegal vote is no vote, and, if it gets in the poll books and in the returns, it should be stricken out whenever it can be ascertained by sufficient and competent evidence; and it should be taken from the candidate who received it whenever that fact can be made clearly to appear by competent and legal evidence. As Dunn was an illegal voter, the uncontradicted testimony as to how he voted is competent, and his vote was therefore deducted from Tunks' total vote. We have seen that Crawley was an illegal voter, but when we come to ascertain how he voted an interesting question is presented. He was introduced as a witness for Tunks, and testified on cross-examination that he was a Republican, this being his first vote. When he asked for whom he voted, he expressed a willingness to answer, but counsel for Tunks objected, and told him not to answer. He then declined to answer. It was shown by other testimony, the competency of which was challenged, that he said before he voted that he intended to vote the Republican ticket except in one particular, not important here, and, after the election, that he had so voted. Several witnesses so prove, and Crawley in no way contradicts their statements. We regard the proof that the witness was a Republican as competent testimony, and, further, that he was himself

a competent witness to prove how he voted, and might be compelled to testify as to how he voted, unless, indeed, he declined upon the ground that such testimony would incriminate himself. Judge McCrary, in his work on Elections (3d Ed. §§ 457-459), very clearly lays down this rule as supported by the authorities. He concluded by saying: "It is very clear that the rule which, upon grounds of public policy, protects the legal voter against being compelled to disclose for whom he voted, does not protect a person who has voted illegally from making such disclosure. To give that rule this wide scope, would be to make it shield the right and the wrong, the honest and the dishonest." The witness offered to answer the question as to how he voted, and was prevented only by the objection of Tunks; and this, in connection with the proof that he was a Republican, would seem to afford prima facie grounds for concluding that he voted for Tunks. Mr. McCrary, in section 458, says: "And when a voter refuses to disclose and fails to remember for whom he voted, it is competent to resort to circumstantial evidence to raise a presumption in regard to that fact," citing *People v. Pease*, 27 N. Y. 45, and *Cush. Parl. Law*, §§ 199, 210; and the same author says it is also competent to prove that the alleged voter was an active member of a particular political party, or obtained his ballot from a person supporting a particular candidate or ticket. We are not inclined to follow what may be conceded to be the rule approved by a preponderance of authority, to the effect that Crawley's declarations as to how he voted are competent. We think these statements are mere hearsay. As we have seen, however, there is enough testimony to show that this vote was an illegal one, and that Tunks got the benefit of it, and the trial court committed no error in subtracting it from appellant's vote. It is not necessary to review the action of the court in declining to reject other alleged illegal votes said to have been counted for appellant. The judgment is affirmed.

GUFFY and DU RELLE, JJ., dissent.

ÆTNA INS. CO. et al. v. COMMON-WEALTH.¹

(Court of Appeals of Kentucky. June 15, 1899.)

CRIMINAL CONSPIRACY—COMBINATION TO MAINTAIN RATES OF INSURANCE—COMMON LAW—SERVICE OF PROCESS ON FOREIGN INSURANCE COMPANIES.

1. Under Ky. St. § 3915, declaring that any corporation, person, or association of persons who shall combine with others "for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured articles or property of any kind," shall be guilty of criminal conspiracy, it is not an offense to combine for the purpose of maintaining rates of insurance.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

as the rule of ejusdem generis applies in determining the meaning of the word "property."

2. Only such principles and rules as constituted a part of the common law prior to March 24, 1807, are in force in Kentucky.

3. By the common law of Kentucky it is not an indictable offense to combine for the purpose of maintaining rates of insurance.

4. Under Ky. St. § 631, requiring every foreign insurance company to file with the insurance commissioner a resolution consenting that service of process upon such commissioner "in any action brought or pending in this state, shall be valid service upon said company," and Cr. Code, § 147, providing that a summons on an indictment shall be served in the same manner as a summons in civil actions, the consent of a foreign insurance company to service of process on the insurance commissioner includes the summons on an indictment.

Guffy, J., dissenting.

Appeal from circuit court, Franklin county.

"To be officially reported."

The Ætna Insurance Company and others were convicted of the offense of criminal conspiracy, and they appeal. Reversed.

W. S. Pryor, Pirtle & Trabue, W. W. Thum, S. E. Sloss, and Paddock, Wright & Billing, for appellants. Robt. B. Franklin, W. S. Taylor, and M. H. Thatcher, for the Commonwealth.

DU RELLE, J. This appeal is from a judgment of conviction under an indictment charging appellants with "the offense of unlawfully conspiring, by persuasion, intimidation, and force, to counteract, avoid, stifle, and kill the effect of free competition among fire insurance companies and agents engaged in and offering to do a fire insurance business in the city of Frankfort, county of Franklin, and state of Kentucky, committed as follows, viz.: The said Ætna Insurance Company, a corporation organized under the laws of the state of Connecticut [and eighty-six others], in the said city of Frankfort, county of Franklin, and state aforesaid, on the 22d day of September, 1898, and within one year before the finding of this indictment, did then and there, each with the other, and with other persons, associations, firms, and corporations to this grand jury unknown, unlawfully conspire, confederate, combine, enter into, maintain, consummate, and continue an unlawful pool, trust, conspiracy, confederation, combination, compact, and agreement, intending and contriving thereby to persuade, intimidate, compel, and force all agents and companies then and there engaged in and offering to do a fire insurance business to enter into, maintain, consummate, and continue said unlawful pool, trust, conspiracy, combination, confederation, compact, and agreement, the objects, aims, and ends of which were then and there to counteract, avoid, stifle, and kill the effect of free competition among all insurance companies and agents then and there engaged in and offering to do a fire insurance business, to fix and maintain the cost of fire insurance to the insuring public at a greater premium rate than would oth-

51 S.W.—40

erwise have to be paid, and thus unlawfully to exact, extort, and procure great sums of money from citizens of this commonwealth owning and insuring property in the city of Frankfort, county of Franklin, and state aforesaid, which said great sums of money said citizen would not have to pay but for the existence of said unlawful pool, trust, conspiracy, combination, confederation, compact, and agreement, and which said unlawful pool, trust, conspiracy, combination, confederation, compact, and agreement so as aforesaid entered into, consummated, maintained, and continued by the parties aforesaid is of grievous prejudice and hurt to the common and public good and welfare, of evil example, and against the peace and dignity of the commonwealth of Kentucky." To sustain this charge of conspiracy, the commonwealth introduced the constitution and by-laws of the Kentucky and Tennessee board of fire underwriters and the Franklin board of underwriters, to show the objects of the associations named, together with the evidence that appellants were engaged in fire insurance business at Frankfort through agents who were members of the Frankfort or local board. Not all of the appellants were members of the Kentucky and Tennessee board, but all appear to have done business in Frankfort through members of the local board. The Kentucky and Tennessee board was an association of fire insurance companies doing business in the two states named; the object stated in its constitution being "to organize and maintain local boards, to establish and enforce uniform commissions, adequate rates, correct forms of policies, and to inculcate sound principles of underwriting." Each company desiring membership was required to subscribe to the constitution and by-laws through its representatives, "thereby pledging itself to the objects and regulations of the association, and every member of this association shall require its agents to unite with local boards, and co-operate actively therewith; but all rules and rates of the association must be enforced by members, whether adopted by the local boards or not." The by-laws require the secretary, "under the direction of the executive committee, to promulgate rates and rules of the association." The Frankfort board, entitled "The Local Board of Fire Insurance Agents of Frankfort, Kentucky," had for one of its objects, as declared by its constitution, the establishment "and maintenance of adequate and equitable rates." Membership was confined to agents of companies and officers of local companies, and no person was eligible to be a member who was in any way interested in insurance business with a person or company not a member, "unless they also are governed by all the rules and rates adopted by the board." Every member was required "strictly and rigidly to adhere to the rules and rates adopted by the board, without deviation in letter or spirit." By the by-laws,

provision was made for an executive and rating committee to survey and report risks. The surveys and rate books issued to members were the property of the board, and returnable upon its order. Misrepresentation or improper means of interference by agents subjected the party offending to charges. No agent was allowed to employ a solicitor or broker. Members were forbidden to attempt to create or foster prejudice against the state association, the local board, or its members. There were provisions against dividing commissions, and writing risks outside the jurisdiction of the board at less than the established rate at the locality of the risk. Obedience to these regulations was to be enforced according to a schedule of penalties fixed in the by-laws, and a member was to be punished for violation of rules or rates by suspension from membership, after hearing, upon a two-thirds vote, followed by a request to the companies of such agent that his commission be canceled. Testimony was introduced tending to show that a considerable increase had taken place in the rate of insurance in Frankfort and vicinity after the establishment of these boards. It is not necessary here to go further into the testimony. A number of questions are presented upon this appeal, and have been most elaborately argued by counsel. Among other grounds for reversal presented, it is urged that under the ruling in *Com. v. Ward*, 92 Ky. 158, 17 S. W. 283, the indictment did not sufficiently set forth the facts stating the offense attempted to be charged; that the evidence was insufficient to sustain the charge; that this was especially true as to the so-called nonboard companies, which were not members of either board, and against whom the only testimony connecting them with the alleged conspiracy is the fact that they employed agents in Frankfort who were members of the local board, thereby adopting the rates promulgated by that board; that the service and summons upon the insurance commissioner were not sufficient to bring the defendants before the court to answer an indictment; and that the instructions did not present the law to the jury. But the underlying question, which, if answered in the negative, renders the consideration of these questions unnecessary for the disposition of this case, is whether, either by the common law or under the statute, there is in this commonwealth such an offense as that attempted to be described in the indictment. This question we shall consider first.

It was conceded by counsel representing the commonwealth, both in oral argument and brief, that this proceeding was not instituted under the statute, but under the common law; and a careful examination of the statute has convinced us that it does not apply to a case like the one at bar. It provides (Ky. St. § 3915) "that if any corporation under the laws of Kentucky, or under the laws of any other state or country, for transacting

or conducting any kind of business in this state, or any partnership, company, firm or individual, or other association of persons, shall create, establish, organize, or enter into, or become a member of, or a party to, or in any way interested in any pool, trust, combine, agreement, confederation or understanding with any other corporation, partnership, individual or person, or association of persons, for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured articles or property of any kind, or shall enter into, become a member of, or party to, or in any way interested in a pool, agreement, contract, understanding, combination or confederation, having for its object the fixing, or in any way limiting the amount or quantity of any article of property, commodity or merchandise to be produced or manufactured, mined, bought or sold, shall be deemed guilty of the crime of conspiracy, and punished therefor as provided in the subsequent sections of this act." The language used would indicate that the statute was intended to prevent pools and trusts forming for the purpose of fixing the price of merchandise and manufactured articles. Without giving undue weight to the argument that the punctuation shows the word "property" to be qualified by the adjective "manufactured," it seems certain that the ejusdem generis rule of construction does apply, and that property referred to in the section was property of the same general class or nature as that described previously by the words "merchandise and manufactured articles." And while it may be admitted that a contract, either for labor, or for indemnity against contingent loss, like an insurance contract, when executed, becomes property, because it is then a chose in action, the right to enter into such contracts, which belongs to all persons capable of contracting,—as well natural persons as artificial ones authorized by their organic law to make such contracts,—would hardly be considered to be included by the word "property," unless that word were used in a much broader sense than it is customarily used by lawyers or in statutes. We conclude, therefore, that the word "property," as used in the statute, does not include the right to enter into a contract of insurance, nor to fix the terms upon which such a contract will be made.

This brings us to consider whether, by the common law, as adopted into the jurisprudence of Kentucky, the acts whereof appellants have been charged constitute an indictable offense. And we should inquire further whether the English common law, at the time of its importation into our system, contained a principle which, by natural growth and expansion to meet the needs of social progress in a civilized state, has so enlarged its original scope as to include those acts in the catalogue of public offenses. On behalf of the commonwealth it is contended with great ability and fervor that criminal conspiracies

—that is, conspiracies that were indictable at common law—included three classes: First, conspiracies to do an unlawful or indictable thing; second, conspiracies to accomplish a lawful purpose by means which were themselves unlawful or indictable; and, third, conspiracies to do a wrong affecting the general public, or an individual thereof, though neither the acts done to accomplish the end, nor the end itself, would be in themselves indictable, but for the conspiracy. Perhaps as clear and compact a statement of the commonwealth's contention as can be given is to be found in an extract from the article by Mr. Robert Desty on Criminal Conspiracies, in the American and English Encyclopædia of Law: "A criminal conspiracy is (1) a corrupt combination (2) of two or more persons, (3) by concerted action to commit (4) a criminal or an unlawful act; (a) or an act not in itself criminal or unlawful, by criminal or unlawful means; (b) or an act which would tend to prejudice the public in general, to subvert justice, disturb the peace, injure public trade, affect public health, or violate public policy; (5) or any act, however innocent, by means neither criminal nor unlawful, where the tendency of the object sought would be to wrongfully coerce or oppress either the public or an individual. * * * It is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end, that constitutes a criminal conspiracy. The unlawful thing must either be such as would be indictable if performed by one alone, or of a nature particularly adapted to injure the public or some individual by reason of the combination. It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which, if done, would be criminal. It is enough that they are wrongful; that is, amount to a civil wrong. * * * Every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious, or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is an indictable offense, regardless of the means whereby it is to be accomplished." 2 Bish. Cr. Law, § 172, is to substantially the same effect: "Conspiracy is the corrupt agreeing together of two or more persons to do by concerted action something unlawful, either as a means or as an end. The unlawful thing must be such as would be indictable performed by one alone, or, not being such, be of a nature particularly adapted to injure the public or some individual by reason of the combination." Relying upon these text writers, and upon the expressions of courts in a number of adjudged cases, the commonwealth urges that fire insurance, in the progress of civilization, has grown to be an everyday necessity; that a combination to prevent free competition among those engaged in the business is against public policy; that, at common law, all combinations to raise the cost of necessa-

ries were indictable, and therefore this combination is indictable here. Considerable argument on the other side is devoted to the attempt to show that the combination here complained of is not only not obnoxious as against public policy, but a positive benefit to the public, since by the maintenance of adequate rates it secures the companies bound by it against doing business in a manner which might render them insolvent, and thereby cause loss to the policy holders. This argument, which is plausible, if not convincing, need not be here considered.

In this state the law seems to be well-settled that agreements in restraint of trade or commerce are so far against public policy as to be illegal, in the sense of being void and not enforceable. *Anderson v. Jett*, 89 Ky. 375, 12 S. W. 670. In *Huston v. Reutlinger*, 91 Ky. 333, 15 S. W. 867, it was held that an association of underwriters almost exactly similar to the ones now in question, organized "for the purpose of securing uniformity in the rates of premiums, harmony in the conditions of insurance," etc., was void, in so far as it undertook to regulate the employment of solicitors, the time of employment, and the compensation to be paid. And while there are decisions on the subject holding that the business of insurance, as carried on in one state by a company incorporated in another, was not commerce between the states (*Paul v. Virginia*, 8 Wall. 168; *State v. Phipps*, 50 Kan. 609, 31 Pac. 1097), and in which it has been held that a dealer in foreign exchange was not engaged in commerce, but merely in supplying an instrument of commerce (*Nathan v. Louisiana*, 8 How. 73), this court seems to have had no difficulty in holding that a combination in restraint of the exercise of the right to contract for labor was against public policy, and an agreement to be bound by the rules of such combination was void. We shall assume, therefore, that under the cases of *Anderson v. Jett* and *Huston v. Reutlinger*, *supra*, and *Sayre v. Association*, 1 Duv. 143, the agreement whereby appellants and their agents became members of the associations mentioned was against public policy and void, in so far as it restrained or prevented free competition in the fire insurance business, and shall proceed to consider whether such a combination was an indictable offense by the common law as we obtained it, or included within the spirit of the common-law doctrine as to criminal conspiracies. In *Lathrop v. Bank*, 8 Dana, 121, in an opinion by Chief Justice Robertson, this court, construing the question of how far the common law of England was adopted by Kentucky, said that only such principles of the common law as had been adjudicated before the fourth year of James I. had been adopted in Kentucky. The history of the adoption is given as follows: "By an ordinance of 1776, Virginia adopted 'the common law of England, and all statutes or acts of parliament made in aid of the common

law prior to the fourth year of James I., and which [were] of a general nature and not local to that kingdom.' And the eighth section of the sixth article of the constitution of Kentucky adopted, with certain qualifications, all laws which on the 1st of June, 1792, were in force in the state of Virginia. Unless the British mortmain acts were in force in Virginia on the 1st of June, 1792, they have never, prior to June, 1792, specially enacted any mortmain statute; and, therefore, if the mortmain acts of England prior to the 4th of January were all 'local to that kingdom,' no part of them was ever in force in either Virginia or Kentucky." In *Ray v. Sweeney*, 14 Bush, 2, in an opinion by Judge Cofer, the court said: "By an act of the Virginia convention of 1776 it was declared that the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of King James I., and which are of a general nature, and not local to that kingdom * * * shall be the rule of decision, and shall be considered in full force, until the same shall be altered by the legislative power of this colony." *Morehead & B. Ky. St. 612*. The present constitution provides, and previous constitutions, in substance, provided, that "all laws which on the first day of June, 1792, were in force in the state of Virginia, and which are of general nature, and not local to that state, and not repugnant to this constitution, nor to the laws which have been enacted by the general assembly of the commonwealth, shall be in force in this state until they shall be altered or repealed by the general assembly. * * * But only such principles and rules as constituted a part of the common law prior to the fourth year of the reign of James I. are, or ever were, in force in this state. This is clearly implied in the act of 1776. To declare that the common law and statutes enacted prior to that time should be in force was equivalent to declaring that no rule of the common law not then recognized and in force in England should be recognized and enforced here. James I. ascended the throne of England in 1603 (March 24th), and the fourth year of his reign commenced March 24, 1607; and when it is sought to enforce in this state any rule of English common law, as such, independently of its soundness in principle, it ought to appear that it was established and recognized as the law of England prior to the latter date." What, therefore, was the common law as to criminal conspiracies in the year 1607? In Mr. Wright's admirable little book upon the Law of Criminal Conspiracies (section 1), it is said: "There appears to be no evidence that during the first of these periods [A. D. 1200 to 1600] any other crime of conspiracy or combination was known to the common law than that which was authoritatively and 'finally' defined in A. D. 1305 by the ordinance of conspirators (33 Edw. I.), as consisting in confederacy or alliance for the false and ma-

licious promotion of indictments and pleas, or for embracery or maintenance of various kinds. During the reigns from that of Edward III. to the end of that of Elizabeth, various statutes were directed against combinations for treasonable purposes or for breaches of the peace, against combinations by merchants to disturb the markets or prices, and against combinations by masons and carpenters, by victualers to raise prices, and by laborers to raise wages or alter hours; but no mention has been found in any of the writers, reports, or abridgments of the period before the seventeenth century of any kind of conspiracy, confederation, or combination, as being criminal at common law, except the crime of conspiracy as defined by the ordinance of 1305. The process by which this specific offense has been expanded into the comprehensive title of conspiracy or combination in the modern criminal law is now to be traced." The author then proceeds to trace the expansion of the criminal law of England in this behalf until it "grew into a rule that a combination to commit or procure the commission of any crime was criminal, and might be prosecuted as a conspiracy, although the crime might have nothing to do with the crime of conspiracy, properly so-called." He ascribes the principal share in the earlier stages of this development to the court of star chamber. Speaking of this book, Sir James Fitzjames Stephen, eminent alike as judge and law writer, says in the thirtieth chapter of his magnificent *History of the Criminal Law of England*: "Mr. R. S. Wright, in a work of remarkable learning and ability, collected and commented, with a special view to this particular subject, upon every case ever decided upon the subject of conspiracy. The matter has also been fully discussed in many other works. The result is that the following statement as to the result of the authorities upon the subject may be depended upon: (1) No case has ever been cited in which any person was, for having combined with others for the raising of wages, convicted of a conspiracy in restraint of trade at common law before the year 1825. There is, indeed, one case (that of the journeymen tailors of Cambridge) which may perhaps be an authority the other way, but this appears doubtful. (2) There are some dicta to the effect that such combinations would be unlawful. The most important of these is the dictum of Grose, J., in *Rex v. Mawbey* [6 Term R. 636]: 'In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual without any agreement among themselves, would not have been illegal,—as, in the case of journeymen conspiring to raise their wages, each may insist on raising his wages if he can, but, if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy.' This dictum is an illustration not necessary to the

decision of *Rex v. Mawbey*, and founded, as it seems to me, upon the case of the Cambridge tailors. (3) 'Some traces may be found in the ancient books of a doctrine that it may be criminal, independently of combination, for one man to oblige another, by bond or otherwise, to abstain from the exercise of his proper craft or employment.' These traces, however, are very faint, though it is clear enough that the attempt to create monopolies by royal grants, or by the by-laws made by bodies corporate or the like, or to restrain people by contract from exercising their trade, were always held to be illegal, except under certain limitations which do not affect this matter, in such sense as to be void." The result of the examination of the English cases is thus summarized in Stephen's remarkable book: "Such, for the present, is the final result of the long history which I have been relating. It is one of the most characteristic and interesting passages in the whole history of the criminal law. First, there is no law at all, either written or unwritten. Then a long series of statutes aim at regulating the wages of labour, and end in general provisions preventing and punishing, as far as possible, all combinations to raise wages. During the latter part of this period an opinion grows up that to combine for the purpose of raising wages is an indictable conspiracy at common law. In 1825 the statute law is put upon an entirely new basis, and all the old statutes are repealed, but in such a way as to countenance the doctrine about conspiracies in restraint of trade at common law. From 1825 to 1871 a series of cases are decided which give form to the doctrine of conspiracy in restraint of trade at common law, and carry it so far as to say that any agreement between two people to compel any one to do anything he does not like is an indictable conspiracy, independently of statute."

In the volumes of Wright and Stephen, all the English cases cited on behalf of the commonwealth are considered and discussed, and it is very conclusively shown that prior to 1807 there was no such thing at the common law as criminal conspiracy, except the confederacy for the false and malicious promotion of indictments and pleas, or for embezzlement or maintenance of various kinds, and that whatever may have been the dicta of the judges who decided subsequent cases, or the deductions drawn therefrom by some of the text writers, the cases themselves, for more than 200 years thereafter, do not support the contention made on behalf of the commonwealth. There were a large number of statutes against forestalling, ingrossing, regrating and badgering, and a very large number against combinations of laborers and artisans to raise their wages. Some of the latter class were not formally repealed until the year 1875. Of this system of statutes Stephen says: "I should not myself describe it as a system specially adapted and designed

to protect freedom of trade. The only freedom for which it seems to me to have been specially solicitous is the freedom of the employers from coercion by their men." The English cases cited on behalf of the commonwealth are all discussed in the works referred to, and shown not to sustain appellee's contention. In the case of *Steamship Co. v. McGregor*, 21 Q. B. Div. 549, there was a confederation of steamship companies, united to drive their rivals out of the carrying trade between England and China. The question for decision was whether the federation constituted a conspiracy at common law, as being in general restraint of trade, and of particular injury to certain individuals and to the general public. The opinion in the queen's bench division was delivered by Lord Coleridge. Subsequently, in the appeal division of the queen's bench, reported in 23 Q. B. Div. 616, the opinion was delivered by Bowen, L. J. It was subsequently decided in the house of lords. The opinions of the judges on the two first hearings, and those of the various law lords upon the final appeal, present a very complete review of all the English cases. Not to occupy too much time in their consideration, it may be remarked that the language of Crompton, J., in *Hilton v. Eckersley*, 6 Bl. & Bl. 47, relied on for appellee, was disapproved, Lord Halsbury saying in his opinion: "I am unable to assent to that dictum. It is opposed to the whole current of authority. It was dissented from by Lord Campbell and Chief Justice Erle, and found no support when the case in which it was said came to the exchequer chamber, and it seems to me contrary to principle." In the opinion of Lord Bramwell in the house of lords the doctrine was thus stated: "I think, upon the authority of *Hilton v. Eckersley* and other cases, we should hold that the agreement was illegal; that is, not enforceable by law. I will assume, then, that it was, though I am not quite sure. But that is not enough for the plaintiffs. To maintain their action on this ground, they must make out that it was an offense, a crime, a misdemeanor. I am clearly of the opinion it was not. Save the opinion of Crompton, J. (entitled to the greatest respect, but not assented to by Lord Campbell or the exchequer chamber), there is no authority for it in the English law." We think it unnecessary to go further in an examination of the English cases upon this subject. The opinions in the *Mogul Steamship Case* in themselves form a treatise upon the subject, and a very complete discussion of practically all of the English cases upon it. It is evident from this examination that at the time the English common law, and the English statutes of a general nature, became a part of our system, the acts charged as an offense in this case were not indictable. Nor do we think that any such principle has been adopted generally by the states of this Union as would justify us in holding, in the absence of

all precedent to that effect in this state, that the acts charged are criminal.

We do not consider it necessary to go into an extended review of the American cases upon this subject, but we shall refer to a few of them. In *Hutchins v. Hutchins*, 7 Hill, 107, Chief Justice Nelson, in an elaborate opinion, in which the English cases are reviewed at length, said: "We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another (that is, to diminish his gains and profits), and yet, so far from being criminal, the object may be highly meritorious and public-spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy." To the same effect, see *Carew v. Rutherford*, 106 Mass. 14. In a carefully considered opinion in the case of *U. S. v. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 278,—a case arising under the federal statute,—Judge Taft, in discussing the statute, said: "Contracts that were in unreasonable restraint of trade at common law were not unlawful, in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void, and were not enforced by the courts. *Steamship Co. v. McGregor* [1892] App. Cas. 25; *Hornby v. Close*, L. R. 2 Q. B. 153; *Lord Campbell, C. J.*, in *Hilton v. Eckersley*, 6 El. & Bl. 47, 66; *Hannon, J.*, in *Farrer v. Close*, L. R. 4 Q. B. 602, 612. The effect of the act of 1890 is to render such contracts unlawful, in an affirmative or positive sense, and punishable as a misdemeanor, and to create a right of civil action for damages in favor of those injured thereby, and a civil remedy by injunction in favor of both private persons and public against the execution of such contracts and the maintenance of such trade restraints." And see *Orr v. Insurance Co.*, 12 La. Ann. 255; *Macauley v. Tierney*, 19 R. I. 255, 33 Atl. 1; *Printing Co. v. Howell*, 26 Or. 527, 38 Pac. 547. In the view we have reached as to this case, it is immaterial to discuss the cases which have arisen under more or less stringent statutes in a number of the states, of which *Queen Ins. Co. v. Texas*, 36 Tex. 250, 24 S. W. 397, upon the one side, and *State v. Phipps*, 50 Kan. 609, 31 Pac. 1097, upon the other, are fair examples. There are some cases, it is true, where it seems to have been held that a combination to injure another in his business or reputation constituted an offense or afforded a cause of action. In these the element of malice seems to have been relied on. *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 738; *Casey v. Typographical Union*, 45 Fed. 135.

We must not be mistaken as intimating

that contracts in restraint of trade, or which prevent a contracting party from accepting employment from or giving it to whomsoever he may desire, are not illegal, in the sense of being void as against public policy. That such contracts are unenforceable is settled law in this state, and in most of the states of the Union. Indeed, the bulk of quotations from adjudged cases given in the very ingenious brief of counsel who represented the commonwealth upon the trial are from cases where this was the question for decision. This is notably the case in his quotations from *Anderson v. Jett* and *Huston v. Reutlinger*, decided by this court. It is true that in *Com. v. Ward*, 92 Ky. 158, 17 S. W. 283, this court—misled, doubtless, by similar loose expressions in the text writers—used this language: "A criminal conspiracy is a corrupt combination of two or more persons by concerted action to do an unlawful act, or an act not unlawful by unlawful means, or an act which would tend to prejudice the general public." But the latter clause of the sentence quoted was not at all necessary to the decision of the case then before the court, and must be considered as dictum.

We are not able, from a consideration of the cases decided in this state, to reach the conclusion that the doctrine as to criminal conspiracies to be deduced from the common law and statutes recognized in England prior to 4 Jac. I. has exhibited any such growth in this state as to include any offenses not then cognizable. On the contrary, the tendency in this state in one respect, at least, has been in the other direction. The statutes of Edw. VI., adopted in 1552, were, at the time we got our common law, in full force against forestallers and regrators. But, notwithstanding the English law had been adopted, by which it was unlawful to buy goods on their way to market; to contract to buy them before they came to market; to make any motion, by word, letter, message, or otherwise, to any person for the enhancing of the price or dearer selling of any goods; to buy up dead victuals of any kind in one market in order to sell them at a higher price later at the same place, or within four miles,—it was found necessary in Virginia to adopt statutes against forestalling and ingrossing food, in order to obtain provisions for the Revolutionary army. Even more marked has been the progress, or, rather, retrogression, in relation to labor unions. At the time we adopted the English law, the statutes passed in the time of the sixth Edward were in full force, which forbade all conspiracies and covenants of artificers, workmen, or laborers not to make or do their work but at a certain price or rate, under the penalty, on a third conviction, of the pillory and the loss of an ear, and to be taken as a man infamous. There were also in force at that time, unless superseded by the elaborate act of fifth Elizabeth, the statute of 3 Hen. VI., providing that, "whereas by the yearly congregations

and confederacies made by the masons in their general chapters and assemblies the good course and effect of the statutes of labourers be openly violated and broken," the chapters should not be holden, those that caused them to be assembled and holden should be "judged for felons, and punished by fine and by imprisonment, fine and ransom." The statute of Elizabeth referred to fixed the hours of work; required all persons able to work, and not possessed of independent means or other employment, to labor on demand; gave power to the justices to fix the rate of wages; and forbade any one to set up or exercise any craft, mystery, or occupation unless he had served an apprenticeship of seven years. But, so far as we are informed, the right of workmen to combine for an increase or maintenance of their wages by lawful means has never been held unlawful in this commonwealth. The statutes of Henry, Edward, and Elizabeth upon that subject, so far as the Kentucky authorities show, have always been as dead as they were in England after the act of 1875. Says Mr. Bishop (2 Cr. Law, § 233): "Whatever the language of some of the old cases, no lawyer of the present day would hold it indictable for men simply to associate to promote their own interests, or especially to raise their wages. If the means adopted were mutual improvement of their mental or physical powers, mutual instruction in their methods of doing their work, mutual inquiring and imparting information as to the wages paid in other localities, or anything else of a like helpful nature, severally enabling the members to obtain higher wages, nothing could be more commendable, and nothing further from the inhibition of the law; or, if employers should combine simply to reduce wages, not proposing any unlawful means, perhaps we might not so much commend them, yet still they would stand under no disfavor from the law,—the result of which is that a conspiracy to enhance or reduce wages is not indictable per se, while yet it may be so by reason of proposed unlawful means." And this has been the doctrine recognized in this state. In *Schulten v. Brewing Co.*, 96 Ky. 224, 28 S. W. 504, this court said that it was "not unlawful for several persons in trade to confederate together to protect themselves by lawful acts from dishonest debtors." In *Sayre v. Association*, 1 Duv. 145, referring to a New York case, the court said: "It seems to have been held [in New York] that combinations of workmen to raise their wages are necessarily injurious to trade or commerce, and indictable as misdemeanors. * * * It seems to be doubtful whether either of these positions is correct. It is entirely consistent with the interests of the public that labor shall be fairly rewarded. If the employer of a number of workmen should refuse to pay them fair wages, why may they not,

if bound by no contract, combine for the purpose of obtaining reasonable prices for their labor? We do not perceive that the public would be injured by it, nor any principle upon which it can be condemned as illegal." See, also, *Brewster v. Miller*, 41 S. W. 301, citing *Manufacturing Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119. And in *Hetterman v. Powers*, 43 S. W. 180, in an opinion by Judge Hazelrigg, this court distinctly recognized the doctrine that a laborers' union, formed for the purpose of maintaining wages, might be protected in the use of a label indicating that manufactured goods had been made by members of the union. We conclude that by the common law of Kentucky it is not an indictable offense to combine for the purpose of maintaining rates of insurance.

One other question should perhaps be decided, as necessary to determine what order shall be entered in the circuit court as to the foreign insurance companies when the case goes back. That is the sufficiency of the service of summons upon the insurance commissioner. By the statute (Ky. St. § 631), foreign insurance companies are required to file with the commissioner a resolution "consenting that service of process upon any agent of such company in this state, or upon the commissioner of insurance of this state, in any action brought or pending in this state, shall be valid service upon said company." Section 11 of the Criminal Code provides: "A public offense, of which the only punishment is a fine, may be prosecuted by a penal action in the name of the commonwealth of Kentucky. * * * The proceedings in penal actions are regulated by the Code of Practice in civil actions." Section 9 provides: "All public offenses may be prosecuted by indictment, except offenses of public officers," etc. Chapter 3 of the Criminal Code, on the subject of "Process upon Indictments," provides, in section 147: "The summons shall be issued and served in the same manner as a summons in civil actions." It is urged that as the consent goes no further than to make the service upon the commissioner sufficient in an action, civil or penal, it cannot be extended to an indictment, because the action is within the consent given by the company, and the indictment is not. But we think these statutes, though they might have been better expressed for the purpose, were intended to apply to exactly this class of cases, and to make valid service upon the commissioner of summons on a misdemeanor indictment, and give jurisdiction of such prosecutions to the Franklin circuit court. For the reasons given, the judgment is reversed, with directions to sustain the demurrer to the indictment.

GUFFY, J., dissents, except from that part of the opinion as to service upon the commissioner.

EUCLID AVE. NAT. BANK v. JUDKINS
et al.

(Supreme Court of Arkansas. May 27, 1899.)

**FRAUDULENT CONVEYANCES—ADEQUATE
REMEDY AT LAW.**

A judgment creditor cannot maintain an action to set aside a fraudulent conveyance, made by one of several joint judgment debtors, unless the other joint judgment debtors are sureties merely, or are insolvent, as otherwise he has an adequate remedy at law.

Appeal from circuit court, Lawrence county; Richard H. Powell, Judge.

Action by the Euclid Avenue National Bank against J. B. Judkins and others. From a judgment sustaining a demurrer to the complaint, plaintiff appealed. Affirmed.

The complaint in this case is as follows: "Plaintiff states that it is a corporation duly organized under and by virtue of the laws of the state of Ohio, that as such corporation it obtained a judgment against the defendant J. B. Judkins, the White Sewing-Machine Company, and H. R. King, in the Pulaski circuit court, on the 16th day of June, 1890, for the sum of \$1,719.54, as will appear by reference to a copy of said judgment herewith filed, marked 'Exhibit A,' and made a part hereof (a transcript of which judgment has been duly filed in Lawrence county, as required by law); that no part of said sum, nor the interest or costs, have been paid. Plaintiff states further that on or about the 4th day of March, 1891, the defendant J. B. Judkins, in anticipation of the judgment against him as above referred to, fraudulently, and with the intent to place all of his property beyond the reach of his creditors, executed and delivered to the defendant W. A. Townsend a deed to the following described lands. [Here follows a description of the lands.] Plaintiff states that after said defendant Judkins had executed the deed to Townsend as aforesaid, he, the said Judkins, had no property whatever left in his hands subject to execution out of which his debts, or any part thereof, could be made by law. Plaintiff states further that said above-mentioned transfer was wholly without consideration, and was for the sole purpose of placing the property of said Judkins out of the reach of his creditors as aforesaid. (2) Plaintiff further states that, even though the said defendant should have paid a valuable consideration for said land, still it was done for the fraudulent purpose of aiding and abetting the said defendant Judkins in defrauding, hindering, and delaying his creditors in the collection of their debts (and not as a seeking to collect his debt), and more especially was it done for the purpose of assisting and aiding the said Judkins to defeat this plaintiff in the collection of its debt as hereinbefore mentioned and set forth, as said defendant Townsend well knew that the transfer of the said Judkins to him of said property was for the express purpose of putting all the property of the said Judkins beyond the reach of the

creditors of said defendant Judkins. Wherefore plaintiff prays judgment for the said deed from the defendant J. B. Judkins to the defendant W. A. Townsend be canceled, set aside, and held for naught, and that said lands be sold to satisfy the claim of the plaintiff as herein set forth, and, should there be other creditors of the said Judkins desirous of joining in this suit, that they be permitted to join herein, and said property be sold to satisfy all said claims, or pro rata, as the court may think just and proper; and for all other proper relief." To this complaint a general demurrer was interposed, and sustained by the court, and, the plaintiff standing upon its complaint, judgment was entered dismissing same, and for costs, etc.

Jas. H. Harrod, for appellant. W. A. Townsend, pro se.

WOOD, J. (after stating the facts). 1. Prior to the passage of the act of March 31, 1887 (section 3134, Sand. & H. Dig.), the rule obtained requiring the plaintiff, in a proceeding in equity to set aside a fraudulent conveyance as to creditors, to reduce his claim to judgment at law, and have execution issued, and a return of nulla bona, as prerequisites to the relief sought. This was necessary in order to show that the plaintiff did not have a complete remedy at law. It was the method prescribed for showing the insolvency of the debtor, and that the creditor could not collect his debt at law. *Meux v. Anthony*, 11 Ark. 418; *Phelps v. Jackson*, 27 Ark. 589; *Wright v. Campbell*, Id. 637; *Sale v. McLean*, 29 Ark. 621; *Clark v. Anthony*, 31 Ark. 548; *Hunt v. Weiner*, 39 Ark. 74. The act of March 31, 1887, supra, provides: "That in suits to set aside fraudulent conveyances, and to obtain equitable garnishments, it shall not be necessary for the plaintiff to obtain judgment at law in order to prove insolvency, but in such cases insolvency may be proved by any competent testimony, so that only one suit shall be necessary in order to obtain the proper relief." The design of this act was not to do away with the necessity of showing insolvency to entitle to the equitable relief, but only to broaden the methods of proving it. The statute makes unnecessary the expense and delay incident to obtaining judgment and the issuing and returning of process thereon when insolvency—the ultimate fact to be established—may be proved by other and more direct methods. *Riggin v. Hillard*, 56 Ark. 481, 20 S. W. 402. The old and familiar rule that, before one can seek relief from a court of equity, he must show that he does not have a complete and adequate remedy at law, still prevails in this state. Section 3034, Sand. & H. Dig., provides that "on a judgment or decree against several, the execution must be joint." Now, the complaint in this case shows that plaintiff's judgment was against the White Sewing-Machine Company and H.

R. King, as well as against the defendant Judkins, and there is no allegation that the White Sewing-Machine Company and King were sureties merely. They appear as joint principals. The complaint shows that Judkins had "no property whatever left in his hands subject to execution, out of which plaintiff's debt could be made by law," but it does not show that the other joint judgment debtors, the White Sewing-Machine Company and H. R. King, did not have property subject to execution ample to satisfy plaintiff's debt at law. The complaint did not allege the insolvency of these joint judgment debtors with Judkins. Herein it fails to show any occasion for the interposition of a court of equity. The complaint shows that the bank had already obtained judgment against Judkins, the White Sewing-Machine Company, and H. R. King. Under the statute of 1887, *supra*, the obtaining of judgment at law was not necessary, but it was necessary to show the insolvency of all the joint judgment debtors; for, in the absence of such an allegation, or a showing of some other facts calling for equitable relief, it does not appear that a resort to equity is proper. *Davis v. Insurance Co.*, 63 Ark. 412, 39 S. W. 258. See *Howard v. Sheldon*, 11 Paige, 558; *Child v. Brace*, 4 Paige, 309. The demurrer was properly sustained. Affirmed.

KELLY v. TELLE.

(Supreme Court of Arkansas. May 27, 1899.)

LIMITATIONS—NEW PROMISE—COMMERCIAL PAPER—LOCUS CONTRACTUS.

1. The time when plaintiff's cause of action on a note would be barred by limitations is postponed by the execution and delivery to plaintiff by the maker, before the statute had run, of an unconditional acknowledgment in writing of the execution and validity of the note and a definite promise to pay it.

2. A note signed in one state, but delivered to the payee in another, for money loaned there, is a contract made in the latter state, and is subject to the laws thereof.

Appeal from circuit court, Sebastian county; Edgar E. Bryant, Judge.

Action by Harry E. Kelly, as administrator, against Alinton Telle. From a judgment in favor of defendant, plaintiff appealed. Reversed.

H. C. Mechem and F. A. Youmans, for appellant. Hill & Brizzolara, for appellee.

BUNN, C. J. The note sued on in this case was signed by the appellee, in Choctaw Nation, Indian Territory, on the 10th January, 1888, and was payable on demand, and delivered to payee, in Ft. Smith, Ark., for money loaned there. No demand was made until the institution of the suit, which was on the 6th day of October, 1893, more than five years after the execution of the note. On the 8th February, 1890, defendant, Telle, addressed a letter to plaintiff's intestate at Ft. Smith, Ark., from Atoka, Indian Territory, in which

the defendant and appellee definitely and unconditionally admitted the execution and validity of the note sued on, and, in effect, definitely promised to pay the same, according to the legal tenor and effect thereof. This furnished a new date, from which the statute runs, and, in that view of the case, the bar had not attached when the suit was instituted. The conclusion of law of the trial court was erroneous, to the effect that the debt sued on was barred by the statute of limitations.

This, properly speaking, is the only question addressed to us by the record, but, as the parties have discussed another, which may be involved in a new trial, we will dispose of that also. It is this: Was this an Arkansas contract, and had the Sebastian circuit court jurisdiction to hear and determine the same? We are of opinion that the contract was completed in Arkansas, by the delivery of the note to the payee at Ft. Smith, and is valid according to the laws of the state, and that the circuit court had jurisdiction in the matter. Reversed, and remanded for further proceedings not inconsistent herewith.

WOOD and RIDDICK, JJ., did not participate.

STATE v. LANCASHIRE FIRE INS. CO.

(Supreme Court of Arkansas. May 27, 1899.)

MONOPOLIES—STATUTES PROHIBITING COMBINATIONS—CONSTRUCTION—EXTRATERRITORIAL EFFECT—LEGISLATIVE INTENT.

1. That before the passage of an act the legislature was aware of the construction placed on it by the attorney general, and rejected an amendment expressly giving it a different meaning than that placed on it by him, does not conclusively show that the legislature intended to adopt his construction.

2. The presumption is that a state legislature did not intend its statutes to apply to acts done, or contracts made, without the state, not in any way affecting persons or property in the state.

3. Act March 6, 1890, subjecting any foreign or domestic corporation entering into any pool or combination for regulating the premiums to be paid for fire insurance to a penalty, does not apply to pools and combinations effected outside of the state, not intended to affect the prices of insurance in the state; and a foreign insurance company, doing business in the state, is not subject to such penalty for having, in another state, entered into a combination for fixing the premiums on insurance to be effected outside of the state.

4. A statute will not be construed so as to render it unconstitutional, in whole or in part, where it can reasonably be given a construction giving it effect in all its parts.

Appeal from circuit court, Pulaski county; Joseph W. Martin, Judge.

Action by the state against the Lancashire Fire Insurance Company. There was a judgment for defendant on demurrer to the answer, and the state appeals. Affirmed.

The attorney general of the state filed a complaint against the defendant, Lancashire Fire Insurance Company, alleging that it was a foreign corporation, organized under the

laws of England; that it was, on and after March 6, 1899, engaged in the business of insuring property in this state against loss or damage by fire; and that while so engaged it became and was a member of a pool or combination with other corporations engaged in a similar business, to regulate or fix the price or premium to be paid for insuring property against loss or damage by fire; wherefore he asks judgment against said company for the sum of \$5,000. The defendant company filed its answer, admitting that it was engaged in the business of insuring property against loss or damage by fire, as alleged in the complaint, but denied that while so engaged in business of insuring property in this state it became or was a member of any pool or combination, either in this state or elsewhere, for the purpose of fixing or regulating the price or premium to be paid for insuring property in this state against loss or damage by fire, etc. The state, by her attorney, filed a demurrer to this answer, on the ground that it did not state facts sufficient to constitute a valid defense. The circuit court overruled the demurrer, and, the state electing to stand on its demurrer, final judgment was entered against it, from which judgment the state appealed.

Jeff Davis, Atty. Gen., and Chas. Jacobson (Jesse C. Hart and Hal L. Norwood, of counsel), for the State. Rose, Hemingway & Rose, Blackwood & Williams, Cockrill & Cockrill, Dodge, Johnson, Carroll & Pemberton, J. M. Moore, and Morris M. Cohn, for appellee.

RIDDICK, J. (after stating the facts). This is an action against a foreign insurance company in which the state, through her attorney general, claims a penalty of \$5,000. The question presented is whether a foreign corporation, doing a fire insurance business in this state, subjects itself to a penalty, under the recent statute against trusts and combinations, by entering into an agreement with other insurance companies for the purpose of fixing rates of insurance in foreign countries, when such agreement is neither made in this state, nor intended in any way to affect the prices or premiums to be paid for insuring property in this state. As the legislature has the power to entirely exclude foreign insurance companies from doing business in this state, it can, of course, dictate the terms upon which such companies may do business here. The whole matter rests in the discretion of the legislature. *Paul v. Virginia*, 8 Wall. 168. There is no controversy on this point, but the attorney general contends that no insurance company, while a member of a trust or combination to fix rates in any portion of the world, can do business here, without becoming liable to a penalty under our statute. The defendant, on the other hand, denies that the language of the statute in question carries the meaning contended for by the attorney general, and the question before us has

reference, not to the power of the legislature,—for that is conceded,—but to the proper construction and meaning of the statute.

The statute in question, so far as it affects this case, provides that “any corporation organized under the laws of this state or any other state or country, and transacting or conducting any kind of business in this state, or any partnership or individual * * * who shall create or enter into or become a party to any pool agreement, contract, combination, association or confederation to fix or limit the price or premium to be paid for insuring property against loss or damage by fire, shall be deemed and adjudged guilty of a conspiracy to defraud and be subject to the penalties as provided by this act.” Act March 6, 1899. Another section provides that “any person or corporation violating any provisions of the act shall forfeit not less than \$200 nor more than \$5,000 for every such offense, and each day such corporation or person shall continue to do so shall be a separate offense.”

Before proceeding to discuss the language of this statute, we will notice an argument on the part of the attorney general to the effect that the intention of the legislature that this statute should have the broad meaning contended for by him is conclusively shown by the fact that, after he had placed such construction upon the statute, the legislature rejected a proposed amendment expressly limiting its effect to combinations formed to affect prices in this state. This argument assumes that the only reason moving members of the legislature to oppose such amendment was that they agreed with the attorney general in his construction of the act, and desired the act to stand as he construed it. But how can we know that this assumption is true? While some members may have acted from that motive, is it not just as reasonable to suppose that others differed with him in his construction of the law, and voted against the amendment on the ground that it was unnecessary and a needless waste of time to pass an amendment in order to make the law mean what they supposed it already meant? The settled rule, established by the highest authority, is that but little weight should be attached to expressions of individual members of the legislature, or to the fact that certain amendments were rejected. *Aldridge v. Williams*, 3 How. 24, opinion by Chief Justice Taney; *Black*, *Interp. Laws*, 226. These matters are liable to be misunderstood. It is not always true that those members who speak are the most influential, or that those who speak express the views of those who do not speak, and we therefore have no means of knowing the reasons that influenced the legislature in voting down the amendment. To determine the meaning of a statute, the courts must look mainly to the language of the act itself; for that is the final expression of the legislative will, and therein must such will and intention be sought. Whatever the legislature

may have intended, such intention can have no effect unless expressed in the statute, for this, being a penal statute, cannot be extended by implication. It would be in the highest degree unjust to punish conduct not clearly forbidden by the law itself. *Casey v. State*, 53 Ark. 336, 14 S. W. 90. And so, to quote the words of a recent opinion of the supreme court of the United States, "we are left to determine the meaning of this act as we determine the meaning of other acts, from the language used therein." *U. S. v. Trans-Missouri Freight Ass'n*, 168 U. S. 318, 17 Sup. Ct. 550.

The words of the statute to which counsel for state attach such a wide meaning are, "any corporation," "any partnership or individual," "any pool, agreement, contract, combination." It will be noticed that these are general words. The statute nowhere expressly says that it was intended to have the wide extraterritorial effect which the construction of counsel for the state necessarily imputes to it.

Now, in determining the meaning of this statute, we must keep in mind certain well-known rules of construction, based on reason, and so well settled that members of the legislature must be supposed to have been familiar with them, and to have had them in view, in framing the law. One of these rules is that the legislature is presumed to intend that its statutes shall not apply to acts or contracts done or effected beyond the limits of the state, and having no reference to, or effect upon, persons or property in this state. As the legislature of each state assembles to legislate especially for the benefit of the people of that state, it is reasonable to suppose, when the statute does not expressly show to the contrary, that it was not designed to punish acts done, or contracts made, in foreign countries, and affecting only the people of such countries. For this reason, although the legislature may use general words, such as "any" or "all," in describing the persons or acts to which the statute applies, still it does not follow that the law has an extraterritorial effect; for it is presumed that the legislature did not intend it to have such effect unless the language of the statute admits of no other reasonable interpretation. *Bond v. Jay*, 7 Cranch, 350. The reports furnish numerous instances of the application of this rule, by which general words used in statutes are taken as limited to cases within the jurisdiction of the legislature passing the statute, and confining its operation to matters affecting persons and property in such jurisdiction. It will be necessary to notice only a few of such cases.

In the case of *U. S. v. Palmer*, 3 Wheat. 610, there was a prosecution under a statute which provided for the prosecution and punishment of "any person or persons" committing murder or robbery upon the high seas. Chief Justice Marshall, discussing in that case the question whether the act applied to

all persons committing such crimes, or only to those owing allegiance to the United States or committing the offense against her citizens, said that no doubt congress had power to enact laws punishing pirates, although they may be foreigners and may have committed no particular offense against the United States. He admitted that the words, "any person or persons," used in the statute, were broad enough to comprehend every human being; but he said that such general words must be limited in some degree, and he held that it was offenses against the United States, not offenses against the human race, that congress by the law intended to punish. "Every nation," he said, "provides for such offenses the punishment its own policy may dictate, and no general words of a statute ought to be construed to embrace them when committed by foreigners against a foreign government."

So, a learned English court, construing an act of parliament which abolished certain weights and measures, and enacted "that any contract, bargain, or sale made by any such weights or measures shall be wholly null and void," held that the general words used in the law should be limited to contracts in which the goods bought or sold were to be weighed in that country, and that the statute, though the words used were as broad as those under consideration here, had no application to contracts, though made in England, when the goods were to be weighed in a foreign country. *Rosseter v. Cahmann*, 8 Ex. Ch. 361.

If it were necessary, hundreds of cases and statutes could be referred to in which general words are thus limited. It is common for penal statutes to contain general words such as "any" or "all," in order to cover all persons of the kind referred to in the state where the legislature assembles; but these general words must necessarily be treated as limited in some respects, otherwise innumerable conflicts between the laws of different states and countries would result, and unutterable confusion be brought into the law. Among the vast number of cases construing such statutes, it is doubtful if one can be found in which such general words have not been treated as limited to some extent, for it is unusual for a legislature to intend that its statutes shall apply over the whole world. For these reasons, we think the words, "any pool or combination," used in the statute here, must also be treated as limited, and we cannot adopt the broad construction contended for by the state's counsel.

The cases cited by the attorney general on this point do not, we think, support his construction of this statute. Take, for instance, the case of *Leonard v. Com.*, 112 Pa. St. 620, 4 Atl. 221, cited by him, in which the court construed a section of the constitution of Pennsylvania which provided that "any person who shall while a candidate for office be

gully of bribery, fraud or wilful violation of any election law shall be forever disqualified from holding any office of trust or profit in this commonwealth." The court held that this meant "any election law then in existence or thereafter to be passed by the legislature, which that body had a right to pass." It will be noticed that the court limited the general words "any election law" to laws passed by the legislature of Pennsylvania. But, if the court had applied the rules of construction contended for here by counsel for the state, the words, "any election law," would have included the election laws of every state or country, so as to prohibit persons violating such laws in another state from afterwards holding office in Pennsylvania. But no such broad construction was suggested by either court or counsel in that case.

Again, take the illustration that the attorney general makes of a man in Missouri who shoots and kills a person in this state. He says that such a man could be indicted and punished here. Suppose that this is so, still the argument is not in point, for the defendant here denies that, either in Missouri or elsewhere, it has entered into or made any combination to affect rates in this state. In other words, to continue the illustration, it denies that it has shot or killed any man in this state, yet the state, by its demurrer, says that this is not a good answer.

But let us follow the argument of counsel for the state, and see whither it would lead. The defendant company is an English corporation, engaged in the business of fire insurance. It may, and probably does, carry on such business, not only in America, but also in Europe and Asia. Now, under the construction which counsel for the state seeks to have placed on this statute, if this English company, while doing business here, should, at its office in England, enter into an agreement with other foreign companies, for the purpose of fixing rates of fire insurance in Hong Kong or in the city of Canton, China, it would at once become liable to a penalty, under our statute; for counsel for the state contend that the words, "any pool or combination," used in the statute, embrace such combinations in any portion of the world. This, we admit, is the logical result of their construction of the law. There is no middle ground. Either the act applies only to combinations affecting persons, property, or prices in this state, or its scope is unlimited. If this be the meaning of the statute, then, if the attorney general was informed that a company doing business here had entered into a combination in Japan or South Africa fixing rates of fire insurance in those countries, he would be required to institute an inquiry, and perhaps to take proof. It is easy to see that, under such a law, litigation might take a wide range, for the field of evidence would be as wide as the habitable globe. Investigations of that kind would be

expensive. The time of the attorney general and the courts of the state would often be consumed by controversies concerning trusts and combinations in different parts of the world, having no reference to, or effect upon, the people of this state. If the legislature intended the statute to have such a broad scope, it should have expressly said so in plain words.

It is so unusual for a legislature to intend that its acts shall have such world-wide effect that courts are never justified in putting such construction upon them, if their language admits of any other reasonable interpretation. *Bond v. Jay*, 7 Cranch, 350. Such a construction might result in defeating the main purpose in passing the act, for it is evident that one object in passing the act was to encourage competition. By preventing the combinations and agreements named in the act, the legislature wisely intended to stimulate competition, and thus reduce prices. But it might happen that a company willing to lower prices here might, by force of circumstances, be compelled to enter such combinations in certain foreign countries whose laws permit them. If such a company can for that reason only be shut out from doing business here, although its contract as to prices in such foreign country had no reference to, or effect upon, prices here, competition, instead of being increased, might be lessened, and prices thereby increased.

Again, this statute not only forbids corporations from entering into pools and combinations, but it also forbids individuals, persons, and partnerships, and they are subjected to like penalties. Now, while the legislature can dictate the terms under which corporations of other states may do business here, it does not have such control of the citizens. If a merchant of Missouri, doing business also in this state, should enter into a pool or combination in Missouri to regulate prices there, but not intended to have effect in this state, our legislature could not, on that account, prevent him from doing business here or subject him to a penalty. So, if we adopt the construction contended for by the attorney general, we must assume, as to a portion of the statute, that the legislature was attempting to do something it plainly had no right to do, and such portion must be treated as unconstitutional and void. But the courts always endeavor to avoid declaring an act, or any part thereof, unconstitutional. If it can reasonably be done, they avoid such a result by giving the statute such a construction as will enable it to take effect in all its parts; for the presumption is that the legislature intended the whole act to take effect. This furnishes another reason why the construction contended for by counsel for the state should not be adopted.

Our conclusion is that this statute does not apply to pools or combinations formed outside of this state, and not intended to affect, and which do not affect, persons, property,

or prices of insurance in this state. In other words, we are of the opinion that the legislature, by this act, did not intend to prohibit or punish acts done, or agreements made, in foreign countries, by corporations doing business here, when such acts or agreements have reference only to persons, property, or prices in such foreign countries. We therefore hold that the answer sets up a valid defense, and that the demurrer thereto was properly overruled. Entertaining no doubt of the correctness of the judgment of the circuit court, the same is affirmed.

WOOD, J. (concurring). The proposition, when analyzed, is exceedingly simple. The legislature has no extraterritorial power to punish crime. The crime specified in this act is the entering into, becoming "a member of, or a party to, any pool," etc., "to fix or limit the prices or premiums to be paid for insuring property against loss or damage by fire," etc. If a foreign corporation doing business in this state enter into, or become a member of, this pool or trust beyond the limits of the state, then the crime is clearly committed beyond the limits of the state, unless the pool or trust is to fix the premiums for insuring property in Arkansas, in which event the crime put in motion in the foreign state takes effect and becomes complete in Arkansas. Just as in the cases cited by the attorney general, where a man in one state throws a stone or shoots a gun across the line and kills a man in another state, or forms a conspiracy in one state to burn or destroy property in another state, the crime, in such cases, becomes complete where the person is killed or where the property is destroyed. But where the foreign corporation enters into, and becomes a member of, a pool or trust in a foreign state, which does not purport to, and does not, in any manner affect the property of the people of this state, of course no crime is committed in this state.

The legislature certainly did not intend to make a crime and punish the mere act of doing business in this state by a foreign insurance company, although a member of a pool or trust, whether in or out of the state; for the very gravamen of the crime is entering a pool or trust to fix the price or premiums to be paid for insuring property, etc. Now, suppose the member of the pool or trust in the foreign state proposed to do business, and did business, in Arkansas on a strictly competitive basis, which tended to cheapen and lower the rates of insurance to the people of this state; could any dispassionate lawyer say that the legislature intended by this act to punish such a beneficial and commendable deed as that? Certainly not. The legislature manifestly was intending to correct an evil existing which affects, or might affect, injuriously the people of this state.

Now, the prohibiting of foreign corporations from doing business in this state on any terms and conditions that the legislature may

prescribe is one thing, and the punishing of them for any crime they may commit is another, and entirely different, thing. As to the former,—the privilege to do business,—the legislature had the power to say: "Foreign Corporations, you cannot do business in this state if you are a member of a pool or trust to fix or limit prices anywhere in the wide world." As to the latter,—the entering the pool or trust,—they could only say: "You will be punished with the severe penalties demanded by the act, if you are a member of a pool or trust to fix the price or premium upon property in Arkansas." As the legislature had no power to punish foreign corporations for becoming members of a pool or trust outside of the state, which do not propose to affect prices in the state, and as it did have full power to punish them for entering pools or trusts to affect prices or premiums in Arkansas, and also to forfeit their right to do business in this state, is it not conclusive that they intended by the words, "any pool or trust," to mean any pool or trust to fix the price or premium on property in this state? We must not convict the legislature of doing, or attempting to do, a vain and idle thing. Had the legislature intended to exclude foreign corporations that were members of a pool or trust anywhere in the world to fix prices anywhere, how easy would it have been to have made it unlawful for such corporations to do business in this state, and to have provided sufficient penalties for the violation of such law to secure its enforcement! But no such thing as that was provided in the act under consideration. The purpose of the legislature is doubtless correctly reflected in the title, "An act providing for the punishment of pools, trusts, and conspiracies to control prices," etc. The fact that the legislature embraced the other persons named in the act along with foreign corporations shows that it intended that these corporations might be considered as violating the law in the same way as any "partnership or individual or any other association or persons whatsoever" might do. It is an egregious mistake to suppose that a foreign corporation is guilty of an offense for merely doing business in this state, or to consider the act of doing business as an element of the offense under this law. It would be no more an offense for them to do business than for domestic corporations or individuals to do business. Foreign corporations are expressly authorized to do business. The doing of business by them is not an ingredient of the offense at all. The words, "and transacting or conducting any kind of business in this state," applied to them, are used in the sense merely of *descriptio personarum*. They merely indicate that these corporations are within the legislative jurisdiction because of the fact of their doing business in this state. There are no separate acts conjoined, as the attorney general supposes and argues, but one act. The proof which would estab-

lish the crime would also establish the forfeitures of the right to do business in the state. The legislature could both forfeit the right of the insurance company to do business and punish for the crime of entering a pool or trust to fix the price or premium, if the act was done in, or became complete and effectual in, Arkansas, but it could not punish for the crime unless it did. Therefore the fact that the legislature has included individuals and domestic and foreign corporations, and has prescribed, as a result of the violation of this act, both a penalty for the crime committed and a forfeiture of the right to do business, shows conclusively that, as to foreign corporations, it could only have intended to reach such of these corporations as were in a pool or trust in this state or in a foreign state to regulate prices in this state.

STATE v. ÆTNA FIRE INS. CO.

(Supreme Court of Arkansas. May 27, 1899.)
MONOPOLIES—UNLAWFUL COMBINATION—ACTION FOR PENALTY—PLEADING.

1. Under Act March 6, 1899, subjecting to a penalty any foreign or domestic corporation entering into any pool or combination for regulating the premiums to be paid for fire insurance, a complaint for the recovery of such penalty from a foreign insurance company, alleging the company to be a foreign corporation doing business in Arkansas, and that while so engaged in business it became a member of a pool with other insurance companies to regulate the premiums for insurance, is not, as against a general demurrer, insufficient in failing to show that the combination was with respect to business in Arkansas.

2. An indefinite pleading must be attacked by motion to make more certain, and not by demurrer.

Appeal from circuit court, Pulaski county; Joseph W. Martin, Judge.

Action by the state against the Ætna Fire Insurance Company. There was a judgment for defendant on demurrer to the complaint, and the state appeals. Reversed.

Jeff Davis, Atty. Gen., and Chas. Jacobson (Jesse C. Hart and Hal L. Norwood, of counsel), for the State. Blackwood & Williams, Rose, Hemingway & Rose, Cockrill & Cockrill, J. M. Moore, Dodge, Johnson, Carroll & Pemberton, and Morris M. Cohn, for appellee.

BUNN, C. J. This is a suit for a penalty and forfeiture against the appellee insurance company by the state of Arkansas, on the relation of the attorney general, under the act of the general assembly commonly known as the "Anti-Trust Law," passed March 6, 1899. There was a demurrer to the complaint interposed, and the same was sustained, and, plaintiff failing to plead over, judgment was rendered for the defendant, and the plaintiff appealed to this court.

The complaint is as follows: "The plaintiff, the state of Arkansas, by her attorney general, Jeff Davis, complains of the defendant, and for cause of action alleges: (1) That the defendant is a foreign corporation, organized and existing under the laws of the state of New York, and doing business in

this state; that the defendant is engaged in the business of insuring property against loss or damage by fire, lightning, storm, cyclone, and tornado, in this state, and was so engaged on and after the 6th day of March, 1899. (2) That while so engaged in the business of insuring property, in this state, against loss or damage by fire, cyclone, lightning, storm, and tornado, the said Ætna Insurance Company became and was a member of a pool, trust, agreement, combination, confederation, or understanding with other corporations, engaged in similar business, to regulate or fix the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, and tornado, the said combination being commonly known or designated as an 'insurance exchange' or 'rating bureau,' contrary to the form of the statute in such cases made and provided. (3) That by an act of the general assembly of Arkansas approved March 6, 1899, and known as the 'Anti-Trust Law,' it is provided that if any corporation, organized under the laws of this state, or of any other state or country, and transacting or conducting any kind of business in this state, shall enter into, or become a member of, any pool, trust, agreement, confederation, or understanding with any other corporation, individual, or any other person or association of persons, to fix the price or premium to be paid for insuring property against loss or damage by fire, tornado, lightning, storm, or cyclone, said corporation shall be adjudged guilty of a conspiracy, and its corporate existence shall, upon proper proof thereof, be declared forfeited, void, and of none effect, and shall thereupon cease and determine, and shall thereby forfeit its right and privilege thereafter to do business in this state. It is also provided in said act, as aforesaid, said corporation shall forfeit not less than \$200, nor more than \$5,000, for every such offense. Wherefore plaintiff alleges that defendant, by becoming a member of said combination as aforesaid, became liable to the plaintiff in the sum of \$5,000, and an action accrued to plaintiff in said sum, according to the provisions of said act. Premises considered, plaintiff prays that defendant's corporate existence shall be declared forfeited, void, and of noneffect, and shall forfeit its right and privilege to do business in this state, and that plaintiff have and recover judgment against said defendant in the sum of \$5,000, and all her costs in this suit expended, and for such other and further relief as plaintiff shall be entitled to under the proof in this case." To this complaint the defendant interposed a general demurrer, to the effect that the same does not state facts sufficient to constitute a cause of action.

The state charged in her complaint, and the charge was admitted to be true by the demurrer of the defendant, that the defendant, while engaged in business in this state, became and was "a member of a pool, trust, agreement, combination, confederation, or un-

derstanding, with other corporations engaged in similar business, to regulate or fix the price or premium for insuring property," etc.

This charge was substantially in the language of the act. The state had a good cause of action, but, according to our construction of the act, the cause of action was defectively stated, in this: that it does not charge that the pool or combination was for the purpose, or had the effect, of influencing the defendant's business in this state, no matter where formed. The complaint is uncertain and ambiguous, and doubtless made so because the language of the act itself is ambiguous, more or less. Ordinarily, it is sufficient to declare in the terms of a penal act, and such declaration is not the subject of a general demurrer; for, as said by the supreme court of North Carolina in *Commissioners v. Capeheart*, 71 N. C. 156: "The demurrer, of course, admits all the facts averred in the complaint. The complaint alleges that defendant violated Ordinance No. 43, made under section 14 of the act of March 28, 1869. Upon the authorities, this is a sufficient averment that defendant did some act by which, under that act and ordinance, he became liable to a town tax, e. g. shipped fish from the town. If the defendant had meant to put in issue that what he did was not a shipping of fish within the ordinance as properly understood, he should have answered; either stating specially what he had done, or have defended generally, and procured a special finding of the facts. In either of these ways, the question of law could have been presented to the superior court whether the acts of the defendant brought him within the ordinance." So it is with the defendant in the case at bar. It contended in argument, and its contention was correct, that the true meaning of the act upon which the complaint is based is that the act of a person, partnership, or corporation, doing business in this state, and who is a member of a pool, combination, etc., no matter where formed, having for its object or effect the influencing of its business in this state, and that alone, is denounced by the act. This was the offense set up in the complaint; for it was expressed substantially in the terms of the act, and the general demurrer should not have been sustained. If the complaint was thought to be indefinite and uncertain, as it was, in our view of the law of the case, it was the proper subject of a motion to make more specific and certain; or, if the defendant did not choose to do this, he should have answered, stating the facts showing that it was not the subject of the act's prohibition and penalty. *Morse v. Gilman*, 16 Wis. 504; *Demartin v. Albert*, 68 Cal. 277, 9 Pac. 157. This position must not be understood as controverting the theory that in some cases it is essential that the complaint should negative the liability of those not comprehended in the statute invoked, but all that is intended to be said is that a general demurrer is not proper in a case like this.

The only case cited by appellee on this point is that of *Collier v. Davis* (Ala.) 10 South. 86. This case was subsequently more fully reported in 94 Ala. 456, 10 South. 86. In that case the plaintiffs, Collier & Pinckard, loan brokers, engaged by special contract to negotiate a loan of \$10,000 for the defendants, Davis & Davis, to be secured by a mortgage on their farm in Lowndes county, Ala. The loan was effected from the American Freehold Land Mortgage Company of London, Limited. Plaintiffs afterwards brought suit for the amount defendants had agreed to pay them for their services in procuring the loan. The defendants interposed a plea or special answer, in which they alleged that the plaintiffs in this transaction were the agents of said American Freehold Land Mortgage Company of London, a foreign corporation, and that the latter had no known place of business in Alabama with an agent thereat, and that, therefore, under the statutes of that state, the contract sued on was null and void, constituting a part of the company's doing business in that state. A demurrer was interposed to this plea, which the trial court overruled, but which the supreme court on appeal sustained, and dismissed the case, saying: "If the complaint or plea had averred or shown that the agreement between Collier & Pinckard on the one side, and Davis Bros. on the other, was entered into in Alabama, then it would have been shown that a foreign corporation, through its agent, or the agent of a foreign corporation, had engaged in business, or transacted business, in Alabama, without a compliance with the statutes. This would have made the agreement illegal and nonenforceable. There is nothing, however, to show that such was the case. It is perfectly consistent with every averment of the pleadings that the agreement declared on was executed outside of the state of Alabama; and, if Collier & Pinckard were not agents of the corporation, then there is nothing stated that is incompatible with the idea that the loan was to be negotiated outside of Alabama's limits. The situs of the security offered (the location of the land mortgaged) is not necessarily determinative of that inquiry, e. g. where the agreement was made, although it may be a factor to be considered." By their special plea the defendant undertook to show that the transaction was one denounced by the legislative enactment, and by it made void. They failed to state all the essential facts necessary to this end, and, since the defect was not cured by anything in the complaint, the plea was bad on demurrer. If the conclusion of facts was as found by the court (and we are not sure that it was), it must readily be admitted that a failure on the part of the defendants to bring the contract within the denunciation of the law, in their recital of the essential facts, rendered their plea the subject of a general demurrer, because, surely, the very statement of the point is to the effect that the facts as stated did not con-

stitute a defense. When the defendant undertakes to state his defense, he should state all that is essential to his defense, and, of course, should not fail to state the most essential element of his defense. The statute of Alabama was unambiguous, and prohibited foreign corporations from doing business in the state, except on the performance of certain conditions. To attempt, by answer, to bring a business within the purview of the statute, and not to state where it had been transacted, was, of course, no defense in the case, and was therefore the subject of a general demurrer.

The demurrer was not proper, and, of course, was improperly sustained, and for this error the judgment of the court below is reversed, and the cause remanded, with directions to overrule the demurrer, and on motion permit plaintiff to amend her complaint by making the same more specific and certain as to the point indicated, or, if the defendant chooses to do so, permit it to answer, setting up the facts constituting its defense, under the rulings of this court in the companion case of to day, to wit, *State v. Lancashire Fire Ins. Co.*, 51 S. W. 633.

HEINTZ et al. v. THIAYER et al.
(Supreme Court of Texas. June 5, 1899.)
DEED—RECORD—PROOF.

That a deed, not acknowledged so as to be entitled to record, was transcribed on the record of deeds, if material to any issue, can be proved according to the common law, though not by a certified copy.

Error to court of civil appeals of Fourth supreme judicial district.

On rehearing. Denied.

For former opinion, see 50 S. W. 175.

Baker, Botts, Baker & Lovett and Lock McDaniel, for plaintiffs in error. Allen, Watkins & Jones and N. G. Kittrell, for defendants in error.

BROWN, J. The ground upon which the plaintiffs in error objected to the introduction of certified copies of the deed from Cochran to Thayer was that the acknowledgment was not in compliance with the requirements of the law, and that the clerks of the different counties had no authority to record the deed, for which reasons the certified copies were not admissible. The validity of the acknowledgment was necessarily passed upon and determined by this court in sustaining the assignment made by the plaintiffs in error. But it is earnestly contended upon this motion for a rehearing that the certificate of acknowledgment is sufficient under the law, and that the certified copies were admissible for all purposes. We have re-examined the question, and have considered the following authorities, which are cited and mainly relied upon to sustain the claim: *Brownson v. Scanlan*, 59 Tex. 222; *Pasture Co. v. Preston*,

65 Tex. 448; and *Snowden v. Rush*, 69 Tex. 593, 6 S. W. 767. The official report of *Brownson v. Scanlan* does not show the fact, but an examination of the original record discloses that the body of the deed contained all the requirements of a valid acknowledgment, and justified the statement of Chief Justice Willie that: "The acknowledgment is contained in the body of the deeds, instead of at the foot, being simultaneous with their execution. It contains all of the requisites of the proof as required by our statute for admitting deeds to record." Neither of the cases cited sustains the acknowledgment to the deed in question. We see no reason to change our opinion as to the proper construction of article 2306, Rev. Civ. St. If the fact that the deed from Cochran to Thayer was transcribed upon the record of deeds in the counties named is material to any issue in the case, it can be proved according to the common law, but not by a copy certified to by the clerk.

CONNER v. JACOBS.¹

(Court of Civil Appeals of Texas. May 10, 1899.)

JUSTICES OF THE PEACE—JURISDICTION—AMOUNT IN CONTROVERSY.

Under Acts 1876, p. 155, providing that justice courts shall have jurisdiction in civil matters where the amount in controversy is \$200 or less, exclusive of interest, and also to foreclose mortgages and enforce other liens on personal property, and Acts 1876, p. 17, by which county courts were given exclusive original jurisdiction in all civil cases where the "matter in controversy" exceeded \$200 in value, and not exceeding \$500, exclusive of interest, a justice has jurisdiction of an action to foreclose a mortgage where the demand is less than \$200, and the mortgaged property does not exceed the value of \$200; the amount of the demand and the value of the security not being added to determine the jurisdiction.

Appeal from Dallas county court; Kenneth Foree, Judge.

Action by R. A. Jacobs against J. T. Conner. From a judgment dismissing the action, defendant appeals. Reversed.

M. T. Conner, for appellant. J. O. Davis, for appellee.

JAMES, C. J. Jacobs sued appellant in a justice's court for amounts aggregating \$195.20. Of this sum, one item was a note for \$20, which was secured by a mortgage on personal property shown to be of the value of \$45. Both the justice and the county courts held that there was no jurisdiction, and dismissed the case for that reason. If this ruling be correct, there is no occasion to notice other assigned errors.

It has been held in *Cotulla v. Goggan*, 77 Tex. 33, 13 S. W. 742, and cases there cited, and *Schwartz v. Frees* (Tex. Civ. App.) 31 S. W. 214, that in foreclosure suits in reference to personal property, where the value of the

¹ Rehearing denied June 7, 1899.

latter exceeds the jurisdictional amount, the court is without jurisdiction to try the case; in other words, both the sum claimed and the value of the mortgaged property must be within the amount. It is urged by appellant that in the cases in which this question has been passed on since 1876, consideration has not been given to the act of August 17, 1876, defining the powers and jurisdiction of the justices' courts, and providing that such courts shall have jurisdiction in civil matters in all cases where the amount in controversy is \$200 or less, exclusive of interest, and also to foreclose mortgages and enforce other liens on personal property where the amount in controversy shall not exceed \$200, exclusive of interest. Acts 1876, p. 155. We notice that appellant's brief does not correctly quote the provision of said act. There is nothing in the act cited which indicates that the legislature intended that the justice's court should foreclose a lien on personal property, regardless of its value, when the debt sued for appeared to be within its jurisdiction. On the contrary, it appears that the legislature did not so intend. See the act passed by the same body defining the jurisdiction of the county courts (Acts 1876, p. 17), by which the county courts were given exclusive original jurisdiction in all civil cases where the "matter in controversy" exceeded \$200 in value, and not exceeding \$500, exclusive of interest. By "matter in controversy" is meant, not only the debt, but also the security given for its payment. *Marshall v. Taylor*, 7 Tex. 235; *Smith v. Giles*, 65 Tex. 343. If mortgaged property exceeded in value \$200, it clearly was the intention of that legislature to confer jurisdiction upon the county court, and to exclude the justice's court from jurisdiction. But here the mortgaged property did not exceed the value of \$200. Suppose the mortgage in question had been given as security for all of the \$195; in that case the justice would be held to have had jurisdiction, because neither the claim nor the value of the property would have been in excess of his jurisdiction. The same must be the case where such mortgage is security for a part of the claim. The amount of the demand and the value of the security are not added, to determine the jurisdiction. The plea in reconvention was not demurrable. Reversed and remanded.

HOUSTON & T. C. R. CO. v. MARTIN.¹
(Court of Civil Appeals of Texas. May 4, 1899.)
MASTER AND SERVANT—RISK ASSUMED BY SERVANT.

Plaintiff assisted in unloading ties from a flat car under the directions of defendant's foreman. The car was moved by pinch bars, and stopped by a scantling thrust in front of the wheels,—a common method, familiar to plaintiff. For convenience, the standards confining the ties on the car had been removed, which plaintiff knew. The foreman directed him to stop the

car, and cautioned him to avoid getting hurt, but did not direct him how to use the scantling. He had stopped it once or twice before the accident. In trying to stop it again, he was thrown down, and one of the wheels passed over the scantling. The jolt caused the ties to fall off the car and upon him. The track and car brake were defective, but such defects did not cause the accident. *Held*, that the plaintiff was not entitled to recover.

Appeal from district court, Harris county; John G. Tod, Judge.

Action by William Martin against the Houston & Texas Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Baker, Botts, Baker & Lovett and Frank Andrews, for appellant. O. T. Holt, for appellee.

WILLIAMS, J. For the reason that we are of the opinion that the admitted facts are such as to debar appellee from a recovery, and therefore to require the reversal of the judgment, we have found it unnecessary to critically examine many of the assignments based upon the rulings of the court. The rulings, apart from the assumption involved in some of them that there was evidence to justify a verdict for plaintiff, seem to be substantially correct.

Appellee was one of a section gang, under the supervision and control of a foreman, who were engaged in unloading cross-ties from a flat car upon appellant's switch track at Carmine, and was hurt by some of the ties falling upon him. The switch track was defective, and the car upon which the ties were loaded had been left upon the siding in order that they might be distributed along it, to be used in repairing it. There being no engine, the car was moved by use of pinch bars inserted between the rails and rear wheels, and used as levers, and was stopped by thrusting a piece of scantling, about three by four inches thick and about five feet long, in front of the wheels. The foreman walked in front or along with the car, and indicated the points at which ties were needed and stops were to be made, and appellee was directed by him to stop the car in the manner indicated. The stop had been once effected by the foreman himself, and once or twice by appellee, before the accident occurred. At the point of accident the car moved slightly down grade along a curve, the rail nearest appellee being inside the curve, and therefore lower than the other; and the cars thus moved somewhat faster than before, and careened towards appellee. Appellee placed the end of the timber upon the rail, standing beside it and holding it in front of him; and when the wheel struck it the end held by him flew back and threw him down, and the first wheel passing over the timber, the jolt caused the ties to fall off the car and upon appellee. There is no evidence that the car was improperly loaded. Before the movement of it began, the standards by which the

¹ Writ of error denied by supreme court.

51 S.W.—41

ties were confined had been removed for convenience in unloading; appellee knowing this, and assisting in the removal. The timber used in stopping the car was one of the standards, and its character was as open to appellee's view as to that of the foreman. This method of moving and stopping cars was often adopted by section men in doing such work, and appellee was familiar with it, as with the other duties of his position. No particular instrument was generally used, but only such as could be conveniently found, to check the movement of cars. The track was defective, but the evidence shows that the accident was caused by the jolt attending the passing of the wheel over the stick, and not by a defective track. The brake upon the car also was defective, and appellee says he did not know this. But he did know that the brake was not being used or relied on, and that the car was to be stopped by the means described, and that, when this was resorted to, brakes were not employed. The foreman only assigned appellee to perform this work, and indicated where the car should be stopped, but did not direct or determine when or how the stick should be interposed, nor otherwise influence appellee's action. Every fact and condition existing and affecting the risk were as open to appellee's observation as to that of the foreman. Appellee was between 20 and 21 years of age. He had been engaged as a section hand for more than two years, with his father's consent, and admits that he was a good section hand, and familiar with the duties of the employment. The work of handling cars as this was handled was familiar to him. He had previously seen a tie fall from a car and strike a section hand. He had also been cautioned by the foreman to be careful and avoid getting himself hurt. There is no ground whatever upon which the judgment can be sustained. The risk incurred seems clearly to have been one of those known to appellee to be incident to this particular service, and was therefore assumed by him. But, if not, it was open and patent,—was, in fact, one which arose from the operation of the plainest natural laws. The facts affecting the risk were all known to him, as well as to any one else. He did not realize or foresee the danger, but it was one which, with his knowledge of the facts, he was required to foresee, as well as another. It arose from conditions open to his observation. *Railway Co. v. French*, 86 Tex. 96, 23 S. W. 642; *Railway Co. v. Lempe*, 59 Tex. 22. The character of the instrument, the defects of the track, and the absence of the brake can none of them, or all of them, constitute ground for recovery, under the facts stated. For the same reason the fact that he acted under the foreman's direction or orders cannot avail him. There was no fact affecting the danger known to the foreman which was not also known to him. *Railway Co. v. Bradford*, 66 Tex. 734, 2 S. W. 595; *Railway Co. v. Drew*, 59 Tex. 10. Since

there are no facts upon which the cause should be submitted to a jury, it is proper that the judgment should be reversed, and judgment be here rendered for appellant. *Railway Co. v. Strycharski* (Tex. Sup.) 37 S. W. 415. Reversed and rendered.

TURNER et al. v. CITY OF HOUSTON.

(Court of Civil Appeals of Texas. May 18, 1899.)

PLEADING—NOTICE OF AMENDMENTS—APPEAL AND ERROR—TAXATION—MODE OF ASSESSMENT—COLLECTION AND ENFORCEMENT OF TAX.

1. The appearance of a party on the trial of a cause supplies want of notice of filing of an amendment of the pleadings.

2. Every presumption will be indulged in favor of the proof of facts necessary to support judgment, where the assignment of error relied on, and propositions thereunder, are not followed by any statement of facts as required by the rules.

3. Where the statute requires the taxpayer to render an inventory of his property, it will be presumed that he furnished the description on the roll, and that the assessment of several lots together as one parcel is proper.

4. Under the charter of the city of Houston (Sp. Laws 1897, pp. 72, 73), providing that a "tax on property shall be a lien thereon, that a judgment may be recovered against the owner for the tax with a foreclosure of the lien, and the property sold, either each piece separately, or in gross," a judgment against the property owner for the aggregate sum of all the taxes assessed against several parcels of land, with a foreclosure of the lien therefor on all the property in gross, is valid.

5. In a suit to foreclose a tax lien, the question of sufficiency of description of the property will not be considered, when raised for the first time on appeal, without assignment of error.

Error from district court, Harris county; John G. Tod, Judge.

Action by the city of Houston against E. P. Turner and others. There was judgment for plaintiff, and defendants bring error. Affirmed.

E. P. Turner, for plaintiffs in error.

GARRETT, C. J. This action was brought by the city of Houston against E. P. Turner and his wife, Mary V. Turner, and Frank Dunn for the recovery of taxes due the city, and for the foreclosure of a lien therefor upon certain property, assessed against the defendants. The original petition was filed September 11, 1894, and in it the plaintiff sought to recover, as taxes due upon said property, the sum of \$1,576.60, for the years 1881 to 1889, inclusive. The defendants appeared in the cause by an answer filed on October 4, 1895. Afterwards, on June 8, 1897, the plaintiff filed an amended original petition, in which it sought to recover the sum of \$2,323. taxes due the city for the years 1881 to 1889, sued for in the original petition, and the additional years 1890 to 1893, inclusive, and the year 1896. A statement of the taxes due on the property, made from the tax rolls certified to and signed by the city assessor and

collector, was attached to the petition, and made a part thereof, as follows:

Year.	# Lots Δ Δ	# Blk.	Side B. B.	Value, & Rate %	Amt. Tax.
1881.	¼	300	South	5,000	\$100
1882.	¼	"	"	5,000	100
1883.	¼	"	"	5,000	100
1884.	¼	"	"	5,000	120
1885.	4, 5, ¼ 11	"	"	6,000	120
1886.	4, 5, ¼ 11	"	"	5,000	100
1887.	4, 5, ¼ 11	"	"	5,000	100
1888.	4, 5, ¼ 11	"	"	5,000	100
1889.	4, 5, ¼ 11	"	"	6,000	120

1887. July 26. Credit by reduction from city council, 1881 to 1886.....

					\$900
					40
1887.	Part 11	32	South	10,000	\$920
1888.	Part 11	"	"	11,000	200
1889.	Part 11	"	"	11,000	220
1890.	4, 5, ¼- 11	300	"	7,000	140
1891.	4, 5, ¼- 11	"	"	7,500	150
1892.	4, 5, ¼ 11	"	"	7,550	151
1893.	4, 5, ¼- 11	"	"	7,550	151
1894.	4, 5, ¼ 11	"	"	8,550	171
					\$2,823

I hereby certify that the above and foregoing statement of the taxes due the city of Houston on the above-mentioned property for the years above named was made from the city tax rolls of the city of Houston in my office, and that said statement is true and correct, as shown by said city tax rolls. Justin C. White, City Assessor and Collector of Taxes of the City of Houston.

On July 17, 1897, the case was tried before the court without a jury, and judgment was rendered against the defendants for the aggregate sum of all the taxes, with a foreclosure of the lien therefor upon all the property in gross; and a sale thereof was ordered for the payment of the sum adjudged. The defendants E. P. Turner and his wife, Mary V. Turner, have brought the judgment of the court below before this court for revision by writ of error. There is no statement of facts in the record. The errors relied on for reversal of the judgment of the court below are: (1) Rendition of judgment against the defendants upon the amended original petition, with service thereof upon them; (2) in foreclosing the lien upon the several lots for the taxes assessed against the same upon all of them in solido. Defendants also present, in a supplemental argument, filed some time after the brief was filed, as fundamental error, that the assessment is void for want of a sufficient description of the property.

In *Rabb v. Rogers*, 67 Tex. 335, 3 S. W. 303, it was held that, when the defendant has been cited and has not answered, he is entitled to notice of every amendment setting up a new cause of action, but, if he has answered, the only notice to which he is entitled is that of the order of the court granting leave to file the amendment. When the amendment is made in vacation, the party filing the pleading must notify the opposite party or his attorney within five days from the filing of the same. *Batts' Rev. St. art. 1188*, and notes; *Id. arts. 3856-3958*; *Sayles, Pl. (1893) § 508*. The amendment was filed during a term of the court, but the record does not contain any order of the court showing leave to file. Appearance, however, supplies the want of notice of an amendment; and, it appearing from the recitals in the judgment that

the defendants appeared upon the trial of the cause, it becomes immaterial whether there was an order of court granting leave to amend, or notice was given of the filing of the amendment, or not. The object of obtaining the leave to amend is to give the notice. *Batts' Rev. St. art. 3954*, note. By their appearance at the trial of the case the want of formal notice was obviated.

The fifth assignment of error and the propositions thereunder are not followed by a statement, as required by the rules. It is only by this assignment that the question of foreclosure upon one lot of land for the taxes due upon another is presented. But we are of the opinion that no error was committed by the court. Since there is no statement of facts in the record, every presumption will be indulged in favor of the proof of facts necessary to support the judgment. The defendants were required by law to render an inventory and list of their property for taxation, and it will be presumed that the description appearing upon the tax rolls was furnished by the defendants themselves, and that the lots assessed and valued together were, from their use and situation, practically one tract or parcel of land, and were thus properly assessed. *Dallas Title & Trust Co. v. City of Oak Cliff*, 8 Tex. Civ. App. 217, 27 S. W. 1036. There are, however, different parcels of lots thus assessed, and the foreclosure is upon all in solido for the sum of the taxes assessed against each parcel. By the charter of the city of Houston, as well as the constitution, the taxes assessed against property are made a lien thereon, and a suit may be maintained therefor against the owner, and personal judgment recovered against him, for the amount of the taxes, with foreclosure of the lien, and the property may be sold, either each piece separately or in gross; but the same may be sold in less tracts than the whole, at the written request of the defendant, filed with the officer in whose hands the order of sale may be, any time before the sale. *Charter of Houston, § 40 (Sp. Laws 1897, pp. 73, 74)*. A similar provision as to sale of land for delinquent taxes due the state is made by general law. *Sayles' Civ. St. arts. 5232f, 5232g*. This provision has received construction by the court of civil appeals for the Fourth district in a case in which the supreme court has refused a writ of error, and a judgment directing a sale of a large number of sections of land in gross was sustained. *Masterson v. State*, 42 S. W. 1003. There is nothing of which the defendants can complain. They are personally liable for the whole amount of taxes, and all of the property is subject to sale for the payment thereof. There is nothing in the record to show that any part of the property was the homestead of the defendants. Their answer alleges that a part of it was their homestead, but the petition does not disclose it, and there is no statement of facts to show that the averment in the answer is true.

We do not regard the question of sufficiency of description, sought to be raised by the defendants without assignment of error, as one of fundamental error, of which we should take notice when raised for the first time on appeal, and without assignment,—especially since the charter of the city provides that “when the description of any property on the assessment sheets or tax rolls is vague and indefinite the city may show by evidence other than the assessment and tax rolls where the property is located and on what property the tax is due, what parties own the property, and that the taxes on the same are due and unpaid, and enforce and foreclose the tax lien on such property.” Sp. Laws 1897, pp. 72, 73. The judgment of the court below will be affirmed. Affirmed.

INTERNATIONAL & G. N. RY. CO. v. MASTERSON.

(Court of Civil Appeals of Texas. May 24, 1899.)

PLEADING—RECOVERY ON IMPLIED, IN ACTION ON EXPRESS, CONTRACT—VALUE OF SERVICES—INSTRUCTION.

1. It is error to give a jury an instruction authorizing them to find for plaintiff on an implied contract, where the plaintiff has alleged an express contract.

2. It is not error to instruct a jury that, if they find that defendant contracted with plaintiff for the performance of services, he can recover for the reasonable value thereof, where the plaintiff alleged a contract for the performance of certain services at a price to be agreed on afterwards.

Appeal from district court, Brazoria county; T. S. Reese, Judge.

Suit by Branch T. Masterson against International & Great Northern Railway Company. From a judgment in favor of plaintiff, defendant appealed. Reversed.

W. B. Teagarden, for appellant. Masterson & Masterson, for appellee.

FLY, J. This suit was instituted by appellee to recover of appellant the sum of \$3,000 alleged to be due upon an express contract to pay for certain services rendered by appellee and his partner in obtaining abstracts of title of the land over which the line of appellant runs in Brazoria county. The cause was tried by jury, and resulted in a verdict and judgment for \$625. In the pleading it was alleged that A. R. Masterson was employed by appellee to assist in the service he had contracted to perform for appellant, but the testimony tends to show that he was a partner of appellee, at least in the contract with appellant, and he should have been joined in the suit as a party plaintiff.

The first assignment presents as error the action of the court in overruling the special exception to the petition. The pleading clearly presents a cause of action, and placed appellant upon full notice of the contract it was charged with having breached. Appel-

lee was not called upon to plead his evidence.

The evidence of Trammell, as to his understanding of the arrangement with appellee, if improperly excluded, would not be ground for reversal, for the reason that he swore that no contract was made by him with appellee, and that he had no authority to make, confirm, or ratify any such contract with appellee. In addition, he told all that he remembered as occurring between him and appellee.

The testimony of Trammell, to the effect that appellee represented that he had means for ascertaining titles to the lands through which the railway ran, was not material. Appellee testified that he had the means through an abstract of the titles in the county owned by him and other parties. In the only proposition under the assignment it is urged that the court erred because the objection was not made in writing, and presented before announcement on the facts. No such objection appears in the bill of exceptions, and there is nothing in the record to show that such objection was presented to the lower court.

The following instructions were given by the court: “(4) In order to find that a contract was made between Campbell and plaintiff, you must believe that the terms of the agreement were mutually understood and agreed upon by plaintiff and Campbell. (5) If you find that, as explained in the foregoing paragraph, no contract was made, but you find that the plaintiff understood that he had been so employed by Campbell to perform the services hereinbefore referred to in and about procuring such right of way, and if plaintiff proceeded to perform such services and incur such expenses as were reasonably necessary in the accomplishment of the work, and if it was known to the defendant's agents, having authority to bind the defendant in and about such business, that the plaintiff was engaged in doing such work, and the work was of such a character that it was unreasonable to suppose that he was doing the same without compensation and merely working to further employment, and if the defendant's said agents allowed plaintiff to proceed to do such work, with such knowledge on their part, then the defendant would be liable to the same extent as if he had been employed to do such work; that is, for the reasonable value of the services performed.” The last instruction above quoted was clearly erroneous. Appellee declared upon an express contract made with appellant, through its officers, for the performance of certain labor at a price to be agreed upon afterwards. He could not recover upon an implied contract, as stated by the charge. *Shiner v. Abbey*, 77 Tex. 1, 13 S. W. 613. It was not improper for the court, under the pleadings, to inform the jury that, if appellant contracted with appellee for the performance of certain services, it would be held bound to pay the reasonable value of such services. Such a charge was supported

by the pleadings. The two charges requested by appellant, and refused by the court, were upon the weight of the testimony, and properly refused. The other matters complained of will not probably arise on another trial, and need not be considered. The judgment is reversed, and the cause remanded.

GRAHAM v. BILLINGS.

(Court of Civil Appeals of Texas. April 29, 1899.)

TRESPASS TO TRY TITLE—QUESTION FOR JURY—IDENTITY OF PERSON—EVIDENCE—IGNORANCE OF LAW.

1. In the absence of duress or fraud, ignorance of law in the execution of a contract, not mixed with accident or mistake of fact, is no ground for relief.

2. It is error in trespass to try title to submit to the jury the issue of plaintiff's right to possession by reason of defendant's written and actual renouncement of possession, subsequently invaded by defendant, where the fact of such renouncement is undisputed, and only the validity of the instrument and act is in dispute.

3. The secretary of war of the republic of Texas having, in 1837, issued a land certificate based on the fact, recited therein, that H. B. had served in the army for 8 months from February 14, 1837, till October 11, 1837, and was discharged by death, and the probate court having contemporaneously administered the estate of H. B., and a patent having thereafter been issued on the certificate to the heirs of H. B., it cannot be held that H. B. was identical with the person of that name who the evidence tended to show went to Texas in 1833, was in the Texan army, was wounded at the battle of San Jacinto, remained in Texas till after close of war of United States with Mexico, and then returned to Ohio, and died in 1875, though long before his return it was reported that he had been killed, though he claimed to friends to have acquired lands in Texas for being in the war, and to one person claimed the land covered by the patent; it not appearing, however, that he ever made any effort to appropriate it, and there being no evidence that there was not more than one H. B. in the Texan army.

Appeal from district court, Bosque county; J. M. Hall, Judge.

Trespass to try title by Benjamin Graham against C. W. Billings. Judgment for defendant, and plaintiff appeals. Reversed.

Robertson & Robertson and Poindexter & Padelford, for appellant. Kearby & Muse and Cockrell & Muse, for appellee.

STEPHENS, J. November 8, 1852, a survey of 1,920 acres of land was patented "to the heirs of Henry Billings, deceased," the same being a parallelogram 2,000 varas wide and 5,418 varas long. The land in controversy is the southern end and all that part of the survey lying in Bosque county, and is described in the petition of appellant, plaintiff below, and in the judgment from which he appeals, so as to make it 2,000 varas square; the rest and greater part of the survey being situated in Somervell county. The patent was issued by virtue of the following certificate: "No. 1,387. 1,920 Acres. Republic of Texas. Know all men to whom these presents shall come: That Henry Billings, having served faithfully and honorably

for the term of eight months from the fourteenth day of Feby., 1837, until the eleventh day of October, 1837, and being honorably discharged from the army by death, is entitled to nineteen hundred and twenty acres bounty land, for which this is his certificate. And the said Henry Billings is entitled to hold said land, or to sell, alienate, convey, and donate the same, and exercise all rights of ownership over it. This certificate will be transferable by indorsement, with a deed, before any competent authority, with witnesses to the same. In testimony whereof, I have hereunto set my hand at Houston, this day of Decr. 28th, 1837. Bernard E. Bee, Sec. War. Approved, Nov. 8th, 1852. James S. Gillette, Adj't. Genl." Appellant deraigned title through a sale of this certificate, made under the orders of the probate court of Jackson county in the year 1838, by the administrator of the estate of Henry Billings, deceased, to Barton Peck, the administrator's deed being dated May 12, 1838, acknowledged May 15, 1838, before the chief justice of Jackson county, and again acknowledged October 15, 1851, in statutory form, before George R. Billings, clerk of the county court of Jackson county, and recorded in Bosque county May 7, 1855. Barton Peck conveyed the land to Edward Gottschalk, February 23, 1843, which deed was recorded in July, 1839; and on May 6, 1889, the heirs of Gottschalk conveyed to Jesse Thomas, who had already, in the year 1876, taken possession of the land, but, it seems, without any appearance of right until May 7, 1878, when he obtained a tax deed from the sheriff and tax collector of Bosque county, purporting to be made in pursuance of a sale by virtue of an assessment of taxes against the unknown owners for the year 1877, which deed was in the usual form of tax deeds, was recorded May 20, 1880, and thus described the land sold and conveyed: "516 acres out of the Henry Billings 1,290-acre survey, beginning at the southeast corner, and running for complement. New abstract No. 98, certificate No. 1,387, it being the unrendered portion of the said Billings 1,290-acre survey." The certificate of acknowledgment to this deed, as copied in the transcript, bears date May 11, 1888, but, as this was at the date of registration an impossible date, it is doubtless due to clerical misprision in the preparation of the transcript, as is, perhaps, fairly to be inferred from the manner in which the appellee has briefed his contention on this point. Under this deed Thomas held adverse possession and paid all taxes till May 24, 1889, a little less than 10 and more than 5 years, when he sold the entire survey to R. H. Kimbrough, taking therefor his promissory note in the sum of \$7,246, with the vendor's lien expressly retained to secure its payment, which he assigned, July 13, 1889, to R. L. Brown, who obtained a judgment foreclosing the lien February 8, 1894, with an order that the purchaser at foreclosure sale be placed in possession. The land was sold under this de-

cree April 3, 1894. to R. L. Brown, who was, the next day, placed in possession by the officer executing the order of sale, and who then conveyed and delivered same to appellant. The appellee was made a party to the foreclosure suit against Kimbrough and others, but when judgment was taken the suit as to him was dismissed. He never claimed the land till the year 1893, when he took possession in his own right as the sole heir of the Henry Billings on account of whose military service and death the certificate and patent issued. When made a party to the foreclosure suit, he filed an answer claiming the land as his own, and reiterated this claim when the officer came to execute the order of sale as a writ of possession, but was then induced to sign the following instrument, and surrender possession to the purchaser at foreclosure sale: "I renounce possession of the Henry Billings survey on line of Bosque and Somervell counties to R. L. Brown, and agree and bind myself to yield possession at once to said Brown. It is understood that I do not waive my right to sue for said land in trespass to try title if I so desire. April 4th, 1894. In duplicate. C. W. Billings. Attest: James M. Robertson. Rufus Barker." Attached to which was the following receipt: "Meridian, Texas, April 4th, 1894. Received from H. A. Fitzhugh, for R. L. Brown, forty dollars, in full payment for sodding land on the H. Billings survey. \$40.00. C. W. Billings." Besides the prior adverse possession of Thomas, specially pleaded under the 5 and 10 years' statutes of limitation, this relinquishment of possession was also specially pleaded by appellant as a ground of recovery. On the other hand, appellee, claiming that he had been imposed upon, and wrongfully ousted, again went into possession, whereupon this suit was brought to eject him. On the trial he undertook to show, in avoidance of the renunciation and prior possession so set up by appellant, and disregarded by him, that in executing these papers and surrendering possession to appellant's vendor he acted in ignorance of the law and his rights and under duress, and that he accepted the \$40 paid him at the time expressly and only as a gift. Upon this issue the evidence was conflicting, and would at least have warranted a finding in favor of appellant. In submitting it to the jury, the court made appellee's understanding or not understanding his rights, or his acting through fear, the test of the validity of his act in renouncing possession, without reference to whose fault it may have been that he did not understand the legal consequences of what he was doing, or that fear came upon him. In the absence of duress or fraud, ignorance of law, not mixed with accident or mistake of fact, is no ground for relief, either in law or equity. The charge submitting this issue was therefore erroneous.

The further objection made to it by appellant is also well taken,—that it submitted as doubtful the undisputed fact of the written

and actual renunciation of possession, when only the validity of that instrument and act was in dispute. But appellee insists that he alone could justly complain of this paragraph of the charge. That it was also erroneous as against him must be conceded, since it instructed the jury to find against him upon his "renunciation of possession" as shown in the written instrument, provided he "understood the nature of said renunciation," though they should believe from the evidence that he was "the son and heir of the Henry Billings, to whom the land in controversy was patented." This was clearly erroneous, because, if for no other reason, in the written renunciation itself appellee reserved the right to contest the title to the land in trespass to try title. The jury however, in addition to the general verdict in favor of appellee, in response to a special issue found that he was the sole heir of "the Henry Billings to whom the land in controversy was patented." Does it follow, then, that, because appellee might have complained of this charge had the verdict been against him, the appellant cannot? We think not. True, if the finding that appellee was the heir of "the Henry Billings to whom the land in controversy was patented" be upheld, that would render the errors in the charge of which appellant complains harmless; but, if that finding be not sustained, the effect of the charge was to deny appellant the right of recovery founded upon "the renunciation of possession," though that renunciation may have been binding on appellee, provided only the jury believed he made it "not understanding his rights, or through fear." That is to say, if appellee had no title, and appellant had an acknowledged prior and superior right to the possession, he was entitled to recover the possession at least, and hence to have the issue of fact upon which such right to possession was founded correctly submitted to the jury; but if appellee had, as claimed by him, and found by the jury, the fee-simple title, the errors assigned to the charge by appellant become harmless. We are thus brought to consider the important finding, to which also error in different forms is assigned, that appellee was the sole heir of "the Henry Billings to whom the land in controversy was patented." This finding does not rest upon conflicting evidence, except that among the witnesses whose depositions appellee offered to sustain his claim are found some conflicting statements; but, assuming that these were all reconciled by the jury so as to sustain the credibility of the witnesses so testifying, we must yet determine whether the evidence was sufficient to overcome the probative force of the documentary evidence relied on by appellant, for over an issue of fact so made the jurisdiction of the jury is not supreme and exclusive. The most that appellee's evidence tended to prove was that about the year 1833 his father, George Henry Billings, commonly known as Henry Billings,

went from Indiana or Ohio to Texas, served as a soldier in the Texas army during the war between Texas and Mexico, had his thumb shot off and was otherwise wounded in the battle of San Jacinto, remained in Texas till after the war between the United States and Mexico, engaging also in that war, and returned to Ohio after Texas was annexed to the United States, and remained there till his death in 1875 or 1876. Long before his return to Ohio the report went back to his relatives and friends that he had been killed in Texas. He claimed, in conversation with his friends, to have acquired lands in Texas for being in the war, and to one witness claimed this land, but there is no evidence that he ever made any effort to appropriate it. An old, unsigned certificate was found in the land office, bearing various indorsements, some in ink and some in pencil, the body of the certificate being the same as that quoted above, except that 1837 is written thus: 1836. The memoranda indorsed contain nothing more determinative in favor of appellee than the above figure 7 terminating at the bottom in a 6, which, at most, is ambiguous, and which, we think, fairly symbolizes the case made by appellee's evidence. While he proved that the certificate upon which the land was patented may possibly have been intended for George Henry Billings, who was still alive, and not for Henry Billings, deceased, his proof fell far short, in our opinion, of establishing that fact. No effort was made to show that only one Henry Billings served in the Texas army, while the unquestioned circumstances tended to show that, if George Henry Billings was at the battle of San Jacinto, and continued in the military service during the year 1837, there was also a Henry Billings who was not in the San Jacinto battle, but who entered the service February 14, 1837, and died October 11, 1837. Texas was threatened with invasion (notably in the early part of 1837, by Gen. Fillisola), and her army was held together long after the battle of San Jacinto, and after the treaty of Velasco; and the law under which the certificate in question seems to have issued made not only service in the army, but also a discharge or death, the basis of the republic's bounty in granting such certificates. No effort even was made to account for George R. Billings, the clerk of the county court of the very county where the Billings estate was administered, and before whom the administrator's deed was acknowledged, as shown above, which circumstance, though slight, was at least suggestive of more Billingses than one in those days. We are asked, after the lapse of three score years and more, and after the officers who made the record of this title have all passed away, to infer from circumstances inconclusive in themselves, in the first place, that the secretary of war who issued the certificate, in which were set down, at a time when he could not well have been mistaken, the date

and length of the military service and the death of Henry Billings, made a mistake as to these material facts; in the second place, that similar mistakes were made contemporaneously by the probate court and its officers; and, in the third place, that the adjutant general and commissioner of the general land office were also mistaken in approving and acting officially upon the recitals set forth in the original certificate. To set aside such record recitals of material facts, made by public officers practically contemporaneous with the facts so recited, after they have stood unchallenged for half a century, without clear proof of mistake, and that, too, upon the poor memory of witnesses infirm with "age and feebleness extreme," involves an assault upon the integrity of land titles in Texas which her courts should never sanction. There is a marked difference between proof that a mistake was actually made and proof showing the possibility, or even bare probability, of mistake. We therefore conclude that appellant may avail himself of the error assigned to the charge submitting the issue of his right to the possession perforce of appellee's written and actual renouncement of possession, subsequently invaded by appellee, and this, too, notwithstanding the conveyance, offered by appellee to show an outstanding title, from Edward Gottschalk to George W. Paschal, dated July 6, 1853.

Error is also assigned to the verdict upon the ground that the undisputed evidence showed title in appellant by reason of his five years' adverse possession and payment of taxes under the tax deed above referred to; but whether or not that deed was void for uncertainty of description is a question upon which we have been unable to reach a satisfactory conclusion. His honor, the district judge, held it to be sufficient as a basis for limitation, and we are not now prepared to hold that he was in error in so doing. See *Day v. Needham* (Tex. Civ. App.) 22 S. W. 103, and cases there cited; *Turner v. Crane* (Tex. Civ. App.) 47 S. W. 822. As the judgment must be reversed for reasons already given, and our jurisdiction is not final, we suggest that upon the next trial, should this issue not be eliminated, a special finding of the facts involved be had upon it, in order to facilitate the ultimate disposition of the case. We also suggest that the alleged variance between the petition and evidence in respect to this issue may be too easily avoided by amendment to require a decision of that question.

This appeal presents many other interesting as well as difficult questions, all of which have received careful consideration, but we find no material error in the many incidental rulings complained of, unless it be in the rejection of the testimony of James M. Robertson, to which the thirteenth error is assigned, which testimony, we think, should have been admitted. For the errors indicated, the judgment is reversed, and the cause remanded.

HITCHLER et al. v. BOYLES (SMITH, Intervener).¹

(Court of Civil Appeals of Texas. May 18, 1899.)

ESTOPPEL—CONSTRUCTION OF DEED—IDENTIFICATION OF LAND—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS.

1. Defendant, in a former action against S. and others, claimed title to the land in controversy; S. claiming to be in possession of evidence which would not only defeat defendant's recovery of the land from S., but also of other tracts from the other defendants. On such representations, the defendant agreed with S., by a duly-executed contract in writing, that he would convey 40 acres of the tract sought to be recovered from S. to her at any time after the termination of the suit, provided she would not adduce such evidence. Thereafter S. executed a trust deed of the premises, and intervenor purchased the same on a sale under the deed. Defendant, at the time he executed the contract, acknowledged that S. had title to the land. The beneficiary under the deed loaned the money for which it was given on the faith of such acknowledgment and contract by defendant, and with his knowledge and consent. Thereafter it was discovered that the evidence which S. claimed to have, and his representations as to his defense of the suit, were without merit, and the agreement was abrogated, and S. contested the suit, and the land was decreed to defendant. *Held* that, as to the beneficiary and those claiming under him, the defendant was estopped to deny that S. had title to the land.

2. In construing a deed, the court will consider the whole instrument, and, when the calls in a deed lead to conflicting results, that construction must be adopted which is most consistent with the intent apparent on its face.

3. Deeds which do not identify the lands described will be received in evidence when, by the aid of extrinsic evidence, the land conveyed can be identified.

4. In an action to recover land, a deed through which plaintiff claimed title described the land in controversy by reference to a map made by H. On a former trial of a controversy in reference to the same land, a map, apparently ancient, which was afterwards lost, was found among the title deeds of a subsequent grantee, bore the signature of the original grantor, and was shown to be the work of H., and that it was shown to counsel for defendant, and was not objected to by him. It showed the position of the lots described in the original deed, and a witness who had examined it testified that the land in controversy was the land described in the original deed, according to the map. Another old map, found among the papers of a former county surveyor, was in harmony with it, and showed the land in controversy to be the land described in the original deed. *Held*, that such evidence authorized a submission to the jury of the question of the identity of the land described in the original deed.

5. It is not error to refuse a requested instruction when it is embraced in the general charge given.

Appeal from district court, Harris county; William H. Wilson, Judge.

Suit by T. J. Boyles against A. H. Hitchler and others. John Peter Smith, as receiver, intervened. From a judgment in favor of plaintiff and intervenor, defendants appealed. *Affirmed.*

Jones & Garnett, for appellants. Fisher, Sears & Sherwood, for appellee Boyles. West

& Smith and E. P. Hamblen, for appellee Smith.

PLEASANTS, J. The appellee Boyles instituted this suit against appellants Hitchler and wife, Harriet S. Sellers, W. J. Moore, S. B. Moore, and J. H. Burnett, to recover of appellants Hitchler and wife and Mrs. Sellers 60 acres of land, a part of the Luke Moore league, situated in Harris county, said 60 acres being in the southwest part of lot 11, a subdivision of said league, and to vacate and annul a certain judgment rendered in the district court of Harris county on the 29th of July, 1895, in cause 12,867, wherein said Hitchler and wife were plaintiffs and the said Harriet S. Sellers and others were defendants, and by which judgment the said Hitchler and wife recovered of the said Sellers the land here sued for; and also to declare fraudulent a certain deed of trust executed by Hitchler and wife upon said land to the defendants W. J. & S. B. Moore and J. H. Burnett. The plaintiff alleged title in himself to the land by purchase at execution sale made in February, 1895, under judgment rendered in the district court of Harris county on the 5th of October, 1892, at the suit of J. H. Kirby against the said Harriet S. Sellers, and upon which plaintiff averred execution issued in December, 1892, and an abstract of the judgment was duly recorded in the office of the clerk of the county court of Harris county. The plaintiff further averred that said land, at and long prior to said judgment in favor of Kirby, was the property of the said Harriet S. Sellers, and so continued her property until purchased by plaintiff at execution sale, at the time and manner aforesaid. It was further alleged that, at and before the institution of the suit of said Kirby against the said Sellers, there was then pending suit 12,867, in which the said Hitchler and wife, plaintiffs, were seeking to recover from the defendants therein certain tracts of land, parts of said lot 11, in the Luke Moore league, and from the defendant Sellers the identical land purchased by the plaintiff at said sale. And the petition charged that after his purchase of the land, with the intent to defraud him and deprive him of his property, by fraudulent collusion between the said Sellers and the said A. H. Hitchler, judgment was rendered in said suit, in July, 1895, for the plaintiffs Hitchler and wife against the defendant Sellers for the land sued for; that the said A. H. Hitchler and his counsel had, before the institution of the suit by said Kirby against Harriet S. Sellers, acknowledged her right to the land, and, in consideration of the suppression by the defendant Sellers of certain documentary evidence which would tend to defeat the recovery by the plaintiffs against the other defendants in said suit 12,867, the said Hitchler and wife agreed and contracted with the said Sellers to make title to her of 40 of the said 60 acres of land. Defendant W. J. Moore, for himself and as surviving

¹Rehearing denied.

partner of S. B. Moore, deceased, disclaimed all right, title, or interest in the subject-matter of litigation, either by lien or otherwise. On the 18th of January, 1897, John Peter Smith, as receiver of the City National Bank of Ft. Worth, Tex., intervened in the cause, alleging ownership of 40 acres off the south end of the land sued for by plaintiff. He averred the allegations in the plaintiff's petition, with the exception that the plaintiff was the owner of the entire 60 acres sued for, were true. Alleged that the defendants Hitchler and wife, on November 9, 1889, executed a contract in writing, and duly acknowledged, by which they obligated themselves to execute to Harriet S. Sellers, at any time after the termination of cause No. 12,867, a deed to all their right and title to 40 acres of land off the south end of the tract sued for by the plaintiff herein; and that on the 6th of June, 1892, the said Harriet S. Sellers executed upon said 40 acres of land a deed of trust, with power to sell, to one F. O. Barron, to secure the payment of certain promissory notes of the said Sellers; and that said City National Bank of Ft. Worth became the owner of said notes, and, default in payment of same being made, the land was sold under said deed of trust, and said bank became the purchaser thereof, and received a deed of conveyance for the same from the trustee, in accordance with the provisions of said deed of trust. The intervener also charged that the judgment rendered in cause 12,867, on the 29th of July, 1895, was obtained by said Hitchler and wife by fraud, and collusion with the said Harriet S. Sellers. He further averred that the contract on the part of said Hitchler and wife with the said Sellers was made for the purpose of defrauding the other defendants in cause No. 12,867, and that the fraudulent and collusive judgment rendered therein on the 29th of July, 1895, was for the purpose of defrauding the said bank, the purchaser of said 40 acres, and he prayed that said judgment might be canceled. The defendants Hitchler and wife demurred to the petition, and denied all and singular the allegations in the plaintiff's and intervener's petitions, except such as were expressly admitted. They admitted that they were in possession of the premises sued for, and claimed ownership of the same. They admitted the contract with Mrs. Sellers set out in the intervener's petition, but averred that it was made upon assurances of counsel of Mrs. Sellers that she had in her possession a plot made by Frost, under whom both they and the defendants in suit No. 12,867 deraigned title, which definitely fixed the position in subdivision lot 11 of the Luke Moore league of all the lots described in deeds of conveyance from Frost to his various vendees for lands in said subdivision of said league; and the further representation on the part of said counsel for Mrs. Sellers that his client could establish her title to the land claimed by her under plea of limitation of 10 years, but that the said

counsel was mistaken in all these representations, and, upon discovery of his mistake, it was mutually agreed between said counsel and the defendants that said contract, binding defendants to convey deed to Mrs. Sellers for 40 acres of the land claimed by her, should be canceled, and that cause 12,867 should be prosecuted to judgment, and that Mrs. Sellers might introduce in her defense any evidence in her possession; and defendants expressly deny that the judgment rendered for them in said cause was obtained by fraud, or by collusion with Mrs. Sellers or her counsel, and aver that said judgment was obtained without agreement of any kind with said defendants, and only after the claims of each party had been hotly contested by the other, upon the trial of the cause. The intervener, by replication, denied the allegations of the defendants' answer, and averred that the deed of trust referred to in intervener's petition was taken, and the money advanced upon it, on the faith of Hitchler and wife's acknowledgment of Mrs. Sellers' title, and their agreement with her to execute to her a deed of conveyance for the 40 acres covered by the deed of trust, and that the bank relied on said acknowledgment and said agreement in purchasing said land, and pleaded the facts alleged, in reply to defendants' answer, in estoppel of their claim to said 40 acres.

Upon trial of the cause, the court submitted special issues to the jury, and upon the findings of the jury, in response to the questions propounded by the court on said submission, the court rendered a decree canceling the judgment rendered for defendants Hitchler and wife, on the 29th of July, 1895, in cause No. 12,867, and gave judgment for the plaintiff and intervener against all of the defendants, and decreed the title to said 60 acres of land to the plaintiff and intervener, giving to the intervener 40 acres described in the deed of trust under which he deraigned title, and the balance of said 60 acres to the plaintiff, and directed writs of possession to issue for the plaintiff and for the intervener for their respective tracts.

Whether the judgment rendered in cause No. 12,867, for Hitchler and wife, was or was not collusive, is immaterial, as to the right of the intervener to recover the 40 acres adjudged him. The defendants Hitchler and wife admitted they executed the agreement to convey the land to Mrs. Sellers, and the evidence is uncontradicted that the loan of money to Mrs. Sellers, to secure the payment of which she executed the deed of trust to Barron, was made upon the faith of said agreement, and that the bank purchased the land at the sale made under the deed of trust, and it further being indisputably shown by the evidence that the loan was effected and the deed of trust executed by Mrs. Sellers with the knowledge and assent of Hitchler, he and his wife are estopped from denying the title of Mrs. Sellers' vendee to the 40 acres covered by the deed of trust.

and the judgment for the intervener for the land which Hitchler and wife contracted to convey upon the termination of cause No. 12,867 must be affirmed, whether the judgment rendered in the said cause was or was not collusive, or whether Mrs. Sellers had or had not title to the land, other than that derived through the contract with Hitchler and wife. To warrant a recovery, however, by the plaintiff, Mrs. Sellers must have had title to the land sued for independent of her contract with Hitchler and wife, and the judgment rendered in cause No. 12,867 against her must have been collusive. Upon the second of these issues, the finding of the jury was for the affirmative, and, while the evidence is not conclusive, it is sufficient to support the finding that that judgment was collusive. To show title in Mrs. Sellers to the property described in his petition, the plaintiff averred a deed from Sophronia Cone to Harriet S. Sellers dated June, 1860, which deed purports to convey to Harriet S. Sellers the following described property: "All that certain tract or parcel of land lying and being situated in Harris county, Texas, in the vicinity of the city of Houston, being a part of a survey of 148 acres out of the Luke Moore league, known as the southwest part of lot 11, containing $54\frac{1}{2}$ acres, beginning at a stake on the north boundary line of said lot 11, from which a pin oak marked 'X' bears north, twenty degrees east, three varas distant, for the N. E. corner of this survey; also Ingraham's southwest; thence south, 70 degrees east, 160 varas, across Slaughter Pen bayou, 250 varas, corner, a stake on Redmon's line, from which a pin oak marked 'W' bears south, 50 degrees west, 6 varas; thence south, 20 degrees east, 295 varas, a corner, a stake in prairie, from which a post oak marked 'X' bears N., 4 W., 20 vs.; thence S., 20 W., 468 vs., corner, a stake mkd. 'W', from which a pine bears S., 32 deg. east, 4 varas; thence north, 70 deg. E., 500 varas, corner near bayou, from which a pin oak marked 'X,' 1 vara; thence north, 20 deg. east, 763 varas, to the beginning." To the introduction of this deed in evidence the defendants Hitchler and wife objected, because the land attempted to be conveyed them does not embrace the land described in the plaintiff's petition in this cause, and because no title is shown in Sophronia Cone to the land attempted to be conveyed, or to the land in this suit; which objection the court overruled, and permitted the deed to be read, to which the defendants excepted, and its admission is assigned as error.

The land sued for by the plaintiff is described in his petition as being off the south end of lot 11. The contention is that the land conveyed to Mrs. Sellers by Sophronia Cone is in the northern end of lot 11, but we think this contention is not sustained by the language of the deed. The grantor conveys "all that certain tract or parcel lying and being situate," etc., "being a part of a survey of 148 acres out of the Luke Moore league, known as the southwest part of lot 11." It is the land con-

veyed, and not the 148 acres, which is known as the "southwest part of lot 11." Lot 11 contains but 148 acres, and these acres cannot, therefore, be referred to as a part of lot 11. It is true that the deed calls to begin at a stake in the north boundary line of lot 11. This subdivision of the Moore league, lot 11, is a rectangle, with a width from east to west of 500 varas, and its length from north to south is 1,666 varas. The last corner called for in the deed from Cone to Sellers is from the beginning corner 763 varas S., 20 deg. W. If this corner be, as we may conclude it is, from the language of the deed, the southwest of lot 11, the beginning corner cannot be in the northern boundary of the lot. "When the calls in a deed lead to conflicting results, that must be adopted which is most consistent with the intent apparent on the face of the grant." *Hubert v. Bartlett*, 9 Tex. 103. Observing this well-recognized canon, and considering the entire description, in construing this deed, we cannot say the land conveyed is in the northern boundary of lot 11. S. M. Frost was the common source of title of all parties to the suit. He purchased, some time prior to 1840, the subdivision of the Moore league known as "Lot 11," and in the year 1841 he made two sales of land in this subdivision of the league to R. C. Ingraham. One sale is for 54 acres, and one for 40 acres, and on each deed of conveyance the land is described by lots, giving their numbers, with reference to a map of lot 11 made by F. W. Herman for further description. Besides Ingraham, Frost sold parts of this subdivision to several others, and, with one exception, the land conveyed is described just as in the deeds to Ingraham. All of these deeds were of record in the clerk's office of Harris county, and, unless a very small fraction, these various deeds embrace the whole of the area of lot 11. In November, 1844, R. C. Ingraham executed to A. B. Worsham a mortgage on all of his land purchased from Frost, and in this mortgage the lands are described as "lots 19 to 66, inclusive, each lot consisting of $2\frac{1}{2}$ acres, more or less, part of the land originally belonging to Luke Moore, and including the improvements where I, the said Ingraham, now live." This mortgage was foreclosed, the judgment describing the property just as it is in the mortgage, and at the foreclosure sale Worsham, the mortgagee, became the purchaser; the sheriff in his deed giving the same description of the property as did the judgment. Worsham, in December, 1848, conveyed to H. H. Cone a part of the Luke Moore tract, in Harris county, Tex., consisting of 20 lots, giving their numbers, as designated on the plot and survey of said tract, from 19 to 39, inclusive. To the introduction of each of these deeds in evidence, the defendants Hitchler and wife objected, on the ground that it did not describe any property, and did not identify the property which it purported to convey in any such manner as that the property could be identified or found. The ob-

jections were overruled, and the several instruments admitted in evidence, and the ruling of the court is the subject of several assignments of error. None of these deeds, unaided by extrinsic evidence, could identify the land described in them, but they were not for that reason inadmissible. They were not void for patent ambiguity. Vide *Hermann v. Likens*, 90 Tex. 448, 39 S. W. 282, and *Hitchler v. Scanlan*, 15 Tex. Civ. App. 45, 39 S. W. 633.

The appellants' ninth assignment challenges the action of the court in submitting to the jury whether or not they could identify, from the evidence, the lands conveyed from Frost to Ingraham, in the deeds dated, respectively, March 1, 1841, and June 19, 1841, and in the deed from Worsham to Cone dated December, 1848. The appellants insist that the submission of this issue and the finding of the jury are unauthorized by the evidence. The evidence, we think, authorized the submission of such an issue, and we think the evidence is sufficient to sustain the verdict. That there was a map found among the title papers of Mrs. Sellers, and that this map was apparently ancient, and that it was shown by Mrs. Sellers' counsel in cause No. 12,867 to the counsel of plaintiffs in that case, the appellants, Hitchler and wife, and to the counsel of the defendant, Scanlan, E. P. Hamblen, and that a copy of this map was in evidence on the trial of this cause, and, so far as we know to the contrary, without objection from appellants, are facts which the record discloses. The witness Hamlin testified as to the similarity between the writing upon this map and the signature of Frost to the deeds of conveyance from him to Ingraham, and this map gave the position of all the lots embraced in the deeds to Ingraham from Frost in lot 11. Besides this map, the witness Ruby produced one which he testified he had constructed from examining the various deeds of conveyance on record from Frost for lands in lot 11, and from the map found among Mrs. Sellers' title papers; and by this map, this witness testified, the land in controversy could be easily identified, and that the position of that land is off the southern end of lot 11. This witness further testified that he has found and identified on the ground marked trees called for in the deed from Cone to Sellers. He further testified that the map found by Mrs. Sellers' counsel was seen by him, and critically examined, and that it was the work of the surveyor, F. W. Herman; that Herman's name was on it. This part of his testimony, it is true, is not supported by that of any of the other witnesses who testified about this map. The map was last seen in the possession of counsel for Hitchler and wife, who has since died, and a search among his papers failed to discover the document. There was also in evidence, and apparently without objection by appellants, another old map found among the papers of one Bringham, now dead, and

who was at one time the surveyor of Harris county, and this map was in harmony with the other as to the position of the land in controversy in lot 11. Counsel for appellants has cited our opinion in the case of *Scanlan v. Hitchler*, reported in 48 S. W. 762, in support of his contention that the evidence in this case is not sufficient to warrant the finding of the jury for the plaintiff. Much of the evidence in that case was identical with the evidence in this case, and that evidence was reviewed and commented on, and we expressed the opinion that we would not be justified in holding that the judge who had tried the case erred in not giving judgment for defendant Scanlan. But our decision in that case was on the ground that Scanlan was estopped from claiming the land sued for. In view of all the evidence which we have cited, we cannot say that the findings of the jury are without evidence, or that the court erred in refusing a new trial.

The appellants should not complain of the refusal of the court to give their requested instruction, to the effect that the burden was upon the plaintiff and the intervener to prove that the judgment rendered in favor of Hitchler and wife in cause 12,867 was collusive, because the instruction was embraced in the charge of the court. We discover no error in the assignments, and the judgment must be affirmed, both as to the plaintiff and the intervener. Affirmed.

RAATZ v. GORDON et al.

(Court of Civil Appeals of Texas. May 17, 1899.)

NOTES—BONA FIDE PURCHASERS—PAYMENT OF DEBTS.

A failure of consideration is no defense to a note as against one acquiring it without notice thereof in payment of a pre-existing debt.

Appeal from Johnson county court; F. E. Adams, Judge.

Action by Otto Raatz against V. R. Gordon and others. Judgment for defendants, and plaintiff appeals. Reversed.

F. A. Arnold and English, Ewing & Walker, for appellant.

FLY, J. Appellant instituted this suit in the justice's court against V. R. Gordon, J. A. Doak, S. J. Gordon, and W. L. Dayton, on a promissory note for \$150, executed by the first three named to W. L. Dayton, and by him indorsed to appellant. Dayton did not answer. It was alleged by the other defendants that the note was given for certain territory in which to sell a patent, and that the consideration had failed because Dayton had promised, but failed, to furnish a sample to be used in the sale of the patent, and also that the patent was useless, and appellant was charged with notice of the facts when he obtained the note. Appellant swore that Dayton owed him for goods, and transferred

the note to him as a payment on his indebtedness. The transfer was made before maturity. "It is the settled law of this state that one who acquires a negotiable promissory note in payment of an existing debt is a purchaser for value and in the usual course of trade." *Herman v. Gunter*, 83 Tex. 66, 18 S. W. 428. There was no evidence that appellant had any notice of the failure of consideration, but, on the other hand, the evidence affirmatively showed that he did not have such notice, and there was not a circumstance in proof that would place him upon inquiry in regard to the consideration. Because the verdict and judgment are not sustained by the proof, the judgment is reversed, and the cause remanded.

MOSS v. CITY OF ROCKPORT.

(Court of Civil Appeals of Texas. May 24, 1899.)

TAXATION—OWNERSHIP OF PROPERTY—PARTY—APPEARANCE—WITHDRAWAL.

In a suit to foreclose a tax lien, the defendants named in the petition were not served; but one M. appeared and answered, stating that he had become the owner of the property. On the trial there was nothing to show that the person assessing the property was not the original owner, nor that the persons sued were not at the time the owners. *Held*, that the presumption was that M.'s title came through the person who had assessed the property for taxes, and hence the court properly refused to permit him to withdraw his answer because he was not named as defendant in the petition.

Appeal from district court, Aransas county; M. F. Lowe, Judge.

Suit by city of Rockport against B. F. Moss. There was a judgment for plaintiff, and defendant appeals. *Affirmed*.

Jas. B. Simpson, for appellant. E. A. Stevens, for appellee.

JAMES, C. J. This suit was brought in July, 1896, by the city against James B. Simpson and the Texas Loan & Realty Company for \$170, taxes for the years 1894 and 1895 on a block upon which the Aransas Hotel is situated, and for foreclosure of the lien. No service was had on either of the above defendants. In February, 1897, B. F. Moss appeared as defendant in the suit; stating in the answer filed by him that he had been permitted to make himself a party defendant in the cause, and that since the filing of the suit he had become, and now is, the owner of the property. The answer consisted of demurrers and a general denial. Afterwards, and before any change in plaintiff's pleadings, he moved to be permitted to withdraw his answer, which was refused by the court. After this the plaintiff amended, and added the name of B. F. Moss as a defendant. At the trial plaintiff dismissed as to Simpson and the Texas Loan & Realty Company, and

as to the taxes of the year 1895; and judgment was rendered in favor of plaintiff, ascertaining the amount of taxes for 1894 to be \$170, and foreclosing a lien therefor, with 6 per cent. interest from the date of the judgment, upon the property, and personal judgment against Moss for the costs.

The court, we think, did not err in not permitting Moss to withdraw his answer. It is true that at that time he was not mentioned in the petition. But his answer impleading himself as defendant contained the allegation and admission that since the filing of the suit he had become the owner of the property upon which the foreclosure was asked. It was entirely compatible with this allegation that his title had come through the person who had assessed the property for the taxes. We do not know what the judge had before him in passing on the application. We do know, however, that upon the trial the only evidence as to ownership of the land at the time to which the assessment related showed that the Fourth National Bank of Dallas was the owner. In the absence of any other evidence, it is presumed that the person assessing the property was then the owner, and the assessment legal. If this is so, then it follows from this, and the admission in the answer of Moss, that he held under the person who made the assessment. There was nothing to show that the persons originally sued were not the owners at the time. The case, it appears to us, stands as if the suit to subject the property to a sale for the payment of the tax had been brought against the then owners of the property, and Moss had impleaded himself as the defendant, upon his admission and declaration that since the suit was brought he had become the owner. The court, upon passing on the motion to withdraw the answer, may have ascertained that he was such pendente lite purchaser. If he was a pendente lite purchaser, he would have been bound by any judgment rendered upon the original petition; and upon that theory he was practically a party without being joined, and in contemplation of law he was already a defendant, so far as a foreclosure was concerned. When, under such circumstances, he impleaded himself as the defendant, he was not entitled to be dismissed upon the ground that his name was not mentioned as a defendant in the petition. The bill of exceptions does not show what the court had before it at that time, and we are unable to say that it erred in overruling the motion. There is nothing in the statement of facts that affirmatively shows that he was improperly retained as a party. We conclude, therefore, that the court properly proceeded to trial, and acted correctly in adjudging the legal existence of the tax under the testimony, in ascertaining the amount of the same, and in foreclosing the lien on the property as against Moss, and also in adjudging the costs against him. *Affirmed*.

GULF, C. & S. F. RY. CO. v. WILLIAMS.

(Court of Civil Appeals of Texas. June 14, 1899.)

RAILROADS—INJURY TO PERSONS AT STATIONS—TRESPASSER—ABANDONMENT OF STATION—EVIDENCE—INSTRUCTIONS.

1. A person who goes on the platform of a railway company at its station to meet a passenger is not a trespasser. Hence the company must exercise due diligence to secure his safety.

2. A requested instruction must be refused where it is predicated on a theory not supported by the evidence.

3. A railway company, in an action against it for damages for injuries sustained at a station, cannot defeat a recovery by the claim that such station was abandoned, where, although it kept no agent and sold no tickets there, it sold tickets to, and permitted passengers to get off and on at, such place.

Appeal from district court, Brown county; J. O. Woodward, Judge.

Action by Mrs. Fannie Williams against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. Terry, for appellant. Rogan & Rice, for appellee.

KEY, J. Appellee brought this suit against appellant to recover damages for personal injuries sustained by her, resulting from a fall from a railroad platform at Bangs station, on appellant's road. She charged appellant with negligence in building its platform too narrow and too high from the ground, and in not providing it with a railing, and in not properly lighting the same,—the accident and injury having occurred at night. Appellant, among other things, in its answer asserted that the plaintiff was guilty of contributory negligence, and that the injury resulted from assumed risk. The testimony shows that appellee, with others, went to the depot at Bangs in the nighttime to meet her sister-in-law, who was expected to arrive on a passenger train on appellant's road; that some one at the depot had a lantern, which gave very little light, and not enough for the plaintiff to see; that the platform was nine feet wide, and had no railing, and, where the plaintiff fell off, was three feet high; that a trunk was on the platform, obstructing the plaintiff when she started to meet her sister-in-law, after the latter had gotten off the train, and in passing around the trunk she fell from the platform and sustained the injuries complained of. Without discussing the evidence in detail, we hold that it sustains the charge of negligence in not properly lighting the platform, and that the plaintiff was not guilty of contributory negligence, and that \$2,500, the amount awarded her by the jury, is not excessive.

Under the facts stated, the plaintiff was not a trespasser, and the railway company owed her the duty of ordinary care. In other words, she had the right to go on the platform for the purpose of meeting her sister-in-

law, and it was the duty of the railway company to exercise such care and diligence as an ordinarily prudent person would have exercised under the same or similar circumstances for her safety. *Hamilton v. Railway Co.*, 64 Tex. 251; *Railway Co. v. Best*, 66 Tex. 117, 18 S. W. 224; *Railway Co. v. Reich* (Tex. Civ. App.) 32 S. W. 819; *Railway Co. v. Miller* (Tex. Civ. App.) 27 S. W. 905.

Appellant asked a charge to the jury predicated upon the theory that if it had abandoned its station at Bangs, and plaintiff was aware of the fact, and knew that its depot and platform were not lighted, when she went upon the platform, she could not recover. This charge was properly refused, if for no other reason, because there was no testimony to support a finding that appellant had abandoned its station at Bangs. The undisputed testimony shows that Bangs is a small village, that appellant has a depot and platform there, and that its passenger trains stop there regularly, both day and night. For several years it has had no agent at that place, and does not sell tickets there; but it permits passengers to get on at that station, and it sells tickets from other points to Bangs. Under these facts, we are of the opinion that it cannot claim that it has abandoned this station. The only difference between this and any other railway station is the fact that it has no agent there, and does not keep the depot building open or sell tickets there. However, it treats it as a station, itself, and invites the public to so regard it, by selling tickets to it, and by stopping its passenger trains, and permitting the traveling public to get on and off thereat.

Several objections are urged to the court's charge, all of which have been duly considered. While the charge deviates somewhat from charges usually given in cases of this kind, we think, considered as a whole, that it enunciates the correct principles of law, and was not calculated to mislead the jury. We find no error in the record, and the judgment is affirmed. Affirmed.

JEFFERIES et al. v. HARTEL.¹

(Court of Civil Appeals of Texas. May 24, 1899.)

MORTGAGE—CONDITIONAL DEED.

An instrument in form of a mortgage recited that it was given in consideration of legal services by the grantees to the grantor in a suit then pending, conditioned to be void if, within 10 days after final judgment in the suit, the grantor should pay the grantees \$100, but, on failure to so pay the \$100, the deed was to be absolute, without equity of redemption. *Held*, that it was a mortgage, and not a conditional deed.

Appeal from district court, Ft. Bend county; T. S. Reese, Judge.

Action by Carrie E. and H. Jefferies against

¹ Rehearing denied June 14, 1899.

Fred Hartel. There was a judgment for defendant, and plaintiffs appeal. Reversed.

Wm. Masterson, for appellants. C. C. Everett, for appellee.

JAMES, C. J. An action of trespass to try title, brought by appellants against Fred Hartel for a tract of 162 acres of land. Plaintiffs claimed under a sheriff's sale of the land as the property of George H. Schley. The facts material upon this appeal, in our view of the law of the case, are as follows, as taken from the record:

"Defendant claims title under an instrument executed by George H. Schley to J. C. and T. E. Mitchell February 18, 1888, acknowledged for record March 21, 1888, and filed for record March 28, 1888. As the construction of this instrument is the real matter in issue, it is copied in full, as follows:

"Deed. Geo. H. Schley to Mitchell & Mitchell. The State of Texas, Fort Bend County. Know all men by these presents, that I, Geo. H. Schley, of said state and county, for and in consideration of the sum of one dollar to me cash in hand paid, and the further consideration of the professional services as attorney at law rendered and to be rendered for me in defending the suit of Carrie E. Jefferies and husband against Geo. H. Schley and E. E. Ransom, No. 8,474, now pending in the district court of said Fort Bend county, by Jno. C. Mitchell and T. E. Mitchell, composing the law firm of Mitchell & Mitchell, of the town of Richmond, in said state and county, I hereby grant, bargain, sell, and convey, and by these presents do grant, bargain, sell, and convey, unto the said Mitchell and Mitchell the following tract or parcel of land, lying and being situated in said state and county, and bounded as follows, to wit: Beginning N., 45 W., 573 vrs. from the south corner of D. A. Connor's survey and W. corner of John McKnight survey, at a stake from the E. corner of Charles Schrimpp homestead survey; thence S., 45 W., with Schrimpp's survey, 620¼ vrs., to his south corner, and is the N. E. corner of a survey for Jesse Bundick; thence south with Bundick's E. B. line 371 vrs. to a stake in the N. B. line of James Connor's survey; thence E. with Connor's N. B. line 1,108 vrs. to his N. E. corner; thence south with Connor's E. line 1,033 vrs. to a stake in the N. W. B. line of G. W. Cartwright survey; thence N., 45 E., with Cartwright's N. W. B. line, 830 vrs., to the south corner of said McKnight survey; thence N., 45 W., 1,773 vrs., to the place of beginning,—and being the same tract of land conveyed to me by E. P. Everett by deed duly recorded in Book O, page 184, of the Records of Deeds of said Fort Bend County, Texas, and to which deed reference is here made for a more particular description. To have and to hold the above-described premises, together with all and singular the rights and appurtenances in any

wise belonging, unto the said Mitchell & Mitchell, their heirs and assigns, forever. Now, if I pay the said Mitchell & Mitchell the sum of \$100.00 within ten days after the final judgment in the above entered and numbered cause, which is now pending in the district court of said county, this deed shall become null and void, but, if I fail to pay the said Mitchell & Mitchell the said sum of money within the said time, then this deed shall become absolute, without the equity of redemption. Witness my hand this, the 18th day of February, A. D. 1888. Geo. H. Schley.

"The State of Texas, Fort Bend County. Before me, J. D. Bryant, a notary public in and for said county and state, on this day personally appeared Geo. H. Schley, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed. Given under my hand and official seal this, the 21st day of March, A. D. 1888. [Seal] J. D. Bryant, Notary Public, F. B. Co., Texas.

"Filed for record the 28th day of March, 1888, at 8 o'clock p. m. Recorded the same at 11½ o'clock p. m. L. B. Smith, Clerk, by H. L. Sommerville, Deputy."

"The one hundred dollars mentioned in this instrument was never paid. No evidence was introduced by either of the parties with reference to this instrument or its execution, and the nature and character of the transaction are to be gathered solely by the terms of the instrument. J. C. and T. E. Mitchell conveyed the land for a recited consideration of one hundred dollars to Miss Zulema Schley, by special warranty deed dated August 31, 1897. This deed recites a conveyance of the land May 15, 1888, which had been recorded, but with a defective certificate of acknowledgment, which defectively recorded conveyance was to be cured by this last conveyance, and the deed records introduced in evidence showed such conveyance to have been recorded with defective certificate of acknowledgment. Zulema Schley sold and conveyed the land to the defendant Fred Hartel by deed dated May 30, 1897, for a recited consideration of five hundred dollars. The deed was a general warranty deed."

Upon the foregoing testimony the district court held the instrument to be a conditional deed, which, we think, was error. The instrument was dated February 18, 1888. J. C. and T. E. Mitchell conveyed on May 15, 1888 (they made another deed on August 31, 1897, to correct the acknowledgment to this deed), to Zulema Schley by special warranty. The sheriff's deed from George H. Schley was made in June, 1889, under a judgment rendered in favor of Carrie E. Jefferies on March 28, 1888, of which an abstract was recorded on April 3, 1888, although, as no evidence was offered as to the indexing of this judgment, it is not possible to say that the judgment became a lien. These facts we cite sim-

ply to show that the nonassertion of the debt by J. C. and T. E. Mitchell and the nonpayment of the debt by George H. Schley are not potent circumstances in determining whether or not it was intended as a conditional deed or a mortgage. The district judge did not consider such matter as important, and it is stated in his conclusions—which we think is correct—that, as the testimony stood, the character of the instrument is to be arrived at solely from its terms. The form of the instrument is that of a mortgage, although this is not controlling. The instrument shows that a relation of creditor and debtor existed at the time of its execution between the Mitchells and the maker. They were rendering for the latter legal services in some suit,—apparently the suit in which the judgment was obtained against Schley by Carrie E. Jefferies, under which the land was sold to plaintiff. It was in reference to this very relation of indebtedness that the instrument was made. It provides, after conveying the property, as follows: "Now, if I pay said Mitchell & Mitchell the sum of \$100.00 within ten days after the final judgment in the above entitled and numbered cause, which is now pending in the district court of said county, this deed shall be null and void, but, if I fail to pay said Mitchell & Mitchell the said sum of money within said time, then this deed shall become absolute without equity of redemption." It is manifest from the instrument that whatever the indebtedness may have been from Schley to said firm for the services they had in view,—and it was evidently then fixed by the parties at the sum of \$100,—it might have been paid at any time previous to the date designated, and therefore an equity of redemption was provided for in favor of Schley up to that time. The instrument, by mentioning that, if he did not pay by the certain date, the equity of redemption should cease, in effect provides that it should exist up to that time; in other words, that it should be subject to defeasance up to that time. The rule applied by equity in cases of this nature is that when the character of an instrument as a conditional deed or mortgage is a matter of doubt it is construed to be a mortgage. But we think this not a case of doubtful meaning. The instrument is all that there is to go by, and it has upon its face the essentials of a mortgage. It indicates it was given in reference to an indebtedness, which continued to exist after its execution,—at least as to Schley continuing for a time to have the right to pay it off. It provides for, or contemplates by its language, the continuance of the right of redemption of the property up to the date limited. It was *prima facie* a mortgage, and there was no extrinsic evidence to enforce a different construction. *McCamant v. Roberts*, 80 Tex. 328, 15 S. W. 580, 1054; *Walker v. McDonald*, 49 Tex. 462; *De Bruhl v. Maas*, 54 Tex. 464; *Eckford v. Berry*, 87 Tex. 415, 23 S. W. 987. We are asked to render judgment

for the appellants, but there may be rights under the instrument in question (which appears to have been recorded when the title of plaintiffs accrued) to which plaintiffs' title is subject. Upon this matter we express no opinion, but reverse the judgment, and remand the cause.

SIMPSON v. TEXAS TRAM & LUMBER CO.

(Court of Civil Appeals of Texas. May 24, 1899.)

APPEAL — JUDGMENT — CONTINUANCE — EXCEPTION — DEMURRER — HUSBAND AND WIFE — BURDEN OF PROOF — EVIDENCE — REVIEW.

1. The exception noted in the judgment refusing a continuance will not supply the place of a proper bill of exceptions.
2. A party amending after demurrer sustained cannot complain of the sustaining of the demurrer.
3. Where property presumptively community is taken on execution against the husband, the burden is on the wife to prove that it is her separate estate, acquired during coverture.
4. Admission of evidence will not be reviewed where it is not shown to be prejudicial.

Appeal from district court, Aransas county; M. F. Lowe, Judge.

Action by the Texas Tram & Lumber Company against J. B. Simpson. Judgment for plaintiff, and Harriet J. Simpson filed claim. Judgment for plaintiff, and claimant appeals. Affirmed.

Jas. B. Simpson, for appellant. U. F. Short, for appellee.

FLY, J. Personal property of the value of \$850 was levied upon under an execution in favor of appellee and against J. B. Simpson; and Harriet J. Simpson, wife of J. B. Simpson, filed her claimant's oath and bond, and took the property. In the issues tendered by the claimant the property was claimed as her separate property, acquired by her while a married woman. Judgment was rendered in favor of appellee. The facts justified a finding that the property was not the separate estate of Mrs. Simpson.

The first assignment of error complains of the action of the court in overruling an application for a continuance. The assignment cannot be considered, for the reason that no bill of exceptions was reserved to the action of the court. The exception noted in the judgment refusing the continuance will not supply the place of a proper bill of exceptions. *Campion v. Angier*, 18 Tex. 93; *Harrison v. Cotton*, 25 Tex. 54; *McMahan v. Busby*, 29 Tex. 195; *Railway Co. v. Hardin*, 62 Tex. 367; *Phillipowski v. Spencer*, 63 Tex. 604; *Railway Co. v. Mallon*, 65 Tex. 115; *Waltes v. Osborne*, 66 Tex. 648, 2 S. W. 665.

The second, third, and fourth assignments of error complain of the action of the court in sustaining demurrers to certain issues tendered by appellant. After the demurrers were sustained, appellant amended the issues to meet the objections contained in the de-

murrer, and cannot, therefore, be heard to complain of the action of the court. If she desired to insist that the demurrers should not have been sustained, she should have stood upon her rights, and have refused to amend. Appellant could not have sustained any injury by the demurrers being sustained, because in her amended issues is found everything (and much more) stated in the original issues tendered; the pleadings simply being amplified to meet the objections presented.

The personal property sued for was claimed as the separate estate of Mrs. Simpson, acquired during her coverture, and the court properly held that the burden rested upon her to prove that it was her separate property. It does not matter that the property may have been taken from her possession. When it appeared that she claimed property that presumptively was community, the burden was shifted to her. *Epperson v. Jones*, 65 Tex. 425.

If the testimony whose admission is complained of in the sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, and thirteenth assignments was improperly admitted, it has not been made to appear that appellant suffered injury thereby, and she presents no cause for reversal. None of the assignments of error is well taken, and the judgment will be affirmed.

HARE v. GRAYSON COUNTY.

(Court of Civil Appeals of Texas. May 17, 1899.)

COUNTY ATTORNEYS—COMPENSATION—CONSTITUTIONAL LAW.

1. Under Sayles' Civ. St. arts. 2495c, 2495d, providing that county attorneys in counties that cast 7,500 votes in the presidential election of 1896 shall receive fees amounting to \$2,500 per annum, and, in addition thereto, one-fourth of the excess of fees collected by them, and requiring them to pay to the county treasurers all fees collected in excess of the maximum amount allowed and of the one-fourth of the excess of such maximum for their services, and for the services of their assistants, the attorneys are entitled to \$2,500 out of the fees collected and one-fourth the fees above such sum, and their assistants are to be paid out of the remainder, and the balance paid to the county treasurers.

2. Sayles' Civ. St. art. 2495c, entitling county attorneys of certain counties to only a part of the fees attached to their office, is not repugnant to Const. art. 5, § 21, providing that county attorneys shall receive as compensation only such fees as may be prescribed by law.

Appeal from Grayson county court; J. D. Woods, Judge.

Action in a justice's court by Silas Hare, Jr., against Grayson county. From a judgment for defendant, plaintiff appealed to the county court, which rendered a judgment for defendant, and plaintiff again appeals. Reversed.

Wolfe, Hare & Semple, for appellant. J. F. Holt, for appellee.

FLY, J. Appellant, the county attorney of Grayson county, instituted this suit in the

justice's court to recover of the county \$165.12, which were fees paid to it under protest. Judgments were rendered in the justice's and county courts against appellant. Appellant is the county attorney, and, although the amount of fees collected by him did not amount to more than enough to pay him the \$2,500, and one-fourth of the amount over and above that sum, and the salaries due his assistants, under fear, brought about by an instruction by a district judge to the grand jury to indict him for retaining one-fourth out of the amount remaining after paying him the sum of \$2,500, he paid over the \$165.12 which he seeks to recover in this suit. The county refused to pay the claim. At the special session of the legislature in 1897 a fee bill was passed, in which it was provided in one section (article 2495c, Sayles' Civ. St.) that in counties in which there were cast as many as 7,500 votes at the presidential election of 1896 county attorneys should receive fees amounting to \$2,500 per annum, and, in addition thereto, one-fourth of the excess of the fees collected by him. In a succeeding section (article 2495d, Id.) it is provided that "all fees collected by officers named in article 2495c during the fiscal year, in excess of the maximum amount allowed, and of one-fourth of the excess of the maximum amount allowed for their services, and for the services of their deputies or assistants hereinafter provided for, shall be paid to the county treasurer of the county where the excess accrued." These provisions of the statute were by the trial judge held to mean that the county attorney was entitled first to receive out of the fees attached to the office the sum of \$2,500, and then one-fourth of the amount remaining after paying the amounts due his assistants. We conclude that this was error. We think it is clear from the language of the two articles above cited that the county attorney should receive out of the fees, first, \$2,500, and, second, one-fourth of the amount of the fees over and above the \$2,500, and out of the remainder the assistants should be paid and, if there was still any portion of the fees remaining, the same should be paid to the county treasurer. The primary object of the law was to provide remuneration for the county attorney or other principal officer, and, secondarily, for the pay of the assistants, and, if any excess should then remain, that it should go into the hands of the county treasurer. It is provided in section 21 of article 5 of the state constitution that "county attorneys shall receive as compensation only such fees, commissions, and perquisites as may be prescribed by law," and it is contended that articles 2495c and 2495d are in violation of such constitutional provision, in that they attempt to take away the fees, commissions, and perquisites that have been prescribed. We see no force nor merit in this contention. The legislature clearly has the authority, under the constitution, to fix the fees, commissions, and per-

quisites appertaining to the office of county attorney, and repeal laws on such subject, and enact others. This is admitted by appellant, and he does not insist that he has any vested right in fees that would prevent legislation in connection therewith. If the legislature has the authority to fix the amount of the fees, it would have the right to say that only a portion of the prescribed fees should be received by an officer, for it is not prescribed in the constitution that he shall receive all the fees, commissions, or perquisites connected with the office, but only such as may be provided for by law. The judgment will be reversed, and judgment here rendered that appellant recover of Grayson county the sum of \$165.12 and all costs of this and the lower courts.

CITY OF LIBERTY v. PAUL et al.¹
(Court of Civil Appeals of Texas. May 24, 1899.)

JUDGMENT—RES JUDICATA.

A judgment in a former suit between the same parties concerning the land in controversy and another tract, which were therein treated as one tract, and which recites that "the law and the facts are for defendant," and that he "have and recover" certain land (describing it), which was not the whole of the tract then sued for, but which was the tract excluded in the case at bar, is not an adjudication as to the title of the land in controversy in the case at bar.

Appeal from district court, Liberty county; L. B. Hightower, Judge.

Suit by the city of Liberty against Henderson Paul and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Stevens & Marshall, for appellant. Lanier, Kirby & Martin, for appellees.

FLY, J. Appellant instituted this suit against Henderson Paul, J. F. Lanier, W. L. Douglass, and Jack Mason to recover 100 acres of land, known as the "Ferry Lot," or "No. 6," save and except 20 acres, described by metes and bounds, which was inclosed by said Paul on February 28, 1894. Appellees pleaded a general denial and "Not guilty." The cause was tried by the court, and judgment rendered for appellees.

The following facts were in proof: The land in controversy in this suit is a part of the four leagues of land originally granted by the republic of Texas and patented to the town of Liberty, and the plaintiff is the successor of the town of Liberty by virtue of its adoption of the Revised Statutes of Texas for the incorporation of cities. On the 15th day of August, 1893, the plaintiff in this cause filed a suit in the district court of Liberty county, Tex. (being an action of trespass to try title against the defendant Henderson Paul, who was in actual possession), for the

recovery of, and to try title to, the same land sued for in this suit, including that portion of the survey excepted in the petition in this cause. The defendant in said suit filed his answer in said cause, wherein he pleaded "Not guilty," and the statute of limitation of 10 years against the plaintiff. The said cause came on to be heard by the district court of Liberty county at a regular term thereof, on, to wit, the 28th day of February, 1894, before the judge thereof, a jury having been waived; and the said district court, after hearing all the evidence in said cause, entered up a judgment in substance as follows: "The court is of the opinion, and it is so adjudged, that the law and the facts are for the defendant. It is therefore ordered, adjudged, and decreed by the court that the defendant, Henderson Paul, do have and recover from the said plaintiff all that portion of lot (6) six in the town of Liberty, Liberty county, Texas, known as the 'Ferry Lot,' embraced within the bounds of his inclosure of fences, and including all improvements, and being a portion of one of the leagues originally granted to the town of Liberty, and that his title be quieted. And it is further adjudged that the plaintiff pay all costs in due course of the administration of its government, and that the officers of court and defendant have all legal process to collect same." On the 1st day of May, 1894, Henderson Paul and his wife, Lucretia Paul, who had been married and living together as husband and wife for over 20 years, conveyed by their deed of conveyance the W. ½ of the tract of land sued for in the suit first mentioned, and in this suit, to the defendants J. F. Lanier and W. L. Douglass. The tract of land described in the judgment in the former suit, to wit, "all that portion of lot No. (6) six in the town of Liberty, county of Liberty, Texas, known as the 'Ferry Lot,' embraced within the bounds of his inclosure or fences, and including all improvements, and being a portion of the league of land originally granted to the town of Liberty," is the identical tract of land which is excepted from the 100 acres sued for and described in the plaintiff's petition in this cause. It is clear that there was no adjudication in the first suit of the title to the 80 acres of land sued for in this case, and, the testimony showing that the title to the land was in the city of Liberty, judgment should have been in its favor. The judgment is reversed, and judgment here rendered that appellant recover of appellees the 80 acres of land sued for, and all costs of this and the lower court.

STATE v. WOLFE.

(Court of Civil Appeals of Texas. March 15, 1899.)

TAXATION—ASSESSOR—CLERK—FEES—DELINQUENT ASSESSMENT.

Under Acts 1897, §§ 3, 9 (Sayles' Civ. St. arts. 5232c, 5232i), requiring the collector to

¹ Rehearing denied June 14, 1899.

prepare a delinquent tax record, showing the amount of taxes assessed against each owner and returned delinquent for each year, and securing him a fee of \$1 for each correct assessment, and securing to the county clerk for making out and recording each delinquent assessment and certifying the same, and noting the same on the delinquent tax record, a fee of \$1, to be taxed as costs against the land in each suit, these officers are entitled to a fee of \$1 each for each year taxes were delinquent.

Appeal from district court, Frio county; M. F. Lowe, Judge.

Action by the state against W. P. Wolfe. There was a judgment for plaintiff for less than the relief demanded, and it appeals. Reversed.

Magus Smith, R. W. Hudson, and Mason Maney, for the State.

NEILL, J. This suit was brought by the state to recover of appellee the sum of \$121.88, taxes and costs due by appellee on a certain tract of land, situated in Frio county, for the years 1884, 1885, 1886, 1887, 1888, 1889, and 1896 (seven years in all), and to foreclose a lien thereon for said taxes. The case was tried without a jury, and judgment was rendered in favor of appellant for only \$111.88, from which judgment the state has appealed.

This is an agreed case, and so much of the agreement as is pertinent to the error assigned is as follows: "If the court of civil appeals should construe sections 3, 4, and 9 of an act to amend an act to provide for the collection of taxes heretofore and that may hereafter be levied, etc. (pages 132, 136, Acts 1897, Gen. Laws Tex.), and hold that under the provisions of said act the tax collector and county clerk are allowed as costs \$1 each for each year that the land described in plaintiff's petition was delinquent (the years 1884, 1885, 1886, 1887, 1888, 1889, and 1896), and that 'each correct assessment,' as used in section 9 of said act, means the assessment of each of said years, and does not mean (the correct delinquent record) to embrace all the years from 1884 to 1895, then in such case the judgment of the district court of Frio county in this case should be reversed, and judgment rendered for plaintiff for \$121.88; otherwise the judgment on this question should be affirmed." It is also agreed that all the facts necessary to the decision of the above question were fully proven by the evidence in the case, each officer having performed all the duties required of him by the terms of said act.

Section 3 of the act of 1897 (Sayles' Civ. St. art. 5232c) provides that a delinquent tax record shall be prepared by the collector, "showing when the lands or lots were reported delinquent or sold to the state for taxes, also the name of the owner at the time of the delinquency, if known, the number of acres, the amount of taxes due when first sold, and the amount of taxes assessed against each owner thereon, and returned delinquent for each year," etc. "This delinquent tax record for each county shall be delivered to and preserved

by the county clerk, in his office, and the commissioners' court shall cause a duplicate of same to be sent to the comptroller." Section 4 of the act (Sayles' Civ. St. art. 5232d) provides that "on the receipt of such delinquent tax record * * *, it shall be the duty of the county clerk of each of the counties of this state respectively to certify the same to the commissioners' court for examination and correction, and shall thereafter cause the same to be recorded in a book," etc. Section 9 of the act (Sayles' Civ. St. art. 5232i) provides that "the collector of taxes for preparing the delinquent list and separating the property previously sold to the state from that reported to be sold as delinquent for a preceding year, and certifying the same to the commissioners' court, shall be entitled to a fee of \$1.00 for each correct assessment of the land to be sold, said fee to be taxed as costs against the delinquent." It provides also that "the county clerk for making out and recording the data of each delinquent assessment and for certifying the same to the commissioners' court for correction and for noting the same on the minutes of the commissioners' court and for certifying the same with corrections to the comptroller, and noting the same on the delinquent tax record, shall receive the sum of \$1.00 to be taxed as costs against the land in each suit."

The collector, in making out the first delinquent record after the passage of the act, cannot perform the duties required of him by section 3 without examining the assessment rolls of each year from the 1st day of January, 1885, down to the time of the last assessment made prior to the date of his preparation of his delinquent list, for it is from such rolls he must ascertain the amount of taxes assessed against the owner of the land returned delinquent for each year. No assessment is made by the collector, but the delinquent list prepared by him must show the amount of taxes assessed against each owner; and, when the delinquent tax record is made out, his compensation for the services performed by him is determined on the number of correct assessments shown by the delinquent list of the land to be sold.—It being \$1 for each correct assessment. Hence, the greater the number of assessments, the greater the work to be performed by the collector, and the greater his compensation. The compensation of the county clerk is not by said act made to depend upon the number of correct assessments. He is only entitled to receive the sum of \$1, to be taxed as costs against the land in each suit, for all the services required to be performed by him. We therefore hold that the phrase "each correct assessment" is to be considered only in determining the amount of the collector's fee, and does not govern or determine the amount of compensation to be received by the county clerk. It may be inferred from the agreement that a correct assessment for each year the land was delinquent is shown by the delinquent tax record prepared by the collector. Assuming that this inference is correct, he is

entitled to a fee of \$1, to be taxed as costs, for each year the taxes were so shown to be delinquent. As the compensation allowed the county clerk to be taxed as costs is only \$1, and that of the collector is \$1 for each year the taxes were by the delinquent record shown to be delinquent, we cannot render such judgment as is provided for by the agreement. But, as it appears that the collector is entitled to a fee of \$1 each for five more correct assessments than was allowed him, the judgment of the district court will be reversed, and judgment here rendered in favor of appellant for \$116.88, together with a foreclosure of the lien on the land for said amount.

Neither of the other questions submitted by the agreement is raised by an assignment of error or brief of the appellee. Such questions will therefore not be considered. Reversed and rendered.

On Rehearing.

(June 14, 1899.)

PER CURIAM. We have concluded, on a re-examination of the case, that the clerk is entitled, for the services defined in section 9 of the act of 1897, to \$1, in reference to each delinquent assessment, and not as his total compensation, as was held in our former opinion. Therefore, in accordance with the agreement, the judgment of the district court is reversed, and judgment here rendered for the sum of \$121.88.

KURTZMAN v. BLACKWELL.¹

(Court of Civil Appeals of Texas. May 4, 1899.)

SCHOOL LANDS — SALE — VALIDATING LOCATION — RESALE — CONSTITUTIONAL LAW.

1. In 1892 land in L. county, surveyed for school fund by virtue of Confederate scrip, was sold by the state to T., without actual settlement, as isolated public lands, under Laws 1887, p. 83, c. 99, and Laws 1889, p. 50, c. 56, providing for sale of school lands. The alternate survey for the owner of the scrip was in H. county, and had been patented. Another school survey, adjoining T.'s tract, was sold in 1894. In 1895 the sale to T. was canceled on the ground that the land was not isolated when sold. On May 25, 1897, before Laws 1897, pp. 113, 160, validating sales of isolated sections, took effect, the sale to T. was reinstated. Neither T., nor any one claiming under him, settled on the land. *Held*, that Laws 1897, pp. 113, 160, cured the defect in the original location, in that it was not located contiguous to its alternate, and validated the sale to T.

2. A sale of school-survey land by the state to T. in 1892 was canceled in 1895, but the land was never placed on the market again. Subsequently in the same year J. settled on it and applied to purchase it, but his application was rejected, and he removed. *Held*, that J.'s settlement and application did not constitute a resale of the land, within the meaning of Laws 1897, pp. 113, 160, validating sale of certain public lands.

3. In 1895 J. settled on school-survey land, and applied to purchase it as an actual settler. His application was rejected on the ground that the

survey was invalid because not contiguous to its alternate, and he removed. In 1896 K. settled on same land. In December, 1897, after Laws 1897, pp. 113, 160, validating sales of isolated sections, took effect, J. relinquished to the state, and on same day K. applied to purchase it as an actual settler. His application was rejected in April, 1898. *Held*, K.'s settlement was not a purchase of the land, within the meaning of Laws 1897.

4. Laws 1897, pp. 113, 160, validating sales of isolated sections of public lands, do not cut off rights of any one accruing subsequent to sale sought to be validated, and prior to its passage.

5. Laws 1897, pp. 113, 160, validating sales of isolated sections of public lands, do not violate Const. art. 7, § 4, prohibiting the granting of relief to purchasers of school land.

Appeal from district court, Liberty county; L. B. Hightower, Judge.

Action of trespass to try title by A. P. Blackwell against Charles Kurtzman. Judgment for plaintiff, and defendant appeals. Affirmed.

Stevens & Marshall, for appellant. M. D. Rayburn and G. H. Pendarvis, for appellee.

GARRETT, C. J. This was an action of trespass to try title brought by A. P. Blackwell against Charles Kurtzman for the recovery of 1,280 acres of land. The defendant pleaded "Not guilty." There was a trial by the court without a jury, and judgment was rendered in favor of the plaintiff.

The land in controversy is survey No. 1,020, in Liberty county, made for the school fund June 30, 1882, by virtue of Confederate scrip No. 791, issued to Medora A. Harris, by J. N. Dark, assignee. The alternate survey made for the owner of the certificate is situated in Hardin county. It was made October 23, 1891, and has been patented to the assignee. The two surveys are not contiguous to each other. The school survey in controversy was classified and appraised, and the classification and appraisal were approved by the commissioner of the general land office, and certified by him to the county clerk of Liberty county, prior to December 7, 1892. Contiguous to and adjoining the Medora A. Harris school survey on the north lies another school survey, which then belonged to the state. This survey was sold to a settler December 15, 1894, and the survey in controversy then became isolated and detached from other public lands. On December 7, 1892, the commissioner of the general land office sold the survey in controversy to one H. F. Thompson, under the provisions of section 22 of the act of the legislature providing for the sale and lease of school and other public lands approved April 1, 1887, and the amendment thereof approved April 8, 1889 (Laws 1887, p. 83, c. 99, and Laws 1889, p. 50, c. 56), as detached and isolated public lands, without actual settlement. Thompson complied with all the requirements of the law, and paid interest, and his account was kept in good standing on the books of the land office until January 7, 1895, when the commissioner canceled the sale on the ground that the survey was not

¹ Rehearing denied.

isolated and detached from other public lands; but afterwards, on May 25, 1897, the commissioner reinstated the sale, and the treasurer accepted payment of the interest which had accrued in the meantime, and all interest has been fully paid up to the time of the trial below. Neither Thompson nor any one claiming under him ever settled upon the land. The plaintiff is the owner of Thompson's interest in the survey, by mesne conveyances from him. On January 10, 1895, one E. H. Judd settled upon the north half of the survey, and applied to purchase the same as an actual settler. His application was in all respects in conformity with the law, but the commissioner rejected the same on June 5, 1895, and returned the money remitted with it, on the ground that the survey was invalid because it was not located contiguous to its alternate. Judd remained upon the land until some time in August, 1895, when he removed therefrom, and in December, 1897, filed in the general land office a written relinquishment thereof to the state. On December 15, 1896, the defendant Kurtzman moved upon the said north half of said survey, and has ever since resided thereon as a home, using, cultivating, and enjoying the same. In December, 1897, on the day that Judd filed his relinquishment in the land office, Kurtzman made application for the purchase of the land as an actual settler, complying with the law in all respects; but the commissioner rejected his application on the — day of April, 1898, and returned to him the money which accompanied the same.

After the sale to Thompson it was decided by the supreme court that the surveys made for the owner of a certificate and for the school found by virtue of the act granting land to Confederate soldiers should be contiguous to each other, and that a separation of the surveys, locating them in different counties, would be illegal. *Von Rosenberg v. Cuellar*, 80 Tex. 249, 16 S. W. 58. And in a cause decided by this court, in which the supreme court refused a writ of error, it was held that, where a survey of public school land was contiguous to another survey of public land, it was not detached and isolated, within the meaning of the law above referred to, providing for the sale of detached and isolated sections without actual settlement, and that a sale such as was made in this case would be invalid. *Cameron v. State*, 7 Tex. Civ. App. 35, 26 S. W. 869. The separate location of the surveys made by virtue of the Confederate scrip, and the sales by the commissioner of the general land office of public lands as isolated and detached, which, under the construction of the courts, were not isolated and detached, were subsequently validated by Acts 25th Leg. (Gen. Laws 1897, p. 113; *Id.* p. 160). These acts went into effect on the same day, to wit, 90 days after adjournment of the legislature, which occurred May 21, 1897. The law validating the sales of isolated and detached sections purports

to validate them "where the original sales have not been canceled and the lands resold," and they were "legalized and made valid in all cases where such sales would have been valid if the lands so sold had in fact been isolated and detached; provided that when applications have been made for the purchase of any such lands, in advance of placing the same on the market again, it shall not have the effect of a sale of such lands, nor of requiring the commissioner of the general land office to award such lands to such applicants."

A contention of the defendant is that the sale to Thompson would not have been valid, although the survey had been isolated and detached from other public lands, because it had been located apart from its alternate, and therefore did not come within the terms of the act validating the sale as of an isolated and detached section. The meaning of the act, however, is that the sale should have been in other respects valid according to the law under which it was made, and the healing act undertook to validate that defect in the sale, without reference to the regularity of the location; and, when the healing act became a law, it referred back to the original location, and prevented all possible objection to its validity. Hence the act validating the sale must be construed as though the two surveys had been made contiguous to each other, as required by law.

Had the sale to Thompson been canceled, and the land resold? As we have seen, the commissioner of the general land office canceled it on January 7, 1895, on the ground that the survey was not isolated and detached, but the land was never placed upon the market again, and was never resold. Upon the contrary, the sale to Thompson was reinstated by the commissioner as soon as the validating acts were passed, although before they had gone into effect. There was no sale to Judd, because at the time of his application there had been no valid location and survey of the land, and the forwarding of his application, and the remitting of the money required as a cash payment, was not the acceptance of any offer on the part of the state to sell this land, which, although it had become detached by the sale of the contiguous section, had not been located in compliance with the law; and the commissioner was right in rejecting the application on that account. Judd also abandoned the land a few months after his settlement,—long before the validating act was passed,—and finally relinquished whatever interest he had to the state, but he had acquired no interest. The defendant settled upon the land in December, 1896, but made no application for the purchase thereof until December, 1897,—long after the validating acts had gone into effect. His settlement was not a purchase of the land, and there was nothing to prevent the application of the law to the sale made to Thompson.

There can be no objection to the consti-

tutionality of the law. Its effect is not to cut off the rights of any one accruing subsequent to the sale sought to be validated, and prior to its passage. Nor is it in contravention of article 7, § 4, of the constitution, prohibiting the legislature from granting relief to the purchasers of school land. To the contrary, the law confirmed the sale, and required the purchaser to complete his contract.

We do not deem it necessary to notice any of the other assignments of error presented in the brief of the appellant. The judgment of the court below will be affirmed. Affirmed.

NATIONAL BANK OF DANGERFIELD v. RAGLAND.

(Court of Civil Appeals of Texas. May 17, 1899.)

JURORS — COMPETENCY — RELATIONSHIP TO PARTIES — USURY — EVIDENCE — ACTION FOR PENALTY — LIMITATIONS — TRIAL.

1. In a suit against a bank to recover usurious interest paid to it, it is not an abuse of discretion to sustain a challenge for cause to jurors related to stockholders of the bank within the third degree of consanguinity, under Rev. St. art. 3207, defining a challenge for cause as an objection disqualifying the juror in the opinion of the court.

2. Where the alleged usury consisted in adding the usurious interest to the note, which has been paid, parol testimony is admissible to show the amount of interest included in the note.

3. Defendant cannot complain of the refusal to withdraw from the jury an itemized statement of plaintiff's claims, which, on retiring to deliberate, they took with them, with his consent.

4. An action against a national bank to recover double the amount of usurious interest paid to it may be brought within two years after the payment of such interest, under Rev. St. U. S. § 5198, making national banks taking usurious interest liable for double the amount of such interest, and requiring an action to be brought within two years from the time of the occurrence of usurious transaction.

Appeal from district court, Morris county; J. M. Talbot, Judge.

Action by G. W. Ragland against the National Bank of Dangerfield. There was a judgment for plaintiff, and defendant appeals. Affirmed.

J. M. Moore, for appellant. Sheppard, Jones & Bolin, for appellee.

FLY, J. Appellee instituted this suit to recover of appellant the penalty provided by statute, amounting to \$557.34, on account of usurious interest demanded and received by it from appellee. The cause was tried by jury, being submitted on special issues, and on the answers judgment was rendered for \$252.05.

Two jurors, who were related in the third degree by consanguinity to stockholders in the bank, were challenged for cause by appellee, and the challenges sustained by the court, and appellant complains of that action. The statute gives wide discretion to the trial judge in connection with challenges for cause, not confining him to any specified cause, but

authorizes challenges for any cause "which, in the opinion of the court, renders him an unfit person to sit on the jury," and a judgment will not be reversed without it should appear that the discretion has been abused and the party complaining injured thereby. Rev. St. art. 3207; *Couts v. Neer*, 70 Tex. 468, 9 S. W. 40. O. M. Walls, one of the rejected jurors, was a half-brother to W. B. Womack, a large stockholder in the bank, and the other rejected juror was the father of another of the stockholders. We think the court did not abuse the discretion intrusted to it by statute, and no attempt is made to show that appellant was deprived of a fair trial by the rejection of the jurors.

There is no merit in the second assignment of error, which is to the effect that appellant should not have been allowed to state that he agreed to pay 12 per cent. interest on the note. The first note was given for \$380, payable in 12 months, when appellant obtained only \$348, and appellant was properly allowed to state that \$42, which was more than 12 per cent., was added in the note as interest for the 12 months. Appellee swore that he had paid all the different notes given which included usurious interest, as did the one above mentioned, and there can be no force in the contention that he should not have been allowed to testify as to what he contracted to pay, but as to what he paid. An explanation of the contract was necessary to show what usurious interest he had paid.

A statement of the various sums of money which had been loaned by appellant to appellee, with the date of each loan, when it became due, rate of interest, etc., was prepared and testified to by appellee, and, after the jury had retired, they requested the court to allow them to have the statement. With the consent of the attorneys of both parties, the statement was delivered to the jury. Afterwards appellant sought to have the statement withdrawn, but the court would not permit it. Appellant perhaps had the right to have the statement excluded from the jury, but, having consented to let the jury have it, it cannot complain that the court would not permit it to have it recalled.

The facts do not bear out the assertion that the usurious interest, or any part thereof, was paid more than two years before the suit was instituted. The statute did not begin to run until the usurious interest was paid. Rev. St. art. 3106; *Stout v. Bank*, 69 Tex. 385, 8 S. W. 808. The other assignments are not well taken. The judgment is affirmed.

On Motion for Rehearing.

(June 14, 1899.)

It is urged by appellant that it, being a national bank, is entitled to have the laws of the United States fixing limitations of suits for usurious interest applied to it, and that limitation by those laws begins at the date

of the "usurious transaction," and not, as provided by the laws of Texas, from the day of payment of the usurious interest. It may be admitted that the proposition is a correct one, and still there would be no ground presented for a rehearing; for it is well established that under section 5198, Rev. St. U. S., invoked by appellant, the right of action accrues when the usury is paid, and that limitation begins to run from that date. Webb, Usury, § 525, and authorities cited. The motion for rehearing is overruled.

GULF, C. & S. F. RY. CO. v. MITCHELL
et al.

(Court of Civil Appeals of Texas. June 14, 1899.)

WRIT OF ERROR—FAILURE TO FILE BRIEF—STATEMENT OF FACTS—PARTIES DEFENDANT—WITNESSES—CONTRADICTION OF ONE'S OWN WITNESS.

1. A writ of error will not be dismissed for failure of the plaintiff in error to file his brief in the trial court five days before filing the transcript in the appellate court, where defendant in error has filed a brief answering all the assignments of error, and the failure to file the brief did not delay the submission of the cause.

2. Where a litigant has transferred an interest in his cause of action, and the court, after a recovery thereon, approves the transfer, and directs the judgment recovered to be paid to the transferees to the extent of their interest, the latter are proper parties defendant to a writ of error to review the judgment.

3. A statement of facts on error will not be stricken as unnecessarily voluminous where the prevailing party refuses to agree to a shorter statement, which plaintiff in error tenders him.

4. Where a witness has testified that he is getting a certain rate per diem for testifying, which is in excess of his reasonable compensation for expenses and loss of time, evidence that defendant, for whom he is testifying, has only agreed to pay his expenses, and the reasonable value of his time, not exceeding the amount he could have made in his usual business, is admissible.

5. Such evidence is not objectionable as tending to impeach defendant's own witness.

Error from district court, McLennan county; Sam R. Scott, Judge.

Action by Thomas S. Mitchell against the Gulf, Colorado & Santa Fé Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Sanford & Lee, J. W. Terry, and Chas. K. Lee, for plaintiff in error. T. A. Blair and D. A. Kelley, for defendants in error.

KEY, J. This is a damage suit for personal injuries. Mitchell was the plaintiff, and recovered a judgment for \$1,500. Several motions have been submitted in connection with the submission of the main case, and these will be first considered.

The first motion is to dismiss the writ of error because the brief of the plaintiff in error was not filed in the court below five days before the transcript was filed in this court, as required by the rules. The brief was not filed within the time prescribed, but, as the

defendants in error have filed a brief in this court answering all the assignments of error, and the failure of the railway company to file its brief in the court below within the proper time has not resulted in delaying the submission of the case, the motion to dismiss will be overruled.

The plaintiff transferred one-half of his cause of action to his attorneys, T. A. Blair and D. A. Kelley, and, after the judgment was rendered, the court made an order approving said transfer, and directing that \$750 of the judgment recovered by the plaintiff be paid to Blair and Kelley. In suing out the writ of error, the railway company made Blair and Kelley parties defendant, and they objected to this, and filed a motion to dismiss the writ of error as against them. We think they occupy substantially the position of parties to the suit, and were properly made defendants in the writ of error, and their motion to dismiss will be overruled.

The third motion is to strike out the statement of facts upon the ground that it is a copy of the stenographer's notes, and unnecessarily voluminous. The first charge does not appear to be sustained. As a general thing, the testimony of the witnesses is stated in narrative form, though in some instances questions and answers are inserted; but in these instances this appears to have been necessary to a proper understanding of the testimony. The statement of facts could properly have been curtailed, and it is shown by the verified response to the motion to strike out that counsel for the railway company tendered to counsel for the other side a much shorter statement of fact, to which the latter refused to agree. Under these circumstances we do not think the motion to strike out should prevail, and it will be overruled.

We have duly considered the questions upon which a reversal is sought, and find but one just ground of complaint. The plaintiff's case rested upon the theory that while crossing the railroad track at a street in the town of Temple he was run upon and injured by a moving train, the employees in charge of which were guilty of negligence in failing to give the required signals. The theory of the defense was that the plaintiff attempted to board a moving train for the purpose of stealing a ride, and fell from the same in such position that a car wheel ran over his foot and caused the injury complained of. Luke Hart, a witness for the railway company, testified that he was near by at the time of the accident; saw the plaintiff attempt to get on the train, and fall therefrom. On cross-examination this witness used this language: "I came over to Waco because I wanted to come. I was not subpoenaed. They pay me about \$900 a day to come over here and testify, and I was to have that \$900 a day for 365 days. Why, I'll tell you, there ain't no use in going over all that kind of business. I don't think I would sell myself." After this witness left the stand, counsel for the railway company

offered to prove by J. W. Evans, the company's claim agent, in substance, that the company had agreed with the witness Hart that if he would attend the trial as a witness the company would pay his expenses, and the reasonable value of his time, not to exceed what he could have made in his usual business. This testimony was objected to as immaterial, and the court sustained the objection. In granting the bill of exception, the judge made the explanation that the company failed to ask Luke Hart what he meant by stating that he was getting \$900 per day for 365 days in the year for testifying in the case, but we do not see how this explanation justifies the exclusion of the testimony. Hart was a material witness for the company, and, if he was to receive from the company more than his expenses and reasonable compensation for loss of time in attending court, the jury might well believe that he was a bought witness, and unworthy of credit. Therefore his statement that he was to receive \$900 a day, while too extravagant for entire credence, may have impressed the jury with the idea that he was to receive more than an honest witness, desiring to tell the truth, should receive; and not only tended to break down his credibility as a witness, but also to place the railway company before the jury in the attitude of attempting, by an improper use of money, to defeat the plaintiff's case by false testimony. Hence it was very important to the company to show, if it could, that Hart was not to be paid more than his expenses and a reasonable compensation for his time, thereby bolstering him as a witness, and relieving itself from the suspicion of using unfair and dishonest means to defeat the plaintiff's suit. The excluded evidence of the witness Evans was not offered for the purpose of explaining what Hart meant by his statement that he was getting \$900 per day as a witness, as the trial court seems to have regarded it, but for the purpose of showing that such was not the fact; and this it had the right to do by the testimony of Evans or any other witness cognizant of the fact. Evans' testimony was not objected to on the ground that the company was attempting to impeach its own witness, nor was it subject to that objection. On this subject a standard text-book states the rule in these words: "In this country, while a party cannot ordinarily discredit his own witness, his right to prove facts inconsistent with those stated by such witness is unquestioned, even though this discredit the witness materially." 1 Whart. Ev. § 549. In criminal cases this is expressly authorized by statute. Code Cr. Proc. art. 795. And though this statute does not, in terms, apply to civil procedure, the rule should be the same in both civil and criminal cases, unless cogent reasons for a distinction can be given. We know of no such reasons, but, on the contrary, we believe that the common law is in harmony with the statute. The testimony referred to was admissible, and, as it

was of vital importance to the company, the ruling of the court excluding it was reversible error. On the other questions presented in the briefs we rule against the railway company. Judgment reversed, and cause remanded.

KAY v. HATHAWAY.

(Court of Civil Appeals of Texas. June 14, 1899.)

TRESPASS TO TRY TITLE—SETTLEMENT OF EQUITIES—JURISDICTION—HOMESTEAD—DEFENSES.

1. The court can, in an action of trespass to try title, determine and settle an indebtedness growing out of defendant's building a house on the land, though the amount is not within the court's jurisdiction, since the court can settle in such an action all the equities between the parties.

2. Where a house was built by defendant on plaintiff's land under an agreement that it should remain there until the former paid an indebtedness for which plaintiff was his surety, after which he was to remove it, defendant cannot defeat plaintiff's right to possession, after a refusal to pay the indebtedness, by asserting a claim of homestead, since plaintiff's right is similar to that of a vendor, and a homestead right will not defeat a vendor's claim.

Appeal from district court, Robertson county; W. G. Tallafarro, Judge.

Trespass to try title by A. U. Hathaway against E. C. Kay. From a judgment for plaintiff, defendant appeals. Reversed.

Simmons & Crawford, for appellant. J. D. Gann, for appellee.

KEY, J. Appellee sued appellant in trespass to try title. Appellant's answer, among other things, includes a special plea, setting up a verbal agreement to the effect that appellant was to have the right to erect a dwelling house on the land in question, use and occupy the same as a home, and be permitted to remove the house from the land; that, in pursuance of said agreement, he built a house on the land, of the value of \$325, which he has ever since used as a home for himself and family. He also alleged that he was about to remove the house from the land at the time the plaintiff brought his suit, and prevented him by a writ of sequestration from accomplishing that purpose. The plaintiff, by supplemental petition, admitted that the defendant built the house on the plaintiff's land under a verbal agreement between them, but denied that it cost over \$185, and denied that defendant had the right to remove the house from the land, and set up as part of the agreement by which the house was to be built that plaintiff, as surety for the defendant, had signed a note for \$232.85, bearing interest at the rate of 10 per cent. per annum, and that it was agreed that the house to be built by defendant on the plaintiff's land was to be the plaintiff's property until the defendant should pay off the note referred to; charged that the defendant had failed to pay the note, except the sum of \$50,

and that the plaintiff had paid the same, amounting to \$273.55. The plea further averred that the house was a fixture on the land, denied the defendant's right to remove it, but admitted that he was entitled to pay for the material and necessary labor furnished by him in building the house; claiming, however, that the \$273.55 paid by the plaintiff as surety for the defendant should be offset against the defendant's right to recover for material and labor. The plea further charged that the defendant was wholly insolvent. The defendant filed a supplemental answer excepting to the plaintiff's supplemental petition, denying the averments therein, and pleading as an offset an account against the plaintiff. The trial judge filed the following conclusions of fact and law:

"Conclusions of fact: The defendant built a house on plaintiff's land under a verbal agreement between them that he (defendant) was to have possession of the premises for five years, free of rent; that said house was to remain on plaintiff's land until defendant's indebtedness to Mitchell Bros. & Dechered, for which plaintiff had gone security, was paid by defendant, after which he should have the right to remove the same at any time; that such indebtedness has not been paid by defendant; that defendant, when this suit was brought, was in possession of said premises, and has been for more than one year, and had refused to pay such indebtedness, or to give up the possession of said house, and the said indebtedness had been paid by plaintiff, and defendant was about to remove the house; that defendant was a married man, and occupied the premises as a homestead, and had no other homestead.

"Conclusions of law: That the contract between the parties, not being in writing, was in contravention of the statute of frauds, and the defendant, more than one year having elapsed, was, at the time this suit was brought, a tenant at will of plaintiff's; that plaintiff is entitled to the possession of the premises, and to hold said house until the indebtedness due by defendant to Mitchell Bros. & Dechered is settled; that when the same is settled, the defendant is entitled to remove said house; that the adjustment of the amount of such indebtedness, and the foreclosure of any lien that plaintiff may have on said house, cannot be considered and disposed of in this action."

Judgment was rendered in pursuance of these findings, and the defendant has appealed.

The third assignment of error is addressed to the action of the court in refusing to determine the amount of appellant's indebtedness to Mitchell Bros. & Dechered, for which amount appellee had become surety, and we sustain this assignment, and reverse the judgment. The pleadings raised this issue. The parties submitted testimony in reference thereto, and the judgment of the court awards both the land and the house to the

plaintiff, granting the defendant permission to remove the house after he has paid off the amount of said indebtedness. The court below appears to have entertained the opinion that it had no jurisdiction to determine the amount of such indebtedness. In this respect we think the court erred. The court had jurisdiction of the suit, because it was an action of trespass to try title; and under our blended system of law and equity it had jurisdiction to determine and settle in the one action the defendant's equities growing out of his building a house on the plaintiff's land; and if the agreement was, as found by the court, and supported by testimony, that the defendant should have the right to remove the house upon payment of the debt for which the plaintiff was his surety, the court had jurisdiction to determine the amount of such debt, and definitely settle the rights of the parties, although the amount of the indebtedness was alleged to be less than \$500. By another assignment, appellant contends that the house was his homestead, and therefore not subject to the payment of the claim asserted by appellee. In the absence of an agreement for its removal, when a house is erected it becomes a fixture and part of the realty, and belongs to the owner of the land. According to the findings of fact in this case, the house was built under an agreement that it should remain on the land until appellant paid the indebtedness for which appellee was surety, after which he should have the right to remove the house. We are of the opinion that the homestead right cannot be asserted for the purpose of defeating this agreement. The substance of the contract was that, unless appellant discharged said debt, the house should remain a fixture upon the land, and belong to appellee. Under this contract, appellee's rights are similar to the rights of a vendor; and it is well settled that the homestead right will not defeat the claim of a vendor for his purchase money. Appellee had the right to dictate the terms upon which appellant would be permitted to build a house upon appellee's land, and it would be unjust to subordinate this right to appellant's claim of homestead. On this question, and all others except the one presented by the third assignment, we rule against appellant. For the error pointed out, the judgment is reversed, and the cause remanded. Reversed and remanded.

BATLA et al. v. BATLA et al.

(Court of Civil Appeals of Texas. May 17, 1899.)

HUSBAND AND WIFE—MUTUAL SEPARATION—DIVISION OF COMMUNITY PROPERTY—SUBSEQUENT COHABITATION.

1. Where a husband and wife actually separate, intending that the separation shall be permanent, a division of their community property made to separate their interests and give to each one-half, if fairly consummated, is effectual,

and what each thus obtains becomes his or her separate property.

2. Where a husband and wife separate by mutual agreement, and divide their community property, with the expectation that their separation will be permanent, the fact that they, years later, and for a year before the death of the wife, lived together, will not convert the separate property thus acquired by each into community property, where they do not do anything to indicate an intention to nullify, or that has the effect of nullifying, the division made.

Appeal from district court, Colorado county; H. Teichmueller, Judge.

Action by John Batla and others against Thomas Batla and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Beauregard Bryan and Geo. McCormick, for appellants. M. H. Townsend, for appellees.

JAMES, C. J. This is a suit for partition by plaintiffs against their father, Thomas Batla, Sr., claiming that the land in question was community property of their father and their deceased mother, Rosina Batla. Before trial, the father died, and his second wife, as his executrix and sole devisee, then became the defendant. Judgment was for defendant.

The conclusions of the judge constitute the statement of facts, and are here given: "(1) Facts. Thomas Batla and Rosina Batla were husband and wife, having intermarried in Europe before emigrating to Texas, 1852. They were husband and wife on the 28th day of June, 1896, the date of the death of Rosina Batla. (2) Plaintiffs are the children and heirs, as alleged in their petition. (3) Subsequently, either the latter part of 1886 or early in the year 1887, Thomas and Rosina Batla agreed to separate, and, as incident to and in contemplation of this agreement to separate, they jointly conveyed on the 22d day of February, 1887, to one Mary Sabyzek three several tracts of land situated partly in Austin and partly in Colorado county for the aggregate sum of seven thousand dollars. These several tracts of land constituted the community estate of Thomas and Rosina Batla. Mary Sabyzek, the purchaser, made and delivered her several fourteen promissory notes, each for the sum of five hundred dollars, for the purchase money (seven thousand dollars), and one-half of said notes were made payable to and delivered to Thomas Batla, and one-half of them were made payable to and delivered to Rosina Batla. (4) Simultaneously with the aforesaid sale and division of the proceeds, the parties separated, and remained actually separated until some time in December, 1893. But they were never divorced. (5) Thomas Batla invested the proceeds or notes he received in the aforesaid partition, or a part thereof, in the purchase of the lands described in the petition of plaintiffs, and claimed by them as community property of Thomas and Rosina Batla. (6) The evidence fails to show what use or disposition Rosina Batla made of the notes delivered to and controlled by her. (7) Rosina Batla returned to her husband at his request

about a year before she died, and remained at her husband's home until she died, the 23d day of June, 1896. (8) Sons of Rosina Batla, introduced as witnesses, intimate that the father was embarrassed and had payments to make, and was actuated to induce their mother to return to him by the desire of having her assistance to pay his debts; but it does not appear whether she still had means, whether she rendered him any assistance, or to what extent, but it was shown that she gave one of the five hundred dollar notes to one of her sons. Witnesses knew of no purchases or investments she made; but the fact was shown that Rosina Batla had no property at the time of her death. (9) On February 13, 1888, the said Thomas Batla bought the land in controversy from one B. F. Stafford; the deed reciting that he paid the said Stafford the sum of two thousand dollars in cash, and executed to him his four notes, each for five hundred dollars, due, respectively, December of 1888, 1889, 1890, and 1891, secured by vendor's lien, which was released December 31, 1894. (10) There was no written agreement, but only a verbal agreement, between Thomas and Rosina Batla in regard to their separation. (11) Defendant Thomas Batla died soon after the institution of this suit, and, having married a second time, his surviving widow, executrix of the will of the deceased, became party defendant."

It appears from this statement that the separation of Thomas and Rosina Batla was actual, and intended as permanent when made. In such situation a division of their community, made for the purpose of separating their interests, and giving to each one half of the property, if fairly consummated (as appears here), is effectual, and the property thus obtained by each becomes his or her separate property. *Rains v. Wheeler*, 76 Tex. 890, 13 S. W. 324. The notes which composed the community estate were personal property, and the division between the parties was consummated when their land was sold and one-half of the notes taken to the husband and one-half to the wife. The fact that years later and about a year before the wife died they came together again did not change into community property that which had become the separate property of each. They did nothing to indicate their intention, or that had the effect, of nullifying the division of property. The land in question was bought by the husband with the notes or the proceeds of the notes that had been set apart to him. We conclude that the judgment should be affirmed. Affirmed.

On Motion for Rehearing.

(June 14, 1899.)

Appellants, in this motion, call our attention to an inconsistency in the judge's findings of fact. One finding is that Thomas and Rosina Batla remained actually separated un-

til some time in December, 1893; another is that Rosina Batla returned to her husband at his request about a year before she died, and remained at her husband's home until she died, the 23d day of June, 1896; another finding was that the vendor's lien upon the land which Thomas had bought was released December 31, 1894. In our view of the case, the discrepancy in these findings is not material. The parties did not cease to be man and wife, the property was acquired during their coverture, and was *prima facie* community property. It is only to the extent that it was purchased by Thomas Batla with his separate funds that the presumption of community property is removed or rebutted. This case is not to be viewed as one in which the husband, before marriage, purchases property, and completes payment therefor after marriage, in which case it has been held that the property remains separate, with a charge thereon in favor of the community against him. *Lawson v. Ripley*, 17 La. 251. A close examination of the findings of the judge discloses that he does not find unequivocally that the entire purchase money for the land was paid by the notes allotted to him, or the proceeds thereof. If this had been found, we would adhere to the disposition of the case already made. The finding is: "Thomas Batla invested the proceeds or notes he received in the aforesaid partition, or a part thereof, in the purchase of the lands." The purchase price of the land was \$4,000, and the notes he had were for \$3,500, and one year's interest, not sufficient of itself to pay the whole price. There being no statement of facts, and having only the findings of the judge, we are forced to say that the facts, as found, do not remove entirely the presumption of community property, so that we can affirm the judgment. The findings show a doubt in the mind of the judge as to the extent the separate notes or proceeds thereof went to pay for the property. At the same time he makes it appear that, to some extent,—probably to a large extent,—payment was so made. Upon this condition of evidence, we can neither affirm the judgment nor render one. *Claborne v. Tanner*, 18 Tex. 79. The motion is granted, and the judgment reversed, and cause remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. ST. CLAIR.¹

(Court of Civil Appeals of Texas. May 17, 1899.)

DEPOSITIONS—ENVELOPE—INDORSEMENTS—ADOPTION BY NOTARY—HARMLESS ERROR—PERSONAL INJURY—NEGLIGENCE—QUESTION FOR JURY—EVIDENCE—WITNESSES—IMPEACHMENT—MASTER AND SERVANT—INSTRUCTIONS—ASSUMPTION OF RISK.

1. Where attorneys prepared the envelope for returning depositions, the indorsements thereon

are made the act of the notary by his adoption thereof in using it.

2. Error in permitting a witness' deposition to be read, where he afterwards appeared and testified, is harmless.

3. Where plaintiff, in an action for negligence, testified that a car he was climbing on when he was hurt was a medium-sized coal car, it was not error to permit a competent witness to testify as to the width of that kind of car.

4. A witness cannot be impeached by showing that he was employed by the party against whom he testified, and was discharged by him at some indefinite time.

5. The principle that subsequent repairs at the place of an accident are not evidence of negligence existing at the time thereof does not apply to evidence of the removal of a car after an accident alleged to have been caused by leaving it on the track too close to another track.

6. Where a witness in an action for an injury alleged to have been caused by leaving a car on a track too close to another track testified that after the accident he went to the place where plaintiff was hurt, and there were no cars standing at that point, evidence that the car had been removed was admissible.

7. In an action for a personal injury, evidence that plaintiff was totally disabled warranted the admission of evidence of his life expectancy.

8. Proof of the earning capacity of one who is suing for a personal injury, to determine the extent of his loss where he is totally disabled, need not be confined to the employment in which he was engaged at the time of the injury, but testimony may be introduced to show the various capacities for which he was fitted, and the compensation he might have received therein.

9. There was no error in charging that a servant assumes all risk "naturally" incident to his employment.

10. There was no error in leaving the question of negligence entirely to the jury.

11. There was no error in refusing special charges substantially embraced in the charges given.

12. In an action by an employee for a personal injury alleged to have been caused by negligently leaving a car on a track too close to another track, there was no error in refusing an instruction not to consider, in determining negligence, evidence as to its being dark at the time of the accident, since negligence was a question for the jury under all the circumstances.

Appeal from district court, Grayson county; Don R. Bliss, Judge.

Action by Charles P. St. Clair against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

T. S. Miller and Head, Dillard & Muse, for appellant. Wolfe & Hare, for appellee.

JAMES, C. J. Action to recover damages for personal injuries. We conclude as facts that defendant was injured through the negligence of defendant, without negligence on his part contributing to same, and that the damages awarded are not excessive.

There was no error in the refusing to strike out the depositions of E. A. Boardman and Albert Smith, the indorsements upon the envelope having been made the act of the notary by his adopting them. It seems that the attorneys had prepared an envelope for use by the notary in returning the depositions, and it was used by the notary.

Nor is any error shown by the second assignment, no injury appearing to have resulted to defendant.

¹ Rehearing denied June 14, 1899.

In regard to the third assignment, the court, upon the investigation made by it, did not err in permitting depositions to be read, instead of having the witness brought into court to testify. However, no harm could possibly have been done defendant thereby, for at a later stage of the trial plaintiff went upon the stand, and testified, and was cross-examined by defendant. The same applies to the depositions of the witness Leonard, who, it appears, also was placed upon the stand, and testified at length.

The fifth assignment is that the court erred in permitting the witness E. A. May to testify that the width of an ordinary car, such as those in question, was about 9 feet and 11 inches. The objection made to this testimony was that it should have been directed to the width of the particular cars in question. The plaintiff testified that the car he was climbing upon when he was hurt was a flat coal car; that it was empty, and medium-sized. The witness May testified that the width of a medium coal car is about 9 feet 8 or 9 inches, correcting a previous statement in his testimony that he believed some of the coal cars were as wide as 9 feet 11 inches. We believe there was no error in admitting the testimony. Testimony of a competent witness of the width of cars of the kind testified to by plaintiff was proof thereof. No evidence was offered by defendant on the subject, although it had peculiar knowledge of the particular cars.

The sixth assignment is that the court refused to allow defendant to show by witness May (who testified that he, in company with M. D. Chouquette, made certain measurements of defendant's tracks at the place of the accident) that both he and Chouquette had been discharged by the defendant, for the reason that defendant was entitled to have it appear that the measurements were made by persons hostile to defendant. The court allowed the testimony offered as to the witness May, but, Chouquette not being a witness in the case, as to him the testimony was not admitted. The position taken by appellant cannot be sustained upon the ground of impeachment of Chouquette, for he was not a witness. The assignment, if sustained, must be upon the idea that defendant was entitled to show the full extent the measurements were made by persons sustaining a hostile relation to it, as affecting the credibility of the work shown to have been done by them. The question, then, is, would evidence that the witness and Chouquette "had formerly been in defendant's employ, and had been discharged by it," be proper evidence of their hostility to defendant? The proposed testimony would not have disclosed how recent or how remote in point of time the discharge was. We can find no case in which it has been held that from such fact alone a jury may properly conclude that the party was biased or hostile, and predisposed to give or make questionable testimony

against another. The evidence sought to be elicited was too remote and uncertain for the purpose intended, and the court, in our opinion, did not err in excluding it. *Gale v. Railroad Co.*, 76 N. Y. 594.

The seventh assignment is that the court erroneously permitted plaintiff to prove by witness Taylor that the cars were moved after the injury to plaintiff. The proposition illustrates the point made thus: In a suit for damages alleged to have been occasioned by negligence in leaving a car on a track too close to another track, it is error to permit plaintiff to prove that, soon after the accident, such car so left standing on said track was moved, and placed on some other point in the yard. The brief does not by this present any definite proposition. From the authorities cited it would appear that the principle is invoked that subsequent repairs at the place of the accident are not evidence of negligence existing at the time of the accident. The inapplicability of this rule to the evidence in question is apparent. We do not believe the manner in which this assignment is briefed requires it to be further noticed. The testimony, however, appears to have been proper, in view of testimony of a witness of defendant, who testified, in effect, that after the accident he went to the place where there was blood (presumably where plaintiff was hurt), and there were no cars standing at that point by which plaintiff could have been hurt.

The injury to plaintiff was shown by testimony to have resulted in total and permanent disability and incapacity to do mental or physical labor. In view of this, it was not error to admit evidence of plaintiff's life expectancy.

By the tenth and eleventh assignments it is insisted, in effect, that in proving the earning capacity of a plaintiff suing for damages, evidence should be confined to his earning capacity in respect to the particular employment he was engaged in when injured. The evidence here is that plaintiff had been recently employed by defendant as a switchman. He had, as the evidence showed, been railroading for over 20 years, had worked during that time at braking, as fireman, as engineer, as master mechanic, and conductor, and was 37 years of age. He had served 2 years as a master mechanic, 11 years as an engineer, and 5 years as a fireman, and the remainder of the time he had put in as switchman, brakeman, and conductor. He testified that there was nothing that incapacitated him from filling any of these stations at the time he was injured. We think there is no rule making the particular calling in which a person was engaged at the time of his injury, or the wages he was then receiving, the standard of his damages. There was testimony showing plaintiff to have been an experienced railroad man in many capacities, and fitted, when injured, for employment in any of them, in good health, and nothing

to disqualify him. He was entitled to have these matters and the compensation of these various positions placed before the jury, to aid in determining the probable extent of his loss.

In reference to the charges, we think there was no error in charging the jury that the servant assumes all risk ordinarily or naturally incident to his employment, the use of the word "naturally" being complained of.

Appellant's criticism of the first and seventh paragraphs of the court's charge (twelfth and fourteenth assignments) are not well taken. The court, in said clauses, left the question of negligence entirely to the jury.

The court properly refused to give the special charges to the effect that there was no evidence upon which to found a verdict for plaintiff.

The special charges referred to in the nineteenth, twentieth, and twenty-first assignments were substantially embraced in the charges given.

The twenty-second assignment is that there was no allegation in the petition that it was dark at the time of the accident, and therefore the court erred in refusing to give the special instruction to the effect that in determining negligence the jury would not take into consideration any evidence as to its being dark at the time; and also for the reason that, if it was dark, plaintiff must have known the fact, and would not be permitted to recover by reason thereof. The court gave no instruction in reference to light or darkness, and properly so, for the jury were the judges of negligence under all the circumstances. The petition did allege that at the time of the accident it was dark.

Our conclusions of fact dispose of the twenty-third, twenty-fourth, and twenty-fifth assignments. The judgment is affirmed.

COURTNEY v. BLACKWELL.

(Supreme Court of Missouri. March 23, 1899.)

APPEAL—REVIEW OF EVIDENCE—SLANDER—CANCELLATION OF RELEASE—EVIDENCE—AFFIRMANCE—STATUTE OF LIMITATIONS—HARMLESS ERROR—FORM OF VERDICT—TRIAL—STRIKING TESTIMONY—INSTRUCTIONS.

1. On appeal in an equity case, the supreme court will review the evidence, if it is before it, and reach its own conclusions on the facts, though the trial court has made special findings of fact.

2. After a young woman had commenced an action for slander that was not spoken in her presence, defendant procured a release from her of her cause of action on his agreeing to pay the costs and to give her an exoneration for publication. He falsely represented that he had not spoken the slander, and, having great influence over plaintiff's mother, induced her to threaten plaintiff that she would have to leave her home if she did not settle the matter. He represented to plaintiff that he would take her to a disinterested attorney for advice, and took her to his own attorney, and he also falsely represented that the witness by whom she expected to prove the slander was unreliable. Prior to

the commencement of the action, defendant was plaintiff's teacher, to whom she was accustomed to look for advice and counsel. *Held*, that plaintiff was entitled to a cancellation of the release.

3. Plaintiff's act of accepting the exoneration after her confidence in defendant's disavowal had been shaken by having heard admissions of his utterance of the slander is not an affirmation of the release, where she "didn't have time to think," and was subject to the same influences that enabled defendant to procure the release.

4. Where, in an action for slander, defendant pleaded a release, and plaintiff amended the petition by inserting an additional count in equity for its cancellation after she had sought to avoid the effect of the release by alleging defendant's fraudulent procurement thereof in the replication, the running of limitations against the count for cancellation is terminated by the filing of the replication.

5. In an action containing two counts, the first one being to cancel a release of the cause of action sued on in the second, the defendant is not harmed by error in entering the decree canceling the release immediately after the trial on the first count, instead of postponing the entry until the completion of the trial on the second count.

6. On the subsequent trial on the first count the release is inadmissible.

7. An order overruling a motion to strike out an answer of a witness strikes out all portions of the answer which state what another said to the witness by reciting that what such other had said was incompetent and would be stricken out.

8. Defendant in an action for slander is not harmed by plaintiff's testimony that she failed to procure employment by reason of the slander, where no special damages are allowed by reason thereof.

9. Where, in an action for slander, defendant offers a release in evidence after it has been canceled, it is not error to instruct that the release is no bar to a recovery.

10. A judgment for slander will not be reversed because the jury erroneously assessed the damages in a lump as exemplary damages, instead of assessing separate amounts for the exemplary and the actual damages.

Valliant and Robinson, JJ., dissenting.

In banc. Appeal from circuit court, Boone county; John A. Hockaday, Judge.

Action for slander by Etta Hancock Courtney against James S. Blackwell. Judgment for plaintiff, and defendant appeals. Affirmed.

Turner & Hinton and C. B. Sebastian, for appellant. Odon Guitar, Webster Gordon, and W. M. Williams, for respondent.

BRAOE, J. This is an appeal from a decree and judgment of the circuit court of Boone county, in which the pleadings, finding, decree, and judgment are as follows:

"Petition.

"In the circuit court of Boone county, Missouri, June term, 1897. Etta Courtney (née Hancock), Plaintiff, vs. James S. Blackwell, Defendant. Plaintiff, for her second amended petition, leave of court being first had and obtained, states: That heretofore, to wit, on or about the 12th day of January, 1892, at the county of Boone and state of Missouri, it having been reported to E. C. Clinkscales, then marshal of the city of Columbia, in the state and county aforesaid, that a larceny of

\$30 or upwards had been committed in the dwelling house of one George D. Purinton, in said city, the said Clinkscales was approached by the defendant, who then and there entered into a conversation with said Clinkscales concerning said larceny; and the defendant did then and there, in the presence and hearing of the said E. C. Clinkscales, maliciously, falsely, and wantonly speak and publish of and concerning plaintiff the following false and slanderous words; that is to say: 'Purinton and I have talked that matter all over, and I told him that I knew that girl [meaning the plaintiff] had taken that money the minute I heard of its disappearance; that, everywhere she goes, money disappears. She is an adventuress of the first water, and destined to become a noted crook;' then and there intending to charge and impute, and then and thereby falsely and maliciously charging and imputing, to plaintiff the crime of larceny in a dwelling house as aforesaid, and then and there being so understood by the said E. C. Clinkscales as imputing to and charging the plaintiff with the crime of larceny in a dwelling house as aforesaid,—and that, by reason of said slanderous charge so uttered and published of and concerning plaintiff by the defendant, she sustained damages in the sum of \$25,000, and for which amount she instituted suit in the circuit court of Boone county, Missouri. That while said suit was pending and undetermined, and prior to the institution of this action, and on the 5th day of April, 1892, the defendant fraudulently procured and induced the plaintiff to execute and deliver to him a release, in writing, releasing and acquitting him from any and all liability for the damages sustained by plaintiff by reason of the aforesaid slander so uttered and published by him, and which said release is in words and figures as follows, to wit: 'In the Circuit Court of Boone County, Etta Hancock, Plaintiff, vs. James S. Blackwell, Defendant. Whereas, the plaintiff instituted in the circuit court of Boone county an action against the defendant for damages, charging him with saying of and concerning her that he knew plaintiff had taken money, that money disappears wherever she goes, and that she was an adventuress, and was destined to become a noted crook; and whereas, defendant denies having uttered said words concerning plaintiff: Now, therefore, in consideration of the written retraction this day delivered by defendant to plaintiff, and the sum of \$10 for payment of court costs incurred up to date in said case, the said Etta Hancock by these presents agrees to withdraw said suit, and to give a written order to the clerk of the court for dismissal of the same from the docket, and she further agrees to quit and discharge said Blackwell from all liability for and on account of the charges made in said suit, and by these presents does acquit, discharge, and release said Blackwell from any and all liability for and on account of the words and charges contained in said

suit, and any other words and charges of and concerning the plaintiff up to this date, to the end that all actions and causes of action for words uttered and published heretofore shall be, and the same are hereby, settled, released, and discharged forever, as against said Blackwell, defendant as aforesaid. Witness my hand this 5th day of April, 1892. Etta Hancock. Witness: Mrs. T. J. Hancock.' Plaintiff further states that the defendant induced her to sign said release by his false and fraudulent representations and wrongful conduct; that, several years prior to the date of said release, plaintiff's mother removed from her farm in Charlton county to reside temporarily at Columbia, for the purpose of educating the plaintiff and her sisters at the state university, and to enable the plaintiff to pursue a postgraduate course in said institution, and qualify herself as a teacher; that the plaintiff's father remained upon his farm in Charlton county; that, during part of the time plaintiff was attending the university, defendant was one of the professors thereof, and an instructor of plaintiff; that the family of the plaintiff and that of the defendant, until the time hereinafter indicated, were upon the most friendly and intimate terms; that the defendant professed great friendship for the plaintiff, and that as her teacher she looked to him for advice, and was accustomed to follow his directions, and that he claimed to be a special friend of her family, and plaintiff's mother and sisters, prior to the utterance of the language aforesaid, regarded defendant as a special friend, adviser, and counselor; that the plaintiff's mother, in view of the professed friendship of the defendant for the plaintiff and her family, did not believe that defendant had spoken the slanderous words hereinbefore set out about the plaintiff, and that defendant had great influence over the mother of the plaintiff, to whom he well knew plaintiff looked for advice, and by whom she would be governed in reference to the prosecution of her suit against him for damages for said slander, which was then pending in the circuit court of Boone county; that said defendant, knowing that he was guilty of the utterance of said slander, and intending fraudulently and by means of artifice and undue influence to procure a dismissal of said suit, and a release from the plaintiff of the damages for which he was liable, and well knowing that he had spoken of and concerning the plaintiff the aforesaid false and slanderous words, and had intended to charge, and had been understood as charging, that plaintiff was guilty of larceny, and had given currency to said false and malicious statements about the plaintiff, and that she had been greatly injured thereby, and had a cause of action against him therefor, did, in order to fraudulently induce plaintiff's mother to use her influence with plaintiff to procure the aforesaid release, and in order to secure from plaintiff the settlement and dismissal of said suit, falsely state to plaintiff's mother, to be

communicated to plaintiff, that he had never at any time uttered or spoken the slanderous words above mentioned, or any words of similar import about the plaintiff, and did, with full knowledge that such statements were false, in a most solemn manner, call upon God to strike him dead if he had ever made any such charge against the plaintiff; that he used said expression for the purpose of impressing upon plaintiff the truth of his said utterance, although he well knew at the time that his said statement was false, but he fraudulently intended to make plaintiff believe that the same was true, so as to procure the release aforesaid from her; that, in furtherance of his said fraudulent scheme to procure said release, the defendant did represent to plaintiff's mother that plaintiff's principal witness was a man of disreputable character and could not be relied upon, and that said statement was known to be false at the time by the defendant; that the defendant knew that, in order to accomplish his fraudulent purpose to secure the settlement of said suit without paying to plaintiff any of the damages she had sustained, it was necessary for him to prevent plaintiff from consulting her attorneys, and that said defendant, intending fraudulently to keep her from seeking the advice of her counsel, did falsely represent that they were unreliable and not to be trusted, and that it would not be safe for her to advise with them about said proposed settlement and release, and that it would be best for her interests for said settlement to be made without letting her attorneys know anything about it, and that Judge Alexander Martin was a mutual friend, and not of counsel in the case, and could best advise her as to the proper course to pursue, although the defendant at the time well knew that Judge Martin was his attorney in the said suit; that defendant caused all of his aforesaid false and fraudulent statements to be communicated to the plaintiff; that plaintiff was a young woman wholly unfamiliar with legal methods and procedure, and that this was known to the defendant; that she was induced to believe and did believe defendant's said assertions to be true, and relying upon his statement that he had not spoken the slanderous words, or any slanderous words, about her, and that her principal witness was a disreputable man, she was induced, by reason of the influence which defendant had acquired over her, not to consult her own attorneys, but at defendant's request went to his counsel, without knowing he was defendant's attorney, and that said release was then and there prepared, executed, and delivered by plaintiff; that the ten dollars referred to therein as a consideration therefor was never paid to plaintiff, nor was there any consideration for the same; that defendant knew that plaintiff had not heard him make the statement about her as aforesaid, but that she relied upon others to whom the statement was alleged to have been made, and that plaintiff

would not have executed said release if she had known that defendant had spoken the slanderous words about her as aforesaid, and that defendant well knew this to be true, and for that reason falsely and fraudulently caused her to believe, in the manner and by the means aforesaid, that he was innocent of the charge of having spoken said slanderous words about her; that ten dollars were handed to the plaintiff's mother to pay the costs of said suit upon the dismissal thereof; that afterwards plaintiff learned for the first time that the statements of defendant hereinbefore set out, and in reliance upon which she had executed said release, were false and fraudulent, and so known to the defendant at the time they were made, and were only made to induce her to execute said release, and that thereupon, and before the institution of this suit, to wit, on the 30th day of January, 1893, plaintiff tendered to defendant the said ten dollars, together with interest thereon from the 5th day of April, 1892, and she now brings into court and again tenders to defendant the said sum, together with interest thereon. Wherefore plaintiff prays that the release hereinbefore set out, dated the 5th day of April, 1892, and signed by this plaintiff, be canceled, set aside, vacated, and for naught held, and for all proper relief.

"Plaintiff, for second count of her second amended petition, and for another and further cause of action, states that heretofore, to wit, on or about the 12th day of January, 1892, at the county of Boone and state of Missouri, it having been reported to E. C. Clinkscales, then the marshal of the city of Columbia, in said Boone county and state of Missouri, that a larceny of thirty dollars or upward had been committed in the dwelling house of one George D. Purinton, in said city, he was on the date aforesaid, and at the place aforesaid, approached by the defendant, who then and there entered into a conversation with said Clinkscales touching and concerning said larceny, and did then and there, in the presence and hearing of said E. C. Clinkscales, maliciously, falsely, and wantonly speak and publish of and concerning the plaintiff the following false and slanderous words; that is to say: 'Purinton and I have talked that matter all over, and I told him that I knew that girl [meaning the plaintiff] had taken that money the minute I heard of its disappearance; that, everywhere she goes, money disappears. She is an adventuress of the first water, and destined to become a crook,'—then and there intending to charge and impute, and then and there falsely and maliciously charging and imputing, to plaintiff the crime of larceny in a dwelling house as aforesaid, and being then and there so understood by the said E. C. Clinkscales as imputing to and charging plaintiff with the crime of larceny in a dwelling house as aforesaid, to her damage in the sum of twenty-five thousand dollars; in actual damages in the sum of one thousand dollars, and in exem-

plary or punitive damages in the sum of twenty-four thousand dollars. Plaintiff further alleges that an action was commenced to recover damages upon the cause of action hereinbefore stated within two years after the alleged date of the speaking and publication of the words set out in this petition, and that said action so commenced was pending in the circuit court of Lincoln county, in the state of Missouri, on the 11th day of October, 1894, when a nonsuit was taken in said cause, and that this action was commenced, and the process therein served, on the 15th day of October, 1894, being within one year after said nonsuit was suffered. By reason whereof, plaintiff says she has been damaged in the sum of twenty-five thousand dollars (\$25,000), for which she asks judgment and for costs.

"Answer.

"The defendant comes, and, for his answer to the first count of the plaintiff's second amended petition, denies each and every allegation and averment therein contained, save and except as hereinafter specifically admitted. He admits that on or about the 5th day of April, 1892, pending a former action which the plaintiff had theretofore instituted against him on account of the alleged speaking of the words and charges set forth in said first count, she executed and delivered to him her certain release in writing, therein sought to be set aside, whereby she released and discharged him from all liability for and on account of the alleged speaking of the said words and charges; but he avers and charges that said release was founded upon good and valuable considerations, to wit, the sum of \$10, and a written statement of disavowal, whereby defendant denied the utterance and publication of and concerning the plaintiff of the said words and charges, and disavowed the imputation to her of any guilt or offense implied in said words and charges; and he further avers that the plaintiff then and there accepted and received the aforesaid sum of \$10, and the aforesaid written statement of disavowal by the defendant, as a full and complete consideration for the execution and delivery of said release. For his further answer to said first count of said petition, the defendant avers that, long after the execution and delivery of the said release therein set forth and sought to be set aside, the plaintiff, with full knowledge and information touching the several alleged matters and facts set up in said first count for the setting aside and cancellation of said release, acquiesced in and ratified the same, by then and there, with such knowledge and information as aforesaid, soliciting from the defendant, in connection with one E. C. Clinkscales, his further written statement of exoneration; that defendant, relying upon a full and complete settlement and discharge of any and all causes of action which the plaintiff might have theretofore had against him, did then

and there, on or about the 13th day of April, 1892, at the instance and request of plaintiff, in connection with the said E. C. Clinkscales, execute and deliver to plaintiff his certain further written statement, whereby he exonerated plaintiff from any guilt or offense implied in the words and charges theretofore alleged to have been uttered and circulated against her; and that the plaintiff then and there, with full knowledge and information as aforesaid touching the several alleged matters and facts set forth in the first count of her petition for the avoidance and cancellation of said release, accepted and received the aforesaid written statement of exoneration, and caused the same to be published in the newspaper of the city of Columbia. For another and further answer to said first count of said petition the defendant avers that the plaintiff's supposed cause of action therein set forth to set aside and cancel said release did not accrue within five years next before the institution of this action, or within five years next before the plaintiff obtained leave to institute the same, in this, to wit, that said release was executed and delivered, and thereafter, and more than five years next before the institution of this action to set aside and cancel the same, and more than five years next before the plaintiff obtained leave to institute this action, she well knew, and was fully informed of the several alleged matters and facts set forth in the first count of her petition for the avoidance and cancellation of said release. Wherefore the defendant now pleads and relies upon the lapse of time and the statute of limitations in that behalf enacted in bar of this action.

"For his answer to the second count of plaintiff's second amended petition, the defendant denies each and every allegation and averment therein contained. For his further answer to said second count, the defendant avers that, long after the time of the alleged speaking and publication of the words and charges therein set forth, the plaintiff, for and in consideration of \$10 then and there to her in hand paid by the defendant, and his certain written statement of disavowal, then and there executed and delivered to her, whereby he denied the utterance and publication of the aforesaid words and charges, and disavowed the imputation to plaintiff of any guilt or offense implied in said words, by her certain release in writing, duly executed and delivered to defendant on or about the 5th day of April, 1892, and which is now on file with the original answer in this cause, released, acquitted, and discharged the defendant from all liability for and on account of the matters and things set forth in said second count. Defendant further states that, after the time of the alleged speaking of the words and charges, at the instance and request of the plaintiff he furnished to her his written statements of disavowal and exoneration, which were published to her use in the newspapers of Boone county, and, now hav-

ing fully answered, prays to be dismissed, with his costs.

"Reply.

"Now comes the plaintiff, and, for her replication to the amended answer of the defendant to the first count of her petition, denies each and every allegation in said answer contained. And plaintiff, for her reply to the second count of said amended answer, denies each and every allegation in said count contained."

Upon a trial had on the first count of the petition, on November 11, 1897, the court entered the following decree, setting aside and canceling the release.

"Decree.

"Etta Hancock Courtney, Plaintiff, vs. James S. Blackwell, Defendant. Now on this day comes the plaintiff in person, and by her attorneys, and the defendant comes by his attorneys; and this cause having been heretofore submitted to the court upon the pleadings and proofs on the first count in plaintiff's petition, and by the court taken under advisement, and the court being now fully advised in the premises, doth find the issue for the plaintiff,—that the release signed by the plaintiff and delivered to the defendant, and offered in evidence, was procured by fraud on the part of defendant. It is therefore ordered, adjudged, and decreed by the court that the release set up in the defendant's answer and read in evidence in this cause be, and the same is hereby, annulled, set aside, and for naught held, and that plaintiffs have and recover of defendant all costs of this cause, and have thereof execution. At the request of the defendant the court files the following special findings in this cause, which are in words and figures following, to wit:

"Finding.

"(1) That defendant, in order to induce plaintiff to enter into the same, falsely and fraudulently represented to her and her mother that he had not spoken the slanderous words charged, and that plaintiff, relying upon the truth of such statements, entered into, executed, and delivered such release of her cause of action; that defendant afterwards admitted to plaintiff and others the speaking of the slanderous words. And the court finds as a fact that the representation of defendant, as an inducement to secure the compromise and settlement of the pending suit, that he had not spoken the words charged, was false, and was the controlling inducement that operated upon plaintiff in making the compromise. (2) That the cause of action in the first count of the petition is not barred by the statute of limitations. (3) That there was no such ratification of the settlement and compromise after the discovery of the fraud by plaintiff as to defeat her action to have the same set aside. To which findings of

fact and conclusions of law the defendant excepted at the time."

The cause then proceeded to trial on the second count, resulting in a verdict for plaintiff, upon which, on November 13, 1897, the following judgment was entered:

"Judgment.

"Etta Hancock Courtney, Plaintiff, vs. James Blackwell, Defendant. Now at this day come again the parties by their respective attorneys, as also doth the jury heretofore tried and sworn to try this cause, who, after considering of their verdict, on their oaths do say: 'We, the jury, find for the plaintiff, and assess and award to her as exemplary damages the sum of seven thousand seven hundred and fifty dollars (\$7,750). Wm. Dinwiddie, Foreman;' and the jury are discharged. It is therefore ordered and adjudged by the court that, in conformity with the verdict of the jury herein, the plaintiff have and recover of and from the defendant, James S. Blackwell, the sum of \$7,750, so found as aforesaid for her exemplary damages, together with all costs of this cause, and have thereof execution at 6 per cent."

The statements of disavowal and exoneration referred to in the answer are as follows:

"Statement of Disavowal. Whereas, it has been erroneously circulated and reported that I have uttered and spoken of Miss Etta Hancock certain words reflecting on her character for honesty, to the effect that she had taken money; that, wherever she goes, money disappears; and that she was an adventuress, and was destined to become a noted crook: Now, therefore, I, by this note addressed to all whom it may concern, declare and state that I have never uttered or spoken the words aforesaid of Miss Hancock, and that I have never imputed or intended to impute to her, or to charge her with, the offenses or dishonor implied in said words, and that I do not now impute or charge her with the offenses or dishonor implied in said words. James S. Blackwell."

"An Exoneration. We, the undersigned, hereby exonerate the young lady recently put in trouble on account of an alleged larceny in January, and declare her as innocent of any such charge. E. C. Clinkscales. J. S. Blackwell."

The suit was instituted in October, 1894, upon the same cause of action stated in the second count of the foregoing petition, to which the defendant answered, denying generally the allegations of the petition, and setting up as a defense the release aforesaid set out in the first count of the present petition. To which defense the plaintiff replied, setting up substantially the same facts stated in the first count of the present petition in avoidance thereof. Upon the issues thus formed, the

case was tried as an action at law before a jury, resulting in a verdict and judgment for the plaintiff for \$3,500, from which the defendant appealed to this court, where, on the 8th of June, 1897, the judgment of the circuit court was reversed, and the cause remanded, to be proceeded with in accordance with the opinion therein filed. *Hancock v. Blackwell*, 139 Mo. 440, 41 S. W. 205. In the opinion, delivered by Burgess, J., in banc, and in which all the judges concurred, it was then ruled that: "The plaintiff should not, under the circumstances, be permitted to ignore the release and prosecute her action at law without first having the release set aside by a proceeding in equity for that purpose, either by original bill, or, as the offer to refund the money was made before the commencement of this suit, by amending her petition so as to embrace a count for that purpose. * * * There was evidence tending to show that the release was obtained by fraud, and there is nothing disclosed by the record which will preclude plaintiff from proceeding in equity to set it aside, should the evidence be found to be sufficient by the court upon the trial of that issue." Upon the return of the case to the circuit court, the plaintiff amended her petition as indicated in the opinion, the pleadings assumed their present form, and the case was proceeded with as directed, as appears from the record herein set out. The errors complained of for reversal will be noticed in the order of their assignment.

First Count.

1. The facts disclosed by the evidence sustain the material allegations of the first count of the petition, and that the evidence supports the finding of the chancellor thereon is not disputed; but it is contended by counsel for defendant that "the facts set forth in the special findings of the trial court, viz. that the defendant falsely denied having made the slanderous charges, and thereby induced the plaintiff to dismiss her original suit and enter into the settlement, are not sufficient to justify the setting aside of the release." The argument in support of this contention is introduced by the statement that, "under the special finding of facts, all questions of undue influence, and as to the various grounds of fraud, such as the alleged concealment by defendant of the fact that Judge Martin was his attorney, and the alleged misrepresentations as to the character of plaintiff's witnesses and attorneys, are eliminated, and a single question of law presented, namely, as to whether, under the circumstances, the defendant's denial of the utterance of the slanderous words was fraudulent." This elimination, essential to the argument of counsel in support of their contention, is unwarranted; for it is well settled law that in equity cases, when the evidence is before us, we will review it, and determine for ourselves the correctness of the findings, and arrive at our own conclusions upon the facts in evidence. *Blount*

51 S.W.—43

v. Spratt, 113 Mo. 48, 29 S. W. 967; *Parker v. Vanhoozer*, 142 Mo. 621, 44 S. W. 728; *Hartley v. Hartley*, 143 Mo. 216, 44 S. W. 1044. The proposition of law upon which the argument is based is that "the plaintiff, having brought an action against the defendant for the publication of this slander, knew what she could establish by proof on this subject, and hence cannot now complain of his denial of the publication as fraudulent." The deduction drawn in this proposition is a palpable non sequitur. It does not follow, because the plaintiff had brought suit, that she knew what she could establish by proof. No one knows or can know beforehand what he will be able to establish by proof when the time and necessity for making it shall come, and when the knowledge of the facts to be proven rests in the mind and conscience of others. It may be conceded that if the plaintiff had known the real facts concerning the publication of this slander, and defendant's connection therewith, or if she had stood upon an equal footing with defendant, with equal opportunities of obtaining such knowledge, and in a position to deal with him at arm's length in regard to the matter, then she could not be heard to complain of his misrepresentation, for then she could not say that she had relied upon those representations in making the release; and the authorities cited by counsel in support of their proposition would be in point. But such was not the case. She did not know the real facts. She had simply been told by others that the defendant had uttered the slander. From the very nature of the case, she could not have had equal opportunity with the defendant in obtaining such knowledge, and she was not in a position to deal with him in regard to the matter at arm's length, upon an equal footing. In fact, the defendant had, by undue influence, totally disarmed her, when she was called upon to sign the malignant instrument, for which she received, not an exoneration from the foul slander which he knew he had uttered against her, but a false disavowal, exonerating himself from the slander. The position she was in is briefly but fairly stated in the following extract, slightly modified, from the brief of counsel for plaintiff: "Defendant had been plaintiff's teacher. Their families were upon the most intimate terms. When she first heard of the slanderous charge against her, she immediately went to the man to whom she looked for advice and counsel, and sought defendant in his class room. She proposed to send for her father. He advised against this, and told her that he would protect and assist her in the matter. Plaintiff's mother had implicit confidence in the honesty and good faith of defendant. He seems to have acquired unbounded influence over her. He enlisted the mother in procuring a compromise of the daughter's suit, and she went so far as to inform plaintiff that said plaintiff would have to leave her home unless this settlement was effected. Notwithstanding he well knew at the time that he had uttered

the slanderous words of which she complained, and had made the false accusation against her, yet, in order to induce her to sign a release of her cause of action, and to bring about a compromise, he asserted to her and her mother that he had never spoken those words or made the charge, and in the most solemn manner called upon God to witness the truth of said statement. Plaintiff was invited, through defendant's efforts, to the home of his attorney; and the release was obtained from her in the absence of, and without opportunity for consultation with, her counsel, she understanding from defendant (so she testifies) that she was to be advised by a disinterested lawyer. It is clearly shown that she was prevented by defendant's efforts from conferring with the attorneys who were representing her in the suit then pending. Plaintiff did not hear him speak the slanderous words, and it was further represented to her that the witness by whom she expected to prove the same was not reliable. She was induced by defendant under these circumstances to sign the decree." In *Busian v. Railway Co.*, 56 Wis. 325, 14 N. W. 452, it was said: "We think no release obtained from the plaintiff, after an action has been commenced and counsel employed, in the absence of the plaintiff's counsel, and without his consent or knowledge, should bind the party, unless the utmost good faith is shown on the part of the defendant in obtaining the same." This is doubtless wholesome doctrine. At all events, a release without adequate consideration, procured, as this one was, by misrepresentations upon which plaintiff relied, after suit brought, in the absence of plaintiff's counsel, in the manner and by the means used for that purpose, as shown by the evidence, ought not to stand for a moment in a court of equity. *Hancock v. Blackwell*, 139 Mo. 455, 41 S. W. 205; *Bell v. Campbell*, 123 Mo. 15, 25 S. W. 359; *Berlien v. Bieler*, 96 Mo. 491, 9 S. W. 916.

2. It appears from the evidence that the only consideration plaintiff received for the release and dismissal of her suit was the \$10 given to her mother to pay the costs, and the paper called a "disavowal," which was not to be published, and was not published; but it seems the understanding was that the defendant was to give her another paper, which was to be published, and in pursuance thereof a few days afterwards he did give her the paper called an "exoneration," which was published. Counsel for defendant contend that by the acceptance of this paper she affirmed the release, and ought not now to be permitted to complain of it because in the meantime she had heard some admissions of the defendant as to his utterance of the slander that shook her confidence in the integrity of his disavowal, as she admits in her testimony. This point was strenuously urged upon our consideration when the case was here before. We were not then impressed with the force of it, nor are we now. When

this paper was given her, she was still laboring under the same malign influences that operated on her when she signed the release. She had had no opportunity to consult with her counsel or advise with any disinterested friend. She was on the eve of her departure to the home of her father, where she might hope for sound advice. As she says, she "didn't have time to think." This unconsidered act of the plaintiff while she was still helplessly struggling in the web of infamy which the defendant had wound around her character, and subject to the same influences which had enabled him to procure the release, ought not to, and cannot, have such an effect.

3. The release was executed on the 5th of April, 1892. The amended petition upon which the case was tried, and hereinbefore set out, was filed on the 1st of October, 1897. The petition thereby amended was filed on the 13th of October, 1894. The answer of the defendant thereto, in which he set up the release as a defense to plaintiff's action, was filed at the November term, 1894. In due time thereafter, and before the 13th of January, 1895, the plaintiff filed her replication thereto, setting up the same facts contained in the first count of the present petition in avoidance of the release; and it was upon the issues thus framed that the case was first tried and came to this court. Upon this state of facts, it is contended that plaintiff's action to set aside the release as set up in this count of the amended petition is barred by the statute of limitations. This, of course, would be true, if this amended petition "set up a new claim not before asserted." *Buel v. Transfer Co.*, 45 Mo. 562. But this amended petition does not "set up a new claim not before asserted." It sets up identically the same claim that was set up in this suit by the replication filed in January, 1895, and which was therein asserted for the purpose of obtaining practically the same relief, upon the same state of facts. The only variation in plaintiff's claim is that prior to the amendment it was asserted in the replication, and since the amendment it has been asserted in the petition. But it has at all times been continuously asserted in the case by the plaintiff ever since the replication of January, 1895, was filed. It was because this same cause of action was not properly pleaded, and therefore not properly tried, that the former judgment was reversed. In remanding the case, we said this mistake might be corrected by amending the petition so as to embrace the matter set up in the replication in a separate count of the petition, as was done. Of course, this leave would not have been given if we had thought that the effect of the amendment would be to introduce a new cause of action into the case. We did not think so then, and, notwithstanding the able but technical argument of the learned counsel, we do not think so now. To so hold, we would have to leave out of view one of the

principal objects of allowing amendments, which is to prevent the running of the statute of limitations, and also to ignore the statutory injunction requiring that, in every stage of an action, errors that do not affect the substantial rights of the adverse party, are to be disregarded. We find no error in the record for which the decree should be set aside.

Second Count.

(a) It is next complained that the court committed error in forcing the defendant to trial on the second count pending the defendant's motion for a new trial on the first count of the petition, and in excluding the release as a defense to the action on the second count. It appears from the record that the decree on the first count was entered on the 11th of November, 1897, and on the same day the defendant filed his motion for a new trial, and on the same day, the cause coming on to be heard on the second count, "before the introduction of any testimony on this branch of the case, the defendant interposed objection to the introduction of any evidence in the case, or to any proceedings whatever in the case, until there has been a final disposition of the case on the first count, both in this court and in the appellate court." The objection was overruled. Defendant excepted, and the trial proceeded to judgment on the second count, on which judgment was entered on the 13th of November, 1897, as hereinbefore stated; and on the same day the defendant filed a second motion for new trial upon both counts of the petition, setting up therein the same grounds for a new trial on the first count as in the first motion, and other grounds for a new trial on the second count. These motions coming on to be heard on the 17th of November, 1897, both of them were then overruled, and defendant perfected his appeal. Under the Code, separate causes of action, whether legal or equitable, arising out of the same transaction, or transactions connected with the same subject of action, affecting all the parties to the action, and not requiring different places of trial, may be united in the same petition, if separately stated with the relief sought for each cause of action, so that they may be intelligibly distinguished. Rev. St. 1889, § 2040. When so united, separate trials may be had for each cause of action at the same or different terms of the court, as circumstances may require. But "the judgment upon each separate finding shall await the trial of all the issues." Id. § 2135. If the course marked out by the statute had been literally followed in this case, this point would not have been in the case; for there would then have been no occasion or place for the first motion for new trial, and the whole case would have been covered, as it was intended it should be, and was in fact, by the second motion for a new trial. The evident purpose of the statute is, while providing for separate trials on each

count, and separate findings and judgment or decrees, if need be, that they shall all be entered at the same time; and when so entered they constitute together the judgment, which is "a final determination of the right of the parties in the action" (Id. § 2206), and is the judgment which, for good cause, may be set aside, and a new trial granted (section 2240), and from which an appeal may be taken (section 2246). The statute does not contemplate a dismemberment of the action at any stage of the proceedings, whereby a part of it might be brought to this court and be pending here, while the other part of it was left pending in the circuit court. On the contrary, its obvious meaning is that the whole case shall be disposed of in the trial court before it is in condition for appeal. The only error we find under this assignment is the premature entry of the decree, and, as this was in no way prejudicial to the rights of the defendant, he ought not to be heard to complain of it. Of course, the court did not err in refusing to permit the release to be given in evidence before the jury on the second count. With the issues to be tried by the jury on that count the release had nothing to do. It had already been taken out of those issues, and had been tried by the proper tribunal; and if any error had been committed in that trial, prejudicial to the defendant's rights, he would have had the full benefit of it on this appeal, and plaintiff's judgment would for such error have been reversed.

(b) It is next assigned as error that the court permitted the witness E. C. Clinkscales to testify to the substance of a conversation between himself and Purinton when the defendant was not present. In the course of the examination of the witness Clinkscales for the plaintiff, he was asked, "Who did you get the information from, that induced you to think that the plaintiff was capable of doing a thing like that?" and he answered, "From Prof. Purinton and Prof. Blackwell." On cross-examination of the witness, the following question was asked, and answer given: "Q. You say you got your information from Prof. Purinton and Prof. Blackwell about this matter? A. Yes, sir. Q. Didn't you testify this a while ago? That when Prof. Blackwell came up to you on the street and began talking about this matter, didn't you say that you told him that you already had been thinking about getting this young lady off in a room, so that you could examine her? A. Yes, sir; I did." After which the redirect examination proceeded as follows: "Q. You had before that had a conversation with Prof. Purinton about this matter, had you? A. Yes, sir; and Prof. Purinton had told me all what Prof. Blackwell had said before that, and I knew what he had said to Prof. Purinton. (To this answer the defendant at the time objected for the reason that he was undertaking to detail a conversation with Purinton when the defendant was not present, and moved the court that the answer be stricken

from the record. Which objection the court overruled, and to the action of the court in overruling his objection and motion to strike out this answer the defendant at the time saved his exception. The court said this witness could state from whom he got the information, and that he had got it, but not what Prof. Purinton said to him regarding it, as that was incompetent and would be stricken out.) Q. Did you get that information from any other parties than Profs. Blackwell and Purinton? A. No, sir; I never heard anybody else say anything against her." This was the end of this evidence, and it is obvious upon its face that the court did not permit the witness to detail the conversation between himself and Purinton, but, on the contrary, that everything therein contained, beyond the giving of the source of information upon which he had predicated his belief, was stricken out.

(c) It is next contended the court committed error in permitting the plaintiff to testify, over defendant's objections, that she had been refused employment as a teacher on account of this charge. The only specific testimony that she gave on this subject was: "I applied for two schools, and went home, and was told afterwards that was the reason I didn't get them. * * * It was on account of these reports about me. * * * One of the directors told me that." The inquiry was not prosecuted any further, and no special damage was shown or attempted to be shown by reason of the fact testified to; and as no damage was allowed by the jury on this account, or on account of any special damage, it is not seen how the defendant has been prejudiced by this evidence.

(d) The defendant having offered the release as evidence before the jury, the court committed no error in instructing the jury that the same had been set aside by the court, and was no bar to the plaintiff's recovery. The other instructions criticised are the same as those given and approved when the case was here before, and, although again criticised, we are still of the opinion that the instructions presented the case fully and fairly to the jury.

(e) On the question of damages the court instructed the jury as follows: "(5) If the jury find for the plaintiff, in estimating her damages they are not confined to the mental anguish endured, and the injury, if any, to her character, but, if they find that the words charged were maliciously and wantonly uttered, they may, in addition thereto, assess against the defendant, by way of punishment to him and as an example to others, such exemplary damages as the jury, in their judgment, under all the evidence in the case, believe the defendant ought to pay; and in estimating such damages the jury may consider the pecuniary circumstances of the defendant, and the position and influence of defendant in society, provided that the amount of damages assessed by the jury shall in no

event exceed the amount claimed by plaintiff in her petition." "(7) If the jury find for the plaintiff, and further find that plaintiff is entitled to exemplary damages under the evidence in the case, their verdict should be in the following form: 'We, the jury, find for the plaintiff, and assess and award to her as exemplary damages the sum of — dollars.'" The jury did find for the plaintiff, and in so doing found that the defendant had published the slander with which he was charged; and upon that finding the plaintiff was entitled to have actual damages assessed in her favor, the slander being of that character from which the law implies such damages. They also found, as is apparent on the face of the verdict, when read in connection with the instructions, that the slander had been wantonly and maliciously published; and it was also within their province to assess exemplary damages therefor in her favor. So that there was in fact a basis under the instructions for the assessment of both actual and exemplary damages. But, by some mischance, in the form of the verdict which was given to the jury no place was left therein for the separate assessment of the actual damages, and the whole was returned in a lump sum, according to the form, as exemplary damages. This was an error of form, and not of substance, and as, under the facts and circumstances of the case, the assessment was reasonable and just, we do not think the judgment ought to be reversed for this error. Finding no error in the record for which the judgment of the circuit court should be reversed, the same is affirmed.

GANTT, C. J., and SHERWOOD and MARSHALL, JJ., concur in the opinion. ROBINSON, J., dissents. VALLIANT, J., also concurs in the opinion, except paragraph 3, to which he dissents. BURGESS, J., absent.

MARSHALL, J. I concur in the foregoing opinion, and believe it is the only proper conclusion under the circumstances disclosed by this record, especially in view of the opinion in this case on the former appeal (41 S. W. 205); but, in my judgment, that opinion was erroneous in holding that the issue of fraud in the procurement of the release could not be raised in a reply to the answer setting up the release. In my opinion, release is an affirmative defense, and, when pleaded by a defendant, the plaintiff can meet it in the reply by a plea of fraud in its procurement; and this is the rule prescribed by sections 2042, 2052, Rev. St. 1889. The plaintiff may anticipate an affirmative defense of release by a count in his petition setting out the fraud in its procurement and asking its cancellation, but should not be required to do so; nor should a plaintiff be reverted to a separate bill in equity for such purpose, for the whole question can logically be determined, when the release is pleaded

by the defendant, if it is pleaded, by an issue of fraud raised by the reply, and tried by the chancellor, before the action at law is tried. For these reasons, I think the opinion on former appeal was incorrect, in not so holding, and in requiring the plaintiff to resort to a proceeding in equity or to amend her petition.

GANTT, C. J., and SHERWOOD and BRACE, JJ., concur herein.

VALLIANT, J. (dissenting). The opinion of the majority of the court holds that the suit in equity set up in the first count of the amended petition is not barred by the statute of limitations, because the same facts were stated in a replication addressed to the answer to the original petition, which replication was filed before the cause was barred, but which on the former appeal was by this court (41 S. W. 205) held to be ineffectual because it was a tender of an issue as one of the issues in a law suit to be tried by a jury. I respectfully dissent from the proposition that the equity count is not barred. In the original petition there was but one count, which was an action at law for slander. In the answer it was pleaded that plaintiff had, for a valid consideration, executed a release which barred her action. The plaintiff met that answer by a reply stating facts which indicated that the release had been obtained by fraud, which reply concluded as follows: "Wherefore plaintiff says that the said release is fraudulent, void, and of no effect, and constitutes no legal defense or bar to plaintiff's action." Defendant filed a motion to strike out the reply upon the ground, among others, "that it attempts to raise issues triable solely in a court of equity." The court overruled that motion. And when the cause came to trial defendant demanded that that issue be tried by the court, but the court refused, and submitted that, with the other issues, to the jury. Thus, it will be seen that the plaintiff never intended to plead those facts in such a manner as to obtain the judgment of a court of equity upon them. The attention of her counsel was called to it by the defendant in his motion, and in his request for a trial by the court, but they refused to heed it, and insisted upon adhering only to a verdict of a jury. The trial judge adopted their view, the cause was tried by a jury, and they got what they contended for in that way. This is not a case where they failed to state their cause in form sufficient to accomplish what they intended by their plea. They did not intend to present an issue to be tried by the chancellor. On the contrary, when the defendant demanded that they should do so, they resisted it. There was no inadvertence, oversight, or accident. They knew just what they wanted, and refused to take anything else. And, when the cause was here on the former appeal, counsel for plaintiff insisted that the facts stated in the

replication made the release void, and required no rescission by a court of equity. *Hancock v. Blackwell*, 139 Mo. 440, 41 S. W. 205. Now, after allowing the whole period prescribed by the statute of limitations to elapse while they were trying to obtain what they had no right to (that is, a rescission of a contract by a verdict of a jury), they insist that the hands of that clock must be turned back, and they be allowed to do what they not only neglected but refused to do while the court of equity was yet open to them. On the former appeal this court decided, and rightly so, that that reply was of no avail, and the learned judge who wrote the opinion made it clear that the plaintiff's relief from that contract of release could be obtained only in a court of equity. It was not there decided that the plaintiff could not, in a reply, invoke the equitable relief which she afterwards sought by an amendment to her petition. It was only decided that the reply, as formed, tendered an issue in a law case to be tried by a jury, and that that could not be done. If that reply had been in proper shape,—in effect, a bill in equity praying a rescission of the contract,—it would have been entirely valid, under our system of code pleading. It is insisted that amendments are allowed for the purpose of preventing a bar of the statute of limitations, and cases are cited to support that proposition. That means that the statement of the cause of action pending may be so amended, but not that a new cause of action may be added to another already pending, and give the new suit the date of the old one. Amending a petition by adding a new and different cause of action, leaving the original action standing as it was, is in no sense an amendment of the pending cause. Such so-called amendments are not infrequent practice, but I know no authority for it.

Upon the argument it was contended that on the former appeal this court adjudged that the petition might be amended as it now appears, and that in so amending it the plaintiff was only following the directions of this court, and that, therefore, the cause is not barred. But that is a misconception of the decision. The question of whether or not an equitable suit to be thereafter brought to set aside the release was barred by the statute of limitations was not before the court, and could not have been decided. The facts now presented showing the suit in equity to be barred were not in the record in that case. It is not there decided that the plaintiff could amend her petition in this way. There is at the close of the second paragraph a reference to the subject, but it is only inferential, and to the effect that plaintiff could not ignore the release until a court of equity had decreed its rescission, either through an original proceeding to accomplish that end, or by adding a new count in the shape of an equity bill to her original petition; citing in support of the proposition *Blair v. Railroad Co.*, 89 Mo. 383, 1 S. W. 350, *Homuth v. Railroad*

Co., 129 Mo. 629, 31 S. W. 903, and Och v. Railway Co., 130 Mo. 27, 31 S. W. 962, all of which cases cited sustain the proposition decided,—that is, that the release is a bar until rescinded by a decree of a court of equity,—but neither of them decides that a petition can be amended by adding a new cause of action, by way of an additional count, to the original suit. There is a mere suggestion to that effect in Och v. Railroad Co., but it was a mere suggestion, as in the opinion on the first appeal in this case. In the third paragraph of that opinion it is said, "There is nothing disclosed by the record which will preclude the plaintiff from proceeding in equity to set it [the release] aside, should the evidence be found sufficient," etc. These were mere suggestions, and they pointed as much towards an original suit as they did to an amendment of the old. There was no consideration given to the question of whether or not the old petition could be thus amended. If a separate suit in equity had been adopted, undoubtedly, under the facts presented, it would have been barred by the statute. Even admitting, for the argument, that there is any authority for adding another cause of action to a petition, the new cause so added is in no better condition, so far as the statute of limitations is concerned, than an entirely new suit filed. The plaintiff cannot claim to have been misled to her disadvantage by the former opinion in this case. When that decision was rendered, her right to a suit in equity was already barred, and nothing then said could have revived it. The decision in that case was right on every point. The plaintiff has simply insisted on trying her case in a certain way, and, after the years have passed, she finds that she has taken the wrong course, and it is now too late to begin again. In my opinion, the judgment of the circuit court ought to be reversed.

LAWSON v. MILLS.

(Supreme Court of Missouri, Division No. 1.
May 23, 1899.)

APPEAL—TRANSCRIPT OF RECORD—BILL OF EXCEPTIONS—FILING.

1. Rev. St. 1889, § 2253, requiring appellant to file a perfect transcript of the record and proceedings in the cause, or, in lieu thereof, a certified copy of the record entry of the judgment or decree appealed from, is not complied with by filing a bill of exceptions, without a statement of the record and proceedings in the cause, or any certified copy of the record showing that the bill of exceptions was ever filed.

2. Where the bill of exceptions was filed after the trial term, the transcript of the record on appeal must show that the time for filing it was extended, and a recital to that effect in the bill of exceptions is insufficient.

Appeal from circuit court, Dade county; D. P. Stratton, Judge.

Action by Charles Lawson against James W. Mills. There was a judgment for plaintiff, and defendant appeals. Dismissed.

W. Cloud, for appellant. Wm. B. Skinner and Henry Brumback, for respondent.

MARSHALL, J. This cause is not before the court in such shape as to entitle the appellant to have the judgment of the circuit court reviewed. There is no "perfect transcript of the record and proceedings in the cause, or, in lieu of such transcript, a certified copy of the record entry of the judgment, order, or decree appealed from," before the court, as is required by section 2253, Rev. St. 1889. A certified copy of what seems to have been a bill of exceptions filed in the trial court has been filed in this court, but it is in no sense a perfect transcript. In fact, there is nothing before this court showing any record entry in the cause whatever; nothing to show the institution of the action, the issuance of summons, or the manner of executing it; no petition, answer, or other pleading; a trial, judgment, motion for new trial; the filing of a bill of exceptions, nor the granting of an appeal. The paper here filed is purely and simply a bill of exceptions in proper form to preserve matters of exception, and make them part of the record, but there is no certified copy of any order of record showing that the bill of exceptions was ever filed, and this is absolutely necessary, as the bill of exceptions cannot prove itself. State v. Harris, 121 Mo. 445, 26 S. W. 558; Walser v. Wear, 128 Mo., loc. cit. 653, 31 S. W. 38. The bill of exceptions appears to have been filed after the term when the matters excepted to occurred, and there is no order of record showing that the trial court extended the time for filing the bill of exceptions beyond the term, which is a necessary requisite. The recitals to that effect in the bill of exceptions are not sufficient. State v. Ryan, 120 Mo. 88, 22 S. W. 486, and 25 S. W. 351; Nichols v. Stevens, 123 Mo., loc. cit. 119, 25 S. W. 584, and 27 S. W. 613. The appellant therefore has wholly failed to comply with the provisions of section 2253, Rev. St. 1889. He has also failed to comply with rules 11 (31 S. W. v.), 12, and 13 (16 S. W. vi.) of this court. No abstract of any kind has been filed in this court. What purports to be a statement and brief has been filed, presumably to comply with section 2301, Rev. St. 1889, but even this is not "a clear and concise statement of the case." In this condition of the record the appeal must be dismissed. Walser v. Wear, 128 Mo. 652, 31 S. W. 37; Halstead v. Stone (Mo. Sup.) 49 S. W. 850. It is so ordered. All concur.

BRISTOL v. FISCHER et al.

(Supreme Court of Missouri, Division No. 2.
June 15, 1899.)

SUPREME COURT—JURISDICTION.

The supreme court has no jurisdiction of an appeal in certiorari proceedings to review the action of the commissioners on charitable insti-

tutions of the city of St. Louis in discharging an officer of such an institution.

Appeal from St. Louis circuit court; Leroy B. Valliant, Judge.

Petition for certiorari by Isaac S. Bristol against Martha E. Fischel and others, as commissioners on charitable institutions of the city of St. Louis. From a judgment of the St. Louis circuit court for petitioner, defendants appeal. Transferred.

B. Schnurmacher and O. C. Allen, for appellants. Chester H. Krum, for respondent.

SHERWOOD, J. Isaac S. Bristol was the superintendent of the House of Refuge. The appellants constitute the board of commissioners on charitable institutions of the city of St. Louis. Acting in that capacity, and having authority of law so to do, upon charges preferred, etc., they removed Bristol from his office aforesaid, whereupon the St. Louis circuit court brought up before it by certiorari the proceedings of the commissioners, and, having done so, quashed such proceedings. The facts aforesaid give this court no jurisdiction over this cause, hence we order it transferred to the St. Louis court of appeals. All concur.

CARLIN v. WOLFF et al.

(Supreme Court of Missouri, Division No. 2.
June 15, 1899.)

INJUNCTION—BILL OF EXCEPTIONS—EVIDENCE—ENJOINING OBSTRUCTION OF HIGHWAY.

1. Injunction lies only for a threatened wrong for which no adequate legal remedy is afforded, and a court of equity will not issue an injunction to prevent the performance of an act already consummated.

2. The attachment of a plat, which was in evidence, and which is referred to in a bill of exceptions as an exhibit, to the bill of exceptions, is a sufficient compliance with Rev. St. 1889, § 2304, which provides that evidence shall be incorporated in the bill of exceptions.

3. A court of equity will not grant an injunction to prevent the obstruction of a highway, on vague, uncertain, and contradictory evidence.

Appeal from circuit court, Cole county; D. W. Shackelford, Judge.

Petition by William Carlin against Hermann Wolff and others for an injunction. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Silver & Brown, for appellant. Pope & Belch, for respondents.

SHERWOOD, J. Injunction to restrain defendants, and chiefly defendant Hermann, from building his fence, and thereby obstructing a certain alley in the immediate rear of plaintiff's premises, situate in that certain and uncertain locality known and unknown as the "Lower Jefferson Addition" to the city of Jefferson. In addition to injunctive relief, the petition prays for an assessment of damages as compensation for obstructing the alley aforesaid, which it is char-

ged denied plaintiff ingress to and egress from the rear end of his lot. The answer of Hermann denies having ever obstructed the alley with his fence; but states that "the matters complained of, and which plaintiff now seeks to enjoin, long since happened and were completed, and that this court cannot restrain him from doing what has already been done." There was no reply filed. The answer of the other defendants was, in effect, a general denial and a disclaimer. Upon hearing had, the court found the issues for defendants, and gave judgment accordingly:

1. The evidence shows that defendant Fred Wolff and Waldemar Wolff, Hermann's sons, were prosecuted for obstructing the litigated alley, and on trial, which occurred on November 26, 1895, they went acquit of the charge, and that two days thereafter, to wit, November 28th, the fence was finished. Now, the summons issued and was served in this cause on the same day the petition was filed, to wit, November 30, 1895, which was two days after the fence was completed. More than that, the answer alleging the completion of the fence went undenied, and so must be taken as true; and it is wholly immaterial whether the fence in question was completed before or after suit brought, since an injunction, if granted, could not have any retroactive effect on work being done and incomplete when suit brought, but complete when answer filed. It is familiar and well-settled law that a court of equity will not attempt to restrain the doing of any work which has already been accomplished, and for obvious reasons. 10 Am. & Eng. Enc. Law, p. 783, and cases cited; 1 High, Inj. (3d Ed.) § 23, and cases cited,—among them, *Owen v. Ford*, 49 Mo. 486. This feature is alone decisive of the affirmance of the judgment rendered.

2. It is asserted by plaintiff's counsel that no objection was made to the plat when offered in evidence. This assertion is flatly contradicted by the bill of exceptions brought to this court at the instance and on the motion of plaintiff's counsel, which bill of exceptions, on page 41 thereof, recites: "Mr. Silver: I now offer a certified copy, or, rather, the original plat book. I offer the original plat of Lower Jefferson addition,—I mean the record of the plat of Lower Jefferson addition, as contained in the Cole County Plat Book, on page 16. Mr. Pope: I object to that, because it is not executed and acknowledged as required by the law for the laying off of towns and additions of towns. It does not purport to have been acknowledged; nor is there anything about the record to show upon what piece of land it is situated, or where it begins or where it ends, or any matter by which it could be identified." Such misstatements by counsel, of the record, are indefensible. But the plat is not incorporated in the bill of exceptions. Under the provisions of section 2304, Rev. St. 1889, the only things that need not be incorporated in the bill of exceptions are the motions for new

trial, in arrest, and the instructions; and the bill of exceptions, in such case must contain a direction to the clerk to copy the same, and the same must be so copied. Here the bill of exceptions recites, "Said plat offered in evidence is in words and figures as follows, as appears from same attached to this bill of exceptions, and marked 'Exhibit A.'" Such a reference does not, in strictness, incorporate the evidence in the cause, nor any portion thereof thus referred to, as in this regard the old rule respecting the necessity of the evidence being incorporated in the bill of exceptions still prevails, unaffected by the emendations made by the act of 1885 in section 3776, Rev. St. 1879, now section 2304 aforesaid. *State v. Griffin*, 98 Mo. 672, 12 S. W. 358, and other cases. But the strict letter of the statute has been so far relaxed as to make valid such a reference as above to documentary evidence. *Tipton v. Renner*, 105 Mo. 1, 16 S. W. 608. But, taking the bill of exceptions as all right and regular in the respect mentioned, still this avails plaintiff nothing, and for these reasons: The so-called plat does not comply with the law in any particular, to wit: It is not acknowledged by any one, nor does it appear on what piece of land it is supposedly situate, to wit, as to section, township, and range; nor does it describe the ground reserved for streets and alleys by boundaries, course, and extent, as required by sections 7309, 7312, Rev. St. 1889. Moreover, the testimony of those who have attempted to survey the locus in quo is vexatiously indefinite and unsatisfactory. Of two surveyors who attempted to survey the ground in dispute, one made it out that the alley was almost entirely obstructed by the fence; the other, that it was not obstructed at all. No wonder that the lower court, confronted with such contradictions, refused to enjoin defendants, because a court of equity does not grant injunctive relief in the circumstances related, except in a very plain case. *Elliott, Roads & S.* 496; 1 High, Inj. (3d Ed.) §§ 886, 887; 2 Story, Eq. Jur. (13th Ed.) pp. 227, 228. For these reasons we affirm the judgment. All concur.

STATE ex rel. BURNHAM et al. v. HICKMAN et al.

(Supreme Court of Missouri, Division No. 1.
May 23, 1899.)

LIMITATIONS — ATTACHMENT — PRIORITIES — PROCEEDS — LACHES — PARTIES — SHERIFF.

1. The three-years limitations for the lien of a judgment provided by Rev. St. 1880, § 6012, does not apply to funds in court, and hence does not run against attaching creditors for failure to move the court to order distribution of the proceeds of the attached property in custodia legis.

2. The rule that equity will reward the diligent does not apply to attachments of unequal priority.

3. Laches in moving for a distribution of proceeds in court cannot be imputed to one attach-

ing creditor, whereby another acquires priority over him.

4. In a suit by subsequent attaching creditors to establish the priorities of their liens, the court cannot hold that prior attaching creditors, not parties to the suit, have lost their liens.

5. A sheriff holding the proceeds of an attachment sale cannot be adjudged guilty of a wrong for not paying the claim of an attaching creditor until the court orders him to pay, and he refuses.

Case certified from circuit court, Jackson county; John W. Henry, Judge.

Action by the state, on the relation of James K. Burnham and others, against W. T. Hickman and others. There was a judgment of the Kansas City court of appeals reversing a judgment for defendants, and the judgment was certified to the supreme court. Reversed.

Karnes, Hagerman & Kranthoff, for appellants. Lathrop, Morrow, Fox & Moore, for respondents.

MARSHALL, J. 1. This case was transferred to this court by the Kansas City court of appeals on account of one of the judges of that court deeming the opinion rendered therein by that court in conflict with the cases of *State v. Devitt*, 107 Mo. 573, 17 S. W. 800, *Milburn v. Gilman*, 11 Mo. 64, *Melcher v. Scruggs*, 72 Mo. 406, and *Howard v. Clark*, 43 Mo. 344, decided by this court, and *State v. Spencer*, 30 Mo. App. 407, decided by the Kansas City court of appeals. Under section 6 of the amendment of 1884 to article 6 of the constitution, this court is required to "rehear and determine" this case "as in case of jurisdiction obtained by ordinary appellate process," notwithstanding the case would not otherwise fall within the jurisdiction of this court. The purpose of this provision was to insure uniformity of decision between the courts of appeals and this court and between the courts of appeals between themselves.

2. Briefly stated, the facts disclosed by this record are these: On the 24th of October, 1887, nine creditors sued out attachments against their common debtor, Max Blank, and secured priorities as follows: (1) Isadore Schwartz, \$2,200; (2) Mary Samter, \$508; (3) Barton Bros., \$742.12; (4) J. L. Levin, \$728.15; (5) O. Kriesman, \$410.12; (6) W. B. Grimes Dry-Goods Company, \$1,496.02; (7) Gallagher et al., \$220; (8) L. Feder, \$750; (9) Burnham, Hanna, Munger Co. (relators herein), \$728.82. Under these attachment writs, the sheriff, Hickman, levied on the debtor's stock of merchandise, and under order of court sold the same on November 29, 1887, realizing therefor \$5,333. Before the return day of the writs, to wit, on December 5, 1887, the debtor, Blank, confessed judgment in favor of Schwartz, and also in favor of Samter, in the amount of their claims. No further proceedings were taken by these two creditors towards sustaining their attachments. The other attaching creditors reduced their claims to judgment. On the 10th of March, 1888, Schwartz moved the court for an order on the sheriff to pay his judgment

out of the proceeds of the sale of the attached property. While this motion was pending, to wit, on June 20, 1888, the relators, whose attachment lien was last in order of priority, instituted a suit in equity against Blank, Schwartz, Samter, and the sheriff, seeking to be substituted in order of priority to Schwartz and Samter. The sheriff was served in this case on July 17, 1888. On the 23d of July, 1888, the circuit court ordered the sheriff to pay Schwartz the amount of his judgment, which the sheriff did. The sheriff did not set up in his answer in the suit in equity that he had paid the money to Schwartz under the order of July 23, 1888, and the court, on the 3d of December, 1890, found for the plaintiffs, and ordered the liens of Schwartz and Samter postponed to that of the plaintiffs. The case was appealed to the Kansas City court of appeals, where the judgment of the circuit court was affirmed (49 Mo. App. 56), the decision being put on the ground that the acceptance of the judgments by confession was an abandonment of the attachments, and consequently a loss of their priority of lien by Schwartz and Samter. In the meantime, on August 6, 1888, Samter had moved the circuit court for an order on the sheriff to pay her judgment out of the proceeds of the attachment sale, but the court refused so to order. In the meantime, also, on December 17, 1887, the Grimes Dry-Goods Company, whose attachment was sixth in order of priority, had instituted a suit in equity against Blank, Schwartz, Samter, and the sheriff, asking to have its lien given priority over the claims of Schwartz and Samter, but the circuit court refused to so order, and the Grimes Dry-Goods Company did not appeal. But on March 3, 1888, which was before relators' suit in equity was begun, the circuit court ordered the sheriff to pay the judgment of Barton Bros. and of Levin, and the sheriff did so. In the meantime, also, the sheriff had paid the Kriesman judgment without any order of court. Burnham, Hanna, Munger & Co., upon the sheriff refusing to pay their judgment, then began this action against the sheriff and the sureties on his bond. In their answer the defendants set up the payment of the Schwartz judgment, the Barton and Levin judgments under order of court, and the Kriesman judgment, and alleged that, after deducting these judgments and the costs, it left only \$253.94 in the sheriff's hands. They also pleaded that the judgments of the Grimes Dry-Goods Company, Gallagher, and Feder had not been paid, and that they were not parties to the equity suit, and their rights were not affected by the judgment in that case, and that their liens were entitled to priority over relators. The circuit court rendered judgment for the defendants. The relators appealed to the Kansas City court of appeals, where the judgment of the circuit court was reversed, and judgment entered for the relators upon the ground that the sheriff, having failed to notify the court of the pendency of the equity suit, was not protected in the payment of the

Schwartz judgment by the order of the circuit court, and that the other attaching creditors who held prior liens to relators had lost their liens and priorities by nonaction after they obtained their judgments. The case was then transferred to this court for the reasons herein stated.

No question is raised by relators as to the propriety of the payment of the judgments of Barton Bros. and Levin, so they will be eliminated. We will not consider whether the decision of the Kansas City court of appeals in the equity case was correct or not. That court had final jurisdiction in that case, and the judgment is binding upon all parties to that action. That judgment, however, affected only the parties to that action, who were Blank, Schwartz, Samter, and the sheriff. It had no effect whatever upon the rights or priorities of any of the other attaching creditors. That judgment decided, and decided only, that the claims of Schwartz and Samter should be postponed to the claim of relators. It did not attempt to adjust the priorities between relators and the other six attaching creditors whose attachments were prior to relators. Thus far the sheriff is concluded by that judgment. Neither he nor his sureties can now or hereafter be heard to say that Schwartz and Samter have a priority over relators. The Kansas City court of appeals held that the liens of the attaching creditors which were prior to relators have been lost by their nonaction, and under section 6012, Rev. St. 1889, which limits the lien of judgments to three years, and that relators are entitled to priority over them all as a reward for their diligence. It is undoubtedly the law that, where liens are equal, a court of equity will reward diligence. *Bruce v. Vogel*, 38 Mo. 105; *Story, Eq. Jur. (12th Ed.)* § 64. But here the liens are not equal. Originally the relators' lien was the last in order of priority. Under the decision in the equity case the liens of Schwartz and Samter have been postponed to that of the relators, but that of relators has not been given priority over the other attaching creditors. Relators should be rewarded for their diligence to the extent of being paid before Schwartz and Samter. But the status as to priority between relators and the other attaching creditors remains unchanged. The fund has all the time been in custodia legis. The other attaching creditors (except Barton and Levin) have taken no steps to secure an order of distribution of the fund, and the relators have not done so. They are all in the same attitude before the court. The three-years statute of limitations for the lien of a judgment provided by section 6012, Rev. St. 1889, has no application whatever to funds in the hands of the court. The lien referred to in that section of the statute refers to a lien on real estate which the plaintiff allows to lapse by not suing out an execution on the judgment or reviving the judgment within three years. Here the fund was in court. No execution.

could be issued. The res was in the custody of the court, through its officer, the sheriff. It was awaiting an order of distribution by the court. There is no statute of limitations which bars or cuts out the rights of any litigant because a court fails to order the distribution of money in the registry of the court within any specified time, or because the litigant fails to apply, within any definite time, to the court, for such an order. The fund came into the custody of the court impressed with certain liens according to certain priorities. None of the litigants could change the priority because of any laches by any of the other litigants in pressing the determination of their suits. That is a matter wholly in the power of the court to expedite or allow to drag, and no laches can be imputed to an act which could not be done except by permission or tolerance of the court.

But the Kansas City court of appeals erred in holding that these prior creditors had lost their liens, for another reason. The prior creditors are not parties to this action, and their rights cannot be adjudicated in this proceeding. The answer set up the existence of these prior liens, and while they exist it is a sufficient answer for the sheriff to make to relators' demand for the fund. No judgment that the court has the power to enter in this case could strike down the rights of those attaching creditors, for they are not parties to this suit, and hence have never had a day in court, and are therefore protected by the constitution of the United States. If relators have acquired a priority over these prior creditors as a reward for their diligence, they should apply to the circuit court, under section 570, Rev. St. 1889, and have their priority settled, or should proceed in equity against these prior attaching creditors, and have the claimed priority established in a proper and binding way. They have done neither. It is altogether a mistake to suppose that the decision in the equity case settled the rights of these relators to demand this fund from the sheriff. As herein shown, that decision settled the priority between these relators and Schwartz and Samter. Nothing more. It does not appear from the record that the relators or any one else have ever applied to the circuit court for an order of distribution of the proceeds of the attachment sale. Until such an order is made, the sheriff cannot be adjudged guilty of wrong for not paying the relators' claim. This action is manifestly prematurely begun, for the money is in the sheriff's hands as representing the court; and until the court makes an order on the sheriff to pay it, and the sheriff fails to obey the order, there will be no breach of his bond, and hence neither he or his sureties can be held liable until this condition appears. It is the very purpose of section 570, Rev. St. 1889, that in attachment cases where there is a contest of priorities that question shall be settled by the court, and not by the sheriff, who is a mere ministerial officer.

Bank v. Brennensen, 97 Mo. 145, 10 S. W. 184. See, also, *Clafin v. Sylvester*, 99 Mo. 276, 12 S. W. 508.

This case is here on a certificate of judgment, as authorized by section 2263. There is no abstract of the record filed. The statements filed do not set out the petition, either in full or in substance; hence we are not informed what breaches of the bond were assigned. But none of the statements show that there has been an order of distribution by the court which the sheriff has failed to obey, nor that the priorities between any of the attaching creditors have been settled, except as between relators and Schwartz and Samter. Upon this showing, therefore, the claims of the other six attaching creditors would prima facie be entitled to payment before that of the relators, and, as hereinbefore pointed out, they have been guilty of no more laches than relators have, so far as applying for an order of distribution or of reviving their liens (if such was necessary when the funds are in court,—and we think it was not) is concerned; and, as before shown, these questions are not open to adjudication in this proceeding, where the other creditors are not parties. It follows, therefore, that the Kansas City court of appeals erred in reversing the judgment of the circuit court and in entering judgment against the defendants, and that the judgment of the circuit court was right. The judgment of the Kansas City court of appeals is reversed, and the judgment of the circuit court is affirmed. All concur.

SWEENEY v. KANSAS CITY CABLE RY. CO.

(Supreme Court of Missouri, Division No. 2.
May 23, 1899.)

STREET RAILROADS—INJURIES TO PASSENGERS—NEGLIGENCE—RIDING ON FOOTBOARD—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—TRIAL—WITNESSES—CONTRADICTION.

1. In an action against a street-railway company for the death of a passenger, caused by a collision between the car on which he was riding and a broken-down wagon on the track, there was evidence that the gripman was engaged in conversation with a passenger, and was not looking at the track ahead of him. Passengers on the train testified that they saw the wagon on the track when within 50 to 125 feet from it, and the driver of the wagon and another testified that the driver had gone up the track about 60 feet to warn the approaching car, but that the gripman paid no attention to him; the evidence being conflicting whether the car could have been stopped within 40 feet or in not less than 75 feet. *Held*, that the question of the gripman's negligence was for the jury.

2. A passenger on a cable car notified the gripman of his intention to get off at a crossing, and preparatory to doing so stepped on a footboard running alongside the car on which persons getting off the car were obliged to step. The motorman failed to stop at the crossing, and stated he would let the passenger off at the next crossing, and thereupon the passenger remained standing on the footboard, though there were empty seats in the car, and, before reaching the next

street, he was killed by the car colliding with a wagon on the track. *Held*, that the passenger was not guilty of contributory negligence in remaining on the footboard while the car was going to the next crossing, the position not having been voluntarily assumed by him.

3. Nor was he guilty of contributory negligence in that he saw the obstruction which caused the injury on the track ahead of the car in time to have stepped back into his seat, and failed to do so, as he had a right to assume that he would be carried safely, and that the gripman would see the obstruction in time to prevent a collision.

4. A passenger confronted with sudden danger while on a car is not guilty of contributory negligence merely because he fails to exercise what might have seemed to others the best judgment in trying to avoid the danger.

5. In an action against a street-railway company for the death of a passenger from injuries received while riding on a running board used to step on in getting on and off the car, an instruction that if the passenger voluntarily left his seat in the car to ride on the running board, and that he would not have been injured had he not been standing thereon, and if the position on the running board was an unsafe one for passengers, no recovery can be had, is properly refused, since it prohibits a recovery notwithstanding the carrier's failure to exercise the greatest care to carry him safely, though he had voluntarily assumed an unsafe position.

6. In an action for the death of a passenger from injuries received while riding on a car, an instruction that if the passenger voluntarily left his seat, and took up the position in which he was injured, and that he would not have been injured had he remained in his seat, no recovery can be had unless the person in charge of the car saw him in his position of danger in time to have prevented the injury, is properly refused, as it assumes that the position which the passenger took was dangerous as a matter of law, and that no recovery could be had, though the injury was caused by the negligent management of the train.

7. A witness cannot be contradicted by proof that on a prior occasion he expressed an opinion at variance with the facts testified to by him.

8. In an action for the death of a street-car passenger from injuries caused by the car in which he was riding colliding with an obstruction on the track while the passenger was riding on the footboard of the car preparatory to getting off, the charge being negligence, in that the collision could have been avoided with ordinary care, an instruction that the carrier is liable if the injury was the result of even slight negligence in the management of the train, is not erroneous as enlarging the issues.

9. A street-railway company is bound to exercise towards its passengers the utmost care and diligence of a very cautious person, and an instruction that it will be liable if its servants are guilty of even slight negligence is proper.

10. In a negligence case the court need not, in its charge, define the word "negligence."

11. In an action for the death of a street-car passenger, caused by the car in which he was riding colliding with a wagon, an instruction using the term, "a broken-down wagon and obstruction which was at said time upon and in close proximity to the tracks," is not erroneous as assuming that there was a broken-down wagon on the track, where the evidence shows that part of the wagon extended over one of the rails for a distance of one foot.

12. Nor is such an instruction erroneous where the carrier has requested an instruction assuming that there was an obstruction on the track, thereby conceding the fact.

13. In an action for the death of a passenger caused by the car in which he was riding colliding with an obstruction on the track, an instruction that the carrier is liable if its servants in charge of the car saw the obstruction in time to

stop the car and avoid the danger, or could, by the exercise of the care required of them, have seen it in time to stop the car, followed by an instruction as to the degree of care required of a carrier, is not erroneous as requiring the carrier's servant to stop the car when he saw the obstruction, though too late to avoid the injury.

Appeal from circuit court, Pettis county; G. F. Longan, Judge.

Action by Annie Sweeney against the Kansas City Cable-Railway Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Ohas. E. Yeater, Karnes, Holmes & Krant-hoff, and Frank Hagerman, for appellant. John Cashman and Rozzelle & Walsh, for respondent.

BURGESS, J. This suit was begun by plaintiff in the circuit court of Jackson county against the defendant, a street-railway company, for damages in the sum of \$5,000 for negligently killing her husband, Patrick Sweeney. Upon the application of plaintiff, the venue of the cause was changed to the circuit court of Pettis county, where a trial was had before a jury, resulting in a verdict in favor of plaintiff in the sum of \$5,000, for which judgment was rendered in accordance therewith. After unsuccessful motion for a new trial, defendant appeals.

At the time of the accident defendant operated a double-track cable street railway upon Summit street in Kansas City, Mo. There was a space of $4\frac{1}{2}$ feet between the two tracks. The train upon which deceased was riding as a passenger at the time of his injury was made up of an open gripcar and a closed coach coupled to it, each 22 or 23 feet long, and weighing about 6,500 pounds each. The train was operated by a grip, which was attached to a moving cable rope, and was manipulated by a gripman. The rope moved at nearly 12 miles per hour. Summit street runs north and south. South-bound cars run on the west track, and north-bound cars on the east track. At the place where the accident occurred the fall of the grade is about 10 feet in every 100. The accident occurred a few minutes after 6 o'clock on the evening of October 29, 1894, while the train was going south. To the front of the train was attached a headlight, which, according to the testimony adduced by plaintiff, on a dark night, without a fog, cast its rays from 100 to 130 feet in front, and, according to defendant's testimony, on a misty, foggy night cast its rays in front from 20 to 60 feet. At the time of the accident there were only 7 or 8 passengers in the coach, while its seating capacity was 24. Besides, there were vacant seats in the grip car. Sweeney desired to leave the car at Twentieth street, and when near that point so stated to the gripman, and stepped out upon the running board, upon which it was customary for passengers to ride to be in readiness to leave the car when it stopped. There were three persons on the board when Sweeney stepped out on it. It seems that the

gripman, who was at the time engaged in conversation with a policeman, did not hear Sweeney, and carried him past his place of destination, and, when asked by a passenger why he did not let the old gentleman off at Twentieth street, replied, in effect, that he did not hear him, and that he would stop at Twenty-First street, which was the next street south. In the meantime Sweeney remained standing on the running board, so as to be ready to get off the car at the next street, being Twenty-First street. About this time a coal wagon had broken down on or close to the track of defendant at a point about 300 feet south of Twentieth street, the rear end of which extended over the east rail of the track upon which the car was proceeding southward. The testimony of several witnesses tended to show that the gripman could have seen the broken-down wagon on the track, or its close proximity thereto, from 50 to 120 feet; that the train was running at full speed, and that no effort was made to stop, until about the time of the collision. The driver of the coal wagon, Colton, and the negro woman Emma Pullman, to whom the coal was to be delivered with which the wagon was loaded, testified that Colton ran up the track 50 or 60 feet to warn the gripman, but that he paid no attention to it. The gripman, however, denied that he either saw or heard Colton when he was trying to attract his attention. The track was at the time what a witness called a "clean wet track." The evidence, as is usual in such circumstances, was conflicting with respect to the distance in which the train could have been stopped under the then existing conditions; some saying within 40 feet, others in not less than 75 to 100 feet. There was evidence tending to show that at the time of the accident the gripman was not looking down the track in front of the cars, but was talking to a passenger, and looking in a different direction. Before the car struck the wagon upon the track, two passengers who stood in front of Sweeney upon the running board, jumped into the seat space in the car, but Sweeney, the deceased, received a blow which crushed his left leg at the knee. The injury made amputation necessary, and he died upon the morning of the 30th of October from the hemorrhage incident to the operation. Another man standing behind Sweeney upon the running board was also knocked off and injured, but not seriously. When the car struck the wagon, it was going at full speed. The gripman did not put on the brake to stop the car until just as it struck the wagon. At the close of plaintiff's evidence, and again at the close of all the evidence, the defendant interposed a demurrer thereto, which was refused, and defendant excepted.

The court, over the objection and exception of defendant, instructed the jury in behalf of plaintiff as follows: "(1) The jury are instructed that if they believe and find from the

evidence that defendant was, on the 29th day of October, 1894, operating a railway upon and over certain streets and highways in Kansas City, Jackson county, Missouri, and upon and over Summit street, between Twentieth and Twenty-First streets, in said city, and was at said time engaged in the business of transporting passengers for hire over said last-named line of railway; that plaintiff was, on said 29th day of October, 1894, and prior thereto, the wife of Patrick Sweeney, deceased; that this suit was brought within six months next succeeding the death of her said husband, deceased; that on said 29th day of October, 1894, her said husband took passage upon one of the cars of defendant's railway as a passenger; that said defendant railway company received and accepted her said husband as a passenger upon its said cars; that said defendant, by its agents, servants, and employes in charge of the cars upon which plaintiff's said husband was riding as aforesaid, so negligently, carelessly, and unskillfully managed, operated, and conducted said cars at a point on Summit street, between Twentieth and Twenty-First streets, in said city, as to cause said cars and the person of plaintiff's said husband to be brought into violent contact with a broken-down wagon and obstruction which was at said time upon and in close proximity to the tracks of the defendant at said point, injuring plaintiff's said husband, and causing his death; that the agents, servants and employes of the defendant in charge of the said cable cars upon which plaintiff's said husband, deceased, was then riding, saw, or would by the exercise of the care required of them, as set out in instruction No. 3, have seen, the broken-down wagon or obstruction upon and in close proximity to said track in time to have stopped said cars, and have avoided the injury to plaintiff's said husband, but negligently and carelessly failed to stop said cars and prevent said injury and killing; and that plaintiff's said husband was himself, at the time of the happening of the injury in question, in the exercise of ordinary care,—then your verdict must be for the plaintiff.

(2) By the term 'ordinary care,' as used in these instructions, is meant that degree of care which an ordinarily careful and prudent person would use under like or similar circumstances. (3) The jury are instructed that if you believe and find from the evidence that the defendant, at the time of the occurrence in question, received and accepted the plaintiff's said husband, deceased, as a passenger upon a car which it was then operating, then the degree of care which defendant and its employes were bound to exercise towards plaintiff's said husband while he was so being carried upon said cars was this: Defendant was bound to run and operate its cars with the highest practical degree of care of a very prudent person engaged in like business. In view of all the facts and circumstances, as shown in evidence, at the time of the alleg-

ed killing of plaintiff's said husband; and defendant is liable in this case if its agents, servants, and employees in charge of said cars were guilty of even slight negligence in the management and operation thereof, if the jury further find and believe from the evidence that the death of plaintiff's said husband was the result of such negligence, and that plaintiff's said husband was, at the time of the happening of the occurrence in question, exercising ordinary care himself. (4) The court instructs the jury that, if you find for the plaintiff, your verdict will be for the sum of five thousand (\$5,000) dollars." And thereupon the defendant prayed the court to give instructions as follows: "(1) If the jury believe from the evidence that the injuries received by the plaintiff's husband were the result of an accident, merely, then plaintiff cannot recover, and your verdict must be for the defendant. (2) Although the jury may believe from the evidence that the husband of plaintiff asked the gripman to stop the car and let him off at Twentieth street, and although the jury may further believe that, had said gripman so stopped at Twentieth street, the deceased would have gotten off at that point, yet this cannot be considered by you in determining whether the gripman exercised the care required in seeing the obstruction upon the track, and in stopping the car so as to avoid a collision therewith. (3) The court instructs the jury that they are the sole judges of the credibility of witnesses; and if they believe that any witness, either in his deposition or before the court, has willfully testified falsely as to any matter material to the questions involved in the case, then they are at liberty to disregard the whole of the testimony of such witness. In determining the weight to be given the testimony of any witness, the jury may take into consideration the chance they had of seeing and knowing what they are talking about, and all the other facts and circumstances in evidence. (4) The court instructs the jury that there is no claim made in this case that the car was defectively constructed, or that it was not properly provided with all the necessary appliances for stopping the same; and in arriving at your verdict you will do so on the basis that said car was in all respects properly constructed and properly equipped for use on said railway. (5) The court instructs the jury that it is not claimed in this case that the gripman and conductor operating the car on which plaintiff's husband was riding, or either of them, were incompetent men; nor is it claimed that the track of the defendant's road was not properly constructed, or that the same was out of repair; nor is it claimed that the motive power as used on defendant's road was in any way defective or insufficient; and you will not consider any such matters in arriving at your verdict. (6) The court instructs the jury that there is no claim made in this cause that either the gripman or conductor was an incompetent party

for the position, or that the sand box, the brakes, the grip, the track, the roadway, and all other appliances for propelling or stopping the car were not properly constructed, and in suitable repair; and in arriving at your verdict it will be your duty to consider the gripman a competent party for the position, and that all said appliances for propelling or stopping the cars were properly constructed and in suitable repair. (7) The court instructs the jury that it is wholly immaterial what other persons, if any, have been injured at other times and places on or by the defendant's cars, and all such testimony will be disregarded by you in arriving at your verdict. (8) The jury must find that the cable track was constructed on the proper grades, and if they further find from the evidence that the direct and proximate cause of the injury to plaintiff's husband was the character of the grade of Summit street, at the place where such injury occurred, the plaintiff cannot recover, and your verdict must be for defendant. (9) If the jury believe that the direct and proximate cause of the injury to plaintiff's husband was the breaking down of a coal wagon on or near the cable-railway track, then plaintiff cannot recover, and your verdict must be for defendant. (10) The jury are instructed that all of the instructions given you in this case are the instructions of the court, and should be taken and considered together by you in arriving at your verdict. (11) If the jury believe from the evidence that the deceased, Patrick Sweeney, voluntarily left his seat upon the open gripcar, and stepped out on the running board, and was riding thereon, and if you believe that such position, under the circumstances, was an unsafe one for a passenger to occupy, and that, had he not been so standing, he would not have been injured, then he cannot recover; and this is true notwithstanding you may believe from the evidence that the defendant permitted passengers to ride on the running board. (12) If the jury believe from the evidence that the deceased, Patrick Sweeney, voluntarily left his seat on the gripcar, and took a position on the running board, where he was riding at the time he was injured, and if they believe that he would not have been injured had he remained in his seat, then he cannot recover, unless you further find and believe that his position of danger was seen by the gripman, after the deceased was in peril, in time to have stopped the car and avoided the collision. (13) The defendant asks the court to declare the law to be that under the pleadings and evidence the plaintiff cannot recover." These instructions were all given, with the exception of the eleventh, twelfth, and thirteenth, and to the refusal of the court to give these defendant duly excepted at the time.

The first point for consideration is with respect to the action of the court in refusing the instructions asked by defendant in the nature of a demurrer to the evidence, de-

defendant insisting that if there was any evidence of negligence on defendant's part, Sweeney must be charged with default in the same respect. In other words, if there was any evidence of negligence on defendant's part, that there was also evidence of contributory negligence on Sweeney's part contributing to his injury; and, this being the case, plaintiff was not entitled to recover. In support of this contention it is argued that the gripman had the right to assume that the wagon would move out of the way until something appeared showing that it could not move. When an adult person is injured by being run over by a railroad train while upon its track, in a suit by him or his representatives against the company for damages for such injury it has been held that the engineer in charge of the train had a right to assume that he would at once, on its near approach, step off the track to a place of safety. *Sinclair v. Railway Co.*, 133 Mo. 233, 34 S. W. 76; *Boyd v. Railway Co.*, 105 Mo. 371, 16 S. W. 909; *Bunyan v. Railway Co.*, 127 Mo. 12, 29 S. W. 842. But no such assumption is to be indulged in an action by a passenger against his carrier, whose implied contract is to carry him safely; and, if he be injured by the carrier while the relation of carrier and passenger exists, the burden is upon it to show that the injury was not occasioned by its negligence. As to a person to whom the carrier owes no duty, only ordinary diligence is required in order to prevent injury; while in the case of a passenger the greatest care is required. In the case at bar the moving cause of the injury was defendant's cars. Moreover, the rule does not apply in any case to such obstructions as a broken-down wagon. There was evidence tending to show that at the time of the collision the gripman was engaged in conversation with a passenger, and was not looking in the direction that the train was moving; that he paid no attention to the warning of the driver of the coal wagon, which he could have seen, as well as the broken-down wagon on the track, in time to have stopped the car, had he been looking down the track in the direction the train was moving. Four or five witnesses, including one for defendant, who were passengers on the train at the time, testified that they saw the wagon on the track when the cars were from 50 to 125 feet from it. It was the gripman's duty to keep a lookout along the track for persons and obstructions; and if, by having his attention on the track in front of the cars, he could have discovered the warning of Colton and the wagon in time to stop the cars, and thereby avoid the injury, it was his duty to do so. *Baird v. Railway Co.* (Mo. Sup.) 48 S. W. 78; *Parker v. Railway Co.*, 69 Mo. App. 54. If he could have seen the wagon on the track in time to stop, had he looked, the presumption is that he did not look, or, if he did look, that he did not heed what he saw, so that in either case he was negligent. It thus appears that there

was ample evidence tending to show that defendant was guilty of negligence contributing to the injury of Sweeney to take the case to the jury, and that the demurrers thereto were properly refused, unless the evidence also shows that Sweeney was guilty of negligence contributing directly to his own injury. He had called the attention of the gripman to his purpose to get off the cars at Twentieth street, and had left his seat in the car, and gone out on the running board, so as to be ready to get off when they stopped; but the gripman, unmindful of his duty to him as a passenger, did not, for some reason, stop at that point, but proceeded, stating that he would stop at the next crossing, which was Twenty-First street. If, however, Sweeney had voluntarily assumed a dangerous position, and was by reason thereof injured, he was guilty of contributory negligence; but as he could not have gotten off the cars without stepping upon the running board, and had only done so for the purpose of getting off at Twentieth street, he did not voluntarily assume such position, and was not guilty of contributory negligence in so doing, and remaining there for so short a space of time as was required for the cars to reach the next street, where it had been announced by the gripman they would stop, even though there were unoccupied seats in both cars. The case does not, therefore, come within the rule that one who voluntarily takes a position upon the footboard of a street car running upon a public street may be reasonably charged with knowledge of the danger, and guilty of negligence per se, as announced in the authorities cited by defendant, viz.: *Clark v. Railroad Co.*, 36 N. Y. 135; *Ray, Neg. Imp. Duties (Pass. Carr.)* pp. 44, 45; *Booth, St. Ry. Law*, §§ 341-344; *Tramway Co. v. Reid* (Colo. Sup.) 45 Pac. 379; *Ashbrook v. Railway Co.*, 18 Mo. App. 290; *Gilly v. Railroad Co. (La.)* 21 South. 850; *Aikin v. Railroad Co. (Pa. Sup.)* 21 Atl. 781.

It is further argued that, if the gripman could have seen and heard a warning of danger in time to have stopped his train, Sweeney likewise could have seen and heard it in time to have stepped back into his seat, and in that way have avoided the injury. In answer to this contention it may be said that, even if Sweeney saw the danger in time to have stepped back to his seat, or a place of absolute safety, he had the right to assume that he would be carried safely, and that the gripman would see the obstruction, and stop in time to prevent a collision with the wagon. Nor is a passenger who is confronted by a sudden danger, and fails to exercise what might seem to others the best judgment, in every case guilty of negligence.

It is next claimed that error was committed in refusing the eleventh instruction asked by defendant. This instruction was correctly refused, for reasons already stated: that is, that Sweeney was not, under the circumstances, guilty of contributory negligence

in leaving his seat, and standing on the running board at the time of the accident. It is vicious for the further reason that it prohibits plaintiff's recovery if deceased voluntarily left his seat, and stepped out on the running board, and was standing there at the time of the accident, if the position was an unsafe one, and in consequence of which he was injured, regardless of the fact of defendant's duty to exercise the greatest care to carry him safely, notwithstanding he may have assumed an unsafe position. He was where passengers were accustomed to ride, and the fact that he may have been in an unsafe place did not absolve defendant from its duty towards him as a passenger.

The refusal of the twelfth instruction asked by defendant is also assigned as error. This instruction is faulty, and was properly refused, because it assumes that the position of Sweeney on the running board at the time of the accident was an unsafe and dangerous place, and, this being so, plaintiff could not recover, although defendant's servants may have been guilty of negligence in the management of the train, thereby causing the injury. John H. Twyman, who was a witness for defendant, was a passenger on the gripcar at the time of the accident, and sitting on the west side of the car, back of the gripman, testified that the gripman did nothing towards stopping the car until just as he struck the wagon. He had previously testified on an inquest held as to the death of Sweeney, and upon his cross-examination in this case he was asked this question: "Q. Now, before—before the coroner's jury—you were asked this question: 'As far as you know, do you think the gripman done all he could to stop the train before it reached the wagon?'" The question was objected to, and the objection sustained, upon the ground that it called for an improper conclusion. The purpose of the question was to contradict the witness, and, being with respect to a mere conclusion, was not competent for that purpose. The fact that the witness may have testified on a former occasion as to what he thought of the gripman's effort to stop the cars was not competent for any purpose in this. "The rule [that the proof of contradictory statements goes to the credibility of the witness] does not extend so far as to introduce previous expressions of opinion made by the witness." *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; 1 *Thomp. Trials*, § 493; *Com. v. Mooney*, 110 Mass. 99; *Holmes v. Anderson*, 18 Barb. 420.

Plaintiff's third instruction is criticised upon the ground that it enlarged the issues, and that the degree of care exacted of defendant was too strict. As to the first proposition, it seems to be untenable, and is not in accordance with what seems to us to be a fair construction of the instruction. There is no question but that the degree of care required of street-railway companies towards their passengers is the utmost care and diligence

of very cautious persons. *Huelsenkamp v. Railway Co.*, 37 Mo. 537; *Bryan v. Railway Co.*, 32 Mo. App. 228; *Story, Bailm.* (9th Ed.) § 600. In *Waller v. Railroad Co.*, 83 Mo. 608, an instruction which told the jury that carriers of passengers were bound to exercise the strictest vigilance in carrying them was approved by this court. In *Furnish v. Railway Co.*, 102 Mo. 438, 13 S. W. 1044, similar instructions were approved. So, in *O'Connell v. Railway Co.*, 106 Mo. 482, 17 S. W. 494, an instruction which told the jury that the degree of care which the defendant and its employes were bound to exercise towards the plaintiff, who was a passenger, was to run and operate its cars with the highest degree of care of a very prudent person in view of all the facts and circumstances at the time of the alleged injury, met with the unanimous approval of this court. See, also, *Bischoff v. Railway Co.*, 121 Mo. 216, 25 S. W. 908. The instruction under comment is substantially the same as those passed upon in the cases cited. The fact that in the jury were told that defendant was liable if its servants were guilty of even slight negligence was nothing more than telling them that the law required of it the highest degree of care, and did not vitiate it.

Plaintiff's first instruction is challenged upon a number of grounds, and of these in their order.

First. That it does not define negligence. This is a word the meaning of which is well understood, and no definition of it was necessary. As used in the instruction, it could not have been misunderstood by the jury, or in any way have misled them.

Second. That it erroneously submits the question as to the ordinary care of Sweeney, when, as a matter of law, he was negligent, and, in any event, limits the consideration of the jury to his negligence at the exact time of the injury. In answer to this contention it is only necessary to say that we have already said that Sweeney was not, under the circumstances, guilty of contributory negligence.

Third. That it assumes that there was a broken-down wagon on the track, whereas the rear end of the wagon bed came back almost to the track. The language used in the instruction is, "a broken-down wagon and obstruction, which was at said time upon and in close proximity to the tracks." The evidence shows that about one foot of the hind part of the wagon extended over the east rail of the track, so that the instruction was substantially in accord therewith. But, even if it were not, it cannot be considered as a controverted fact, for the reason that by defendant's second instruction it is assumed that there was an obstruction upon the track, and the rule is that the assumption in an instruction of an issuable fact conceded by the other party is not erroneous. *Bank v. Hatch*, 98 Mo. 376, 11 S. W. 739; *Walker v. City of Kansas*, 99 Mo. 647, 12 S. W. 804.

Fourth. That it required the gripman to stop the cars when he saw the wagon. The instruction is clearly not open to this objection. It only required the gripman to stop the car if he saw, or would by the exercise of the care required of him, as set out in instruction No. 3, have seen, the broken-down wagon or obstruction upon and in close proximity to the track in time to have stopped the cars, and avoided the injury. It did not require him to stop when he saw the wagon. The instruction is, we think, free from substantial error. For these considerations we affirm the judgment.

GANITT, P. J., and SHERWOOD, J., concur.

STATE v. ERNEST.

(Supreme Court of Missouri, Division No. 2.
June 6, 1899.)

RAPE ON A CHILD—FORCE—NEWLY-DISCOVERED EVIDENCE—DILIGENCE.

1. One having carnal knowledge of a child under 14 years old is guilty of rape, though she consented and no force was used.

2. In a prosecution for a rape on a child under 14 years old, a new trial is properly refused on the ground of newly-discovered evidence that the child's mother knew that she was more than 14 years old, where the mother had testified for defendant, as the evidence could have been procured by the use of diligence.

Appeal from St. Louis circuit court; P. R. Flitcraft, Judge.

Julius Ernest was convicted of rape, and he appeals. Affirmed.

Edward C. Crow, Atty. Gen., for the State.

GANITT, P. J. At the December term, 1897, of the circuit court of the city of St. Louis, the defendant was indicted for the rape of his stepdaughter Mille Beckman, a female child under the age of 12 years, on the 15th day of May, 1896. The indictment is sufficient, and the arraignment was regular. The trial occurred at the December term, 1897, on the 14th day of January, 1898, and resulted in a verdict of guilty, and a sentence to imprisonment in the penitentiary for 10 years, from which defendant appeals.

The defendant was represented by counsel in the circuit court, but no counsel have appeared in this court, and we are remitted to the record to ascertain whether the circuit court committed reversible error. Why the legislature should impose upon this court, with an overburdened docket, the duty of reading immense transcripts in search for errors, without the aid of briefs on either side, is past our comprehension. When a defendant in a criminal case has been tried and convicted in a court of general jurisdiction, it would certainly seem that, if he insisted on a review of the proceedings in that court, he should at least be required to pay for his transcript and docket fee to this court, and point out by brief the errors of which he

complains; but it has now become a common practice to give him a free stenographic record at the cost of the state, and when that transcript is filed here we are required, without so much as a suggestion of error, to go laboriously through every step from the organization of the court to the signing of the bill of exceptions to discover error. The practice has become intolerable. The circuit judges of St. Louis have no discretion. The law requires them to order the free transcript, but the circuit courts in the country have a discretion, and we think it should only be exercised in giving free transcripts where they have grave doubts as to their judgments.

The facts developed in this record are, in substance, these: The defendant is a married man, 33 years old; and his wife, 45. His wife was a widow with five children by her first husband, Beckman, at the time he married her. The prosecutrix is defendant's stepdaughter. The evidence on behalf of the state tended to prove that defendant's wife was a midwife by profession, and was often away from home, following her business. At the time of the alleged rape the two older girls were married, and no longer lived with their mother, and the boys worked out,—one for the Anheuser-Busch Brewery. The prosecutrix was at home alone with her stepfather, the defendant. The state's evidence tended to show that the prosecutrix was born on the 16th day of February, 1883, and the alleged rape occurred on the 15th of May, 1896, at the residence of defendant, in St. Louis, on South Eleventh street, when no other member of the family was at home. The girl testified that the defendant told her he would kill her if she told on him. The defendant testified generally that he did not have intercourse with the prosecutrix. The court, in its instructions, very properly confined its instructions to carnal knowledge of the prosecutrix while under the age of 14 years, and did not submit the question of rape by force and against her will. The instructions are full, and very favorable to defendant. The evidence, if believed, as it was, by the jury, was amply sufficient to justify the verdict.

The principal ground for a new trial, as far as we can discern in the absence of any assignment of error or brief, was newly-discovered evidence. This new evidence relates entirely to the age of the prosecutrix. She testified on the trial in January, 1898, that she would be 15 years old on the 16th of the next February, 1898. She testified that her mother had always told her her age. The state called the mother, but, upon defendant's objection, she was excluded because she was the wife of defendant. Defendant afterwards called the mother of prosecutrix, but avoided all reference to the age of prosecutrix. It is now sought to obtain a new trial by filing an affidavit of the defendant's wife, and the mother of prosecutrix, that the prosecutrix

was born February 16, 1882, instead of 1883; that she (the mother) had on Friday, the 21st day of January, 1898, visited the school which her daughter, the prosecutrix, had attended, and found the age of prosecutrix was registered as born in 1882, on February 16th; that she had herself furnished this information to the teachers when she entered the child at school. No diligence whatever is shown in this application for new trial. The issue tendered in the indictment, and all of state's evidence, was that Millie Beckman was under 14 years of age when defendant debauched her. The prosecutrix, in her cross-examination, stated that her mother had begun since the indictment to say she was a year older than she always had stated prior to the finding of the indictment. The wife of defendant was a witness in his behalf. She was entirely friendly to him, and with all this notice he declined to interrogate her as to Millie's age. To set aside a verdict upon such a showing as this would encourage parties to trifle with the courts. There is no pretense of surprise. This court has again and again ruled that the newly-discovered evidence must be such that it could not have been discovered by the exercise of due diligence. We can hardly conceive of a more glaring case of negligence than is shown here. The first mention of the age of the prosecutrix would have suggested to any mind that the natural source of information would be the mother, and when, on the trial, the prosecutrix had testified in the presence of the husband of her mother what her mother had said, it is absolutely incredible that he should fail to ask his wife then, if never before, as to the age of prosecutrix. As to the school register, as it is stated that the mother furnished that information, it adds nothing to the mother's own evidence. The circuit court correctly ruled that no diligence whatever was shown in procuring the mother's evidence. *State v. Locke*, 26 Mo. 603; *Goff v. Mulholland*, 33 Mo. 208; *State v. Ray*, 53 Mo. 345.

We find no error in the record proper. The judgment is affirmed.

SHERWOOD and BURGESS, JJ., concur.

BEEKMAN v. RICHARDSON.

(Supreme Court of Missouri, Division No. 1.
May 23, 1899.)

ADMINISTRATION OF ESTATE—PRESENTATION OF CLAIM—DISABILITY OF CREDITOR—ACCRUAL OF CLAIM.

A creditor who has had an opportunity to prove a claim against an estate in process of administration, but fails so to do through ignorance of the debtor's death, within the time allowed by law for the presentation of claims, is forever barred against the heirs and distributees of the estate, as well as the administrator, from asserting such claim, unless the creditor was under a disability, or the claim could not be presented and established for the reason that it had not accrued.

51 S.W.—44

Appeal from St. Louis circuit court; John M. Wood, Judge.

Bill by Mary Beekman against William C. Richardson, as public administrator. From a judgment in favor of plaintiff, defendant appealed. Reversed.

J. A. Henderson and J. G. & Wm. F. Woerner, for appellant. J. M. Holmes, for respondent.

ROBINSON, J. This is a suit in equity by plaintiff against the public administrator of the city of St. Louis having in charge the estate of James Spore, deceased, whereby it is sought to have the surplus in the hands of the administrator belonging to the estate of the decedent, after the payment of all classified and allowed claims against said estate, applied to the satisfaction of a judgment rendered in favor of Robert W. Parcells, as trustee, for the use of plaintiff and her husband, against the said James Spore during his lifetime, which said judgment, it is alleged, had not been presented for classification and allowance within two years after administration had been taken out on said estate, for the reason that plaintiff and her trustee were ignorant of the fact of the death of said Spore, or that he was possessed of any estate whatever, until within just a few days before the institution of the present suit. Plaintiff in her petition alleges that all other creditors of said estate had been paid in full; that her judgment was on record, and that the defendant administrator had notice of it, and was about to make final settlement without intending to pay it; and closed with the prayer for "an order and decree against the said public administrator, so in charge of the estate of the said James Spore, requiring and directing him to schedule said judgment on behalf of the plaintiff as an allowed claim in judgment against the estate of the said James Spore, and that he be ordered and directed to pay to the plaintiff upon said judgment such dividend as the said judgment may be entitled to in the final settlement and distribution of the estate, and for such other and further order and decree as the circumstances of the case may require." For answer to plaintiff's petition, defendant filed a general denial, and also alleged that due notice to creditors was published by him as administrator, and set up the plea of the special statute of limitation for two years or non-claim. At the trial it was admitted that the public administrator took charge of the estate of said James Spore on March 16, 1898; that he duly caused to be published the statutory notice to creditors within a few days thereafter, and continued the publication for the full time required by law, and that the notice was in due form and valid; that no steps of any kind had been taken before the filing of this suit on June 7, 1899 (more than two years and three months after publication of notice), to have the claim of plaintiff based on said judgment presented for classi-

fication in the probate court, or to bring it to the attention of the administrator; also that final settlement had been advertised, and an order of distribution made, but that the latter order had been appealed from, and was then pending in the circuit court; and that the amount and date of plaintiff's judgment was as set out in her petition. No evidence was offered tending to show that the administrator knew anything about plaintiff's judgment, or that he ever did anything tending to prevent its establishment against the estate of the intestate; nor were there any facts shown, except the ignorance on part of plaintiff and her trustee (in whose name the judgment stood) of the date of the death of the decedent, to excuse his or her failure in not presenting the judgment and having it classified within the two years allowed by statute, or to exempt it from the operation thereof. While plaintiff was shown to have been a married woman up to the — day of —, 1893, when her husband died, the judgment upon which this suit is based was taken against the decedent in the name of one Robert W. Parcells, trustee for plaintiff and her husband, and in his name had stood of record up to the date of the institution of this suit. Up to that time the trustee was the only person who could have presented the judgment for allowance; and as this court has held that the neglect of the legal owner or trustee to act until the statute of limitations has run bars the remedy of the beneficiary, even though the latter was under disability, it follows that the issue in this case finds itself limited to the narrow proposition that a judgment obtained in the lifetime of the decedent is not affected by the statutory bar of two years as other claims are (except for the purpose of classification), but may be ordered scheduled, by a court of equity, at any time before final distribution, as an allowed claim in judgment, to be paid out of any surplus remaining after the payment of the allowed claims that have been placed in either of the six classes designated by section 183, Rev. St. 1889. It is contended by respondent, to maintain the judgment rendered in her favor by the trial court, that as a court of equity is able, under certain conditions, to reach property that has passed into the hands of the heirs or legatees after distribution, to satisfy a creditor whose cause of action has accrued after the estate of the decedent debtor has been distributed, that, by like authority, it may order and direct that the administrator schedule the claim of a judgment creditor as an established demand against the estate before the same has passed out of the hands of the administrator to the heirs and distributees, and while the jurisdiction over the estate is yet in the probate court.

While plaintiff concedes, in her brief filed herein, that she has no rights, as against the creditors of the estate whose claims have been duly allowed and classified by the pro-

bate court, she contends that she has rights to the remaining surplus estate in the hands of the administrator, after all the allowed and classified claims have been paid, superior to the Spore heirs, that a court of equity can and will enforce, by its proper order and decree, directed to the administrator in charge of the estate, regardless of the two-year statute of limitation or nonclaim. To us, this conclusion of respondent seems untenable, in view of the full and comprehensive provision of our administration act. The fact that the plaintiff has lost her right at law to participate in the assets of the estate in the hands of the administrator, as against other creditors, as by proceeding in equity she admits, we think should work no preference in equity in her favor over the beneficiaries who take as heirs and distributees, nor do the authorities cited by respondent give sanction to her contention. Where a creditor has been given an opportunity to prove a claim within the statutory period against an estate in process of administration, and neglects to avail himself or herself of the right, his or her claim is forever barred, alike against the heirs and distributees, as against the administrator in charge of the estate. The only circumstances under which a creditor may establish his or her claim against a defendant, after the lapse of two years from granting of letters of administration, except he or she is under disability (the limitation thereby extended being by express words of statute), is where the claim could not have been presented and established within the two years because it did not accrue until after the decedent's death. In that case, it has been held that the creditor may, in a court of equity, pursue the estate that has passed into the hands of the heirs and distributees, and have his or her claim satisfied. The statute of nonclaim in that case is no bar, because no demand exists against which it could operate. But when, as here, the claim has matured and ripened into a judgment in the lifetime of the decedent, the statute is explicit and mandatory that a copy of the judgment must be exhibited to the probate court for allowance and classification, and all demands not thus presented for allowance and classification within two years shall be forever barred, saving to infants, persons of unsound minds, or imprisoned and married women two years after the removal of these disabilities. Section 184, Rev. St. 1889. Nothing could be more explicit; to our minds, nothing more conclusive.

With us there is no concurrent jurisdiction, resting alike in the probate and the equity courts of the state, in the matter of the allowance, classification, or scheduling of claims against the estates of decedents in process of administration. Under our administration laws, all those matters are relegated to the probate court, under the fullest and plainest statutory provisions, and courts of equity have no power or authority to interpose to

help out belated creditors who have failed to comply with those requirements. For the purpose of the payment of debts, the probate court has been empowered to make all necessary orders for the disposition of all decedent's property, real as well as personal, and do all things necessary to a full and final administration and distribution of an estate; and thus, as seen by our administration act, we have avoided the necessity of the more cumbrous machinery of the common law, where courts of chancery were compelled to intervene to aid the deferred creditors, by their orders for the sale and disposition of real estate, when the person's assets in the hands of the administrator were inadequate to meet the probated demands. Now, by the statute, full and ample provision is made for the allowance, payments, and settlements of all claims against the estate of a decedent in the probate courts, and to that court all creditors must go within the time prescribed by statute, or be forever barred. This plaintiff has failed so to do, and is now without remedy in equity as at law. It follows that the judgment of the circuit court entered herein must be reversed. All concur.

GERMAN-AMERICAN BANK v. CARONDELET REAL-ESTATE CO. et al.

(Supreme Court of Missouri, Division No. 1.
May 23, 1899.)

NOTES—BONA FIDE PURCHASER—TRUST DEED—TRANSFER—RECORD—ACKNOWLEDGMENT.

1. Notes of a corporation were executed in its name by the president, payable to one from whom he had power of attorney to accept and indorse negotiable paper, and by him indorsed with the payee's name in blank, the indorsement showing that it was by him as attorney in fact for the payee, and he then transferred them before maturity, as collateral for his loan. *Held*, that the transferee was a bona fide purchaser without notice.

2. The purchaser of notes secured by a trust deed acquires the title under the deed as incident to the notes, without a formal assignment of the deed.

3. The record of a trust deed acknowledged by the grantor before the trustee as notary is improper, and is not constructive notice to a subsequent purchaser.

4. Rev. St. 1889, § 4864, making records, made one year before the passage of the law, of unacknowledged deeds and conveyances, or deeds and conveyances imperfectly acknowledged, constructive notice, does not apply to instruments recorded after its taking effect.

Appeal from St. Louis circuit court; Pembroke R. Flitcraft, Judge.

Suit by the German-American Bank against the Carondelet Real-Estate Company and others. There was a decree for defendants, and plaintiff appeals. Affirmed.

Fred. Wislizenus, for appellant. Flisse & Kortjohn, for respondents.

BRACE, P. J. This is a suit in equity to set aside a release of and to foreclose a deed of trust, in which the judgment was for the de-

fendants, the bill dismissed, and the plaintiff appeals.

On the 19th of May, 1892, one William B. Lange, being at the time attorney in fact of his mother, Mathilda Lange, and president of the Carondelet Real-Estate Company, executed a deed of trust, of that date, upon the real estate described in the petition, signed, "Carondelet Real-Estate Company, by Wm. B. Lange, President," to secure the payment of five negotiable promissory notes, one principal, for \$4,000, and four interest notes, for \$120 each, of the same date, executed by him, and signed in the same manner, payable to the said Mathilda Lange, the principal note payable two years after date, and the interest notes payable semiannually during the period of the principal. On the next day, May 20, 1892, William B. Lange, as president of the real-estate company, acknowledged the deed before a notary public, and the same was on the same day filed for record. At the time the deed was acknowledged the name of Ernst Renner appeared in the deed as trustee. When filed for record, that name had been erased, and "Chas. F. Vogel" written in place of it, and the notes had been indorsed "Without recourse on me. Matilda Lange, per Wm. B. Lange, Atty. in Fact." In this condition the deed and notes were exhibited by William B. Lange at the recorder's office just before the filing of the deed for record to August Gehner, president of the plaintiff bank, of which the said Lange had been a customer since September, 1891, with the view of obtaining a loan upon the security from Mr. Gehner; and, upon his consenting to consider the proposition, the deed was delivered to the officer for record, and the notes to Gehner, in whose personal possession they remained until the 6th day of August, 1892, when, Lange having negotiated for a loan from the bank on his individual note of that date for the sum of \$3,800, the five notes aforesaid, at his request, were on that day delivered to the bank by Mr. Gehner as collateral security for the loan, and thereafter, except two of the interest notes, which seem to have been taken up, continued in the possession of the bank as such collateral until this suit was brought, on the 18th of January, 1895; Lange's note for the loan being renewed from time to time until his death, and the last renewal note being for the sum of \$2,800, dated January 30, 1894. The deed of trust was never delivered to the bank by Lange, he accounting for its absence, at the time of the delivery of the notes secured thereby, by saying it had been lost, and that he would furnish a certified copy thereof, which he afterwards did. On the 20th of April, 1893, while the bank was thus holding these notes, Lange executed a quitclaim deed to the Carondelet Real-Estate Company, signed, "Mathilda Lange, by Wm. B. Lange, Attorney in Fact," in release and satisfaction of said deed of trust, which on the same day was duly acknowledged by him in that character, filed for record, and duly recorded, which is the release sought to be set aside. Afterwards, on the 20th of May,

1893, Lange executed and acknowledged a deed of trust signed, "Carondelet Real-Estate Company, by Wm. B. Lange, President," conveying the premises to Mott, trustee, to secure a bond of that date to the South End Building & Loan Association of St. Louis, for the sum of \$5,400, executed by him, and signed in the same manner, which deed of trust was on the 23d of May, 1893, filed for record and duly recorded. And afterwards, on the 7th of July, 1893, in like manner, the premises were conveyed to Maggie Christie, subject to the deed of trust in favor of the Building & Loan Association, who, with her husband, Edward Christie, are in possession of the premises, and who, together with said association, the trustee, Mott, and Vogel, Mrs. Lange, and William B. Lange's administrator, are made parties defendant in this action.

The evidence tends to prove that during the period of these transactions the said William B. Lange was of good reputation; that he was in fact the Carondelet Real-Estate Company, which existed as a corporation simply for the purposes of his business; that in all these dealings of the parties with him they acted in entire good faith; that Mrs. Lange had in fact no interest whatever in the property being dealt with, and knew nothing of these transactions. Thus it was that William B. Lange, by means of the relations he sustained to his mother and this corporation, was enabled to perpetrate a fraud, by which some one of the innocent parties to this action, in which no relief is sought or could be given against either of them, must be made to suffer. Who shall be the sufferer can only be determined by the application of strict legal principles.

1. The starting point of the inquiry is the power of attorney given by Mrs. Lange to her son, duly executed, acknowledged, and of record when all of these transactions were had. It was of the most plenary character, constituting him in fact her alter ego to transact any and all kinds of business for her, and in her name, including the power "to sign or accept all orders, promissory notes, drafts or bills of exchange, and to indorse such checks, notes, or bills." His authority to draw the notes in the name of the real-estate company is not questioned. His authority to accept the notes payable to his mother, and to transfer them by indorsing her name thereon, is beyond question. When his name was indorsed thereon in the manner in which it was, the notes became negotiable by delivery. Thereafter the title to the paper was *prima facie* in the holder, whoever he might be, and passed to whomsoever he might deliver them. The title to the notes was thus in William B. Lange when he delivered them to Mr. Gehner, and passed by that delivery to him, and passed by his subsequent delivery to the bank. The bank thus for value, before maturity, in due course of business, acquired title to these notes from the holder, who was the only apparent, and in fact the real, owner thereof, at the time, and it would seem

that its title to the notes is also beyond question. The fallacy of the argument of counsel for respondents in support of their position that the bank was not an innocent purchaser is in assuming that the notes bore upon their face evidence of the fact that they were the property of Mrs. Lange. They did no such thing. They did bear upon their face evidence that they had at one time been her property, but that they were so no longer; that her property in them had passed by indorsement to the holder, whoever he might be; and that, at the time they were hypothecated to the bank, they were in fact the property of such holder. The fact that her name had been indorsed by her attorney in fact suggested no present ownership in her of the notes, or absence of ownership in that attorney, if he then happened, as was the case, to be the actual holder of the notes. The only inquiry that fact suggested was whether he had authority to indorse her name upon the notes, and, having had such authority at the time the notes were so indorsed, when the notes were thereafter delivered to the bank the title passed to it, under well-settled principles of the law merchant. The cases of *Turner v. Hoyle*, 95 Mo. 337, 8 S. W. 157, and *Mason v. Bank*, 16 Mo. App. 275, and 90 Mo. 452, 3 S. W. 206, are not in point in the case.

2. On the trial there was some evidence introduced tending to show that Lange subsequently used the deed of trust, which was not delivered to the bank, in connection with duplicates of the notes therein recited, to secure another loan from other parties; but the weight of the evidence was that the notes transferred to the bank were the identical notes for the security of which the deed of trust was executed, and, upon well-settled principles of law, title under the deed of trust, as incident to the notes, passed to the bank. *Hagerman v. Sutton*, 91 Mo. 519, 4 S. W. 73; *Mayes v. Robinson*, 93 Mo. 114, 5 S. W. 611.

3. The notary before whom the deed was acknowledged was Charles F. Vogel, and when the deed was presented for record he appeared therein as the grantee, and it was so recorded. The recording of such a deed was improper, and the record thereof does not impart constructive notice to subsequent purchasers, under section 2419, Rev. St. 1899; *Stevens v. Hampton*, 46 Mo. 404; *Dail v. Moore*, 51 Mo. 589; *Black v. Gregg*, 58 Mo. 565. But it is contended that the record had that effect, under section 4864, Rev. St. 1899, which reads as follows: "All records made by the recorder of the proper county, one year before this law takes effect, by copying from any deed of conveyance, deed of trust, mortgage, will or copy of a will or other instrument of writing, whereby any real estate may be affected in law or in equity, that has neither been proved nor acknowledged, or which has been proved or acknowledged but not according to the law in force at the time the same was recorded, shall hereafter impart notice to all persons of the contents of such in-

struments, and hereafter, when any such instrument shall have been so recorded for the period of one year, the same shall thereafter impart notice to all persons of the contents of such instruments and all subsequent purchasers and mortgagees shall be deemed to purchase with notice thereof." It has always been thought that this section of the statute applied only to instruments recorded before its passage, and doubtless the profession would be much surprised to learn that it applied to instruments subsequently recorded, and that, by a proper construction, this law, originally intended "to quiet vexatious land litigation," had been converted into one that so qualifies the whole law in regard to the acknowledgment certificate and recording of instruments as to render it in a great measure useless. The text of the section does not warrant such a construction. The subject of the first clause is "all records of instruments made one year before the law takes effect." The subject of the second clause is those "instruments," as plainly indicated by the use of the word "such" in the second clause, and, reading the whole section together, it is evident that it applies to the records of such instruments as were made one year before the law took effect and to the instruments recorded one year before the law took effect. Under the first clause, the record imparts notice; under the second, the instrument imparts notice. The law, in substance, as contained in the first clause of the section, was first enacted, in 1847, in the following form: "The records heretofore made by the recorder of the proper county, by copying from any deed of conveyance, deed of trust, mortgage, will or copy of a will, or other instrument of writing, that has neither been proven nor acknowledged, or which has been proven or acknowledged, but not according to the law in force at the time the same was done, shall, from and after the passage of this act, impart notice to all persons of the contents of such instruments, and all subsequent purchasers and mortgagees shall be deemed to purchase with notice thereof" (Acts 1847, p. 95); and in this form, with unimportant verbal modifications, was carried into the Revisions of 1855, 1865, and 1879, and in that form continued to be the law until 1887, and was uniformly recognized to be a statute of repose, applicable only to records made before its passage. *Bishop v. Schneider* (1870) 46 Mo. 472; *Gatewood v. Hart* (1874) 58 Mo. 261; *Campbell v. Gaslight Co.* (1884) 84 Mo. 352. By an act approved March 31, 1887 (Sess. Acts 1887, p. 183), the law assumed its present form, with the obvious purpose of extending protection to instruments recorded in the period between the passage of the act of 1847 and one year before the passage of the act of 1887. In doing so, the legislature seems to have thought that it was desirable that the instruments themselves, recorded in that period, should impart notice as well as the records thereof, and hence the second clause, and this is the

whole import of the change made. There is nothing in the text, purpose, or history of this enactment to warrant the conclusion that it was intended to protect instruments recorded subsequent to the passage of the latter act, and it follows that, as the defendants purchased upon the faith of the record title, and the record failing to impart to them any notice of a subsisting title under the deed of trust, they took the title to the premises as against the plaintiff claiming under that deed. The court committed no error in refusing to enforce it, and in dismissing the bill, and its judgment is affirmed. All concur.

MAY et al. v. CRAWFORD et al.
(Supreme Court of Missouri, Division No. 1.
May 23, 1899.)

SUPREME COURT—OPINION—LAW OF THE CASE—
CONTRACTS—BREACH—EVIDENCE—LIQUIDATED DAMAGES—INSTRUCTIONS—JUDGMENT ON APPEAL.

1. On appeal from a judgment giving nominal damages only for the breach of a contract which stipulated for the payment of a certain sum in the event of such breach, the court approved the finding as to the existence of the breach, but denied that the damages should be merely nominal, and stated that the "exact damages plaintiffs will suffer is not susceptible of definite ascertainment, and the amount of compensation fixed by the agreement of the parties is not apparently unreasonable," and the case was remanded for a new trial, defendant not having offered any evidence in the court below. *Held*, that the court decided that said sum was to be regarded as liquidated damages, and not a penalty.

2. On the trial of a case after having been remanded to the supreme court for a new trial, it is the duty of the court to follow the opinion of the supreme court as the law of the case, though the trial court believes that it is wrong.

3. In an action for a breach of a contract by the proprietor of a department store not to advertise certain goods as having been purchased from a rival, the testimony of such proprietor, denying that he made such advertisements, is not inadmissible as stating a conclusion.

4. In an action for two breaches of a contract, it is not error to admit defendant's testimony disproving one of the breaches, though plaintiff had introduced no evidence in support thereof, where no objection was made on such ground.

5. Where the proprietor of a store sues a rival for breach of contract not to make certain advertisements, evidence that the former had advertisements in the same paper contradicting the advertisements of the latter is inadmissible where the former is entitled to liquidated damages under the contract on proof of the breach.

6. In an action for the breach of a contract, it is error to submit to the jury a question as to whether there was a breach, where there was uncontradicted evidence of a breach, and none of the witnesses were impeached.

7. In an action for breach of a contract not to use certain words in advertising, and not to advertise goods as having been bought from plaintiff, it is error to instruct the jury to find for defendant if he did not advertise said goods as having been bought from plaintiff, where there was evidence that defendant had used said words in his advertisement.

8. A question whether a sum provided in a contract for its nonobservance is a penalty or liquidated damages is for the court.

9. A proprietor of a department store purchased \$65,000 worth of goods of a rival, who retained other kinds of goods worth \$300,000, and the

former bound himself in the penal sum of \$5,000, to be paid as liquidated damages for a breach of a contract not to use certain general terms in his advertisement of the purchase. *Held*, that the latter was entitled to recover the \$5,000 as liquidated damages for such breach; such damages not being susceptible of definite ascertainment, nor disproportionate to the probable damage, and the intention of the parties being plain.

10. A proprietor of a store purchased a large quantity of goods from his rival owning a store known as the "Famous," and agreed not to use the words "dry goods" or "clothing" in his advertisement of the purchase. He advertised that he purchased the whole "Famous" outfit except the "clothing," and that the "Famous" had been disporting itself in the unknown sea of "dry goods." *Held*, a substantial breach of the agreement.

11. On a second appeal from a judgment in an action for a breach of a contract a judgment will be entered for plaintiff for a sum fixed in the contract as liquidated damages, where he is entitled to such damages on proof of the breach, and the breach is proved by evidence that is not contradicted in either of the trials in the court below.

Appeal from St. Louis circuit court; Leroy B. Valliant, Judge.

Action by David May and others against Dugald Crawford and others. Judgment for defendants, and plaintiffs appeal. Reversed.

R. E. Rombauer and Chas. W. Bates, for appellants. W. B. Homer, for respondents.

MARSHALL, J. 1. This case is here for the second time, upon appeal by the plaintiffs. The prior decision is reported in 142 Mo. 390, 44 S. W. 260. The evidence of the plaintiffs then and now is substantially the same. Then the defendants offered no testimony, insisting that, as plaintiffs had proved no special damage, the judgment of the circuit court, which awarded plaintiffs only nominal damages, should be affirmed, because the contract between the parties provided only for a penalty for its breach, while plaintiffs contended that the damages were liquidated by the contract, and therefore the trial court should have entered judgment for \$5,000, the amount specified in the contract, in respect to the acts complained of, and hence the judgment for only nominal damages was erroneous. The trial court had found that the defendants had broken their contract, and this court then held that this finding was proper. The judgment below was then reversed, and the cause remanded for a new trial. Upon a trial anew before a jury in the lower court the plaintiffs introduced the same evidence as before, and rested without proving any special damages, claiming that under the decision of this court on former appeal the contract provided for liquidated damages, and not for a penalty. The defendants denied this meaning of the prior decision, but introduced some testimony, principally to show that they had not advertised for sale goods as having been purchased from plaintiffs which had not in fact been so purchased, and to show that at the same time that defendants were publishing the advertisements complained of by plaintiffs as constituting a

breach of contract the plaintiffs were advertising that they had sold only certain portions of their goods to defendants, and that as to the remaining portions they were still doing business. There was a verdict for the defendants, from which plaintiffs have appealed.

Counsel for the respective parties are utterly disagreed as to the meaning and effect of the decision of this court on prior appeal, and the trial court seemingly was unable to understand it. Under the conditions stated, that decision can be held to have but one meaning,—the breach having been found, the only remaining question in the case was the amount of the damages. The trial court treated the contract as providing for a penalty, and so, in the absence of proof of special damage, assessed the damages at a nominal sum. This court approved the finding as to the breach, but reversed the judgment below as to the damages, denying that nominal damages could be considered the true measure of damages in this case. True, the opinion does not state, in so many words, whether the contract was for a penalty or for liquidated damages, but, as there was then no proof of special damage, the finding by the trial court of only nominal damages would necessarily have been affirmed if this court had regarded the contract as providing merely for a penalty. Moreover, the opinion pointed out that "the exact damage plaintiffs will suffer is not susceptible of definite ascertainment, and the amount of compensation fixed by the agreement of the parties is not apparently unreasonable when we consider the general character of the transaction, and the business relations of the parties"; and further refers to the difficulty of proving an injury to business resulting from "the mere advertising of a rival concern," in the absence of a stipulation fixing the damages. It is plain, therefore, that this court treated the case as a proper one for liquidated damages, for it would not have remanded the case to afford plaintiffs an opportunity to prove their damage after saying that such damage "is not susceptible of definite ascertainment." But, to dispel all doubt as to what was then meant, we hold that it presented a case of liquidated damages. The fact that a judgment was not then entered here, or the cause remanded, with directions to the trial court to enter a judgment for the full amount of damages agreed upon, must be taken as intending to offer the defendants an opportunity to disprove the breach, which they had failed to do on the first trial, for the probable reason that they regarded the contract as providing for a penalty, and, as no actual damage had been shown, they were, apparently, content to let judgment go for nominal damages. Any other course, upon the record as it then was, might well have been complained of as extremely harsh. But it cannot now be relied on to throw doubt upon the meaning of that decision.

2. We might stop here, and do now what

could have been done then; but the course of procedure in the case since, and the marked ability and deep research of the respective counsel, warrants a fuller review of the case as it is now presented. Prior to January 1, 1894, plaintiffs conducted a large department store on the corner of Broadway and Morgan streets, in the city of St. Louis, known as "The Famous," and defendants were engaged principally in the dry-goods business on the corner of Broadway and Franklin avenue, in that city; their respective establishments being within one block of each other. The plaintiffs had a stock of goods worth about \$400,000, about one-fourth of which was dry goods and notions. They desired to go out of the dry-goods and notions branch of their business, but to remain in business as to their other branches. Accordingly they entered into the following agreement with defendants on that day: "This agreement witnesseth: That D. May & Co., of St. Louis, Mo., a co-partnership composed of David May, Joseph Shoenberg, Louis D. Shoenberg, and Moses Shoenberg, have this day agreed with D. Crawford & Co., a co-partnership composed of D. Crawford and John Crawford, doing business in St. Louis, Mo., to sell to them the following goods, wares, and merchandise, which D. May & Co. have on hand in their store at the close of business on the 9th day of January, 1894, situated in the building of the Famous Shoe & Clothing Co., on the northwest corner of Broadway and Morgan streets, in the city of St. Louis, viz.: Black and colored dress goods kept and sold in department F; silks, satins, velvets, and plushes kept and sold in department G; linens and white goods kept and sold in department H; domestics, woolen, cotton goods, etc., kept and sold in department I; lace curtains, draperies, portiers, upholstery, blankets, comfortables, lap robes, etc., kept and sold in department J; linings, kept and sold in department K; notions, leather goods, art needlework, fancy goods, jewelry, perfumes, soaps, toilet articles, etc., kept and sold in department N; kid gloves, fabric gloves, silk mittens, woolen mittens, etc., kept and sold in department O; dress trimmings, mohair, silk braids, buttons, buckles, etc., kept and sold in department P; laces, embroideries, etc., kept and sold in department Q; handkerchiefs, veillings, ruchings, ladies' neckwear, etc., kept and sold in department R; muslin underwear, corsets, lace and silk caps, infants' wear, sewing machines, etc., kept and sold in department S,—it being the intention of said D. May & Co. in selling, and said D. Crawford & Co. in buying, the merchandise in the aforementioned departments, that said transfer of merchandise shall include any and all other articles kept and sold by said D. May & Co. in said departments not heretofore particularly and individually mentioned; said merchandise being contained principally on the first and ground floor, the show cases, windows, and in the reserve stock room on the fourth

floor of said building; the delivery of said goods being made to D. Crawford & Co. upon the execution of this contract, and the same to be removed by them immediately subsequent to the complete taking of inventory of said merchandise by D. May & Co.; inventory commencing on the morning of the 10th day of January, and continuing from said time diligently and uninterruptedly until an account of all merchandise shall have been taken. The price and consideration to be paid for same to said D. May & Co. by said D. Crawford & Co. is to be the invoice cost price of said goods without any additional charges, less $32\frac{1}{2}$ per cent. upon said cost price; it being understood that, for the purpose of ascertaining said cost price, all invoices and cost marks, whether private or otherwise, now in the possession of said D. May & Co., shall be open to the inspection of said D. Crawford & Co., and in all instances where a reference mark as to cost may be missing, and the cost of such merchandise may not be ascertained by invoices, that the same shall be mutually agreed upon by the parties thereto. The receipt of five thousand (\$5,000) dollars is by these presents acknowledged by D. May & Co. from said D. Crawford & Co. as a part payment on the purchase price of said merchandise hereinabove enumerated; it being understood that the balance that may be found to be due D. May & Co. upon the completion of the invoice by them shall be paid them in cash, without discount or deduction, upon said completed invoice being tendered D. Crawford & Co., and prior to the removal of the goods herein sold. It is mutually agreed and understood as a condition of this sale that D. Crawford & Co., the purchasers herein, are by these presents restricted and prohibited from in any way, directly or indirectly, by means of the public press, posters, circulars (mailed or distributed), or by any other public means of any kind or nature whatsoever, from using in their advertisements of the purchase of the above-mentioned merchandise, the general term, 'dry goods,' 'house-furnishing goods,' 'china ware,' 'shoes,' 'clothing,' 'shirt waists,' 'cloaks,' 'wraps,' 'suits,' 'fur trimmings,' 'men's and boys' hats and caps,' 'ribbons,' 'millinery,' or anything pertaining thereto; it being distinctly agreed and understood that the said D. Crawford & Co. shall be permitted to advertise no other articles as having been bought by them from the said D. May & Co., or Famous, than those actually sold and delivered to them by D. May & Co., and enumerated as sold and kept in the departments mentioned in the first portion of this agreement. As a penalty to insure the faithful carrying out of this provision of this agreement said D. Crawford & Co., individually and collectively, for themselves, their heirs, administrators, successors, and assigns, bind themselves forever in the penal sum of five thousand dollars (\$5,000), lawful money of the United States, to be paid said D. May &

Co. as liquidated damages in lieu of all other damages for their breach or breaches of the above provision, which said D. May & Co. may be entitled to recover by suit brought in any competent court. In order that this agreement pertaining to the purchase and delivery of the merchandise herein enumerated may be faithfully carried out by both of the parties hereto, it is understood and agreed that, if the said D. May & Co. shall fail to deliver the said goods, wares, and merchandise herein described to said D. Crawford & Co. at the time and price herein agreed upon, then the said D. May & Co. shall forfeit to the said D. Crawford & Co. the sum of ten thousand (\$10,000) dollars as liquidated damages in lieu of any other damages under this contract; and in the event that the said D. Crawford & Co. shall fail to accept the aforesaid goods, wares, and merchandise at the time they may be tendered to them after completion of inventory, or shall fail to pay the amount due as a balance on the purchase price as agreed upon herein for said goods, wares, and merchandise, then said D. Crawford & Co. agree, in lieu of all other damages under this agreement, that they will pay to said D. May & Co., as liquidated damages for their breach or breaches, as in this section specified, in the sum of ten thousand (\$10,000) dollars. It is understood that in the event of the breach or breaches of this agreement, and any failure to pay the liquidated damages which may be due by either of said parties hereto, that suit may be instituted in any competent court to recover the said liquidated damages. In witness whereof the parties hereto have hereunto set their hands and seals in duplicate, this ninth (9th) day of January, A. D. 1894."

The goods thus sold invoiced at the contract price about \$65,000, and were delivered to defendants, who paid said sum therefor. The plaintiffs had about \$300,000 worth of goods still left, consisting, among other things, of china, glassware, house-furnishing goods, shoes, hats, caps, trunks, valises, men's and boy's clothing, cloaks, suits, furs, millinery, and ribbons, ladies' and children's underwear and hosiery. On the 22d of January, 1894, the defendants advertised in the St. Louis papers their purchase. In the Globe-Democrat the advertisement read: "D. Crawford & Co.'s great sale of the 'Famous' stock of new merchandise begins this morning at D. Crawford's store. For full particulars of this gigantic sale see papers of yesterday." In the Post-Dispatch it read: "Got 'em again! You bet!! The big purchase by D. Crawford & Co. of the Famous new and immense stock of first-class general merchandise, excepting clothing, shoes, etc., etc., fetched the burghers as never before. Bargains for every day till you can't rest!!" On the 24th of January, 1894, defendants inserted in the Post-Dispatch, the Star-Sayings, and the Chronicle an advertisement the headlines of which were: "The half has not been told!!

of D. Crawford & Co.'s great scoop of the 'Famous' stock!! of its extent, its variety, its richness, its freshness, its newness, its adaptability to the wants of the St. Louis people!! Take a glance at it. It will make your mouth and your eyes water, and your heart leap for very joy!! 'Tis yours, all yours. Yours to command, yours to buy, and yours to send home, all for a mere song!! Crawford's got the whole 'Famous' outfit excepting the 'clogging' [in the Chronicle it was properly spelt], the shoes, the cloaks, the men's underwear, millinery, and hosiery. Of these Crawford's themselves had enough, and to spare, and are retailing them at prices below what the 'Famous' owned these particular goods at!!" On the 21st of January, 1894, the defendants inserted the following advertisement in the St. Louis Sunday Mirror: "No stock of goods on this continent is too big for D. Crawford & Co. to buy out, handle, and pay the cash for, so long as the price is right. Phenomenal and characteristic scoop by the irrepressible scoopers of the whole merchandise contained in the Famous Store, comprising the following: Silks, velvets, satins, plushes, black and colored dress goods, sheetings, shirtings, flannels, upholstery, laces, embroidery, ladies' muslin underwear, corsets, ladies' neckwear, notions, perfumes, jewelry, lace curtains, draperies, handkerchiefs, gloves, baby caps, ladies' waists, etc., etc., etc., who, like little wanton boys who swim on bladders, have been disporting themselves these few summers in (to them) the untried and unknown sea of dry goods, but far, far beyond their depth, endeavoring with such flimsy means to keep on the same tack with such strong and able swimmers as Crawford's! Every experienced mariner could foresee the end, hence the graceful and unconditional surrender and capitulation of the Famous to the doughty Scots!! To the victor belongs the spoils!! Crawford's will put on sale in the morning this whole immense stock of new, first-class merchandise at prices to make Wilson (with his little bill) blush, and hang his head for very shame! Doors open at 9 a. m.; close, dinner hour, 12 to 1; open at 1 and close at 5 p. m. The public will kindly note above arrangement, and save themselves disappointment. Terms, as usual, cash on the nail. No C. O. D.'s. No goods sent on approval. No samples sent. No exchanging. No wheedling. Merit only talks at Crawford's. D. Crawford & Co."

On the 13th of March, 1894, the plaintiffs instituted this action. The petition, after describing the character of the parties, set out the contract, and then laid the breaches, as follows: "Plaintiffs state: That said property mentioned in said agreement was then sold and delivered to defendants, and defendants paid plaintiffs therefor the purchase price stipulated in said contract. But that defendants failed to keep the agreement entered into between plaintiffs and defendants in said contract, by which defendants were

restricted and prohibited therein from in any way, directly or indirectly, by means of the public press, posters (mailed or distributed), or by any other public means of any kind or nature whatsoever, from using in their said advertisements of the purchase of the above merchandise the general terms, 'dry goods,' 'house-furnishing goods,' 'chinaware,' 'shoes,' 'clothing,' 'shirt waists,' 'cloaks,' 'wraps,' 'suits,' 'furs,' 'fur trimming,' 'men's and boys' hats and caps,' 'ribbons,' 'millinery,' or any thing pertaining thereto, and violated the same. But defendants failed to keep the agreement set forth in said contract by which they agreed to advertise no other articles as having been bought by them from said D. May & Co. or Famous, than those actually sold and delivered by said D. May & Co., and enumerated as sold and kept in the departments mentioned in the first portion of the aforesaid agreement, and violated the same. That said defendants, in total disregard of their agreements with the plaintiffs made in said contract, advertised by means of the public press and posters other articles as having been bought by them from said plaintiffs or Famous than those actually sold and delivered to them by said D. May & Co., and used, in their advertisements of the merchandise mentioned in said contract, the general terms they were prohibited from using by said contract; by reason whereof defendants became indebted to plaintiffs in the sum of five thousand (\$5,000) dollars, to be paid by said defendants to D. May & Co. as liquidated damages, as stipulated by the terms of said contract. Wherefore plaintiffs pray judgment against the defendants for the sum of five thousand (\$5,000) dollars, with interest and costs." The answer of the defendants is a general denial.

Upon the trial in the circuit court, the plaintiffs proved the contract, the advertisements aforesaid, and somewhat similar signs on the front of defendants' store, the invoice price of the goods, the value of the stock of goods they carried before and after the sale, with their character, and the delivery and payment of the goods to the defendants, and then rested. Over the plaintiffs' objection the court allowed the defendants to show that on the 14th and 21st of January, 1894, the plaintiffs advertised in the St. Louis papers, stating that they had sold to defendants their entire stock of certain specified goods, and giving as their reasons for selling the enormous growth of their business in certain other specified goods; and, also over the plaintiffs' objection, the court permitted defendant Dugald Crawford to testify that he had not advertised any goods as having been purchased from plaintiffs which were not in fact purchased from them.

The court refused to give the following instructions asked by the plaintiffs: "(1) The court instructs the jury to find a verdict for plaintiffs, and assess their damages in the sum of five thousand dollars, with interest there-

on at the rate of six per centum per annum from March 13, 1894." To which refusal of the instruction thus prayed, plaintiffs then and there excepted at the time. Plaintiffs then prayed the court to instruct the jury as follows: "(2) The jury are instructed that the following facts are admitted by the defendants: First, that the defendants executed and delivered the contract for the violation of which the plaintiffs now sue; second, that the defendants caused the insertion of the advertisements which have been read in evidence by plaintiffs. The jury are therefore instructed that if they believe and find from the evidence that, after the sale thus made by plaintiffs to defendants, the plaintiffs retained an amount of stock of the value of two hundred and fifty thousand dollars and more, and continued to sell the same at their store in the city of St. Louis, known as 'Famous,' and were so selling said stock when the advertisements read in evidence by plaintiffs were inserted by defendants, then the jury will find for the plaintiffs, and assess their damages at the sum of five thousand dollars, with interest thereon at the rate of six per centum per annum from March 13, 1894. (3) The court instructs the jury that the defendants committed a breach of the contract read in evidence by inserting the advertisements offered in evidence by the plaintiffs in this case in the newspapers. (4) The jury are instructed that, if they find for the plaintiffs, they will assess their damages at the sum of five thousand dollars, with interest thereon at the rate of six per centum per annum from March 13, 1894."

At the defendants' request, the court, after modifying, gave the following instructions: "(1) The court instructs the jury that the defendants, under the contract, were entitled to advertise in any manner they chose any goods whatsoever actually bought by them from plaintiffs for sale by them as having been bought from plaintiffs, or Famous, including any goods so actually purchased by defendants from plaintiffs. (2) The court instructs the jury that the meaning of the contract introduced in evidence, and the prohibition against advertising 'other articles,' means that the defendants were not to advertise other articles than those actually purchased from plaintiffs as having been bought by defendants from D. May & Co., or Famous."

The court, of its own motion, instructed the jury as follows: "It appears from the written contract read in evidence in this case that on January 9, 1894, the plaintiffs, D. May & Co., sold to the defendants, D. Crawford & Co., certain goods, wares, and merchandise which the plaintiffs had on hand in their store at the close of the business on the day above stated, situated in what is designated in the written contract as the building of the Famous Shoe and Clothing Company, on the northwest corner of Broadway and Morgan streets, in the city of St. Louis, viz.:

Black and colored dress goods, kept and sold in department F; silks, satins, velvets and plushes, kept and sold in department G; linens and white goods, kept and sold in department H; domestics, woolen, cotton goods, etc., kept and sold in department I; lace curtains, draperies, portiers, upholstery, blankets, comfortables, lap robes, etc., kept and sold in department J; linings, kept and sold in department K; notions, leather goods, art needlework, fancy goods, jewelry, perfumes, soaps, toilet articles, etc., kept and sold in department N; kid gloves, fabric gloves, silk mittens, woolen mittens, etc., kept and sold in department O; dress trimmings, mohair, silk braids, buttons, buckles, etc., kept and sold in department P; laces, embroidery, etc., kept and sold in department Q; handkerchiefs, veillings, ruchings, ladies' neckwear, kept and sold in department R; muslin underwear, corsets, lace and silk caps, infants' wear, sewing machines, etc., kept and sold in department S. It was stipulated in the contract that the defendants, D. Crawford & Co., should not in any way, directly, by means of the public press, posters, circulars (mailed or distributed), or by any other public means, in their advertisements of the merchandise so purchased, use the general terms 'dry goods,' 'house-furnishing goods,' 'china ware,' 'shoes,' 'clothing,' 'shirt waists,' 'cloaks,' 'wraps,' 'suits,' 'furs,' 'fur trimmings,' 'men's and boys' hats and caps,' 'ribbons,' 'millinery,' or anything pertaining thereto. And it was further stipulated in said contract that the defendants were permitted to advertise no other articles as having been bought by them from the plaintiffs, D. May & Co., or Famous, than those actually sold as above enumerated and described. And it was stipulated in the contract that, if the defendants should violate the provisions thereof above specified in reference to advertisements, they should pay to the plaintiffs for their damages the sum of five thousand dollars. The plaintiffs in this suit complain that the defendants have violated the provisions of the contract above specified, and bring this suit to recover the damages above named. The defendants deny that they have violated the contract, and this is the first question you are to settle by your verdict. If you believe from the evidence that the defendants, in their advertisements, included articles as having been bought from the plaintiffs, or Famous, other than those actually sold, as above specified in these instructions, then your verdict should be for the plaintiffs. But unless you find from the evidence that the defendants, in their advertisements, did include articles as having been bought from the plaintiffs, or Famous, other than those actually sold, as above specified in these instructions, your verdict should be for the defendants. If you find for the plaintiffs under the foregoing instructions, your next inquiry should be, have the plaintiffs, by the defendants' conduct in question, suffered any ma-

terial or substantial damage? Unless you find from the evidence that the plaintiffs by the defendants' conduct in question, have suffered material or substantial damage, you should assess the plaintiffs' damages at one cent. But if you find from the evidence that the plaintiffs, by the defendants' conduct in question, have suffered material or substantial damage, then you should assess their damages at five thousand dollars, with interest thereon at six per cent. per annum from March 13, 1894, to this date, you making the calculation of interest yourselves."

The jury returned a verdict for the defendants, and, after proper preliminary steps, plaintiffs appealed to this court.

The plaintiffs insist that there is no difference between the facts as now shown and as they appeared on former appeal, and that, as the trial court had held before that there was a breach of the contract shown, which this court approved, and as the case was then reversed because the trial court had treated the contract as one for a penalty, and this court held it to be one for liquidated damages, there was nothing left open for the trial court to do but to direct a verdict for the plaintiffs for \$5,000, with interest; and hence the circuit court erred in permitting the jury, upon this state of facts and upon the record, to pass on the question of whether there was a breach of the contract, and further erred in instructing the jury on the measure of damages. On the other hand, the defendants contend that the question of whether or not there was a breach of contract proved was a matter of fact which was properly submitted to the jury, and, as the jury found for the defendants, their finding must have been upon the theory that no breach had been proved, and hence their verdict is final, especially in this court; and, further, that this court did not decide on prior appeal that the contract was for liquidated damages, and not for a penalty; but, even if it did so decide, they ask that the question be now reconsidered and reviewed, and also urge that the court properly instructed the jury as to the damages. As hereinbefore pointed out, the decision in this case on prior appeal was that the sum of \$5,000, which the defendants agreed to pay the plaintiffs in case of breach of the terms of the contract, must be regarded as liquidated damages, and not as a penalty. This being so, it became the law of this case, and was not open to question in the trial court. The duty of that court was to obey it without respect to its opinion of whether it was right or wrong. Whatever error there was in it could only be corrected on appeal to this court. *Gamble v. Gibson*, 83 Mo. 290. This principle is well stated in *Wells*, Res Adj. § 613, to be: "It is a settled principle that the questions of law decided on appeal to a court of ultimate resort must govern the case in the same court and the trial court, through all subsequent stages of the proceedings, and will seldom be reconsidered or reversed, even if they appear to have been erroneous. 'A previous ruling

by the appellate court upon a point distinctly made may be only authority in other cases, to be followed or affirmed, or to be modified or overruled, according to its intrinsic merits. But in the case in which it is made it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves, and that, too, notwithstanding the prior decision may be 'in abrogation of one of the plainest principles of law,' since nothing actually determined therein can be reviewed, except, indeed, in the prescribed manner of obtaining a direct hearing on settled terms and conditions by a rule of court." This rule is necessary to the orderly and decent administration of the law, for it would destroy all respect for the law, and make judgments of courts of final resort mere mockeries and travesties, if the trial court could be permitted, on a trial anew in that court, to set aside, disregard, or disobey them. The cases cited by the author quoted from support this doctrine to its last analysis, and many others could be added if precedents were necessary to support so manifest a proposition. It is not to be understood that the trial court on the trial anew in this case acted in disregard of this principle. The trouble seems to have arisen from a misapprehension of what this court previously decided, and not from disobedience to its mandates. As to questions of fact, of course a prior decision of the appellate court is not conclusive, as the law applicable to the facts as presented by the record as it then appeared is all that the appellate court could have decided. The case, as to the facts, is to be treated on a new trial in the trial court as if there never had been a trial. *Crispen v. Hannovan*, 86 Mo. 168. And if the facts on the trial anew present a different case from that presented on the first trial to the appellate court, the trial court will be bound by the prior decision only so far as the principles of law then declared are applicable to the new state of facts. If, however, there is no substantial difference between the facts shown on the first and second trials, the trial court has but one function to perform,—to enforce the law applicable to that state of facts as it has been declared by the appellate court.

This raises the question whether there were any material differences of facts shown on the trial anew from what they were when the case was decided on prior appeal. It has already been shown hereinbefore that the evidence on the part of the plaintiffs was the same on both trials, and that on the first trial the defendants offered no testimony, whereas on the second trial their evidence was simply to the effect that they had not advertised goods as having been bought from plaintiffs which in fact were not so bought, and that the plaintiffs had themselves advertised, about the same time, in, perhaps, the same papers, the fact that they had sold certain parts of their stock to defendants, but were still engaged in business as to all their other branches or departments. The contract prohibited the defend-

ants from using in their advertisements 14 specific general terms, and also from advertising goods as having been purchased from plaintiffs which had not in fact been purchased from them. The petition charged that defendants had broken their contract in both respects. The oral testimony of Dugald Crawford was properly admitted to disprove the second alleged breach, and was necessarily of a negative character, and was not objectionable as stating a conclusion, and not a fact. It was unnecessary in the case, because plaintiffs had introduced no evidence in support of the second breach alleged, but it was not objected to for this reason, and the court therefore committed no error in admitting it. The evidence adduced by defendants going to show that the plaintiffs had advertised their sale to defendants of certain goods only, but were still in business as to their remaining departments, would have been properly admissible if the contract had only provided for a penalty for its violation, for it would have tended to counteract pro tanto the sting of the defendants' advertisements, and to advise the public that plaintiffs were still in business so far as their remaining departments were concerned. But, as the contract was for liquidated damages, this evidence was wholly inadmissible. It could not reduce the plaintiffs' recovery, nor could it defeat it entirely. There was no issue of fact joined in the case which this testimony would tend to support. It was doubtless offered in pursuance to defendants' contention that the contract was for a penalty only, and it was properly objected to by plaintiffs, because, the damages being liquidated by the contract, such testimony had no place in the case. The trial court admitted it, and must therefore have meant that it held as a matter of law that the contract was for a penalty only, thereby falling into the error of misconceiving the meaning of the prior decision of this court. The facts, therefore, were substantially the same on both trials, and the trial court should have enforced the law as declared by this court, for, the facts being conceded, the jury had no function to perform except to obey the direction of the court as to the legal effect of the uncontroverted facts. The trial court, however, refused the instructions asked by plaintiffs, which were predicated upon the theory of liquidated damages, and submitted the case to the jury to find—First, whether there had been a breach of the contract; and, second, in effect, whether the contract was for a penalty or for liquidated damages; for, without employing these specific words, it directed the jury to find for the plaintiffs in the sum of \$5,000, with interest, if they found that the plaintiffs had suffered material or substantial damage, but to give them only 1 cent if they found that they had suffered no material or substantial damage. If there had been any conflict in the testimony as to the breach, it would have been proper to submit it to the jury as a question of fact; but here there was no conflict of testimony,

no countervailing evidence, and no impeachment of any witness. The facts stood admitted. Their legal effect alone remained, and that was a question for the court, and not for the jury. Upon the same facts it had previously been held by the trial court that they constituted a breach of the contract, and this court had approved that finding, and a casual or critical reading of the advertisements would create a false impression on the mind of any one. It was error, therefore, for the court to submit the matter as a question of fact to the jury; and the verdict, declaring that there had been no breach, in face of the uncontradicted evidence that there had been a breach, cannot be allowed to stand, and should have been set aside (or, better still, never permitted) by the trial court. *Jackson v. Hardin*, 83 Mo. 175; *Powell v. Railway Co.*, 76 Mo. 80; *Ackley v. Staehlin*, 56 Mo. 558; *Hearne v. Keath*, 63 Mo. 84; *Reichenbach v. Ellerbe*, 115 Mo. 588, 22 S. W. 573; *Hipsley v. Railroad Co.*, 86 Mo. 348; *Wilson v. Albert*, 89 Mo. 539, 1 S. W. 209; *Long v. Moon*, 107 Mo. 334, 17 S. W. 810; *Caruth v. Richeson*, 96 Mo. 186, 9 S. W. 633; *Avery v. Fitzgerald*, 94 Mo. 207, 7 S. W. 6; *Spohn v. Railway Co.*, 87 Mo. 74; *Whitsett v. Ransom*, 79 Mo. 258.

The instruction given by the court of its own motion was further faulty in that it did not cover the whole case. The contract prohibited the use of certain specific terms by defendants in their advertisements, and also forbade their advertising goods as bought from plaintiffs which had not been so purchased, and the petition assigned both acts as breaches; but the instruction given by the court of its own motion submitted only the latter feature of the case to the jury. It was specially misleading to the jury and prejudicial to the plaintiffs, because the plaintiffs' entire testimony was in support of the former, and they had offered no testimony to sustain the latter, while the exact reverse was true as to defendants' evidence, and this instruction submitted only the latter feature of the case to the jury.

It was also erroneous to submit the second proposition contained in this instruction to the jury. The jury might as well have been instructed to give the plaintiffs 1 cent if they believed the contract was for a penalty, and to give them \$5,000 if they believed it was for liquidated damages. The plaintiffs had introduced no evidence of actual damages; in fact, there was no evidence as to the measure of damages introduced by either party. There was, then, nothing for the jury to proceed upon in order to determine whether the damage was material or substantial or not, and yet the jury were directed to find 1 cent or \$5,000, according as they found the damage to be material or substantial or not, when they had no evidence before them upon which to predicate a finding one way or another. This paradox clearly emphasizes the error of submitting questions of law to the jury, and this is true in whatever form or by

the employment of whatever language it may be done. The question of whether a sum provided in a contract for its nonobservance is a penalty or liquidated damages is a question of law for the court, and never a question of fact for the jury. In any event, therefore, the judgment must be reversed.

3. We are asked to review the former decision in this case, and to consider again the contract, as to whether it is for a penalty or for liquidated damages; and the courteous terms in which the request is couched, together with the marked ability and deep research of counsel shown in the exhaustive brief filed in the case, and the fact that the previous decision seems to have been misunderstood by counsel and the trial court, induces us to accede to the request; but it must not be understood as establishing a right or affording a precedent for so doing in any other case, but rather to the end that confusion may not follow in other cases involving the question here in issue. Originally, at common law, where the parties to a contract had stipulated for the payment of a sum certain for the nonperformance of the contract, the courts of law left them where they had placed themselves, and enforced the provision of the contract as to the damages with the same rigidity that they did any other provision of the contract, and the only defense was a release under seal. Then the only relief available was in a court of equity, where the wronged party was permitted to exact only the actual damages suffered by the breach of the contract. So many difficulties arose in consequence of the harsh rule of the common-law courts that by the statutes of 8 & 9 Wm. III. c. 11, § 8 (3 St. at Large, p. 643), and 4 & 5 Anne, c. 16, §§ 12, 13 (4 St. at Large, pp. 206, 207) the practice in courts of law was changed so as to authorize only a recovery of the actual damages, instead of the whole penalty, thereby avoiding the necessity of a resort to a court of equity. 1 Sedg. Dam. (8th Ed.) §§ 390, 391, et seq. Notwithstanding these statutory provisions, however, the right to stipulate the damages is still recognized by the courts in proper cases. Whether the sum specified in a contract as damages for its nonperformance is a penalty or liquidated damages has always been a question of law for the court, and no case that our attention has been directed to, or our research discovered, has left it to a jury to decide either expressly or by the employment of equivalent words. Three principal tests are usually employed by the courts to determine whether it is a penalty or liquidated damages: First, the language employed; second, the subject-matter of the contract; and, third, the intention of the parties. The language employed is the least relied on. "The subject-matter of the contract and the intention of the parties are the controlling guides. If, from the nature of the agreement, it is clear that any attempt to get at the actual damage would be difficult, if not vain, the

courts will incline to give the relief which the parties have agreed on. But if, on the other hand, the contract is such that a strict construction of the phraseology would work absurdity or oppression, the use of the term 'liquidated damages' will not prevent the courts from inquiring into the actual injury sustained, and doing justice between the parties." 1 Sedg. Dam. (8th Ed.) § 396. "Where the subject-matter of the contract is such that the damages for its breach can be computed with certainty by definite rules, the courts will usually treat the sum agreed upon as a penalty; especially if there is great disparity between the agreed sum and the actual damage. Such contracts are those for the payment of money, and those in which the market price affords a certain standard for the measure of damages. But if, from the nature of the contract, the damages cannot be calculated with any degree of certainty,—as, when that which is the subject-matter of the contract has no precise market value, or there are peculiar circumstances contemplated by the contract,—the stipulated sum will be held to be liquidated damages." 5 Am. & Eng. Enc. Law, p. 25, and cases cited in notes. As was so well said by Scott, J., in *Bayse v. Ambrose*, 28 Mo., loc. cit. 44: "It is obvious that every case occurring under this branch of the law must, in a great measure, be determined by its own circumstances. If the courts were to hold that the parties, by adopting any particular form, might relieve their contracts from their supervision, the law would be entirely defeated, as nothing would be easier than to adopt such form in every case. The nature and stipulations of the contract must determine whether the sum stipulated to be paid in case of its violation is a penalty or liquidated damages. The statute cannot be evaded by arbitrarily calling a penalty 'liquidated damages.' We shall not attempt to review the cases on this subject. They are numerous, and not easily reconcilable. On such a question an entire concurrence of opinion could hardly be expected." 1 Sedg. Dam. § 396, classifies the subject as follows: First, an agreement to do or refrain from doing a particular act, or in default thereof, to pay a given sum of money; second, an agreement to pay an absolute sum of money, conditioned to become void on payment of a less sum, or the performance of some particular act; third, an agreement to do or refrain from doing a particular act, and, if the promise is not performed, to pay a given sum of money as a penalty; and, fourth, an agreement in all respects like the third mentioned except that the sum to be paid is declared to be liquidated or stated damages, or as a forfeiture. The sum of the whole matter is that where the contract is one touching a legal subject-matter, the parties *sui juris*, and the damages for a breach can be computed with certainty by definite rules, the courts will construe it to be a penalty; but where, from the nature of the contract, the damages can-

not be calculated with any degree of certainty, or any attempt to get at the actual damage would be difficult, if not vain, or where "the exact damage is not susceptible of definite ascertainment," or where the acts to be done or omitted "are not measurable by any exact pecuniary standard," and the intention of the parties "is plain and palpable," and the amount stipulated in the contract as the damages to be recovered is not "disproportionate to the probable damage," the courts will construe it to be liquidated damages.

Applying these principles to the case at bar, the contract related to a legal subject-matter. The parties were *sui juris*. There is no pretense of fraud or overreaching. They were successful business men, of large means and experience, and knew the advantages or injuries resulting from advertising. They had been rivals. The transaction involved the payment of \$65,000 in cash, and the plaintiffs still had a stock of goods left worth \$300,000, while that of defendants was also necessarily great. The plaintiffs sold to defendants that branch of their business wherein they had been rivals. They agreed that defendants should not use certain specific, general terms in advertising the sale and purchase. They knew better than any jury or court could know what the effects upon their respective business would be from using those terms in connection with the transaction. They kept their fingers constantly upon the public pulse, and understood what effect such advertisements would have upon the buying world. They agreed what the damage would be to the plaintiffs in case of a breach of the contract. That damage "is not susceptible of definite ascertainment," or "measurable by any exact pecuniary standard," or computable with any degree of certainty by definite rules. Their intention was "plain and palpable." They stipulated for damages which are not "disproportionate to the probable damage." The defendants broke their agreement. The plaintiffs have been damaged, and should be compensated according to the measure deliberately fixed by the parties. This is not a case where the contract has been broken in an insignificant or trivial particular, and hence the cases where the courts have relieved against manifest injustice or oppression for breaches of a trivial character have no application here. The breach here was in respect to matters which were regarded by the parties as of sufficient magnitude to be specially enumerated and guarded against. The defendants advertised that they would sell Famous stock; that they had purchased Famous new and immense stock of first-class general merchandise, excepting clothing, shoes, etc.; that "Crawford's got the whole Famous outfit excepting the 'cloding,' the shoes, the cloaks, the men's underwear, millinery, and hosiery"; and that "no stock of goods on this continent is too big for D. Crawford & Co. to buy out, handle, and pay the cash for, so long as the price is right.

Phenomenal and characteristic scoop of the irrepressible scoopers of the whole of the merchandise contained in Famous store, comprising the following, * * * who, like little wanton boys who swim on bladders, have been disporting themselves these few summers in (to them) the untried and unknown sea of dry goods [one of the prohibited general terms], but far, far beyond their depth, endeavoring with such flimsy means to keep on the same tack with such strong and able swimmers as Crawford's! Every experienced mariner could foresee the end; hence the graceful and unconditional surrender and capitulation to the doughty Scots!! To the victor belongs the spoils!! Crawford's will put on sale in the morning this whole immense stock of new, first-class merchandise, at prices to make Wilson (with his little bill) blush, and hang his head for very shame." Such advertisements were clearly a gross breach of the letter and spirit of the contract, and could convey but damaging impressions on the mind of the public to the plaintiffs' business. For such a breach the defendants agreed that they would pay \$5,000. It is wholly immaterial whether they also spoke of that sum as a penalty to secure the performance of the contract. They measured their own punishment in case of a breach of the contract. A jury could only guess at it, if it were treated as a penalty. The prior decision of this court was that the damages were liquidated. Tested by the rules universally recognized, we reaffirm that conclusion. This case has now been twice tried in the circuit court and the same number of times in this court. The parties have adduced all their testimony. No good could come of another trial. But one judgment could ever be permitted to stand upon this record. Therefore, to the end that there may be an end to this litigation, the judgment of the circuit court is reversed, and the cause remanded to that court, with directions to enter a judgment in favor of the plaintiffs for \$5,000, with interest at the rate of 6 per cent. per annum from March 13, 1894, to the date of such judgment. All concur, except VALLIANT, J., who, having tried the cause while circuit judge, took no part herein.

**HILL et al. v. WERTHEIMER-SWARTS
SHOE CO.**

(Supreme Court of Missouri, Division No. 1.
May 23, 1899.)

**COMPOSITIONS WITH CREDITORS—BREACH—
LIQUIDATED DAMAGES—FRAUD OF DEBTOR—
EVIDENCE—PLEADING—AUTHORITY OF
AGENT.**

1. A composition between two or more creditors is binding on them, though there are other creditors who do not sign it, in the absence of a stipulation therein requiring the signatures of a greater number.

2. A creditor wrote to another creditor of a common debtor that whatever the agent of the former creditor did with reference to a composition would be satisfactory to him. The agent

had general authority to compromise debts and extend the time of payment. *Held*, that he had authority to fix the measure of damages for a breach of a composition with the latter creditor.

3. A penalty prescribed for a breach of a composition, giving a common debtor an extension of time, should not be regarded as liquidated damages, in an action for a breach by reason of an attachment by one of the creditors of the debtor's goods before the extension had expired, as the damages are susceptible of definite ascertainment.

4. In an action by a creditor against another creditor of a common debtor for breach of a composition by attaching the debtor's goods before the termination of an extension fixed by the composition, it is error to instruct the jury to find for defendant if the debtor was guilty of fraud justifying the attachment, in the absence of a special plea by defendant setting up such a defense.

5. The record in the attachment proceedings is not competent evidence against plaintiff to show such defense, where he was not a party to the proceedings.

6. A composition wherein creditors agree to extend the time of payment of their claims, and to refrain from purchasing the debtor's goods, or permit a sale thereof with their aid, is not broken, as between themselves, by one of the creditors attaching the goods before the end of the extension, where the debtor was about to defraud all of the creditors.

Appeal from St. Louis circuit court; Jacob Klein, Judge.

Action by Napoleon Hill and others against the Wertheimer-Swarts Shoe Company. Judgment for defendant, and plaintiffs appeal. Reversed.

Action for damages for breach of contract of composition between the parties hereto and their debtor. Harper & Loretz were in business at Des Arc, Ark. On the 9th of December, 1892, they were unable to meet their obligations at maturity, and were indebted as follows: Hill, Fontaine & Co. (the plaintiffs), \$2,750; Wertheimer-Swarts Shoe Company (the defendant), \$400; Bruce-Beine Hat Company, \$80; Goodbar & Co., \$467; Porter & McRae, \$79.75. On that date their creditors, except Wertheimer-Swarts Shoe Company and Bruce-Beine Hat Company, signed an agreement extending the time of payment until January 1, 1894, and providing that the debtors were to continue in business, collect outstanding accounts, and apply the proceeds of all sales and collections to the payment of the claims of their creditors pro rata. On the 4th of January, 1893, the plaintiffs wrote to the defendant, stating that Harper & Loretz were unable to meet their obligations, but they felt assured that by giving them time they would pay out in full in a few years, and inclosing the agreement which the other creditors (except Leman & Gale Dry-Goods Company and Bruce-Beine Hat Company) had signed; said these parties would sign if the defendant did; and that, unless the extension was granted, the debtors would be compelled to make an assignment; inclosed a statement of their assets and liabilities; and told them that the court would meet the last Monday in January, and all suits over \$200 would have to be brought before that

time, to cut out suits involving smaller amounts. On the 5th of January, 1893, the defendant wrote to plaintiffs, acknowledging receipt of their letter of the 4th, and said they had referred the matter to their representative, Mr. Wash, and that "he will confer with you regarding the matter, and whatever he does will be satisfactory to us." On the 11th of January the plaintiffs wrote to defendant again, but this letter appears to have been lost, and so is not in the record. At any rate, the defendant answered it by postal card on the 12th, saying their letter of the 11th had been received, and that Mr. Wash would be in the city, and mail would reach him in their care by the 14th inst. On the 14th Mr. Wash wrote Harper & Loretz as follows: "Gentlemen: I have just now returned home, and have, consequently, been unable to write you before, with reference to the settlement of your affairs. You may write your factors and all other creditors that the Wertheimer-Swarts Shoe Co. stands ready to assist you in any way it can to the same extent that the other creditors do. If one year's time is sufficient, in their judgment, to tide over the present difficulties, please signify our willingness to accept same. I herewith inclose blank form of agreement for creditors to sign, granting extension, as per promise. Please get your factors to sign it first, and then circulate it among the rest of your creditors." On the same date Mr. Wash wrote to the plaintiffs, acknowledging receipt of their letter of the 11th, and telling them he had written Harper & Loretz to the effect that defendant was ready and willing to assist them in any way in their power to the same extent that their other creditors did, and adding: "I was recently in Des Arc, and had quite a long talk with Mr. Harper, through whom I received a statement of his affairs. I am convinced that he has ample assets, were they available. Under the circumstances, however, I think the creditors will do well to give him an extension of one year from January 1st. I also inclosed him an agreement to be signed by all the creditors granting the extension, which, no doubt, he will forward you at once." On the 17th of January, 1893, Mr. Wash again wrote to plaintiffs as follows: "I suppose by this time you have received my letter in connection with the Harper & Loretz matter. As per your instructions of recent date I herewith inclose letter to you." The defendant did not sign the composition contract of December 9, 1892, but Mr. Wash prepared, and on behalf of defendant signed, another agreement, which was as follows: "We, the undersigned, creditors of Harper & Loretz, of Des Arc, Ark., hereby stipulate and agree to grant said Harper & Loretz an extension of one year from January 1, 1893, for the payment of their respective claims against said firm; further stipulating and agreeing that during the term of said extension neither one of the contracting parties hereto will purchase the stock

of said firm, or permit same to be sold with their aid or assistance, each firm hereto subscribing respectively holding itself liable to all the other subscribing creditors in the sums of their respective claims for breach of condition of this contract. [Signed] Wertheimer-Swarts Shoe Co., by Benj. S. Wash, Attorney. Hill, Fontaine & Co. Bruce-Beine Hat Co., per B. F. Beine." The plaintiffs and Bruce-Beine Hat Company also signed it. The other creditors had already signed the agreement of December 9, 1892, and were not asked by plaintiffs, and apparently not by any one else, to sign this. All of the creditors acted upon these agreements, and none of them pressed the debtors for their money; but on the 2d of November, 1893, the defendant, without notice to the plaintiffs or any one of the creditors, instituted a suit by attachment against Harper & Loretz, alleging that they had sold, conveyed, and disposed of their property with the fraudulent intent to cheat, hinder, and delay their creditors, and that they were about fraudulently to dispose of their property with that intent. They levied on the goods of Harper & Loretz, and they were sold by the sheriff, under the attachment writ, for \$536.60. Defendant afterwards obtained judgment for \$440, which, with the costs, was satisfied out of the proceeds of the sale by the sheriff. The plaintiffs then instituted this suit on the composition agreement signed by the parties hereto and by Bruce-Beine Hat Company, and asked for judgment for \$2,744.03, the amount of their claim against Harper & Loretz, with interest thereon, and also "for five hundred dollars (\$500) damages, in addition to the aforesaid indebtedness." The answer is a general denial.

On the trial the foregoing facts were proved, and the following facts were agreed to by stipulation: "It is hereby stipulated by plaintiffs and defendant that the signature of 'Wertheimer-Swarts Shoe Co., by Benj. S. Wash, Attorney,' to the contract sued on in this case is in the handwriting of said Benj. S. Wash; that the said Wash was at the time of signing said contract, and for years prior thereto, the agent and attorney of defendant's company, whose duty it was to travel for defendant, and settle and compromise debts due defendant, at his discretion, or bring suit upon the debts owing to defendant company from their customers in Arkansas and Tennessee; that in his discretion he had authority to make contracts for defendant for the extension of time to said debtors with their other creditors, as in his best discretion and judgment it was proper to do; that he went to Des Arc, Ark., especially to make some agreement with Harper & Loretz at that place, who were defendant's debtors at said time, and to make an agreement with their creditors about extension of time for the payment of the debts of said Harper & Loretz; that the plaintiffs addressed a letter to defendant, dated January 4, 1893, which was

received by defendant through the mail on the 5th of January, 1893, and that said letter will be produced by defendant at the present trial; that the defendant company answered said letter by letter dated January 5, 1893, and that said answer was forwarded through the mail to the plaintiffs on January 5, 1893, and was received by plaintiffs; said answer is herewith filed, and made a part of this stipulation, and marked 'Exhibit 1'; that plaintiffs replied to said answer by letter dated January 11, 1893, which was forwarded through the mail and received by the defendant on January 12, 1893, but said last-mentioned letter from the plaintiffs cannot now be found by defendant; that defendant company, on January 12, 1893, answered said last-mentioned letter by postal of that date, and forwarded same by mail to plaintiffs, which they received, and said postal is herewith filed, and is made a part of this stipulation, and marked 'Exhibit 2.' It is further agreed that plaintiffs had no knowledge of any limitations, if any existed, upon the authority of said Wash to make the contract set out in the plaintiffs' petition February 19, 1896. [Signed] Harvey & Hill, W. D. Wilkerson, Attorneys for Plaintiffs. David Goldsmith, Attorney for Defendant."

Upon this showing, the court, as it appears from the colloquy between the court and counsel, held that Wash was the defendant's agent, with full power to enter into a composition agreement on their behalf, but that he had no power to bind the defendant to the affirmative part of the second clause of the contract, respecting damages for a breach thereof; that this clause was severable from the remainder of the contract, but that the contract did not prevent or debar any of the parties to it from instituting a suit, by attachment or otherwise, against their debtor, "in the event the debtors themselves were about to defraud them all." Hence the court instructed the jury that the plaintiffs were not entitled to recover, and they thereupon took a nonsuit, and, after proper steps, appealed the case to this court.

W. D. Wilkerson, Thos. B. Harvey, and Harry M. Hill, for appellants. David Goldsmith, for respondent.

MARSHALL, J. (after stating the facts).

1. It is urged by defendant that the composition agreement is not binding upon it, because it was not signed by all the creditors of Harper & Loretz. This is untenable. Unless it is expressly stipulated in a composition that all or a specified number of the creditors shall enter into it to make it binding, it is not essential that a majority, or any particular number more than two, must sign it to make it binding on all who do sign it. *Good v. Cheesman*, 2 Barn. & Adol. 328; *Constantin v. Blache*, 1 Cox, Ch. 287; *Lewis v. Jones*, 4 Barn. & C. 506; *Norman v. Thompson*, 4 Exch. 755; *Devou v. Ham*, 17 Ind. 472; *Lambert v. Shetler*, 71 Iowa, 465, 82 N. W. 424;

Gardner v. Lewis, 7 Gill, 377; *Eaton v. Lincoln*, 13 Mass. 424; *Renard v. Tuller*, 4 Bosw. 107; *Bank v. McGeoch*, 92 Wis. 311, 66 N. W. 606. This composition did not expressly require that it should be agreed to by any particular number of the creditors. On the contrary, in his letter to plaintiffs of the 14th of January, Mr. Wash said, "I also inclosed him [Harper & Loretz] an agreement to be signed by all the creditors granting the extension," thereby clearly limiting it to such only as might grant the extension. As soon as it was signed by the plaintiffs and defendant, it became a valid composition as to them, whether any other creditor signed it or not. *Bank v. McGeoch*, 92 Wis. 311, 66 N. W. 606.

2. Defendant next argues that Wash had no power to bind it to so much of the contract as provides the measure of damages in case of a breach. The stipulated facts show that Wash was the agent of the defendant, clothed with full power to settle and compromise debts due defendant, at his discretion, and with like power and discretion to make contracts for defendant for the extension of time to its debtors, and especially authorized to make some agreement with the other creditors for an extension to Harper & Loretz; and defendant's letter to plaintiffs expressly stated that the whole matter had been referred to Wash as their representative, and "whatever he does will be satisfactory to us." Accordingly, Wash refused to sign the composition of December 9th, which had been signed by all the other creditors except defendant, and Lamson & Gale Dry-Goods Company, and Bruce-Beine Hat Company (and these two had agreed to sign if defendant did so), which granted the same extension of time, and provided that the proceeds of sales and collections should be paid to the creditors pro rata on the 1st of each month, and, instead thereof, prepared, signed, and transmitted the composition sued on, which was the same as to the time granted, but, instead of a pro rata division of receipts from sales and collections on the 1st of each month, provided that none of the contracting parties, during the term of the extension, should "purchase the stock of said firm, or permit the same to be sold with their aid or assistance"; and to make this provision effective the composition he prepared further provided: "Each firm hereto subscribing respectively holding itself liable to all other subscribing creditors in the sums of their respective claims for breach of condition of this contract." Wash is thus shown not only to have been defendant's general agent to act for it in matters of this character, not only to have had apparent authority to enter into contracts of this character, but also to have been clothed by defendant with express authority to bind it in this particular matter, it assuring plaintiffs beforehand that "whatever he does will be satisfactory to us." More complete authority could not have been conferred upon him. The plaintiffs dealt with him as the

alter ego of the defendant, and his acts relating to the subject-matter under negotiation were the acts of the defendant. He had some particular object in mind, which he must have believed would be beneficial to defendant, when he refused to agree to a pro rata monthly division of the proceeds of sales and collections, and instead insisted on a provision against any of the parties to the composition buying, or aiding or assisting in the sale of, the debtor's stock of goods. The only reasonable interpretation to put on his conduct in this regard is that he knew that, if Harper & Loretz were required to divide the proceeds of all sales and collections pro rata among all their creditors on the 1st of each month, it would be a gradual liquidation by Harper & Loretz, but it would give them no money with which to replenish the stock as it was sold out, and they would thus be deprived of turning over their capital as often as they could, and making a profit on each sale, repurchase, and sale; and that, when the stock on hand was all converted into cash, and the outstanding debts were collected, and the whole turned over to the creditors, Harper & Loretz would no longer be a "going concern," but would be eliminated as merchants, and as possible future patrons of the defendant's, whereas, by allowing them to go on in business for a year, with full control over their assets, and without diminishing the earning capacity and profit-making capability of their capital, they might, and possibly would, be able at the end of the year to pay them what they owed, and still have a "going" business, and, mayhap, a surplus on hand. But, whatever was the true reason, and whether the contract proposed by defendant and accepted by the plaintiffs was a wise one or not (and who shall say it was not wise?), it was done, and Wash had authority to bind defendant to it. *Mechem*, Ag. p. 535, § 708; *Story*, Ag. (9th Ed.) p. 505, § 443; *Banks v. Everest*, 35 Kan. 687, 12 Pac. 141; *Cobb v. Day*, 106 Mo., loc. cit. 298, 17 S. W. 323; *Rice v. Groffmann*, 56 Mo. 434; *McNichols v. Nelson*, 45 Mo. App., loc. cit. 452; *Badger Lumber Co. v. Ballentine, Foster & Co.*, 54 Mo. App., loc. cit. 180.

3. Plaintiffs contend that the contract is one for stipulated, or agreed, or liquidated damages,—that is, that if either party broke the contract he would pay the others the amount of their claims, respectively; or, if they are in error in this, and if the contract is only one for a penalty, still they were entitled to nominal damages, and the circuit court erred in ordering a nonsuit. We have at this term, in the case of *May v. Crawford*, 51 S. W. 698, had occasion to investigate and decide the principles which must obtain in determining whether a contract is to be held one for a penalty or for liquidated damages, and it is not necessary to review the law in this case. But, as this case must be tried anew, it is proper to say now that we do not regard it as a case of liquidated damages, for

51 S.W.—45

the especial reason that the damages can be computed with certainty by definite rules, are measurable by an exact pecuniary standard, and are susceptible of definite ascertainment. Or, in other words, the plaintiffs' damage is the amount they lost by defendant's breach of the contract, which, under the facts as they now appear, that the debtors had assets enough to pay all their creditors in full at the time the attachment was levied, and that these assets were diminished or sacrificed by a forced sale, so that they did not yield enough to pay all in full, would be the whole of plaintiffs' claim, less what they might have realized from the debtors by the exercise of ordinary care and diligence, after they learned of the attachment by the defendant. The case, however, did not turn on this question in the trial court. There was some discussion between court and counsel on this proposition, and plaintiffs' counsel seem to have "straddled," as they did in their petition, and refused to take a definite stand as between a penalty and liquidated damages; in fact going so far as to claim a right to recover on both theories. The court put its decision upon a different ground entirely.

4. The circuit court nonsuited plaintiffs on the ground that the composition did not debar any of the parties to it from attaching or otherwise proceeding "in the event the debtors themselves were about to defraud them all." This ruling was not responsive to any issue joined in the case, nor was there any competent evidence before the court upon which to base the instruction. The plaintiffs were not parties to the attachment suit by defendant against Harper & Loretz, and hence are not bound by it in any manner. The record in that case, offered in evidence by plaintiffs, was admissible to prove the breach of the composition contract pleaded in the petition, and denied in the general denial by defendant. But there was no special defense of this character pleaded by the defendant by way of confession and avoidance. Hence this case was determined upon a point not in issue, and as to which there has been no trial or finding of fact between the parties to this action. Indeed, counsel for defendant does not here attempt to sustain the judgment of the trial court on this ground. He does not argue the question, or cite any decision in support of the ruling. Still, as the case must be tried anew, it is proper to refer to the proposition now. The cases of *O'Brien v. Osborne*, 10 Hare, 92; *Cutter v. Reynolds*, 8 B. Mon. 596, and *Flack v. Garland*, 8 Md. 188, decide that the composition agreement cannot be relied on by the debtor to defeat an action by one of the creditors who was a party to the composition, unless the debtor himself has complied with the spirit of the composition; and that he will not be protected by the composition agreement in cases where he has done any act not contemplated by that contract that he should do, and which is injurious to the

creditors; and the case of *Bank of Montgomery v. Ohio Buggy Co.*, 110 Ala. 300, 18 South. 273, holds that where the debtor has violated the terms of the composition agreement, and has paid one of the creditors, who was a party to that agreement, his claim in full, the other creditors, parties to that agreement, cannot treat the money so paid to such creditor as a trust fund in his hands for the benefit of all the creditors who agreed to the composition. In the Alabama case the supreme court treated the composition agreement as abrogated the instant the debtor violated its provisions, and held that each creditor was entitled to look out for his own interests as soon as the debtor violated the agreement. The composition in that case, as in the case at bar, was for an extension of time for payment by the debtor, coupled with a condition that no new indebtedness was to be incurred, and a provision that, if any new indebtedness was incurred, the extension of time granted by the composition was to become null, and the claims so extended were to become due and collectible at once. A contract of composition, depending upon the mutual forbearance of the creditors for a consideration to support it, must be carried out in the strictest good faith by all the parties to it, and every such contract must be strictly construed. 6 Am. & Eng. Enc. Law (2d Ed.) p. 386, and cases cited in note 3. Such agreements must be construed in the light of the financial condition of the debtor at the time they are entered into. There is always present, in such a contract, an implied agreement by the debtor that he will, in good faith, carry out the agreement, and that the status and rights of all parties shall not be changed to their detriment by any fraudulent or wrongful act of his. He could not, therefore, set up the composition agreement as a shield against his own fraud. The agreement of the creditors *inter sese* is that they will extend the time of payment to a particular date, but there is always the implied stipulation that the debtor shall not act fraudulently with respect to the property and assets left in his care and management. This being the nature and extent of the agreement, if the debtor fraudulently disposes of his property before the extended time for payment has expired, there is no rule of law or morals, and no precedent, that prevents any of the creditors from immediately taking steps to protect himself. The composition agreement is broken, and the parties are then in the same attitude towards the debtor and each other as if no agreement had been made. Any other rule would make it possible for the debtor to effectually dispose of his property at his leisure, while the hands of his creditors were tied by a contract which he himself has broken. The agreement in this case does not contemplate the creation of such conditions, or the imposition of such restrictions upon the creditors. Of course, if it should appear, under proper issues ten-

dered and joined, that the debtor had been guilty of no fraud, but that the defendant had wrongfully sued out the attachment, the defendant would clearly be liable in this action, for such conduct would be a palpable violation of the spirit of the composition. But, as before pointed out, no such issue has been joined or tried in this case, and it was error for the circuit court to nonsuit the plaintiffs for this reason. The judgment of the circuit court will be reversed, and the cause remanded to that court for a new trial in conformity to this opinion. It is so ordered. All concur.

ST. LOUIS TRUST CO. v. BAMBRICK.

(Supreme Court of Missouri, Division No. 2.

May 23, 1899.)

OVERFLOWING LAND—PLEADING—MEASURE OF DAMAGES—RENTAL VALUE—INSTRUCTIONS.

1. In an action for overflowing plaintiff's land, a complaint which alleges the ownership and possession of the land at the time of the injury and at the time of the commencement of the suit, and the wrongful acts of defendant, and that plaintiff has been damaged thereby in a specified sum, is sufficient, and need not allege its value before the injury and its value afterwards, or its rental value from the date of the overflow to the time of the commencement of the suit.

2. In an action for overflowing land, an instruction that the jury may take into consideration the rental value of a quarry thereon in determining its value is not erroneous, as that is one of the criterions by which its value may be determined.

3. In an action for overflowing plaintiff's land, and permanently injuring a quarry thereon, it is error to give an instruction that the measure of plaintiff's damages is the difference between the value of the quarry just before the act causing the overflow and afterwards, where there has been no evidence as to its value at such times.

Appeal from St. Louis circuit court; Pembroke R. Flitcraft, Judge.

Action by St. Louis Trust Company, as executor of the estate of Anna F. McDonald, deceased, against John Bambrick. From a judgment in favor of plaintiff, defendant appealed. Reversed.

T. J. Rowe, for appellant. Wm. B. Thompson and Ford W. Thompson, for respondent.

BURGESS, J. This suit was commenced by Anna F. McDonald for damages to a small tract of land, and a stone quarry thereon, of which she was the owner, by filling up with dirt on his land the channel of a stream of water which flows through her land, and also through defendant's, thereby backing the water up and flooding said quarry and land. The plaintiff recovered a verdict in the sum of \$3,000, and, after unsuccessful motion to set the same aside, defendant appeals.

Since the case has been pending in this court, Anna F. McDonald has deceased, and the cause revived in the name of the plaintiff, as her executor. After alleging ownership in plaintiff of the land, the quarry, and the nature

and character of the stream of water thereon, its source, channel, and course, the petition proceeds as follows: "Plaintiff further states that the said defendant has excavated the ground above the said channel, at a point upon and where it passes under his said premises, and has, within sixty days last past filled said channel with dirt, and partially obstructed the flow of the said waters through the same, so that the waters from said spring, and other waters running through said channel, have set back and accumulated to such an extent as to overflow the premises of plaintiff herein, and the same have overflowed the premises of plaintiff herein so that, where plaintiff's premises are excavated and used for a quarry, the same are no longer of any use to the plaintiff for quarry purposes, or for any other purposes, and that the premises of plaintiff herein, by the act of said defendant, have been filled with water, so that the same is now some twenty to forty feet deep, and that the water so accumulated by reason of the overflow is stagnant, and the same has injured and destroyed plaintiff's premises. Plaintiff says that said defendant has wholly obstructed and dammed up the said water course and stream, so that the water accumulated on plaintiff's premises cannot flow into the Marie Castor creek from the stream aforesaid, and the said water has become foul, polluted, and poisonous, and has destroyed the use of the said quarry of plaintiff herein, and also the land owned by plaintiff herein." It then concludes with a prayer for judgment for \$20,000 damages. The answer is a general denial.

The facts, as disclosed by the record, are about as follow: Mrs. McDonald was, at the time of the grievance complained of and at the commencement of this suit, the owner and in possession of lot 52 of suburb Cote Brillante, in the city of St. Louis, Mo., as described in petition, and defendant was the owner of and in possession of lot 47 and part of lot 48 of suburb Cote Brillante, as described in the petition. At said time Giles F. Filley was the owner of, and in possession of, lots 56, 57, 58, and part of 59, as described in the petition. Prior to 1869, a stone quarry had been opened in the northeastern part of plaintiff's lot, and the same had been worked periodically from that time until about July, 1868, and from July, 1868, up to date of the trial it had never been operated. Plaintiff's lot 52 contained about $5\frac{1}{2}$ acres, and the portion used as a quarry was about one-half of an acre. All the surface water of said lots 52, 56, 57, 58, and 59 and the property of Norwood Park Company drained into the quarry of plaintiff, and prior to 1893 the quarry frequently filled with water after heavy rains. In 1893 the defendant operated a stone quarry in the northern part of said lots 47 and 48, and the Marie Castor creek flowed eastwardly along the northern line of said lots. The water from a spring on the land of Giles F. Filley flowed northwardly in a fixed direction across the land of a corporation known as

"Norwood Park," and into and across plaintiff's land, to a place in the stone quarry on plaintiff's land about 700 feet from its source, and there the water became submerged in a crevice in the rock in the bottom of the plaintiff's quarry. There was evidence tending to prove that the water, after it went into the crevice in the rock in plaintiff's quarry, came out again in the quarry of defendant about 1,000 feet from the place where it went underground, and became submerged on defendant's land. The evidence for plaintiff tended to prove that the water from said spring had so flowed from time immemorial, until, about 60 days before June 24, 1893, the defendant excavated the ground on his tract of land, and found the channel through which said water flowed, and partially stopped the flow, so that the abandoned quarry on plaintiff's land filled up with water, and was full of water at the time this suit was commenced. The evidence for defendant tended to prove that the quarry on plaintiff's land had been filled with water from 1889.

At the instance of plaintiff, the court instructed the jury as follows: "(A) If the jury believe from the evidence that from time immemorial a stream or water course known as the 'Marie Castor Creek,' having a fixed, worn, and well-defined channel, has run, and still runs, across the property owned by defendant herein, and that the waters of said creek finally drain or flow into the Mississippi river, and that from time immemorial a large spring of water, of great volume, has risen, and still rises, in a tract of land owned by Giles F. Filley, adjoining plaintiff's land, and that said spring of water has flowed, and still flows, across the land owned by said Filley, and across other land into the said tract of land belonging to plaintiff, and from thence into and through a well-defined and fixed underground channel under and through St. Louis avenue, and into the premises of defendant; that said water flowed through the said channel into the channel of said Marie Castor creek; and that the flow from said spring has been, and still is, continuous and of great volume, and that the same has worn and established for itself a well-defined and known channel and bed for the entire distance from the point where the said spring rises to where it flowed into the said Marie Castor creek; and that said channel and stream has also carried off and conveyed all surface water and other waters flowing into the same from other sources; and if the jury further find that the said defendant has excavated the ground above the said channel at a point upon and where it passes under his said premises, and has thereby, or in any manner, interfered with and obstructed the flow of the said water through the same, so that the waters from said spring and other waters running through said channel have been caused to, and have, set back and accumulated to such an extent as to overflow the premises of plaintiff, and that by reason thereof the same have over-

flowed the premises of plaintiff, and thereby caused the quarry on plaintiff's premises to become, and that the same has become, or partially, filled with water; and if the jury further find from the evidence that the plaintiff's said quarry has been injured, and the beneficial use thereof destroyed, by said act of defendant in obstructing the said water course and channel (if you believe from the evidence that defendant did so obstruct it),—then the plaintiff is entitled to recover, and you should so find by your verdict."

The court, on its own motion, gave the following instructions: "The jury are instructed that if they find for the plaintiff under instruction numbered A, and further find from the evidence in this case that plaintiff's quarry has been permanently injured by the obstruction of the water course in controversy, then the measure of plaintiff's damages will be the difference between the value of plaintiff's quarry immediately before the obstruction of the water course and immediately afterwards, not exceeding the amount claimed in the petition; and the jury are further instructed, in determining the value of plaintiff's quarry, they are at liberty to consider the rental value thereof, and all other facts and circumstances in said case, as appear by the evidence,"—to which said action of the court in giving said instructions defendant then and there at the time duly excepted.

The court, at instance of defendant, gave the following instructions: "The court instructs the jury that plaintiff cannot recover in this action unless they believe from the evidence that there was at the time mentioned in plaintiff's petition an underground flow of water so well defined as to be a continuous stream, and that defendant obstructed the channel of said underground stream of water, and thereby caused the water from said well-defined underground flow of water to back up on plaintiff's land, and thereby injured the plaintiff. The jurors are instructed that water percolating through the ground beneath the surface, either without a definite channel, or in courses which are unknown and unascertainable, belongs to the realty in which it is found; and if the jurors believe from the evidence that the water found on the premises of defendant, Bamberick, percolates through the ground beneath the surface, either without a definite channel or in courses which are unknown and unascertainable, then the plaintiff cannot recover in this action, although they may further believe from the evidence that said water so percolating through the ground comes from the spring on land of Giles F. Filley mentioned in plaintiff's petition."

The defendant offered the following instructions, which were refused: "The court declares the law to be that, under the pleadings and proof, plaintiff cannot recover in this action. The court instructs the jurors that although they may believe from the evidence that the water from spring on Filley's land,

and the water from quarry on plaintiff's land, percolated through the rocks under defendant's land, and came out at or near the Castor creek, yet that fact would not constitute such water a stream, and plaintiff could not recover in this action. The court instructs the jurors that a 'stream' is a current of water, and unless you believe from the evidence that, at time mentioned in petition, a well-defined current of water was running from the surface of plaintiff's land under defendant's land, then the plaintiff cannot recover in this action. The court instructs the jury that if they believe from the evidence that the quarry on plaintiff's land had not been used by the plaintiff as a quarry, and that plaintiff did not intend to use same as a quarry, but intended to fill up same, then the plaintiff cannot recover any damages by reason of her being unable to use said quarry,"—to which said action of the court in refusing said instructions defendant then and there at the time duly excepted.

The first point presented for consideration on this appeal is with respect to the sufficiency of the petition, which defendant contends falls to state a cause of action for permanent injury to the land, because it does not allege its value just before the overflow and its value thereafter, and that it fails to state a cause of action for temporary injury, because it does not allege the rental value of the land from the date of the overflow to the commencement of the suit. We are of opinion that no such allegations were necessary. The petition, in effect, alleges ownership and possession of the land by Mrs. McDonald at the time of the injury complained of and at the time of the commencement of the suit, and that the injury was caused by defendant filling up a natural water course, which flowed through her land, then through defendant's land, at a point on his land, thereby causing the water to flow back on plaintiff's land, and to cover part of the same that had been used for a quarry, etc., to plaintiff's damage in the sum of \$20,000, for which judgment is asked, and contains all necessary averments in an action of this character. It is not necessary that it should allege what the measure of damages are, as that was a matter to be regulated by the court in its instructions to the jury.

The instruction with respect to the measure of damages, which was given by the court of its own motion, is criticised upon the ground that there is no allegation in the petition, and no evidence upon which to bottom it. As to the first proposition, it is only necessary to say that the petition is, as we have already said, sufficient. This instruction is based upon the theory that the injury to the quarry is permanent, and correctly presents the measure of damages, if there was evidence to justify it. Where real property is permanently injured by the wrongful act of another, the measure of damages is the difference between its market value immediate-

ly before the injury occurred and the like value after the injury is complete. *Martin v. Railway Co.*, 47 Mo. App. 452; *Sheehy v. Railway Co.*, 94 Mo. 574, 7 S. W. 579. But there was no evidence as to the value of the quarry either before or after the injury. The nearest approach to it was the testimony of John B. O'Meara, who testified, in substance, that he had been actively in business as a quarry operator and in the construction business for about 15 years; had known Mrs. McDonald's quarry since he was a boy; that the tract upon which the quarry is situated contains 576-100 acres; that his firm owns a quarry in the same vicinity; that the stone in Mrs. McDonald's quarry was regarded as a very good stone; that "it don't freeze with the frost, and makes a nicer front, and is a better stone, than stone from Mill Creek valley." He had looked into the value of this quarry critically at one time, and thinks he valued the land at about \$2,500 or \$3,000 an acre,—the entire property at about \$12,000 or \$13,000. The quarry was worth per month, to work it for stone, in 1893 and 1894, all the way from \$200 to \$250 a month. 1895 was a bad year, and it would have been worth then about \$150 a month. The witness stated he knew there was a ravine there to carry water off. The effect of filling the quarry with water is that you cannot work it unless you put in machinery and pump it out, and then, if the stream is heavy, it would be most too expensive, because it would take all the profits to pump it out. He knew there was a stream there. There was no way to get rid of the water which had accumulated there, except to pump it out on the adjoining land. He knew the Marie Castor creek very well. It empties into the Mississippi river near Baden. The creek near Bambrick's quarry was 10 or 12 feet wide. On cross-examination, the witness stated that, in 1893 and 1894, the property would have been worth from \$200 to \$250 the whole year around. If witness wanted to run a quarry of that kind, he would be willing to pay that much for it if he could get it. "With the quarry so situated, protected in that way from the flow of water, it was very valuable and very easily worked, because you could take off the best of the rock without the water even bothering you at all. You could go down to what is called the 'Pier Ledge' without its bothering." He had noticed that the water used to pass through the quarry unobstructed. It is true he testified to the value of the whole tract, which he fixed at \$2,500 or \$3,000 per acre, and also to the rental value of the quarry; but he did not testify to either the value of the land, after the injury, or to the value of the quarry before nor after the injury. Besides, the injury is alleged to have been inflicted about 60 days before June, 1893, while the evidence of this witness was with respect to the rental value of the quarry during the years of 1893 and 1894.

Another criticism of the instruction is that it should not have told the jury, in determining the value of the quarry, that they were at liberty to consider its rental value, and all other facts and circumstances in said case, as appear by the evidence. The rental value of property is one of the criterions by which its money value may be arrived at, and may be properly received in evidence and considered for that purpose. And so may all other facts and circumstances in evidence. Therefore the instruction is in form correct, the only objection to it being the want of evidence upon which to predicate it. Defendant claims that error was committed in refusing a number of instructions asked by him, but this contention is untenable, for the reason that the instructions that were given covered every phase of the case. For error in giving the instruction by the court of its own motion, we reverse the judgment and remand the cause.

GANTT, P. J., and SHERWOOD, J., concur.

YOUNG v. CITY OF WEBB CITY.

(Supreme Court of Missouri, Division No. 2.
June 6, 1899.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—NOTICE—INSTRUCTIONS—DEMURRER TO EVIDENCE.

1. When the evidence is conflicting, the weight thereof is for the consideration of the jury.
2. A demurrer to the evidence admits every fact proved, or which may be inferred from the testimony to be true, and should never be sustained unless the evidence, when thus considered, fails to prove some essential fact of plaintiff's case.
3. It is the duty of a city to exercise ordinary care to keep its sidewalks in a reasonably safe condition, and, if it negligently fails to do so, it is liable for injuries occasioned thereby.
4. In an action against a city to recover for an injury due to a defective sidewalk, to hold the city liable it must be shown that it had actual notice thereof, or that the defect had existed such a length of time before the injury as to justify the presumption that it did have notice of the defect in time to have repaired it before the injury.
5. The length of time necessary for the continued existence of a defect in a sidewalk to operate as constructive notice thereof to the city depends upon the surrounding facts and circumstances of each case.
6. In an action to recover for injuries sustained by reason of a defective sidewalk, evidence that the defect had existed for six weeks prior to the injury will sustain a finding by the jury that the city had timely notice of the defect.
7. An instruction "that if, from the evidence, the jury find for plaintiff, then, in estimating her damages, they will take into consideration the physical injury inflicted," is not erroneous, as assuming that physical injury was inflicted, where under the instructions, the jury could not find for the plaintiff unless they also found that physical injuries were sustained.

Appeal from circuit court, Vernon county;
D. P. Stratton, Judge.

Action by Martha J. Young against the city of Webb City. From a judgment in favor of plaintiff, defendant appealed. Affirmed.

Frank L. Forlow, for appellant. L. L. Scott, for respondent.

BURGESS, J. This is an action for damages for personal injuries alleged to have been sustained by plaintiff by a fall occasioned by the defective condition of one of defendant's sidewalks upon which she was walking at the time. The suit was instituted in the circuit court of Jasper county, but the venue was subsequently changed to the circuit court of Vernon county, where, upon a trial to the court and jury, plaintiff recovered a verdict and judgment for \$5,000. After unsuccessful motion for a new trial and in arrest, defendant appeals.

The plaintiff is a married woman, and was at the time of the trial, in December, 1896, 34 years of age, and the mother of six living children and one dead. At the time of the accident she lived in Vernon county, but was visiting relatives, who lived near defendant city. Prior to the accident she had always been a stout, healthy woman. On the evening of November 12, 1894, she, in company with her sister, went to Webb City to do some shopping, and while they were walking west on Main street, one of the principal thoroughfares of said city, after dark, plaintiff's foot slipped in a hole in the sidewalk, which was constructed of wood, causing her to fall heavily upon the walk, producing an impacted fracture of the right thigh bone,—that is, a fracture of the neck of the thigh bone,—by reason of which she was confined to her bed for over six months, suffered great pain always thereafter, the leg being shortened, and the injury permanent. The evidence tended to show that the hole in the sidewalk into which plaintiff stepped had been there for about six weeks prior to the accident. At the close of plaintiff's evidence defendant interposed a demurrer to the evidence, which was denied, and it duly excepted.

At the close of all the evidence, the court, at the instance of plaintiff, over the objection of defendant, instructed the jury as follows: "(1) The court instructs the jury that it is by law made the duty of defendant to keep its sidewalks upon its streets in a reasonably safe condition for the use of pedestrians using the same for travel; and if you shall believe from the evidence that the defendant city permitted its sidewalk on the street and at the place on said street mentioned in plaintiff's petition to become out of repair, and in a dangerous condition for travel, and to so remain in a dangerous condition and out of repair after it knew, or by the exercise of reasonable care and caution could have ascertained, the defective and dangerous condition of said sidewalk, and the plaintiff, while passing along said sidewalk, at the place mentioned in plaintiff's petition, was, on account of said defective and dangerous condition of said sidewalk, without fault or negligence on her part, injured thereby, your verdict should be for the plaintiff. (2) The

court instructs the jury that if, from the evidence, they find for the plaintiff, then, in estimating her damages, they will take into consideration the physical injury inflicted, whether temporary or permanent, and the bodily pain and mental anguish endured, if any, by plaintiff; and in assessing her damages you shall assess them at such sum as you shall believe from the evidence will reasonably compensate her for said injury received, together with the suffering caused by reason of said injury, and in a sum not to exceed twenty thousand dollars, as asked for in plaintiff's petition." And to the decision of the court in giving said instructions, and each of them, defendant then and there at the time excepted.

The following instructions were given at the request of defendant: "(3) The court instructs the jury that, before the duty is placed upon the defendant to keep the sidewalk in reasonably safe condition, it devolves upon the plaintiff to show that said sidewalk was a part of a street that had been dedicated to the public by the owner of the land over which it passes, and said dedication accepted by the city; but such acceptance need not be shown by any formal order of record, but may be shown by such other acts as may show that the defendant recognized and treated the same as one of its streets, or the plaintiff must show that said street has been used by the public for the space of ten years continuously under claim of right that it was a public highway; and, unless the plaintiff has so shown, your verdict will be for the defendant. (4) The court instructs the jury that if the defect in the sidewalk was obvious, and plaintiff, by the exercise of reasonable care, would have observed the same, and they further believe that there was sufficient width of said sidewalk for plaintiff and her sister to walk on and avoid said defect, then plaintiff cannot recover. (5) The court instructs the jury that if they believe from the evidence that the amount sued for by plaintiff is excessive and exorbitant, then they may take that fact into consideration as to the weight to be given her testimony. (6) The court instructs the jury that the ground of plaintiff's suit against this defendant is negligence, and that negligence cannot be presumed, but must be established by the plaintiff to your satisfaction by proof. Therefore, although you may find that the plaintiff was injured by falling on the defendant's sidewalk, yet that fact alone does not entitle plaintiff to recover in this action, but she must show further to your satisfaction by the preponderance—that is, the greater weight—of the evidence that she sustained the injuries complained of as the direct consequence of negligence of the defendant in allowing its sidewalk to be in an unsafe or dangerous condition for persons passing over the same, using ordinary care and prudence, after she had actual or implied notice of such unsafe condition; and, unless the plaintiff

has so shown by the evidence, your verdict must be for the defendant. (7) The court instructs the jury that before they can find for the plaintiff they must not only believe from the evidence that the sidewalk, at the place where plaintiff fell, was out of repair, and the defendant had actual or implied notice thereof, but they must further find that by reason thereof that it was not reasonably safe for persons using the same with ordinary care and prudence. (8) The court instructs the jury that the defendant is not an insurer against accidents upon its streets or sidewalks, nor is every defect therein a ground of liability, though it may cause an injury, but the city performs its whole duty if the streets and sidewalks are kept reasonably safe for persons passing over them, using ordinary care and prudence; and, if you believe the sidewalk at the place where plaintiff received her injuries was in such a reasonably safe condition, then the plaintiff cannot recover in this action, and your verdict will be for the defendant. (9) The court instructs the jury that the burden of proof is on the plaintiff, and before she can prevail in this action she must satisfy the jury by the preponderance—that is, the greater weight—of evidence that the sidewalk at the place of the injury was out of repair to such an extent as to render it unsafe or dangerous to persons passing over the same, using ordinary care and prudence, and that defendant had actual or implied notice thereof, and, by reason of said sidewalk being so out of repair, plaintiff was thrown to the ground, and received the injuries complained of; and, unless all the testimony so satisfies you, your verdict must be for the defendant."

It is claimed by defendant that the demurrer which was offered by it at the close of plaintiff's evidence should have been sustained upon the ground, as contended, that the walk where the accident happened was in good condition until it was broken by a horse, on the 11th day of November, 1894, which was only one day before the accident occurred; and that, as the city did not have actual notice of the defect, the length of time that the street was out of repair before the accident was not sufficient to justify the assumption that it had notice of the defect in time to have repaired the walk before the injury. There is no pretense that the city had actual notice of the defective condition of the sidewalk before the accident, and the only evidence which tended to show that the defect existed for a sufficient length of time to justify the assumption that it did know of it, or that it might, by the exercise of ordinary diligence, have known of it, before the accident, was that of a witness for plaintiff, by the name of Reed, who testified that he had lived in Webb City for 16 years, was acquainted with Main street where the accident occurred, and that the hole in which plaintiff stepped was about 4 inches wide and 18 inches long and 6 inches deep, and that he saw it there

about the last of September or the first of October, 1894. He stated, on cross-examination, that he did not know exactly when the hole was broken, but knew it was there before the 11th of November. A witness for the defendant, by the name of Hilburn, testified that the hole was made after the injury, but he was contradicted by W. W. Hill, another witness for plaintiff, who testified that Hilburn told him that the hole was made before the injury. The evidence being conflicting with respect to the existence of the hole in the sidewalk at the time of the accident, as well, also, as to the length of time that it existed prior thereto, if at all, the weight of it was for the consideration of the jury. *Franke v. City of St. Louis*, 110 Mo. 516, 19 S. W. 938; *O'Connell v. Railway Co.*, 106 Mo. 482, 17 S. W. 494; *Seckinger v. Manufacturing Co.*, 129 Mo. 590, 31 S. W. 957. A demurrer of this character admits every fact proven, and which may be inferred from the testimony to be true, and should never be sustained unless the evidence, when thus considered, falls to make proof of some essential fact. *Bender v. Railway Co.*, 137 Mo. 240, 37 S. W. 132; *Rine v. Railroad Co.*, 100 Mo. 228, 12 S. W. 640; *Noeniger v. Vogt*, 88 Mo. 592, and cases cited; *Myers v. Kansas City*, 108 Mo. 480, 18 S. W. 914; *Baum v. Fryrear*, 85 Mo. 151. The evidence not only showed the existence of the hole in the sidewalk at the time of the accident, but it showed that it had existed for about six weeks before that time. It was defendant's duty to exercise ordinary care to keep its streets in a reasonably safe condition for the use of persons walking thereon, and, if it was negligent in so doing, and by reason thereof plaintiff sustained personal injuries, it should be held to respond in damages therefor. It, however, must have had actual notice of the defect before the accident, or it must have existed a sufficient length of time prior thereto to justify the presumption that it did have notice of the defect in time to have repaired it before the accident. As to what length of time would furnish notice to the municipal authorities of such a defect, there is no fixed or definite rule, and each case must depend upon the facts and circumstances attending it. Thus, if the defect existed on a street much traveled and in use, it seems that the duty of the city to the public in looking after its condition required greater diligence in seeing that it was reasonably safe for travel than if it had been but little used. In *Maus v. City of Springfield*, 101 Mo. 613, 14 S. W. 630, it was held that a defect in a street, which had existed for three months, was sufficient to fairly justify the inference that defendant had timely notice of the existence of the defect. In *City of Griffin v. Johnson*, 84 Ga. 279, 10 S. E. 719, evidence that a hole in a bridge on one of the principal streets of a city was permitted to remain from 5 to 20 days was held to be sufficient to charge the city with notice of its existence. In *Tice v. Bay City*, 78 Mich.

200, 44 N. W. 52. It was held that a defect in a sidewalk, which had existed for three months, would justify the presumption that the city had notice of it. So, in *City of Philadelphia v. Smith* (Pa. Sup.) 16 Atl. 493. It was held that when a defect in a sidewalk, which was patent, as in the case at bar, had existed for five or six weeks, the jury were warranted in finding that the city had notice of it. The evidence was, we think, sufficient to justify the inference that the defendant city had timely notice of the defect, and to justify the jury in so finding.

Defendant complains of plaintiff's second instruction in regard to the measure of damages, in that it assumes that physical injuries were inflicted, when that was a contested question. This contention finds no support in the instruction. It does not assume anything. It simply tells the jury that if, from the evidence, they find for plaintiff, in estimating her damages they will take into consideration the physical injury inflicted. They could not, in the first place, have found for plaintiff unless they believed from the evidence that she had sustained physical injury, and it was certainly not error to direct them to take such injuries into consideration in passing upon the case, for it was by them that the damages were to be measured. In passing upon a similar instruction in *Chilton v. City of St. Joseph*, 143 Mo. 192, 44 S. W. 766, *Brace, J.*, in speaking for the court, said: "It is only necessary to say that the damages were predicated only upon such injuries as were the necessary concomitants and consequence of her misfortune, superinduced by defendant's negligence, and contains no unwarranted assumption, and, in view of the extent of those injuries, is not excessive." This language is peculiarly appropriate to the instruction criticised by defendant, as well, also, as to the amount of the verdict. Finding no reversible error in the record, we affirm the judgment.

GANTI, P. J., and SHERWOOD, J., concur.

STEWART et al. v. ALLISON.

(Supreme Court of Missouri, Division No. 2.
June 6, 1899.)

PROCESS—SERVICE BY PUBLICATION—DESCRIPTION OF PROPERTY—TAXATION.

Under Rev. St. 1889, § 2022, requiring the order of publication to state the object and general nature of the petition, in all suits for the enforcement of liens or claims against real property, a judgment based on constructive service in a suit for delinquent taxes, the purpose of which is to enforce the state's lien against the land, is void, unless the order of publication describes the land.

Appeal from circuit court, Bates county; James H. Lay, Judge.

Action by Andrew Stewart and others against John H. Allison. There was a judg-

ment for plaintiffs, and defendant appeals. Affirmed.

J. S. Francisco, for appellant. C. A. Denton, for respondents.

BURGESS, J. This is an action of ejectment for the possession of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 31, township 40, of range 31, in Bates county. The petition is in the usual form, and the answer a general denial. Plaintiffs recovered judgment in the court below for the possession of the land, from which judgment defendant, after an unsuccessful motion for a new trial, appeals.

Both parties claim title under one O'Brian Guinn,—the plaintiffs, as his only heirs at law; the defendant, by virtue of a judgment of the circuit court of Bates county in favor of the state of Missouri, at the relation and to the use of C. Hirni, ex officio collector of the revenue of Bates county, and against W. A. Stephens, and the unknown heirs of O'Brian Guinn, for the sum of \$12.95, for certain delinquent taxes due against said land, and execution thereon, and sheriff's sale, and deed made in pursuance thereof. The service of process was by publication, and the judgment by default. The order of publication was against the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 31, and not against the land described in the judgment, execution, and sheriff's deed, so that the only question to be passed upon by us is with respect to the validity of the judgment, and subsequent proceedings thereunder. The position taken by plaintiffs is that the judgment, execution, and the sheriff's deed made in pursuance of the sale made thereunder were void, because the land therein described was not the same land described in the order of publication, by reason of which the court was without jurisdiction, and the judgment and all subsequent proceedings thereunder void. Upon the other hand, defendant's position is that, in a suit for back taxes against land, an order of publication against nonresident or unknown parties need not describe it.

In suits for the collection of delinquent taxes against land, there can be no personal judgment against the owner, even where there is personal service; and it is only by the petition, and the publication of the notice ordered to be made, that the court acquires jurisdiction of the property and of the defendant. Prior to 1889, in orders of publication in suits for the purpose of enforcing the state's lien against land for delinquent taxes, it was necessary that the order describe the land proceeded against; otherwise, the court acquired no jurisdiction over it, and the judgment was void. *Milner v. Shipley*, 94 Mo. 106, 7 S. W. 175. The order of publication is as much a part of the record proper as the judgment itself. And "if there is any conflict between the recitals in the judgment, as to the terms of the order, and the order itself, the latter must control, for a recital of the order must yield to the order itself." *Milner v. Shipley*, supra; *Crow v. Meyerssleck*, 88 Mo. 411;

Adams v. Cowles, 95 Mo. 501, 8 S. W. 711. Unless, therefore, a description of the land is rendered unnecessary by section 2022, Rev. St. 1889, the court was without jurisdiction in the suit for delinquent taxes and the judgment and sheriff's sale, and deed thereunder, void. This statute underwent critical and careful review by Sherwood, J., in the recent case of *Winningham v. Trueblood* (Mo. Sup.) 51 S. W. 399, not yet officially reported; and it was ruled that in all suits for delinquent taxes, the purpose of which is to enforce the state's lien against the land, and the service of process is constructive (that is, by publication), the land must be described in the order of publication, otherwise the judgment will be void. In that case *Goldsworthy v. Thompson*, 87 Mo. 233, was expressly overruled. Nothing can be added to the opinion in the *Winningham* Case with respect to what was said upon this subject, and that case is decisive of the case at bar. The judgment is affirmed.

GANTT, P. J., and SHERWOOD, J., concur.

STATE ex rel. RIDGE et al. v. SMITH et al.,
Judges.

(Supreme Court of Missouri. May 30, 1899.)
SUPREME COURT — JURISDICTION — RAISING
CONSTITUTIONAL QUESTION—GOOD
FAITH—ADMISSION—EFFECT.

1. An admission of counsel in arguing a case in the court of appeals that he raised a constitutional question in order to oust that court of jurisdiction, so as to have the case heard by the supreme court, does not justify the inference that the raising of the question was a mere sham, so as to eliminate such question, and prevent the latter court from taking jurisdiction.

2. Though the court of appeals overrules every contention of a party who may know or believe that the court's decision will be the same on a second appeal, it cannot be inferred that the raising of a constitutional question by him, which will oust that court of appellate jurisdiction and vest it in the supreme court, was a mere sham.

3. A party's admission on the trial that certain amendments to a city charter were unconstitutional, as claimed by the other, does not eliminate the question of their validity, so as to prevent the supreme court's having jurisdiction.

In banc.

Proceeding by the state, on the relation of Thomas S. Ridge and others, against Jackson L. Smith and others, as judges of the Kansas City court of appeals, for mandamus to compel respondents to transfer a cause to the supreme court. Writ granted.

Yeager & Strother and Jas. G. Smart, for relators. Teasdale, Ingraham & Cowherd, for respondents.

BURGESS, J. This is an original proceeding by mandamus begun in this court by relators against the respondents, judges of the Kansas City court of appeals, to compel them, as such court, to transfer a cause therein pending on appeal, entitled "*The Dollar Savings Bank against Thomas S. Ridge et al.*," to the supreme court, upon the ground of the

want of jurisdiction in the Kansas City court of appeals to hear and dispose of the same, and the exclusive jurisdiction of the supreme court of said cause, there being involved a constitutional question. To the alternative writ of mandamus issued against respondents they make return as follows:

"Respondents, for return to the alternative writ of mandamus, say that the case of *Dollar Savings Bank against Ridge et al.* was not certified to the supreme court, and should not be, for the reason that no constitutional point was involved in the decision in said case, and the alleged constitutional point raised in said case not pertinent or relevant to the issues in said case, as will appear by the following opinion filed in said case in the said Kansas City court of appeals: Defendants claim that a construction of the constitution of this state is involved in the determination of this cause. Plaintiff denies this. The defendants set up, by answer, that the constitution of the state was violated in the mode of adoption of the amendments to the charter of Kansas City, and that, therefore, the amendments are void. The special provision of the constitution is not mentioned, but we infer, from the brief, that it was intended to refer to that portion of the constitution which directs the mode of publication on proposed amendments. They likewise asked an instruction, which was refused, declaring the amendments to be "in violation of that provision of the constitution of this state prohibiting retrospective legislation." During the progress of the trial the plaintiff had entered an admission that the defendants' contention that the amendments were void under the constitution was correct. The admission was in the following words: "Mr. Ingraham: We want to make an admission in regard to this matter (reading). While it is clear that the fact that the upper house did not remain in session until the lower house adjourned does not render the acts of the lower house invalid, especially in view of the fact that both houses met at the same time and entered into a legal session, but such matter is entirely irrelevant to the issues in this case; for, if all that defendant claims be true, it only results that the amendments were not legally adopted, and hence the old charter provisions remain in force and unaffected. We now desire to have the record show that we consent that defendants' contention in regard to the charter amendments be determined in his favor, and that the legality of the tax bills be determined according to the old charter provisions as they existed prior to the amendments; or, that the validity be determined by either or both the old charter or the amendments, at the option of counsel for defendants." Defendants objected to the admission, but the court overruled the objection. The plaintiff contended that the point as to the violation of the constitution was "a sham," and was not brought into the case in good faith; that the defense

in this case was based on points already ruled against defendants' contention in the cases of *Forry v. Ridge*, 58 Mo. App. 615, *McQuiddy v. Vineyard*, 60 Mo. App. 610, and *Bank v. Ridge*, 62 Mo. App. 324; and that this was merely an effort to have those points passed upon by the supreme court. Counsel for defendants conceded, at the argument, that his object in making the point on the constitution was for the purpose of ousting this court of appellate jurisdiction, that the case might be heard in the supreme court, where it was hoped and believed that the cases just referred to would be overruled. Passing by the question of good faith in raising the point as to the constitution, and of the objection to plaintiff admitting that the point was well taken, we will consider the matter as it appears on the face of the record. We interpret plaintiff's admission to concede that the charter amendments were void under the constitution, as contended by defendants. This left the validity of the tax bills to be determined, without the aid of those amendments; in other words, to be determined by the charter as it stood prior to the amendments. But the defendants contended at the argument of the cause that plaintiff cannot obviate their point on the constitution by conceding it to be true and well taken; that, when the record showed such point made in the trial court, this court could not have appellate jurisdiction. The constitution confers jurisdiction on this court "in all cases where the amount in dispute, exclusive of costs, exceeds the sum of two thousand five hundred dollars," unless such cases are those "involving the construction of the constitution of the United States or of this state." It is apparent that the mere fact of a point being made on the constitution during the trial of a cause does not necessarily involve the construction of the constitution in the appellate court; for, if the party making the point should afterwards, in the trial, withdraw it, clearly the case would no longer involve a construction of the constitution. So, it seems to us, if the point made is conceded, and the case is to be determined on other grounds, no construction is involved, and defendants have not been deprived of any right guaranteed by the constitution. The question is eliminated from the case. The court is then relieved of the duty of construing the constitution. The reasoning of the supreme court in the recent case of *Ash v. City of Independence* (not yet officially reported) 46 S. W. 749, is applicable to the question. It is true the trial court refused an instruction, offered by defendants, declaring the charter amendments were in violation of the constitution prohibiting retrospective legislation. But in view of the concession made by plaintiff, as above referred to, we must assume that the court looked upon the instruction as being outside the case, and therefore not pertinent. It may be suggested that in the decision we now make we are construing the constitution, and that the

question we are now deciding should be decided by the supreme court. But we necessarily must decide, in the first instance, whether we have jurisdiction of a case. We do this constantly, in certifying cases to the supreme court and in refusing to certify. Our decision of such question is not final, since, if we refuse to certify on the ground that we have jurisdiction, our mistake may be, and frequently is, corrected by mandamus from that court; and, if we certify a case to that court which ought not to have been sent there, it may be, and frequently is, recertified to this court. In these matters we do not construe the constitution. We merely pass on the question whether there is anything in the case calling for a construction of the constitution. Another point is passed upon in the opinion, but it is not involved in this controversy."

Relators, for plea to the return of respondents to the alternative writ, admit "that a question of the jurisdiction of the Kansas City court of appeals in the case of *Bank v. Ridge* was presented in said court of appeals; admit that the defendants in said case, the relators herein, claimed therein that a construction of the constitution of this state was involved in the determination of said case; admit that the defendants in said case, the relators herein, set up, in their answer in said case, that the constitution of the state was violated in the mode of adoption of the amendments to the charter of Kansas City, Mo., and that, therefore, said amendments were void; admit that the defendants in said case, the relators herein, asked an instruction in said case on the trial thereof in the circuit court of Jackson county, Mo., at Kansas City, which was refused by said circuit court, declaring that said amendments were in violation of that provision of the constitution of this state prohibiting retrospective legislation; admit that, during the progress of the trial of said case in said circuit court, the plaintiff therein made an alleged admission in words as set out in the opinion set out in said return; admit that the defendants in said case, the relators herein, objected to said admission, and that the said circuit court overruled the said objection; but deny each and every other allegation, matter, and thing in said return contained; and say, specifically, that it is not true that the said case of *Bank v. Ridge* should not be certified by said Kansas City court of appeals to this court for the reason that no constitutional point was involved in the decision of said case; and say, specifically, that it is not true that the alleged constitutional point raised in said case was not pertinent or relevant to the issues in said case; but aver, on the contrary thereof, that there were and are constitutional questions involved in the decision of said case, and that the constitutional questions raised in said case were and are pertinent and relevant to the issues in said case, and appear upon the record thereof in manner and

form as alleged and set out in the alternative writ of mandamus heretofore issued herein, and as appears by the record in said case of *Bank v. Ridge*, in said circuit court, and the transcript thereof filed in the said Kansas City court of appeals, which said record and transcript are herewith produced and herewith shown to the court here. And, for further plea to said return to the alternative writ of mandamus issued herein, the plaintiff and relators say that, notwithstanding the alleged admission made upon the trial of said case of *Bank v. Ridge*, as set out in the record and transcript of record in said case, and as contained in the said return, the said circuit court of Jackson county, Mo., did not act upon said alleged admission, but, on the contrary thereof, refused the instructions and declarations of law asked upon the part of the defendants in said case, the relators herein, based upon the unconstitutionality of said charter amendments, and decided the said question of the constitutional validity of said charter amendments adversely to the defendants in said case, the relators herein; and, in addition thereto, upon the trial of said case, admitted evidence on the part of the plaintiff therein based upon the constitutional validity of said charter amendments, which said evidence was admitted over the objections and exceptions then and there at the time made by the defendants therein, the relators herein, raising the question of the constitutionality of said charter amendments, all of which said constitutional questions, objections, and exceptions were by the defendants in said case, relators herein, duly preserved in their bill of exceptions, and appear upon the record of said case in said circuit court, and the transcript thereof filed in the Kansas City court of appeals, in manner and form as hereinbefore and in the alternative writ of mandamus issued herein is set out, and by reason thereof said Kansas City court of appeals did not have, and does not have, any jurisdiction of the matters and things involved in the said case, but jurisdiction thereof was and is solely vested in this court, and the plaintiff in said case could not and cannot, by said alleged admission made as aforesaid, and which was not acted upon as aforesaid, oust this court of its jurisdiction over the matters and things involved in said case, and could not and did not confer jurisdiction thereof upon said Kansas City court of appeals. Wherefore the plaintiff and relators herein pray the court to issue its peremptory writ of mandamus, ordering, commanding, and adjudging that the respondents herein, constituting said Kansas City court of appeals, certify and transfer the said case of *Bank v. Ridge et al.*, relators herein, and the original transcript thereof, to this court, so that said case may be heard and determined according to law, and that the relators herein may have and recover of and from said respondents their damages and costs in this behalf incurred and expended."

The return admits that a constitutional question was raised in the cause in the circuit court by the answer, and also by the refusal of an instruction offered by defendants therein, relators here, declaring that the charter amendments involved in that case were in violation of the constitution prohibiting retrospective legislation, but say that it was withdrawn by the admission of the plaintiff during the trial that the amendments were void under the constitution. The return also avers that counsel for defendants, in the argument of the case before the court of appeals, conceded that his object in making the point on the constitution was for the purpose of ousting the court of appeals of its jurisdiction, that the case might be heard in the supreme court.

As to whether or not the amendments were unconstitutional is not before this court for consideration. We have only to decide whether or not there is a constitutional question involved in the original action, as presented by the record in the Kansas City court of appeals. It is argued by respondents that this alleged constitutional question was injected into the case as a mere sham, and that the supreme court should not take jurisdiction of the case, but there is nothing disclosed by the record which seems to justify such a contention. The mere fact that counsel for relators conceded, in his argument of the case in the court of appeals, that his object in making the point on the constitution was for the purpose of ousting that court of appellate jurisdiction, that the case might be heard in the supreme court, certainly does not do so. Nor is it to be inferred from the fact that the record in the first and second appeal, and the decisions on both appeals, show that, except the constitutional question, every other contention had been passed upon adverse to the relators, and the fact that they may have known or believed that the tax bill would be held good by the court of appeals, if it followed its prior rulings, makes no difference. It is not unfrequently that counsel after an adverse ruling amend their pleadings, and interpose new and different defenses, and in so doing are not considered as attempting to deceive the court. Changes of venue are frequently taken from a trial judge before whom the cause is pending because of some adverse ruling by him thought to be the result of prejudice, or undue influence by the adverse party, and in so doing it cannot, with fairness, be said that the party so doing is shamming. *State v. City of Westport*, 135 Mo. 120, 38 S. W. 663, is relied upon by respondents as supporting their contention, but that was a case in which all the parties thereto desired to obtain the ruling of the supreme court as to the validity of certain tax bills, and not on account of any real controversy, and it was ruled that the proceedings should be dismissed. *Lord v. Veazie*, 8 How. 251, is another case relied upon by respondents; but that case decides nothing more than that

where it appears, from affidavits and other evidence filed by persons not parties to a suit, that there is no real dispute between the plaintiff and defendant therein, but, to the contrary, that their interest is one and the same, and is adverse to the interest of the parties who filed the affidavits, a judgment entered pro forma is void, and that no appeal therefrom would lie. *Manufacturing Co. v. Wright*, 141 U. S. 698, 12 Sup. Ct. 103, is another case cited by respondents, but the only point decided in that case is that the payment, whether voluntary or compulsory, of a tax to prevent the payment of which a bill in equity has been filed, leaves no issue for the court to pass upon. It needs no argument, we think, to show that neither of these cases has any bearing upon the question under consideration, for the reason that there was no understanding or agreement between the adverse parties in the suit of *Bank v. Ridge*, as in the two cases first cited, by which it was to be prosecuted simply for the purpose of obtaining the opinion of the supreme court. Upon the contrary, it seems to be vigorously and earnestly defended, and about which there does not appear to be either sham or deception.

The next question is as to whether or not the constitutional question was eliminated from the case by the admission of the bank, at the time of the trial of the case in the circuit court, that the amendments to the city charter were unconstitutional; if not, it is still involved, and the Kansas City court of appeals acquired no jurisdiction of the appeal. *Const. Mo. 1875, art. 6, § 12; Const. Amend. 1884, § 5.* Whether these amendments were unconstitutional or not was a question of law, upon which the relators, defendants in that suit, were entitled to the opinion of the court, and they could not be deprived of that right by the admission of plaintiff therein that it was, as contended by defendants, unconstitutional. A party to a suit can no more undo the law by admitting its invalidity than he can make it by asserting what the law is. If such a rule was adopted, all amendments to the charter might be abrogated by agreement. The admission that the amendments were unconstitutional was simply an assumption of the prerogative of the court, which possessed the exclusive power to pass upon that question. In *Crockett v. Morrison*, 11 Mo. 3, it is said: "It is well settled that the admissions of a party in relation to a question of law are no evidence. Such admissions do not make the law either one way or the other, and, where the matter admitted involves a question of law as well as fact, it falls within this rule, and is therefore incompetent proof." So, in *Polk v. Robertson*, 1 Tenn. 456, it is said that "admissions of law, or what the law is, have no effect in a court of justice; they are never noticed." And no admission of one, or even both, parties, as to a question of law, would be binding upon the court. *Rice v. Ruddy-*

man, 10 Mich. 125; *Watts v. Boom Co.*, 47 Mich. 540, 11 N. W. 377; *Craig v. Baker*, 3 Hardin, 281; *Happel v. Brethauer*, 70 Ill. 166; *Manufacturing Co. v. Messenger*, 2 Pick. 223. It follows from what has been said that a constitutional question is still involved in the case of *Bank v. Ridge*, and that the Kansas City court of appeals has no jurisdiction of the appeal, but that the jurisdiction is in the supreme court. For these considerations the peremptory writ of mandamus should be awarded against the respondents, as prayed for; and it is so ordered. All concur.

STATE ex rel. CROW, Atty. Gen., v.
KRAMER.

(Supreme Court of Missouri. May 30, 1899.)
JUSTICES OF THE PEACE—ELECTION—TIES—
CONSTITUTIONAL LAW.

Const. 1875, art. 6, § 30, provides that a tie vote for judges of courts of record shall be determined as prescribed by law; and section 40 has a similar provision as to clerks of courts of record. Section 37 authorizes the election of justices of the peace, but does not provide how a tie vote shall be decided. *Held*, that such omission was not unintentional, and hence so much of *Rev. St. 1889, § 6099*, as authorizes county courts to "decide" in case of a tie vote for justices of the peace, and of section 6092 conferring on the mayor of St. Louis the powers of the county court relating to justices of the peace as authorizes the mayor to decide in case of such tie, are unconstitutional.

In banc. Quo warranto by the state, on the relation of Edward C. Crow, attorney general, against Sigmund L. Kramer, certified from the St. Louis court of appeals. Writ granted.

This is a proceeding by quo warranto instituted in the St. Louis court of appeals by the attorney general, in his official capacity, to oust respondent from the office of justice of the peace for the Fourth district of the city of St. Louis. The return of the respondent shows that at the general election in November, 1898, respondent and James Griffen were the only candidates for said office, and that the election resulted in a tie vote, each receiving 3,766 votes; that the board of election commissioners certified this result to the circuit court, which in turn certified it to the mayor of that city, who commissioned respondent to said office. The power of the mayor is alleged to be complete, under sections 6099, 6092, *Rev. St. 1889*. The relator demurred to the return. The St. Louis court of appeals held that there is a constitutional question involved in the case, and hence certified the case to this court.

E. C. Crow, R. T. Brownrigg, and Jesse A. McDonald, for relator. Fiese & Kortjohn, for respondent.

MARSHALL, J. (after stating the facts). Respondent bases his right and title to the office in question upon the commission issued to him by the mayor of St. Louis, and

claims that the mayor had full power to do so, under sections 6090, 6092, Rev. St. 1890, and that section 6090 is a constitutional enactment, as interpreted by this court in the case of *Lewis v. State*, 12 Mo. 128.

The constitution (section 37, art. 6) provides, "In each county there shall be appointed or elected, as many justices of the peace as the public good may require, whose powers, duties, and duration in office shall be regulated by law." The constitution makes no provision for determining the election in case of a tie vote for justice of the peace, but the general assembly has enacted section 6090, Rev. St. 1889, which is as follows: "Wherever two or more persons shall have an equal number of votes for justices of the peace for any township, or there is a contested election, the county court shall decide the same." The general assembly, by section 6092, Rev. St. 1889, divided the city of St. Louis into 14 districts for the election of justices of the peace, and provided, "And all powers and duties now conferred by law on the county court and county clerk, respectively, relating to justices of the peace, shall, in the city of St. Louis, be vested in the mayor and city register," etc.; and it is claimed that as the power to "decide" in case of a tie between two candidates for justice of the peace is vested in the county court, by section 6090, and as the powers and duties of the county courts relating to justices of the peace are, in St. Louis, vested in the mayor, by section 6092, the mayor had full authority to decide the tie by appointing respondent, and that section 6090 has been held to be a constitutional enactment, in the *Lewis Case*, cited.

Similar questions have arisen in other jurisdictions, to which reference is here made, to throw light upon the constitutional and statutory provisions in our state hereinafter discussed.

In Indiana the constitution provides that all elections shall be by ballot. Const. art. 2, § 13. The statutes (section 4736, Rev. St. 1881) provide that in case of a tie the judges of election shall "determine by lot the person entitled to the office." This statutory provision has been held constitutional, and not violative of the provision of the constitution requiring all elections to be by ballot. *Johnston v. State*, 128 Ind. 18, 27 N. E. 422; *Wills v. State*, 128 Ind. 359, 27 N. E. 423; *Kimerer v. State*, 129 Ind. 589, 29 N. E. 178. Consult, also, *State v. McMullen*, 46 Ind. 307.

In Oregon the statute provides that, in case of a tie, it shall be settled by lot. In *Dunham v. Hyde*, 30 Or. 885, 48 Pac. 422, it was held that a town recorder had no power under this statute to have a tie between two candidates for town marshal settled by lot, but the constitutionality of the statute was not discussed or decided.

In New Jersey the statute (Revision, p. 1201, § 45) provides that in case of a tie for a municipal office the town committee shall

"elect between those having an equal number of votes unless they deem a special town meeting for those purposes advisable, and in that case they shall have power to call such special town meeting," etc. In *State v. Boden*, 51 N. J. Law, 114, 16 Atl. 58, it was held that, after the town committee had ordered a special election, it could not reconsider its action and settle the tie by electing one of those having an equal number of votes. The constitutionality of the statute was not passed upon.

In *State v. McKinnon*, 8 Or. 493, it was held that in case of a tie neither candidate is elected, and neither can enter into office until the tie is settled by lot as the statute provides; but, although the constitution of that state (section 16, art. 2) provides that in all elections the person receiving the highest number of votes shall be declared elected, the constitutionality of the statute was not called in question or decided.

In *Webster v. Gilmore*, 91 Ill. 324, it appeared that the parties litigant had received an equal number of votes for the office of supervisor of the town, and that "lots were thereupon drawn, and Gilmore drew the successful lot." Webster contested the election, but no question as to the constitutionality of the statute was raised or decided.

The statute of Michigan (Comp. Laws 1871, § 136) provides that in case of a tie "such persons shall draw lots for election to such office," etc. In *People v. Robertson*, 27 Mich. 116, it was held that such settling of a tie did not preclude an inquiry by the attorney general, on the relation of the losing party in the drawing, into the legality of votes cast at the election. The constitutionality of the statute was not passed upon, although section 3 of article 10 of the constitution, which requires a register of deeds (the office in question in that case) to be chosen by the electors, is quoted, and the words "chosen" and "electors" are emphasized and italicized. In *People v. Sutherland*, 41 Mich. 177, 1 N. W. 927, it appeared that there had been a tie, which had been settled by the parties drawing lots, but the constitutionality of the statute was not discussed or decided.

In Kentucky the statute requires the examining boards, in state, district, and county elections, to cast lots in case of a tie vote. In *Hammock v. Barnes*, 4 Bush, 390, this statute was held not to be applicable to ties in municipal elections. The constitutionality of the statute was not decided.

In *State v. Adams*, 2 Stew. (Ala.) 231, it appeared that the election for sheriff had resulted in a tie, and that the sheriff, as the supervisor of election, had cast the deciding vote. The court discussed the effect of a constitutional provision which would deprive the sheriff of his right to vote except in case of a tie, although there was in fact no such provision of the constitution pointed out in the case, but held that there was no authority under the statute for the sheriff to break the tie by casting the deciding vote, and that in case of

a tie no one was elected, and that a vacancy existed, which the governor had properly filled by appointment.

In *Erdman v. Barrett*, 89 Pa. St. 320, it appeared that Erdman and Folwell received an equal number of votes for the office of prothonotary. Barrett, the hold-over incumbent, claimed that, as the election resulted in a tie, he was entitled to hold over until the next election. Erdman instituted a proceeding against Barrett to test his right to hold the office. The court dismissed the proceeding, holding that in case of a tie either party might contest with the other the election, but that the incumbent (not being a party to the tie) was not a necessary or proper party to such a proceeding, and his right to the office could not be questioned by either party to the tie. This was all that was decided in that case.

In *Patterson v. People*, 65 Ill. App., loc. cit. 655, it was decided that: "In case of a tie in the election of any city officer, it should be determined by lot which candidate shall hold the office. Section 58, c. 24, p. 254, Hurd's Rev. St." The constitutionality of the statute was not decided.

In the contested election case of *Reed v. Cosden*, 1 Clarke & H. Elect. Cas. 384, it appeared that the parties had received an equal number of votes as representative in congress from the state of Maryland, and that the governor and council, acting under a law of the state of Maryland, "proceeded to decide between them which should be the representative," and accordingly issued a certificate of election to Cosden. The constitutionality of the state statute was challenged. The constitution of Maryland directed that all elections should be by ballot. The committee of elections of the house of representatives of the Seventeenth congress, which was composed of Messrs. Sloane, of Ohio, Edwards, of North Carolina, Tucker, of South Carolina, Moore, of Virginia, Walworth, of New York, Rodgers, of Pennsylvania, and Smith, of Kentucky, after referring to article 1, § 2, of the constitution of the United States, which provides that the house of representatives shall be composed of members chosen every second year by the people of the several states, and to section 5 of article 1, which makes each house the judge of the election of its own members, said: "On the first Monday of October, 1820, in conformity with the law of Maryland, an election was held by the qualified electors of the Sixth congressional district. On that day they either did or did not elect a member of congress. None could be elected unless he received a greater number of votes than were given for any other candidate. The term 'election' must mean the act of choosing, performed by the qualified electors, in conformity with the requirements of the constitution and laws regulating the manner in which the choice shall be made. If, therefore, the legal electors on the day appointed shall fail to make a choice, it is confidently believed that no other author-

ity of the state can at any other time make good this defect. Let it be supposed that the electors should fail to attend an election; that, consequently, no election is held; would it then be contended that the executive authority could, by lot or otherwise, appoint a representative for such district in the congress of the United States? This is a power which, it is presumed, none will contend does exist. Yet it is believed to be nothing more than that which has been exercised by the governor and council of Maryland in the case under consideration. In this case the electors assemble, they proceed to elect, they make no choice, they come to no constitutional result. It is asked, what is the difference between the two cases? The one would be an appointment, because no election had been held; the other, because no choice had been made. The committee, being of opinion that the power thus virtually exercised by the governor and council of Maryland, in appointing a representative to the congress of the United States, being contrary to the express provision of the constitution, and one which this house cannot sanction, have no hesitation in rejecting the official statement of the proceedings in the case as evidence of the right of the sitting member to a seat in this house."

It will thus be observed that, outside of Missouri, in every state where there is a statutory provision as to a tie, except Maryland, the statute prescribes that the tie shall be decided by drawing lots, which is done either by the candidates themselves or by the election officers; that in Indiana alone has such a statute been expressly held to be constitutional and not to conflict with the provision of the organic law which requires all elections to be by ballots cast by the electors, and that the Maryland statute which authorized the governor and council to "decide" where there is a tie, without saying how that decision is to be made,—whether by lot or otherwise,—is unconstitutional, whether it be made by lot or otherwise, because the people must elect, and no one is elected who does not receive "a greater number of votes than were given for any other candidate"; and that an election which results in a tie is a no better constitutional result than a failure to hold any election at all.

In the case at bar it appears that the mayor of St. Louis based his action upon the decision of this court in the case of *Lewis v. State*, 12 Mo. 128, and in so doing he acted properly and in obedience to the laws of this state, as declared by the highest court in the state, and his act is therefore to be commended, whatever the result in this case may be, for this court alone has power over that decision,—it is binding upon every other court, officer, and citizen, so long as it stands. We come, therefore, to the question whether, in the light of the constitution, and of precedent and of reason, the decision in that case was a proper conclusion at the time it was rendered, and whether it ought to be adhered to

under the constitution as it now is. The office in controversy in that case was clerk of the county court of Platte county. The election resulted in a tie. Section 8, c. 25, p. 201, Rev. St. 1845, provided: "Elections for clerks shall be conducted as other elections are, but the returns of all elections shall be made to the presiding judge of the county court; and if there be a tie or contested election, it shall be determined by the court to which the office belongs." Section 3 of article 2 of the constitution of 1834 provided "that the offices of the clerks of the several courts within this state shall be vacated on the first day of January, one thousand eight hundred and thirty-six; and the clerks of the circuit and county courts of the respective counties, shall be elected by the electors of their respective counties," etc. The constitution made no provision for determining a tie as to such clerks, and did not authorize the general assembly to make any provision in this respect. Previous to the adoption of the constitutional provision the clerks of the county courts were appointed by the court. In the *Lewis Case*, supra, it was reasoned that as the constitution provided that sheriff's and coroners should be elected by the qualified voters of their counties, and as section 25, art. 4, of the constitution, provided that "In all elections of sheriff and coroner, when two or more persons have an equal number of votes, and a higher number than any other person, the circuit courts of the counties respectively, shall give the casting vote," etc., therefore the statutes quoted, which gave the county courts the power, in case of a tie, to "determine" "to which the office belongs," was a constitutional enactment. No attention was paid to the fact that, as to sheriffs and coroners, the constitution itself expressly gave the circuit court the power to "give the casting vote," while, as to a tie for clerk, no such power was given to anybody by the constitution, but that instrument simply provided that the clerks must be elected by the qualified electors; but notwithstanding that the power was expressly conferred in the one case, and not conferred at all, but, on the contrary, excluded by implication, in the other, the conclusion is drawn in that case that the statute is constitutional. No attention is further paid in that case to the fact that, as to sheriffs and coroners, the constitution expressly gives the circuit court the power to give the "casting vote," while as to county clerks the county court is authorized to "determine" "to which the office belongs." In the former the circuit court is given the power to break the tie by giving the casting vote, while in the latter the county court is required to "determine" "to which the office belongs." The circuit court could break the tie by casting the vote for the one it preferred, but it is not conceivable upon what legal principles the county court could proceed to determine to which of the tied candidates the office "belongs." As pointed out in the case of *Reed v. Cosden*,

if neither was elected (that is, if neither "received a greater number of votes than were given for any other candidate"), the office would not belong to either, and as the county court was limited, by the very terms of the statute, to the right to determine to which the office belongs, it would be unable to draw a legal conclusion or enter a valid judgment, for it would appear that the office did not belong to either, because neither had been elected by the people, and the county court was not given the power to give the casting vote for the one it preferred, and hence, even under the terms of the statute, there was nothing which the legal mind of the county court could operate upon, and hence the tie could not be broken, and the contestants would be left where the electors left them,—neither having a right to have any court say the office belonged to him. In the *Lewis Case*, however, the court invoked the spirit of the constitution to supply an omission in its letter. The spirit of a law may be invoked, where a law has been passed which is ambiguous, in order to ascertain the meaning of the law-maker; but there must first be a law on the subject, before the spirit and meaning can be invoked, for, if the law does not exist in letter in the books (that is, if the lawmakers have never spoken on that subject), their spirit and meaning cannot be inquired into, for they have neither said or attempted to say anything which needs interpretation. So, as the framers of the constitutional amendment of 1834 never attempted to make any provision for deciding in a case of a tie for the office of clerk of the county court, but left it to the people to elect, there is no spirit or meaning to be invoked, nothing to which it could attach or throw light upon. The fact that provision was made as to ties for sheriff and coroner, and no such or other provision made for ties for county clerks, is a very conclusive demonstration that the framers of the constitutional amendment did not intend that ties for county clerks should be determined in any manner by the county court or any one else; for, if they had so intended, they would have said so in express terms, as they did respecting sheriffs. As they did not do so, it is plain that, instead of its being an oversight, it was their intention to require the people to elect, and, if there was a tie, there was no election, and the legal consequences ensued. The case of *Lewis v. State*, 12 Mo. 123, was therefore erroneously decided, and is hereby overruled.

Passing now to section 6090, Rev. St. 1880, which authorizes the county court to "decide" in case of a tie for justice of the peace: Section 37 of article 6 of the constitution of 1875 authorizes the election or appointment of justices of the peace, and the act of 1891 (Acts 1891, p. 175) requires justices of the peace in cities of 300,000 to be elected at the general elections, and section 6090 requires justices of the peace elsewhere in the state to be elected. The constitution does not pro-

vide how ties for justice of the peace shall be settled, and does not authorize the general assembly to make any such provision. It leaves it with the people to elect, or some officer to appoint as may be regulated by law. Section 30 of article 6 of the constitution of 1875 provides that ties for judges of courts of record "shall be determined as prescribed by law," and section 40, Id., has a similar provision in case of a tie between candidates for clerk of any court of record. Section 2 of article 4, Id., requires senators and representatives to be "chosen by the qualified voters," but does not prescribe, or authorize any one to prescribe, how a tie shall be settled. Section 3 of article 5, Id., provides that in case of a tie for the offices of governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general, and superintendent of public schools, "the general assembly shall, by joint vote, choose one of such persons for said office." Section 10 of article 9, Id., requires sheriffs and coroners to be elected by the qualified voters, and the provision (section 35, art. 4) of the constitution of 1820, which authorized the circuit court to give the casting vote for sheriffs or coroner in case of a tie, has been left out of the constitution of 1875, and these officers are left where county clerks were left by the constitution of 1820,—to be elected by the people. Under the constitution of 1875, the general assembly was expressly given power to prescribe by law how a tie between candidates for judge or clerk of a court of record should be determined; but, as to all other ties, the constitution expressly declares how they shall be decided, and does not authorize the general assembly to otherwise provide, or else it makes no provision for them, and does not authorize the general assembly to do so, but requires such officers to be elected by the people. This must have been intentional, and not an oversight; for in section 30 of article 6 the minds of the framers of the constitution were directed to ties for judges of courts of record, and in section 40 of the same article they were directed to ties for clerks of courts of record. Section 37, Id., relating to justices of the peace, comes in between these two sections of article 6; and therefore the question of ties cannot fairly be said to have been in mind when section 30 was adopted, out of mind when section 37 was adopted, and in mind when section 40 was adopted. It was plainly intentional. Being left in this shape by the organic law, neither the general assembly nor the courts have a right to supply an omission, if it could be so considered, in that organic law, either by express legislation or by judicial interpretation, but their duty is to enforce the law, and require all such persons to show that they had been elected by the people, and, failing so to show, to execute the law applicable to cases where there is an intrusion into a public office.

It follows that so much of section 6099 as attempts to authorize county courts to

decide in cases where "two or more persons shall have an equal number of votes for justice of the peace for any township" is unconstitutional, and that, as county courts have no such power, the mayor of St. Louis has no such power, if he has the powers of county courts in this respect, which it is not necessary now to decide, and hence that the respondent herein has shown no legal title to the office of justice of the peace for the Fourth justice's district of the city of St. Louis, but is, in law, an intruder therein. The writ of ouster is hereby issued against respondent, ousting him from the office of justice of the peace for the Fourth justice's district of the city of St. Louis, and he is also adjudged to pay the costs of this proceeding. All concur; VALLIANT, J., in the result only.

RYLAND et al. v. BANKS et al.

JONES et al. v. BUFORD et al.

(Supreme Court of Missouri, Division No. 1.

May 23, 1899.)

TRUSTS—HUSBAND AND WIFE—MORTGAGE—EQUITABLE TITLE.

1. A husband conveyed land to a trustee for the separate use of his wife, authorizing the trustee, on written request of the wife, to mortgage, rent, or sell it. He afterwards joined with his wife in a trust deed, conveying "all his interest" in the land to secure his note, the trustee not joining. *Held*, that the wife could convey her equitable estate without joinder of the trustee.

2. The deed conveyed all her interest in the property, and not simply the husband's estate by the curtesy, and the trustee held the naked legal title which he could be compelled to convey to the heirs of the purchasers at the foreclosure sale.

Error to circuit court, Lafayette county; Charles L. Dobson, Special Judge.

Partition by Simeon B. Ryland and others against Florence J. Banks and others. There was a decree in favor of defendant Coleman Buford and Florence Eckle against defendants Anna Jones, Irvin Zeysing, Jr., and others, and the latter bring error. Reversed.

This is a partition proceeding, and the questions involved in this court arise between the defendants Coleman Buford and Florence Eckle, who claim a part of the land partitioned as the heirs of Legrand G. Buford, Jr., and Orra C. Buford, his wife, on the one side, and the defendants Anna Jones, Irvin Zeysing, Jr., and others, heirs of Irvin Zeysing, Sr., who claim under their ancestor to own the same part of the land, as grantees, by mesne conveyances, of Legrand G. Buford, Jr., and Orra C. Buford, his wife, on the other side. In 1863 Legrand Buford, Sr., died seised of the land in controversy, and also of other land. He left, surviving him, his widow, Eusebia, two daughters, and two sons, of whom Legrand G. Buford, Jr., was one. In 1886 the land was partitioned in kind, and the dower assigned to the widow of over 700 acres, embracing the land in controversy. She remained in possession thereof until her

death, in 1894. After her death this action was begun to partition the dower land. In 1875 Legrand G. Buford, Jr., married Orra Chinn, and on January 25, 1875, Legrand G. Buford, Jr., conveyed all his interest in the dower land to Alexander Graves, in trust for the sole and separate use of his wife, Orra, the deed containing the following clause: "And the said party of the second part shall at any and all times hereafter, at the request and direction of the said party of the third part, expressed in writing, bargain, sell, mortgage, convey, lease, rent, convey by deed of trust for any purpose, or otherwise dispose of said premises, or any part thereof, to do which full power is hereby given, and shall pay over the rents, issues, profits, and proceeds thereof to the said party of the third part," etc. On the 15th of November, 1875, Legrand G. Buford, Jr., and Orra C. Buford, his wife, executed a deed of trust to Irvin Zeysing, Jr., as trustee for Irvin Zeysing, Sr., on property described as: "All of his interest in the undivided estate of the late Legrand G. Buford, and all of his interest in the dower of his mother, Eusebia N. Buford, deceased, as follows [the land described in this deed is the same land described in the conveyance from Buford and wife to Graves, in trust for Mrs. Buford, with the addition of 17 acres in section 21, as to which, however, no point is made here]." The deed then recites that it was made to secure the payment of a note for \$1,438 of the same date, payable at 12 months, and signed by Legrand G. Buford, and further provides that, in case of default in the payment of the note secured by the deed, the trustee shall sell the land, and make, execute, and deliver to the purchaser "good and sufficient deed or deeds, which shall convey to said purchaser or purchasers the fee-simple title in and to such real estate," etc. Orra C. Buford died on the 11th of December, 1875, leaving Coleman Buford and Florence Eckle as her sole heirs. The debt secured by the deed of trust was not paid, and on July 9, 1877, the trustee foreclosed the deed of trust, and Irvin Zeysing, Sr., became the purchaser of the land for \$55, and received a deed from the trustee. Zeysing died, and his heirs represent him in this case. The controversy here is between the heirs of Orra Buford and the heirs of Zeysing. The controversy, in a nutshell, is that the Bufords claim that the legal title to the lands was in Graves, as trustee for Orra C. Buford, and that, under the deed to her, she could not convey, without the trustee joined in the deed, and that, as the trustee did not join in the deed of trust, her interest in the land was not divested by that conveyance, but that upon her death the use was executed, and the title, divested of the use, immediately vested in her heirs; and, further, that the deed of trust only purported to convey the interest of Legrand G. Buford, Jr., in the land, which was only an estate by curtesy, and did not pre-

tend to convey Mrs. Buford's title, and, on the other hand, the Zeysing heirs claim that the method of conveyance provided in the conveyance to Graves, as trustee, is not exclusive, and that the deed of trust to Zeysing conveyed the interest of Mrs. Buford, although the trustee did not join in it, and that it was intended to be the deed of Mrs. Buford, and not of Legrand G. Buford alone. At the request of the Bufords, and of its own motion, the court declared the law as follows: "(1) If the court believes from the evidence that the deed of date the 25th day of January, 1875, from Legrand G. Buford to Alexander Graves, as trustee for the use and benefit of Orra C. Buford, wife of said Legrand G. Buford, was filed for record and recorded in the recorder's office for said Lafayette county on the 30th day of January, 1875, by said Legrand G. Buford, or by his authority or direction, then his dominion over the same was thereby parted with, and such filing and recording thereof constituted a sufficient delivery of such deed to the grantee and beneficiary therein, who are presumed by law to have assented to and accepted the same in the absence of proof of a disclaimer thereof. (2) The use, in said trust deed of date January 25, 1875, from Legrand G. Buford to Alexander Graves, as trustee, conveying such lands to him, for the use of Orra C. Buford, wife of said Legrand G. Buford, as her sole and separate property, free from the control of her said husband, and from liability for his debts, was not executed by the statute of uses in her during coverture and lifetime of said Orra C. Buford, so as to enable her to sell, or convey by deed of trust, such undivided fourth interest in the lands thereby conveyed during such coverture, except by and through her trustee, at her request and direction, expressed in writing, as prescribed and provided for in such deed to said Graves, as trustee. (3) The court declares the proper construction of the deed of trust from Legrand G. Buford and wife to Irvin Zeysing, as trustee, of date November 15, 1875, to secure the payment of the debt of said Legrand G. Buford to said Irvin Zeysing, Sr., to be that such deed of trust only conveys to said Irvin Zeysing, Jr., all of the interest of said Legrand G. Buford in the undivided estate of the late Legrand G. Buford, and all of his (said Legrand G. Buford's) interest in the dower of his mother, Eusebia N. Buford, in said lands therein described and referred to, and does not convey, nor purport to convey, the interest of said Orra C. Buford in such lands. (4) The court, on its own motion, declares the law as follows: The deed from Legrand G. Buford to Alexander Graves, for the use of Orra C. Buford, was sufficient to divest the said Legrand G. Buford of any and all rights as tenant by the curtesy in the lands therein described; and on the death of said Orra C. Buford the title to said lands vested absolutely in her heirs in fee simple." The trial court entered a decree in favor of

the Bufords, and, after proper steps, the Zey-sing heirs brought the case to this court.

J. D. Shewalter and Alex. Graves, for plaintiff in error. Wallace & Chiles, for defendant in error.

MARSHALL, J. (after stating the facts).

1. The legal title being in Graves, and the equitable title in Orra C. Buford, the first question is, did the act of Orra C. Buford in executing the deed of trust carry the title to the land? The deed to the trustee commanded him, at the request and direction of Mrs. Buford, expressed in writing, to "bargain, sell, mortgage, convey, lease, rent, convey by deed of trust for any purpose, or otherwise dispose of "the property, and the Bufords now claim that while it is true that a feme covert is absolutely a feme sole with respect to her separate estate, and can convey the same in any manner known to the law, unless "specially restrained" by the instrument under which she holds title, still the deed under which she has title did specially restrain her as to the manner in which she might convey, and hence the deed of trust is ineffective to divest her title, because it was not made in the manner to which she was limited. The proposition underwent close scrutiny in *Kimm v. Weipert*, 46 Mo. 532. The separate property sought to be charged in that case was held by the wife without the intervention of a trustee, but it was provided that she might incumber, sell, and convey it by "her deed duly executed and joined in by her said husband." *Wagner, J.*, said: "It is now contended that, as the deed conveying the separate estate to Mrs. Weipert provides that she may dispose of it by joining her husband in a conveyance for that purpose, she is incapable of disposing of it in any other way, and it is further insisted that in no event is the separate estate chargeable for the debt. The deed vests in Mrs. Weipert the full, absolute, and complete title, and gives her the entire ownership, and that will be generally held to carry with it the most ample power of disposition. Some of the earlier cases decided that where a particular mode was pointed out in the deed to the married woman, by which she might convey her separate estate, she was restricted, and could convey by that mode only. Chancellor Kent was of the opinion that the power of disposition of the separate estate of the wife by her is not absolute, but only sub modo,—to the extent of the power given her by the instrument,—and, if the instrument points out a particular manner of disposition, then no other can be adopted, although there is no express prohibition of any other made; and there are other authorities of the same purport [citing cases]. But the later, better, and prevailing opinion is that a feme covert is absolutely a feme sole with respect to her separate estate, when she is not specially

restrained, by the instrument under which she acts, to some particular mode of disposition; and, although a particular mode of disposition is pointed out, it will not preclude her from adopting any other mode of disposition, unless there are words restraining her power of disposition to the very mode pointed out [citing cases]. When the leading case of *Jaques v. Trustees*, 17 Johns. 548, was in the court of errors, where all the law judges concurred in reversing the judgment of the chancellor, Spencer, C. J., declared that the decision fully established "that a feme covert, with respect to her separate estate, is to be regarded in a court of equity as a feme sole, and may dispose of her property without the consent or concurrence of her trustee, unless she is specially restrained by the instrument under which she acquires her separate estate," and "that the established rule in equity is that when a feme covert, having separate property, enters into an agreement, and sufficiently indicates her intention to effect it by her separate estate, a court of equity will apply it to the satisfaction of such an engagement." And *Platt, J.*, considered the rule to be "that a feme covert, having a separate estate, is to be regarded as a feme sole as to her right of contracting for and disposing of it. The *jus disponendi* is incident to her separate property, and follows, of course, by implication. She may give it to whom she pleases, or charge it with the debts of her husband, provided no undue influence be exerted over her, and her disposition of it will be sanctioned and enforced by a court of equity, without the assent of her trustee, unless that assent be expressly made necessary by the instrument creating the trust. And the specification of any particular mode of exercising her disposing power does not deprive her of any other mode of using that right, not expressly or by necessary construction negated in the devise or deed of settlement." In the instrument we are now considering there is no restriction or limitation. There are affirmative words showing that the wife may convey by joining with her husband, but there is nothing to indicate that it was intended that she should be restrained to that particular mode." This doctrine, so lucidly stated, has since been followed, and *Judge Wagner's* opinion approved, in *Missouri (Richeson v. Simmons)*, 47 Mo., loc. cit. 26; *Green v. Sutton*, 50 Mo., loc. cit. 191; *Stiemers v. Kleeburg*, 58 Mo. 198; *Wood v. Klee*, 163 Mo., loc. cit. 338, 15 S. W. 625, and in no case to which our attention has been called have the principles announced ever been questioned or departed from, nor indeed do we see how they could be. Mrs. Buford had a separate estate in the land. Her power of alienation was not specially limited to any particular method, and therefore does not fall within the rule against alienation by any other legal method, first declared by Lord Thurlow in *Parkes v. White*, 11 Ves.

209. Being an equitable estate, she had power to charge it by executing her note (*Whitesides v. Cannon*, 23 Mo. 457), which, while not a conveyance, would be enforced in equity as a charge upon the land (*Singluff v. Tindal*, 40 S. C. 504, 19 S. E. 137; *In re Luebbe's Estate*, 179 Pa. St. 447, 36 Atl. 322), she could lease it without her husband joining in the lease (*Perkins v. Morse*, 78 Me. 17), and she could convey her equitable estate by an instrument in writing which would be void at law because her husband did not join in it, but would be valid in equity (*Turner v. Shaw*, 96 Mo., loc. cit. 28, 8 S. W. 898; *Small v. Field*, 102 Mo., loc. cit. 120, 14 S. W. 817; *Pitts v. Sheriff*, 108 Mo., loc. cit. 115, 18 S. W. 1072), and, although the trustee who had the legal title did not join in the instrument, the equitable title would be passed by her act; and the trustee would hold the legal title for the use of her equitable assign, and could be compelled to convey the legal title to her assign, her written instrument being regarded, in equity, as a direction to the trustee to convey. 1 Bish. Mar. Wom. § 853; *Gregg v. Owens*, 37 Minn. 61, 33 N. W. 216.

In *Turner v. Shaw* the husband conveyed the land directly to his wife "to her sole use and benefit," and this was held sufficient to create in her a separate estate, although, if a stranger had so conveyed, it would not have created a separate estate. The wife afterwards conveyed the land directly to her husband, and it was held a good conveyance in equity, although it was a nullity as a deed at law. And it was held that this must have been the effect of her act, "or else it had no effect at all"; and it was said by *Sherwood, J.*: "But it may be urged that this deed was utterly invalid, because it was executed by the wife alone. However this may be as to mere statutory estates, which require a joinder of husband and wife in order to their valid execution, it will not hold as to separate estates in equity, which the wife may charge, mortgage, or convey without let or hindrance from her husband. With regard to such property she is, in equity, a feme sole, and has the *jus disponendi*, which is the inseparable incident of ownership. By virtue of this, she incumbers, or she absolutely disposes of it, or she binds it by her parol agreements, just as any other owner would. This position is sustained by abundant authority both here and elsewhere." In *Small v. Field*, *supra*, the deed was not acknowledged by the married woman, yet, the land being her separate estate, the conveyance was held good in equity, the court, speaking through *Sherwood, J.*, saying: "This being the case, the fact that Kate Greene signed the deed makes it good to pass the equitable fee without an acknowledgment, just as much so as if she had been a feme sole." In *Pitts v. Sheriff*, *supra*, the husband deeded the land directly to his wife. They separated, were afterwards divorced, she conveyed the land to the defendant by mesne conveyances, and

ejectment was brought to recover the land. It was insisted that there was no delivery of the deed, as the wife was incompetent to accept a delivery. But it was held, following *Turner v. Shaw*, *supra*, that the deed, being from the husband to the wife direct, created a separate estate in her, and that the husband would be treated as the trustee of his wife, and that, when the marriage relation ceased, the trust ceased, and the use was executed, and therefore the deed to her and the title claimed through her were held good. Speaking of this power of a wife to alienate her equitable estates, without a statutory deed, wherein her husband joined her, and without the trustee joining in the conveyance, *Bishop*, in his excellent treatise on the Law of Married Women, says (section 853): "The case which led in the new doctrine [*Taylor v. Meads*, 34 Law J. Ch. 206-207] was decided by Lord Chancellor Westbury in 1865. The question, he said, was 'whether in a case where the real estates are conveyed or devised to trustees in fee, upon trust for the sole and separate use of a married woman and her heirs, she has the same power of disposition by deed or will over the equitable fee as she would have if she were a feme sole'; and he answered this question in the affirmative. One cannot read his luminous words without thankfulness to that Providence which guides our earthly affairs, for making, now and then, for high judicial place, a man who will not permit his intellect to wear the chains which superstition, clothed in judicial garments, puts upon almost every mean understanding caught within what ought to be the enlightened ranks of the law. He observed: 'There is no difficulty as to the principle. When the courts of equity established the doctrine of the separate use of a married woman, and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal status, and to make her, in equity, a feme sole. It is of the essence of the separate use that the married woman shall be independent of, and free from the control and interference of, her husband. With respect to separate property, the feme covert is, by the form of trust, released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*. To every estate and interest held by a person who is *sui juris*, the common law attaches a right of alienation, and accordingly the right of a feme covert to dispose of her separate estate was recognized and admitted from the beginning until Lord Thurlow devised the clause against anticipation. But it would be contrary to the whole principle of the doctrine of separate use to require the consent or concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of. That would be to make her subject to his control and interference. The whole matter lies between a married woman and her trustees; and the

true theory of her alienation is that any instrument, be it deed or writing, when signed by her, operates as a direction to the trustees to convey or hold the estate according to a new trust which is created by such direction. This is sufficient to convey the feme covert's equitable interest. When the trust thus created is clothed by the trustees with the legal estate, the alienation is complete both at law and in equity."

In the case before us, there is no objection to the deed of trust from a statutory point of view, for the husband joined with the wife in its execution. The only infirmity relied on is that Graves, the trustee, did not join in its execution. It was not necessary that he should join. The deed conveyed the equitable estate of the wife. The legal estate was still in the trustee, to be held "according to a new trust," or to be conveyed by him to the new owner of the equitable estate according to the direction of the wife expressed in her deed. It is not material in this case which view is taken. The assign of the wife could and can yet demand and compel Graves, as trustee, to convey the legal title to him, and thereby unite in himself the legal title with the equitable title already acquired from the beneficial owner, or it can still be treated as a legal title in Graves for the benefit of the owner of the equitable estate acquired from Mrs. Buford. The right of a feme covert to alienate her separate estate, by deed or other writing, will not be hindered, in equity, unless specially limited by the instrument creating her estate, because the trustee fails or refuses, or has not been asked, to join in the deed or writing, for such a construction of her rights would limit her *jus disponendi* over her separate estate as much as requiring her husband to join in the conveyance limits her free disposal of it. In this case the trust was created to protect her estate from outside interference, but the trustee was not given power to protect the estate against its beneficial owner. He was an aid on her staff, and not a ruler over her. It follows, therefore, that the circuit court erred in the principles which control the case, and that the deed of trust from Legrand G. Buford, Jr., and Orra C. Buford, and the foreclosure thereof, conveyed the equitable estate of Orra C. Buford to Irvin Zeysing, Sr., and that the legal title is still in Graves, but is held by him as trustee for Zeysing as a new trust according to the direction of Orra C. Buford, and that Graves is under obligation to convey the legal title to Zeysing upon request, so as to unite the legal and equitable in him, and that, he being dead, his heirs have succeeded to his rights in this regard.

2. It is wholly immaterial that in the deed of trust the grantors are described as "Legrand G. Buford and Orra C. Buford, his wife," and that the granting clause describes the land as "all his interest in the undivided estate of the late Legrand G. Buford, and all of his interest in the dower of his mother, Eusebia N. Buford, deceased." These are manifest inaccuracies of

the scrivener, in keeping with the inartificial way in which he describes the land, e. g. "eighty acres west half northwest, section thirteen," "forty acres northwest northwest, section fourteen," "seventeen acres, southeast corner southeast, section twenty one," and the like. Legrand G. Buford, at the date of this deed of trust, had no interest in any of the lands covered by this deed of trust, except a contingent estate by the curtesy. There was no undivided part of the father's estate, except the 700 acres, which had been assigned to his mother, Eusebia, for her dower. The description in the deed of trust of "all his interest in the undivided estate of the late Legrand G. Buford, and of all his interest in the dower of his mother, Eusebia N. Buford, deceased," therefore referred to one and the same thing,—his undivided interest in the 700 acres. The looseness of the scrivener is made plainer by his describing "his interest in the dower of his mother, Eusebia N. Buford, deceased." Her dower, of course, would cease at her death; but this deed was made in 1875, and she did not die until 1894. There could be no such thing as a dead person having dower, nor of any one having an interest in the dower of a deceased dowress. This illustrates the loose character of the deed, and the carelessness of the scrivener. If only the contingent estate by the curtesy of Legrand G. Buford, Jr., was intended to be conveyed, there would be no necessity for Orra to join in the deed, for that estate could not arise until after her death. But, if this was all that was actually conveyed (and most certainly the deed was sufficient to convey this), still the circuit court did not even give this much to the Zeysing heirs, and this estate was in existence at the date of the decree, for Orra C. Buford died in 1875, and Legrand G. Buford, Jr., was alive, and a party to this action. The judgment is erroneous for this reason. But it is plain that such a construction makes the act of Orra C. Buford, in joining in the deed, perfectly meaningless. As we have seen, the deed must be construed so as to give some effect to her act, and to ascertain, if possible, and carry out, her intention. She owned the undivided interest of her husband in the 700 acres of his father's estate which had been set apart as the dower interest of his mother. It is too plain to admit of cavil that this was the substantial security which she intended to give, and which she had a right to give, for her husband's note. To accomplish and effectuate her intention, we will read the pronoun "his" as the pronoun "her" wherever necessary in the deed of trust (*Rines v. Mansfield*, 96 Mo., loc. cit. 398, 9 S. W. 799; *Presnell v. Headley*, 141 Mo. 194, 43 S. W. 378; *Thomson v. Thomson*, 115 Mo. 67, 21 S. W. 1085, 1128), thus giving a meaning and effect to the deed, rather than making it meaningless so far as Orra is concerned. It follows that the judgment of the circuit court is erroneous in awarding this interest to the Buford heirs, and in not giving it to the Zeysing heirs; and for this reason

that judgment is reversed, and the cause remanded to be proceeded with in accordance herewith. All concur.

FOSTER et al. v. VERNON COUNTY.

(Supreme Court of Missouri, Division No. 2.

June 6, 1899.)

APPEAL—DISMISSAL.

Where no printed abstract of the pleadings and record, with or without an index thereto, has been filed, as required by Sup. Ct. Rules 11-13 (16 S. W. vi.; 31 S. W. v.), the appeal will be dismissed.

Appeal from circuit court, Vernon county; D. P. Stratton, Judge.

Action by A. J. Foster and others against Vernon county. From a judgment in favor of plaintiffs, defendant appeals. Dismissed.

D. M. Gibson, for appellant. W. M. Bowker, for respondents.

BURGESS, J. This appeal is from a judgment of the circuit court of Vernon county, but no printed abstract of the pleadings and record, with or without an index thereto, has been filed, as required by rules 11; 12, and 13 of this court (16 S. W. vi.; 31 S. W. v.). For this reason we dismiss the appeal. *Murrell v. McGuigan* (Mo. Sup.) 49 S. W. 984; *Halstead v. Stone*, Id. 850.

GANTT, P. J., and SHERWOOD, J., concur.

TURNER et al. v. DIXON.

(Supreme Court of Missouri, Division No. 2.

June 6, 1899.)

JUDGMENT FOR PARTITION—DESCRIPTION—AMBIGUITY—PAROL EVIDENCE—GRAVEYARDS—DEDICATION—EVIDENCE.

1. A judgment for partition, excepting from the land to be sold a half of an acre in a certain quarter section, so laid out as to include the family graveyard of M., is not void for uncertainty of description with respect to the half acre, though no graveyard was located in said quarter section, where the family graveyard of M., containing a half acre, can be located by parol in another quarter section.

2. Parol evidence was admissible to show where the graveyard was in fact located.

3. An instruction that presents a question that is fully covered by instructions given is properly refused.

Appeal from circuit court, Greene county; James T. Neville, Judge.

Ejectment by Matilda Turner and others against John Dixon. Judgment for plaintiffs, and defendant appeals. Affirmed.

Lincoln & Lydy, for appellant. C. W. Hamlin, for respondents.

BURGESS, J. Ejectment for the possession of one-half acre of ground out of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 8, township 29, of range 21, being the family graveyard of one John L. McCracken, in Greene county.

The petition is in the usual form, and the answer a general denial. The ouster is laid August 22, 1896. The case was tried by the court and jury. The trial resulted in a verdict and judgment for plaintiffs for possession of the ground. After unsuccessful motion for a new trial, defendant appeals.

John L. McCracken, deceased, is the common source of title. Plaintiffs claim title as his heirs; the defendant, through mesne conveyances from the purchaser of the ground of which that in question is a part at a partition sale of the lands of said John L. McCracken among his heirs made in pursuance of a judgment and decree of court rendered in a suit for partition, to which plaintiffs were parties. The E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of said section 8 was embraced in the judgment and decree in that suit, and was ordered sold, except "one-half acre of the east half of southwest quarter of section eight, township twenty-nine, range twenty-one, so laid out as to include the family graveyard of said John L. McCracken, deceased." At the partition sale Mary T. Stahl became the purchaser of the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of said section 8, and received a sheriff's deed therefor, dated November 15, 1880. Defendant claims title under Mary T. Stahl, derived from her through J. C. B. Ish, Samuel H. Regan, John Wightman, and William Dixon; but none of the grantees through whom he claims title were innocent purchasers, nor was he, as the graveyard which embraced the land in question had been known and used as such for over 30 years. He also claimed title by adverse possession for more than 10 years.

The following instructions were asked by defendant and refused: "(1) The court declares that under the pleadings and evidence the plaintiffs cannot recover. (2) The court declares that the decree in partition wherein James R. Turner et al. were plaintiffs and William S. Rigg et al. were defendants, read in evidence, locates the burial ground of John L. McCracken, deceased, on the southwest quarter of section eight, township twenty-nine, range twenty-one, Greene county, Missouri; and if the jury finds from the evidence that said burial ground was by mistake described as being on said land, when in fact it was located on the northeast quarter of the northwest quarter of said section, then plaintiffs cannot recover, unless they have shown by a preponderance of the evidence that W. H. Dixon, at the time he purchased the land in controversy, had notice of said mistake, or the existence of said burial ground in said mentioned forty, and if the jury finds that W. H. Dixon had such notice, but that John Wightman, his grantor, had no notice of said mistake, or the existence of said burial ground on said last described forty, then the finding must be for defendant. (3) The court declares that if the evidence shows that Ish, Regan, Wightman, and Dixon successively have been in adverse, actual, open, continuous, and uninterrupted possession

sion of the land in controversy for ten years next before the commencement of this suit, then plaintiffs cannot recover. (4) The court declares the evidence insufficient to establish the dedication of the ground in controversy as the private burial ground of John L. McCracken, deceased. (5) If the jury finds from the evidence that the plaintiffs in this action were also parties to the partition suit for the partition of the John L. McCracken lands, and that the east half of northwest quarter of section eight, township twenty-nine, range twenty-one, Greene county, Missouri, was sold in said cause, and a sheriff's deed in partition executed, conveying said land, without excepting the alleged burial ground in question, and the purchaser paid the sheriff his bid for said land, and W. H. Dixon now holds by means conveyance the title of such purchaser, and the court declares he does hold same, then plaintiffs cannot, while holding the proceeds of the sale, recover herein. (6) The court instructs that if the jury believes from the evidence that the defendant or his landlord was in the actual, open, notorious, and continued adverse possession of the land in controversy for at least ten years before the institution of this suit, claiming to be the owner thereof, then the verdict must be for the defendant." The court, of its own motion, and over the objection of defendant, instructed the jury as follows: "The partition proceedings and sheriff's deed read in evidence did not have the effect of passing the legal title out of the heirs of John L. McCracken, if the McCracken graveyard was known and recognized as such in the community generally. If, therefore, you find from the evidence that it was so known, and that the plaintiffs are the heirs of John L. McCracken, you will find the issue in favor of the plaintiffs, for the possession of the property sued for; unless you further find from the evidence that defendant is entitled to hold the same by virtue of the statute of limitation, as hereinafter defined. If the defendant and Wightman, Regan, Stahl, Ish, and Shaw, any or all of them, have been in the open, notorious, continuous, exclusive, and adverse possession of the land sued for, claiming to own the same under the deeds and title papers in evidence, for any period of ten years prior to the 25th day of August, 1896, then they are entitled to hold the same now, by virtue of the statute of limitations. The burden of showing such title by limitations is on the defendant, and it must be proven by a preponderance or greater weight of evidence. In determining whether the land was held exclusively and adversely by defendants, you will consider the nature of the property, and any and all other facts and circumstances in evidence which in your judgment would throw light on the question."

Defendant claims that the legal title to the one-half acre of land in question passed to the purchaser at partition sale, and, as defendant or his landlord succeeded to that ti-

tle, the first instruction asked by him, in the nature of a demurrer to the evidence, should have been given. It is well settled that ejectment can only be maintained upon a legal title existing in the party suing at the time the action is commenced. *Ford v. French*, 72 Mo. 250; *Dunlap v. Henry*, 76 Mo. 106. So that, unless the title to the land was at the time of the commencement of this suit in plaintiffs, they were not entitled to recover, and the instruction should have been given. There is no question but that the title was in them at that time, unless it passed to Mary T. Stahl by virtue of her purchase at the partition sale, and the sheriff's deed made to her in pursuance thereof. This depends upon the description of the land as reserved from partition sale by the decree of partition. By the description it is located in the wrong quarter section, and unless the added words, "so as to include the family graveyard of said John L. McCracken, deceased," control, and then make the description sufficiently definite to exclude the land from the judgment of partition and order of sale, the title passed to Mary T. Stahl. But she and those claiming title under the judgment in partition must be presumed to have had knowledge of the fact that the land in question was not included in that judgment. There was no other graveyard on any of the land partitioned, and this one had existed since 1855. Suppose we exclude or ignore altogether the words "one-half acre out of the northwest quarter, section eight, township twenty-nine, range twenty-one," as being inconsistent with the location of the graveyard; there would be no difficulty whatever in identifying the land by the description which follows, to wit, "the family graveyard of John L. McCracken": "for still, after such rejection, enough will be left to constitute a good and valid" description. *Sherwood, C. J.* (dissenting opinion), in *Lincoln v. Thompson*, 75 Mo., loc. cit. 637. The rule is well settled that in actions involving the constructions of sheriff's deeds, when the description of the land is vague, parol evidence is admissible for the purpose of showing that the land conveyed is known by a certain name, and where located. *Webster v. Blount*, 39 Mo. 500; *McPike v. Allman*, 53 Mo. 551; *Hammond v. Johnston*, 93 Mo. 198, 6 S. W. 83, and authorities cited. And, if this may be done with respect to land vaguely described in a sheriff's deed, we see no reason why such evidence was not admissible in this case for the purpose of showing where the graveyard was in fact located. This is not a case of failure to describe the land in litigation, but the question is which one of two descriptions shall prevail; the evidence showing that the first does not embrace the land, while the other does, and may with the aid of verbal testimony be definitely located. The judgment in the partition suit was in all respects in accordance with the forms of law, and plainly excluded from its provisions the graveyard in question.

There can be no difficulty in ascertaining by measurement the exact ground included in the graveyard; hence defendant's fourth instruction was properly refused.

The sixth instruction asked by defendant only presents the question of the statute of limitations, which was fully covered by the instruction given by the court of its own motion; and it did not, therefore, commit error in refusing the instruction asked by defendant. *Martin v. Smylee*, 55 Mo. 577; *Condon v. Railway Co.*, 73 Mo. 567; *Coopen v. Johnson*, 81 Mo. 488; *State v. St. Louis Brokerage Co.*, 85 Mo. 411; *Burdiet v. Railway Co.*, 123 Mo. 221; 27 S. W. 453.

It logically follows from what has been said that the judgment in partition, with respect to this one-half acre of ground, was not void for uncertainty of description, and that it was not, therefore, embraced within the decree in that case. We therefore affirm the judgment.

GANTT, P. J., and SHERWOOD, J., concur.

KINGMAN & CO. v. CORNELL-TEBBETTS MACHINE & BUGGY CO.

(Supreme Court of Missouri. Feb. 15, 1898.)

FRAUDULENT CONVEYANCES—TRUST DEEDS—ACCEPTANCE—DELIVERY—INSTRUCTION—INDORSER—PAROL PROOF—CORPORATIONS—PREFERRING STOCKHOLDERS.

1. Where a trust deed of a stock of goods is given to secure the separate, independent debts of several creditors, no trustee being named, it is good as to those who accept it before unsecured attaching creditors intervene, but subject to attachment as to those who have not accepted it.

2. Where a debtor attempts to prefer certain of his creditors by a mortgage, fraud in its execution cannot be predicated on the latter's failure to accept it, where the property has been attached by other unsecured creditors.

3. A charge is erroneous where there is no evidence on which to base it.

4. Where a person not the payee writes his name across the back of a note at the time of execution he is prima facie a joint maker, and, as between him and the payee, the character of his undertaking—whether as maker, indorser, surety, or guarantor—may be shown by parol.

5. An attaching creditor cannot object that such an indorser of the debtor's notes, secured by a deed of trust, is a maker, and not a guarantor, and hence not entitled to protection, as this is a matter between the payee and the indorser; and, where the payee has compelled the indorser to pay the notes, he becomes subrogated to the payee's rights under the deed.

6. His right to such security is not affected by the fact that he is a stockholder of the debtor corporation.

7. Delivery of a trust deed securing creditors, to the trustee named therein, is a good delivery, which inures to the benefit of the named beneficiaries; and, unless they disclaim within a reasonable time after notice, their acceptance will be presumed.

Burgess and Robinson, JJ., dissenting.

In banc. Appeal from circuit court, Jasper county; Edward C. Crow, Judge.

Action by Kingman & Co. against the Cornell-Tebbetts Machine & Buggy Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Division No. 1 of this court, speaking through MARSHALL, J.,—all of the judges concurring,—delivered the following opinion in this case:

"On November 17, 1893, plaintiff instituted suit in the circuit court of Jasper county against defendant upon five promissory notes. The answer was a plea of payment. On the 14th of February, 1894, the defendant executed and delivered to H. H. Harding, as trustee, a deed of trust covering its stock of merchandise in its store, at Carthage, Missouri, to secure its indebtedness, evidenced by promissory notes in favor of William Deering & Co. aggregating \$2,979.50, all dated February 12, 1894, of Merchants' National Bank of Cincinnati, aggregating \$1,482.56, all dated June 6, 1893, and of Fourth National Bank of Cincinnati, aggregating \$726.63, all dated June 6, 1893. None of said notes were due when the deed of trust was made or when the attachment was sued out. The trustee on the same day caused the deed of trust to be recorded in Jasper county, and immediately took possession of the property covered by the deed of trust, and placed A. E. Tebbetts in charge of the goods, with directions to sell them, and render to him an account of sales on the 1st of each month. The deed of trust provided that the mortgaged property should remain in the possession of the mortgagor until default in the payment of some of the notes, but that the mortgagor should have no right to sell any part of the mortgaged property without the written consent of the beneficiaries in the mortgage, and, if done with their consent, the proceeds of sale should be immediately applied to the payment of the secured debts; that in case of a sale or any attempt to sell or remove the property without such written consent, or of any unreasonable depreciation in the value of such property, the trustee should take possession of the property, and sell it at public or private sale, at his option, in Carthage. The trustee, upon taking possession, at once proceeded to sell at private sale, and continued to do so for about a month, receiving all the proceeds of sale. On the 10th of March, 1894, the plaintiff sued out an attachment in aid of its suit previously begun on the 17th of November, 1893, and thereafter, on the 25th of October, 1894, filed an amended affidavit for attachment, alleging five grounds of attachment, to wit: (1) That defendant on March 6, 1894, had fraudulently conveyed and assigned its property and effects so as to hinder and delay its creditors; (2) that the defendant had fraudulently concealed, removed, and disposed of its property and effects so as to hinder and delay its creditors; (3) that defendant was about fraudulently to convey and assign its property and effects

so as to hinder and delay its creditors; (4) that defendant was about fraudulently to conceal, remove, and dispose of its property and effects so as to hinder and delay its creditors; (5) that the debt sued for was fraudulently contracted on the part of the debtor.'

"The not uncommon condition is present in this case of a direct and irreconcilable conflict between counsel as to whether the record shows that the beneficiaries in the deed of trust accepted it before the attachment writ was levied. Appellant's counsel says: 'William Deering & Co., one of the beneficiaries whose debt was secured by said deed of trust, accepted under the same within two or three days after its execution, and about a month before the levy of the attachment in this action. The other two beneficiaries had not formally accepted under the deed at the time the property was seized by the sheriff. Lewis B. Tebbetts, however, who was surety on all the notes held by said Merchants' National Bank and said Fourth National Bank, secured to be paid by said chattel deed of trust, and to whose benefit as such surety the conveyance inured, did accept under the same immediately after the execution of said deed; and subsequently, and after the levy of the attachment, he took up and paid said notes, and became subrogated to the rights of said banks under said conveyance.' Respondent's counsel, on the other hand, says: 'The record shows that neither of the beneficiaries knew of the execution of said chattel deed of trust until after the making and recording of same, and that neither of the beneficiaries accepted or attempted to accept the benefits of said chattel deed of trust until after the levy of the attachment in this cause.' The printed record in this case covers 180 pages, and this contrariety of contention of counsel has imposed upon the court the necessity of reading it to settle this question of fact. The testimony of Craig, Harding, and L. B. Tebbetts shows that Deering & Co. were trying to procure the security before it was given, and that after it was given they accepted it within a few days, and before the attachment was levied. L. B. Tebbetts was an indorser on the notes held by the two banks, and guarantor for the debt to Deering & Co.; and, immediately after the deed of trust was executed, he notified the banks and Deering & Co. of the fact, and he approved of and accepted the deed of trust. It does not appear that the banks accepted the security. None of this testimony was controverted at all by the plaintiff. It must therefore be taken as true in this case. The trustee took possession of the mortgaged property with the consent of the debtor company and of Tebbetts, and his action in this regard was approved by Deering & Co.

"At the request of the plaintiff, the court instructed the jury as follows: '(1) The court instructs the jury that if they believe from the evidence that the defendant, by its officers, in executing and having executed the

chattel deed of trust read in evidence intended thereby to hinder, delay, or defraud any one or more of its creditors, they will find the issue for the plaintiff on first ground alleged in the affidavit for attachment. (2) The court instructs the jury that, while fraud is not to be presumed, yet it is rarely susceptible of being proved by direct and positive testimony, and may be proved by facts and circumstances; and if the jury believe from all the facts and circumstances detailed in evidence that the officers of defendant intended by the execution of the chattel deed of trust read in evidence to hinder, delay, or defraud any one of its creditors, they will find the issue for plaintiff on the first ground of attachment alleged in the affidavit. (3) The court instructs the jury that if they believe from the evidence that the officers of the defendant company executed the chattel deed of trust read in evidence without the knowledge of the Merchants' National Bank of Cincinnati, Ohio, the Fourth National Bank of Cincinnati, Ohio, and Wm. Deering & Co., the beneficiaries therein, or either of them, and either of said parties did not accept said chattel deed of trust before the levy of the attachment in this cause, then said chattel deed of trust was fraudulent as to other creditors of defendant company, and the jury will find the issue for plaintiff on the first cause for attachment. (4) The court instructs the jury that if they believe from the evidence that defendant company had a stock of over \$6,000 about January 1, 1894, and that when the attachment was levied, March 10, 1894, their stock did not amount to more than about \$2,500, and said defendant company, officers, and agents have failed to account for the difference in the value of the stock, then the jury may take such facts, together with all the other facts and circumstances in evidence on the question as to whether defendant had concealed, removed, or disposed of its property and effects with intent to hinder, delay, or defraud its creditors, or any of them; and if the jury believe from all the facts and circumstances in evidence that defendant, by its officers, had at the time of the levy of the attachment concealed, removed, or disposed of any of its property or effects with intent to hinder, delay, or defraud any of its creditors, they will find the issue for the plaintiff on the cause of attachment. (5) The court instructs the jury that L. B. Tebbetts, H. M. Cornell, and A. M. Tebbetts not being payees of the Cook Carriage Company notes, and having written their names across the back of said notes at the time of making same, the law holds said Tebbetts, Cornell, and Tebbetts as makers of said notes, and not securities or indorsers thereof, and it was the duty of said L. B. Tebbetts to pay said notes at maturity; and he is not entitled to any benefit of the chattel deed of trust read in evidence, and his acceptance does not validate the chattel deed of trust, if invalid under the evidence and other instructions in

this case. (6) The court instructs the jury that if they believe from the evidence that the notes made by defendant company to Wm. Deering & Co., and secured by the chattel deed of trust, were sent by defendant officers or L. B. Tebbetts to Deering & Co., and Deering & Co. returned said notes to said Cornell-Tebbetts Machine & Buggy Company, then the receipt alone of said notes at that time was not an acceptance of said deed of trust; and if the jury believe from the evidence that said Deering & Co. did not finally accept said notes until March, 1894, and did not accept said notes until after the levy by the sheriff March 10, 1894, then such chattel deed of trust was invalid as to plaintiff, and fraudulent in so far as it attempted to secure the notes to Wm. Deering & Co., and the jury will find the issues for plaintiff on the first cause of attachment. (7) The court instructs the jury that on February 19, 1892, H. M. Cornell, president of the defendant company, signed a written guaranty to plaintiff, guarantying the payment of all indebtedness that might become due from defendant to plaintiff, and making himself individually liable for all such indebtedness, and that said Cornell on the same day made written representations to plaintiff showing himself (Cornell) to be worth \$39,000 above all debts and exemptions. Now, if the jury believe from the evidence that plaintiff sold goods to the defendant on the strength of and by reason of said guaranty of said Cornell, and his (Cornell's) said representations as to his worth financially, and if the jury believe from the evidence that said Cornell's representations as to the property owned by him, and the value thereof, were substantially false, and said Cornell knew at the time said representations were false, or if said Cornell at the time did not know said representations to be true, then the indebtedness to plaintiff was fraudulently contracted, and the jury will find the issue for plaintiff on the fifth cause of attachment. (8) The court instructs the jury that, to make a valid chattel deed of trust, it must be accepted by the beneficiaries therein, and the filing of same for record by the mortgagors or the trustees named therein does not constitute an acceptance by the beneficiaries; and the trustee named in such chattel deed of trust has no authority, by reason of his being named as such trustee by the mortgagor, to accept the same for the beneficiaries, and must have special authority from such beneficiaries before he can accept the same for them. And any acts of the trustee, Harding, in accepting the trust under the chattel deed of trust read in evidence, and attempting to take possession of the goods, or place parties in charge of said goods to sell same, or in collecting or attempting to collect the proceeds of the sale of such goods, would not make said chattel deed of trust valid until said chattel deed of trust had been accepted by the beneficiaries therein named, to wit, the Merchants' National Bank, the

Fourth National Bank, and Wm. Deering & Co.; and if the jury believe from the evidence that said beneficiaries, or any of them, did not accept such chattel deed of trust until after the levy of the attachment in this cause, then said chattel deed of trust was fraudulent as to plaintiff, and the jury will find the issue for plaintiff on the first charge in the affidavit for attachment. (9) The court instructs the jury that if they believe from the evidence that in executing the chattel deed of trust read in evidence, by the officers of the defendant company, that said chattel deed of trust was not made in good faith to secure the Merchants' National Bank of Cincinnati, Ohio, and the Fourth National Bank of Cincinnati, Ohio, and Wm. Deering & Co., but was made for the purpose of protecting L. B. Tebbetts, H. M. Cornell, and A. M. Tebbetts, or either, as signers or indorsers of the Cook Carriage Company note, and as guarantors of the indebtedness to Wm. Deering & Co., then such chattel deed of trust was a secret trust, fraudulent as to the other creditors of defendant company, and the jury will find the issue for plaintiff on the first cause for attachment.

"At the request of defendant the court instructed the jury as follows: '(2) The court instructs the jury that the burden of proving the truth of the grounds of attachment rests upon the plaintiff, and that plaintiff must sustain such burden by a preponderance of evidence in its behalf, by which is meant, not that plaintiff must have introduced a greater number of witnesses in its behalf, but that the evidence must have been more clearly and convincingly in favor of the plaintiff than of the defendant. It is to the quality, rather than to the quantity, of the evidence on both sides, that the jury must look. (g2) The court instructs the jury that the question to be determined by them under the plea of abatement is not whether the defendant is indebted to the plaintiff, or the extent of such indebtedness, but the question to be determined is whether the charges made in the affidavit filed by the plaintiff as grounds of attachment are true and founded on fact. (h2) The court instructs the jury that, while fraud may be established by circumstances, yet it is not to be guessed at, merely, or presumed to exist, in the absence of evidence tending to show fraud; and the court directs the jury that if the evidence here indicated matters of suspicion merely, or matters of mistake, and is as consistent with proper motives as with those which are improper, then the jury will find for the defendant upon the grounds of attachment, as they all involve a finding by the jury that the action of the defendant was fraudulent and for unlawful purposes. (i2) All the instructions given you are the court's instructions, and in arriving at a verdict in the case you will read and consider all of them together, as modifying and explaining each other; and, if you have any doubt about the meaning of any one or more of the instructions, it is your duty to read

the other instructions in connection therewith, with a view of understanding all of the instructions submitted to you for guidance.'

"The defendant asked, and the court refused to give as asked, the following instructions, but modified them by requiring the jury to find that the beneficiaries in the deed of trust accepted it before the levy of the attachment, and, when so modified, gave them to the jury: '(a) The court instructs the jury that if they believe from the evidence that the notes secured by the chattel deed of trust dated February 12, 1894, which have been read in evidence, were for bona fide indebtedness owing by the defendant to the parties named in said notes, then it was lawful for the defendant to execute said chattel deed of trust, and, if such deed was valid, the execution of the same affords no grounds for sustaining the attachment in this case. (b) The court instructs the jury that an insolvent debtor has the right to prefer or secure one or more creditors to the exclusion of all other creditors, and that a conveyance by way of preference or security, made in good faith, and simply to prefer or secure, is valid, although the effect of it may be to postpone the demands of other creditors, or, in the language of the attachment act, "to hinder or delay such creditors." Before such conveyance can be found to be fraudulent, within the meaning of the statute, so as to authorize an attachment, it must be proven to have been given, not for the purpose of preference or security simply, but to preserve or secure a secret use for the debtor, or create for such debtor a secret estate in the property, in fraud of the rights of other creditors not preferred or secured. (c) The court instructs the jury that if they believe from the evidence that all the indebtedness mentioned in and secured by the chattel deed of trust read in evidence in this case, dated February 12, 1894, was a bona fide liability of the defendant company to the persons and in the amount therein named and therein expressed, existing at the time said chattel deed was executed, and that said chattel deed was given in good faith simply to prefer or secure the indebtedness therein referred to, then said conveyance was not fraudulent, within the meaning of the statute, although the jury may further find from the evidence that the effect of giving of said chattel deed of trust was to hinder or delay other creditors of the defendant company, and give preferences to certain creditors over other creditors of the defendant company. (d) The court instructs the jury that statements made by Mr. Cornell touching his personal assets and liabilities cannot be treated or considered by the jury as a statement or representation of the Cornell-Tebbetts Machine & Buggy Company, and even if the jury believe and find that said Cornell did make false representations as to the character and value of his individual property, real and personal, this would afford no ground for sustaining the attachment in this

case. (e) The acceptance of the deed of trust by the beneficiary need not be in express words or terms, but may be implied from the facts and circumstances shown in evidence.'

"The defendant asked, and the court refused to give, the following instructions: '(k) The court instructs the jury that the ground of attachment, that the debt sued for was fraudulently contracted, can only be sustained by evidence tending to show that the whole debt sued for was so contracted upon the part of the defendant. (l) The court instructs the jury that, if they believe from the evidence that the chattel deed of trust read in evidence was given to secure a bona fide promissory note mentioned therein, then said conveyance was not fraudulent, although the effect of its having been given was to give a preference to certain creditors over that of other creditors of the defendant. (m) The court instructs the jury that the retaining of possession of the property covered by the deed of trust read in evidence of it, and the sale of portions thereof by the defendant after the execution of the said deed of trust, constitute no grounds for sustaining the attachment in this case; that the deed of trust read in evidence provides that this may be done, and such provision is consistent with law, and does not constitute fraud; that there is no evidence in this case that the defendant used any of the property covered by the deed of trust for its own use after execution of the same. (n) The court instructs the jury that there is no evidence in this case that the officers of the defendant company practiced any misrepresentations or deceit upon the plaintiff, whereby it was induced to extend the credit or consent to the debt sued for. (o) The court further instructs the jury that if they believe from the evidence that William Deering & Co. ratified the execution of the deed of trust as security for their notes before the 10th day of March, 1894, then it became operative as to said William Deering & Co. as a security, even though the jury believe and find from the evidence that the banks of Cincinnati never accepted or ratified said deed of trust as security of papers held by said banks, respectively. (p) The court instructs the jury that the plaintiff had no right to look to L. B. Tebbetts for the payment of the debt sued for in this case. If you believe from the evidence that the plaintiff gave defendant credit for the debt sued for on account of L. B. Tebbetts owning one share of stock in, and being a director of, the defendant company, and that said L. B. Tebbetts refused to become personally liable for the debt in suit,—this would constitute no legal ground whatever for attachment in this case.'

"The jury found for the plaintiff 'on the first cause of attachment,' and made no finding as to the others. The defendant's motion for new trial having been overruled, and after final judgment had been entered for plaintiff on the merits for \$3,140.75, defendant filed

its bill of exceptions, and appealed to this court.

"1. It is apparent that this case was tried by the circuit court upon the theory that if any one of the creditors whose debts were secured by the deed of trust did not accept the security created by that deed, before the plaintiff's attachment was levied, it made the deed of trust fraudulent as to all the creditors whose debts were thereby secured, even if all such other creditors did accept. The jury was expressly so instructed in the third and eighth instructions given at the request of plaintiff. In this respect the circuit court committed error. The rule in Missouri is that where a mortgage or deed of trust is given to secure the separate, independent debts of several creditors therein named, it is good as to those who accept its provisions before the rights of other unsecured creditors of the debtor intervene by attachment, but the rights of those who do not so accept are subordinated to the rights of the attaching creditors. This is the case where there is a contest of priority between the secured creditors and the attaching creditors. *Kuh v. Garvin*, 125 Mo., loc. cit. 561, 28 S. W. 850; *Jones, Chat. Mortg.* (3d Ed.) § 104. But the fact that some of the debts of the unsecured creditors are fraudulent or fictitious does not make the deed fraudulent as to those whose debts are bona fide. *Woodson v. Carson*, 135 Mo., loc. cit. 528, 35 S. W. 1006, and 37 S. W. 197; *Jones, Chat. Mortg.* (3d Ed.) § 836; *Cobbey, Chat. Mortg.* §§ 150, 416, 418. Such mortgages are treated as if separate mortgages had been made in favor of each creditor. This being true, it follows that the third and eighth instructions given at the request of the plaintiff are erroneous, for they proceed upon the false idea that, if any one of the creditors secured by the deed of trust did not accept the deed of trust before the plaintiff's attachment was levied, it made the whole deed of trust fraudulent, even as to those who did accept. In this connection it is proper to say that in this case there is no evidence whatever that the debts secured by the deed of trust were fraudulent. On the contrary, it affirmatively and conclusively appears that they were all bona fide. This being conceded, the debtor had a right to prefer those creditors. If this was its purpose, no fraud can be predicated upon the act. It could not be tolerated that the good faith of the mortgagor could be made dependent upon the acceptance or rejection of the security by the mortgagee, or, in other words, that the mortgage would be valid if the mortgagee accepted it before the attachment was levied, but would be fraudulent if the mortgagee failed or refused to so accept it. In this case the court confounded the principles applicable to a contest of priority between the unaccepting mortgagees and the attaching creditor with the principles applicable to fraudulent conveyances in a contest between the debtor and an attaching creditor. These considerations necessarily

lead to a reversal of the judgment below, but, as the case must be retried, it is proper to refer to other features of the case.

"2. There is no conflict in the evidence that Deering & Co. accepted the mortgage before the attachment was levied; neither is there any suspicion of a doubt that their debt is bona fide. There can be no doubt that they were not parties in any way to any fraud upon the other creditors of the defendant. They could not be excluded from the benefit of the security because they did not know the mortgage had been made, and had not accepted it, and at the same time be adjudged guilty of participation in making a fraudulent mortgage. They are not parties to this action, and the priority between them and the plaintiff cannot be settled in this proceeding. But the deed of trust cannot be held to be fraudulent, for there is this valid, bona fide claim to support it. The sixth instruction given for plaintiff was erroneous, forasmuch as there was no evidence upon which to base it. The acceptance of Deering & Co. was before, and not after, the levy of the attachment.

"3. The fifth instruction given for plaintiff declared the law to be that L. B. Tebbetts, H. M. Cornell, and A. M. Tebbetts not being the payees in the notes given the Cook Carriage Company (being the notes held by the two Cincinnati banks), and having written their names across the back of said notes at the time they were made, they are makers of said notes, and not securities or indorsers thereof, and it was the duty of L. B. Tebbetts to pay them at maturity, and he is not entitled to any benefit of the chattel deed of trust, and he could not accept the deed of trust. The decisions in England and America differ widely as to character and liability of one who writes his name on the back of a negotiable note of which he is not the payee. In some jurisdictions he is held to be a first indorser; in others, a second indorser; in others, a surety or guarantor; and in others, prima facie a joint maker. *Daniel, Neg. Inst.* (4th Ed.) § 710 et seq. As between such person and the payee, parol evidence is admissible to explain and control the character of his obligation, and in many jurisdictions this may be done even where the note is in the hands of a bona fide holder for value and without notice. *Daniel, Neg. Inst.* (4th Ed.) §§ 711, 712, et seq. The rule in Missouri has long been settled that he is prima facie a joint maker. *Powell v. Thomas*, 7 Mo. 440; *Lewis v. Harvey*, 18 Mo. 74; *Schneider v. Schiffman*, 20 Mo. 571; *Baker v. Block*, 30 Mo. 225; *Chaffe v. Railroad Co.*, 64 Mo. 193; *Sample v. Turner*, 65 Mo. 696; *Bank v. Hamerslough*, 72 Mo. 274. As between such person and the payee, parol evidence is admissible to prove the character and extent of the undertaking and obligation,—whether as joint maker, indorser, surety, or guarantor. *Beldman v. Gray*, 35 Mo. 282; *Seymour v. Farrell*, 51 Mo. 95; *Sample v. Turner*, 65 Mo. 696.

But such parol evidence is not admissible when the note is in the hands of an innocent purchaser before maturity, for value, without notice. *Chaffee v. Railroad Co.*, 64 Mo., loc. cit. 195. And, e converso, where the person named in the note as payee indorses the note, parol evidence is not admissible to show that he agreed to be liable in some other character than as an indorser. *Rodney v. Wilson*, 67 Mo. 123. The character of the liability of a party to a note is a matter to be settled between the parties thereto. No third person, who has no interest in the note, can classify or determine the liability of those who are parties to and interested in the note. In this case, as between the Cook Carriage Company, the payee, and L. B. Tebbetts, who signed the note of the defendant company, parol evidence was admissible to determine the character of Tebbetts' liability. But, the payee having negotiated the notes to the Cincinnati banks before maturity, if the banks held them for value and without notice Tebbetts could be treated by the banks as a joint maker or an indorser, at their option. But this plaintiff had nothing to do with the notes. Whether Tebbetts was a joint maker or an indorser or a surety or a guarantor is not material in this case. The debt evidenced by the note was the debt of the defendant company, and not of Tebbetts. As between the defendant company and Tebbetts, he was entitled to protection by the company against loss, and that protection could legally be given him at the time he became liable for the debt of the company, or at any time after he became liable. It was the privilege as well as the right of the company to protect him. Having a right to prefer some of its creditors over others, it could adopt any legal means to effectuate that purpose. In this instance it secured the debts for which he was liable. If the secured creditors had seen fit to pursue their remedy under the mortgage, and had collected their debts in this way, the unsecured creditors could not have successfully opposed it. On the other hand, the secured creditors had a right to pursue the other course, and compel Tebbetts to pay them. They selected this method. Tebbetts therefore became immediately subrogated in equity to the rights of the secured creditors under the mortgage, and was entitled to all the security which they held against the mortgagor, and the fact that he was or was not a stockholder in the defendant company is wholly immaterial. *Foster v. Planing-Mill Co.*, 92 Mo. 79, 4 S. W. 260; *Schufeldt v. Smith*, 131 Mo. 280, 31 S. W. 1039; *Furnold v. Bank*, 44 Mo. 336; *Allison v. Sutherland*, 50 Mo. 274; *Sevier v. Roddie*, 51 Mo. 580; *Burnside v. Fetzner*, 63 Mo. 107; *Ferguson's Adm'r v. Carson's Adm'r*, 86 Mo. 673; *Bank v. Leyser*, 116 Mo., loc. cit. 76, 22 S. W. 510; *Clark v. Bank*, 57 Mo. App., loc. cit. 283. On the other hand, if the defendant had executed the mortgage directly to Tebbetts to protect him against loss by reason of his indorse-

ments and guaranties, the holders of such notes and guarantied debts would have been subrogated to his rights under the mortgage. *Thornton v. Bank*, 71 Mo., loc. cit. 232. Applying these principles to the case at bar, it follows that as Deering & Co. had accepted the mortgage before the levy of the attachment, and as the mortgage was a simple preference, and in no respect fraudulent, they had a superior right in the property to that acquired by plaintiff under its attachment, and when Tebbetts paid their notes he was subrogated to all their rights under the mortgage. The banks did not accept the mortgage before the levy of the attachment; hence their rights were inferior to plaintiff's. Tebbetts is not shown to have had any authority to accept for them; and, not having paid off their notes before the levy of the attachment, he had no fixed demand against the mortgagor, and hence could not accept the mortgage for himself. *Hearne v. Keath*, 63 Mo., loc. cit. 89. His subsequent payment of the notes held by the bank subrogated him to the rights of the bank, and, as the bank's right under the mortgage was inferior to the plaintiff's rights under its attachment, Tebbetts' rights were likewise subordinate to the rights of the plaintiff. It follows that the fifth instruction given for plaintiff is erroneous, in respect to declaring that Tebbetts was a joint maker of the notes, and in not discriminating between the status of Deering & Co. and of the banks, and the subrogated rights of Tebbetts under their respective claims, and further in undertaking to measure the bona fides and validity of the mortgage by the legal standards applicable to a contest of priorities. This last remark applies to and runs through the whole case.

"4. The rule requiring an acceptance of a mortgage by the beneficiary before the attachment of the unsecured creditor is levied, and determining their respective priorities by these considerations, has given rise to many perplexing questions and consequences. A failing debtor has a right to make preferences, which implies that the debt so secured is bona fide, and that the mortgage is made by him in good faith, and that there is no fraud on the part of the mortgagee. Such a transaction is undoubtedly legal and valid. But before all the mortgagees can possibly be informed of the recording of the mortgage in their favor, or have had time to accept it, an unsecured creditor levies an attachment on the property, based upon allegations of fraudulent intent on the part of the mortgagor, or upon any of the statutory grounds for attachment. The attaching creditor, under the decisions in Missouri above referred to (and the same rule obtains in many, if not most, of the other states,—*Jones, Chat. Mortg.* § 104; *Cobbey, Chat. Mortg.* § 413), acquires an inferior right to the secured creditors who have accepted, and a superior right to those who have not accepted, the mortgage prior to the levy of the attachment. The secured

creditors are not parties to the attachment suit, and their rights cannot be litigated, or the priorities between them and the attaching creditor settled, in that proceeding. Under our statute (section 572, Rev. St. 1889), the secured creditors have a right to interplead, and the priorities could be settled in that way, as was done in *Kuh v. Garvin*, 125 Mo. 547, 28 S. W. 847, or they might replevy the goods, as was done in *Woodson v. Carson*, 135 Mo. 521, 35 S. W. 1005, and 37 S. W. 197, and, as there, the attaching creditors can come in and be made parties defendant, and the question of priorities could be settled. But if the secured creditors, as here, do not come in and interplead or replevy, the case must be tried simply between the attaching creditor and the debtor; and if, as here, the evidence discloses that the mortgage is valid and in no sense fraudulent, but that the rights of some of the mortgagees are superior to those of the attaching creditor, by reason of their having accepted the mortgage before the attachment was levied, while the attaching creditor is entitled to a priority over the other mortgagees because they did not so accept the mortgage before the attachment was levied, what is the legal result? Logically, the plaintiff should fail in his attachment entirely, for he has alleged fraud, and simply proved there was no fraud, but that he has acquired a priority over some of the mortgagees, though not over all. If, however, plaintiff's attachment is abated for failure to prove his case as laid, he will lose the priority he has obtained over the unaccepting mortgagees. On the other hand, it is clear that his attachment cannot be sustained, and the attached property sold and the proceeds turned over to him, for the accepting secured creditors have a superior right to the attaching creditor, and, moreover, the plaintiff would then be allowed to recover on an allegation that the mortgage was fraudulent, while the whole proof was that it was valid, and that others had a superior legal right to the priority over that of the attaching creditor. The court could not require the secured creditors to interplead under section 572, Rev. St. 1889, for that is a privilege conferred upon them. The attaching creditor could not avail himself of the rights conferred by section 571, Id., and maintain an action against the mortgagor and mortgagees, or only against the latter, to have the mortgage set aside as fraudulent; for, as pointed out, the proof would fail to sustain such an allegation in such a proceeding, for the same reason that it would fail to support the attachment. If the attaching creditor went into a court of equity, and made the mortgagor and all the mortgagees parties defendant, and proved the facts to be as stated, the court of equity would have power to adjust the priorities of the parties to enjoin the further prosecution of the attachment suit or any other proceeding. In this event the plaintiff will have gone into a court of law, with an attachment, charging

that the mortgage is fraudulent, and will come out of a court of equity, where the mortgage will have been held valid, but the plaintiff accorded a priority over some or perhaps all of the mortgagees, and the attachment charges will never have been tried, much less sustained. Yet this seems to be the only possible solution of the problem, by which the rights of all the contesting parties can be preserved, and their priorities settled, under this perplexing and illogical condition of the law, which has been brought about by requiring an acceptance by the mortgagee. Speaking for myself alone, I think there never was any logic, reason, or common sense in the rule requiring acceptance. On the contrary, a mortgage, on its face, is a benefit to the secured creditor. It can do him no possible injury. His acceptance of a deed is presumed, when it is beneficial, as between him and the grantor. *Kuh v. Garvin*, 125 Mo., loc. cit. 560, 28 S. W. 849. And reason and common sense would presume the same thing as between him and the unsecured creditors of a mortgagor. *Long v. Smelting Co.*, 68 Mo., loc. cit. 431; *Sleferer v. City of St. Louis*, 141 Mo., loc. cit. 595, 43 S. W. 165. But 'Ita lex scripta est,' according to judicial interpretation; and there is no relief except through legislative enactment, which, in our direct and practical age, cannot come too quickly for the welfare of the people and for the ending of this entanglement.

"5. It is not necessary to examine specifically the multitude of instructions given or refused in this case. Enough has already been said to show that the judgment of the circuit court must be reversed and the cause remanded, and that if the secured creditors do not interplead or replevy, or if the plaintiff does not proceed in equity, no recovery can ever be sustained upon the attachment suit, under the facts shown by this record. The judgment below is reversed and the cause remanded."

Seneca N. Taylor, Charles Erd, and E. O. Brown, for appellant. McReynolds & Halliburton, for respondent.

MARSHALL, J. A motion for rehearing was filed, and, one of the judges of that division having dissented from the order overruling the motion, the cause was transferred to the court in banc, where it has since been fully reargued; and, in addition to the propositions formerly relied on, the appellant now urges: (1) That the deed of trust having been made without the knowledge or consent of the beneficiaries, and not having been accepted by at least two of them before the attachment writ was levied, "the effect of the deed of trust was to place on record a false showing of the title of defendant's property, and the effect was to hinder and delay defendant's other creditors. The conveyance is therefore fraudulent and void as to the other creditors, and will sustain attachment." And (2) that the deed of trust constitutes fraud in

law, notwithstanding there was no fraud in fact in the case; and defendant contends that Tebbetts, as surety for the debts secured by the deed of trust, had a right to accept the deed of trust, which he did, and hence so much of the opinion as holds that the debts to the two Cincinnati banks are junior in priority to the attachment of plaintiff should be modified.

After full deliberation and consideration, we have concluded that the delivery of the deed of trust to Harding as trustee for the three secured creditors, and his acceptance of it, constituted a good delivery of the deed of trust, which inured to the benefit of all the beneficiaries therein named, and, as it was not disclaimed by any of them within a reasonable time after they had notice of it, their acceptance thereof must be presumed. This question has lately been considered by division No. 2 in the case of *Feary v. O'Neill* (Mo. Sup.) 50 S. W. 918. In that case it appeared that one Miller was indebted to various persons for goods sold, money loaned, and services rendered. He gave a deed of trust on his stock of goods to Feary, as trustee, "with the right upon default to take immediate possession of said goods and sell the same in any manner he should see fit, and, after paying first the costs of executing said trust, he should pay the indebtedness secured by said deed, in proportion to the amounts of the said notes, and the balance, if any, to said Miller." The notes were not paid, and the trustee took possession of the stock. The same day an attachment was levied on the goods, and the trustee replevied them. There was no acceptance by any of the beneficiaries. Division No. 2, speaking through Gantt, C. J., held that the trustee's acceptance for the preferred creditors, with the presumption of its acceptance by the beneficiaries, made out a *prima facie* case, and that "*Kuh v. Garvin*, 125 Mo. 547, 28 S. W. 847, did not change the universally accepted rule that, as between the parties to the deed, the beneficiaries were presumed to accept it, if beneficial to them. *Tompkins v. Wheeler*, 16 Pet. 118; *Brooks v. Marbury*, 11 Wheat. 78,"—and further held that *Kuh v. Garvin* was inapplicable to the case, adding: "Here the deed was made directly to a trustee for the benefit of these preferred creditors, and the legal title passed at once to him, and was accepted by him for the benefit of these creditors. The conveyance was absolute, and contained no expressions requiring the assent of these creditors. In such cases, even in those jurisdictions which hold the assent of creditors necessary where the conveyance is made directly to them, it is ruled that, where the conveyance is made directly to a trustee for the benefit of creditors, the legal title passes for the benefit of creditors, without further evidence of assent on the part of the beneficiaries. *Cunningham v. Freeborn*, 11 Wend. 240; *Tompkins v. Wheeler*, 16 Pet. 118; *Brooks v. Marbury*, 11 Wheat. 78; *Halsey v. Fairbanks*,

4 Mason, 206, Fed. Cas. No. 5,964; *Furman v. Fisher*, 4 Cold. 628. Said the supreme court of the United States in *Brooks v. Marbury*, 11 Wheat., loc. cit. 97: 'Deeds of trust are often made for the benefit of persons who are absent, and even for persons who are not in being. Whether they are for the payment of money, or for any other purpose, no expression of the assent of the persons for whose benefit they are made has ever been required, as preliminary to the vesting of the legal estate in the trustee.' "As early as the case of *Major v. Hill*, 13 Mo. 172, it was held in our state that "where a debtor, without the knowledge of the creditor, conveys property to a trustee to secure the debt, it is valid, unless within a reasonable time after the fact comes to the knowledge of the creditor he disclaims it." This was followed in *Pearce v. Dansforth*, 13 Mo. 360. In *Kane v. McCown*, 55 Mo., loc. cit. 198, it was objected that there had been no delivery of the deed to Calhoun, plaintiff's grantor, but this court said: "The deed to Calhoun was executed, acknowledged, and recorded, and this is equivalent to a delivery. No formal delivery was necessary, as the law presumes a delivery under such circumstances." In *Huey v. Huey*, 65 Mo., loc. cit. 693, it was said: "It is laid down in *Greenleaf's Evidence* (volume 2, § 297) that 'the delivery of a deed is complete when the grantor or obligor has parted with his dominion over it, with intent that it shall pass to the grantee or obligee, provided the latter assents to it, either by himself or by his agent.' The concluding paragraph, in relation to the assent of the grantee, is unimportant in the present case, as we are considering only what is required on the part of the grantor. Besides, the assent of the grantee is always presumed, where the instrument is beneficial to him." In *Rumsey v. Otis*, 133 Mo., loc. cit. 95, 34 S. W. 553, Gantt, C. J., said: "In *Cannon v. Cannon*, 26 N. J. Eq. 316, the court says: 'To make delivery of a deed, it is not necessary it should actually be handed over to the grantee, or to another person for him. It may be effected by words without acts, or * * * by both acts and words. Indeed, it may be made though the deed remains in the custody of the grantor.' *Sneathen v. Sneathen*, 104 Mo. 201, 16 S. W. 407; *Standiford v. Standiford*, 97 Mo. 233, 10 S. W. 836. In *Tobin v. Bass*, 85 Mo. 654, it was held that, 'while the delivery of a deed is necessary to make it effectual in passing title, yet, when a deed to a minor child is absolute in form and beneficial in effect, and the father and grantee voluntarily causes the same to be recorded, acceptance by the grantor will be presumed, and such facts constitute, *prima facie*, a delivery.' " In *Appleman v. Appleman*, 140 Mo., loc. cit. 313, 41 S. W. 794, it appeared that the deed was properly executed and delivered to a third person, with the direction to hold it until called for by the proper person, and it was said: "Under these

circumstances, we think the deed was well delivered; the rule being, in respect to a grantee not under disability, 'that when such grantee is aware of the conveyance, and does not dissent, and the conveyance is positively beneficial to him or her, acceptance will be presumed.' *Hall v. Hall*, 107 Mo. 101, 17 S. W. 811; *Standiford v. Standiford*, 97 Mo. 231, 10 S. W. 836." *Ensworth v. King*, 50 Mo., loc. cit. 482, is peculiarly applicable to the case at bar. There it appeared that the debtor executed a mortgage to secure one of his nonresident creditors, and placed it on record. Subsequently the property covered by the mortgage was seized under writs of attachment by the unsecured creditors. The mortgagee had no knowledge of the mortgage until after the attachment writs were executed, but he then assented to and ratified the mortgage. *Wagner, J.*, said: "It is insisted that the mortgage was absolutely void, because made without the previous knowledge of the grantee, and that the plaintiff therefore acquired nothing by his purchase. [The plaintiff was the assignee of the mortgagee.] And this view was taken of the transaction by the court. The general rule is that where an instrument is executed in favor of a party, for his interest, he will be presumed to assent thereto until he manifests his dissent, after being duly notified. That the mortgage was honestly and fairly made for the purpose of securing a just debt is not attempted to be denied, nor is there anything to show that it was intended to delay or defraud creditors. No such pretense is set up by the parties combatting its validity. The case shows that Breckenridge was merely anxious to secure this debt; that he had a large quantity of real estate, and the parties all subsequently believed that he had enough to pay all his debts and have something left. The record is utterly barren of all facts which have even a tendency to impeach the good faith of the transaction. Breckenridge had the right to prefer one creditor to another, and his acts in that respect cannot be questioned, providing he did nothing with a fraudulent view, or which operated to hinder or delay his other creditors. Nothing of the kind is pretended or set up. I think the court committed error in pronouncing the mortgage entirely void, and for this reason the judgment will be reversed and the cause remanded."

The rule in Missouri, therefore, is that, where the grantor has relinquished dominion over a properly executed deed, the delivery is complete, and, where the conveyance is clearly beneficial to the grantee or beneficiary, his acceptance will be prima facie presumed, until he, after notice of the grant, within a reasonable time disaffirms or refuses to accept the grant. The adjudications in other jurisdictions are conflicting upon the necessity of showing an acceptance. In 9 Am. & Eng. Enc. Law (2d Ed.) p. 161, it is said: "While delivery is essential to the transfer of title, it is not sufficient. Title rests in the

grantee when he accepts a duly-executed deed. Any words or acts which show an intention to receive title will be sufficient to prove acceptance. When a deed clearly beneficial to an infant or person under disability is given to him, or to a third person for his use and benefit, the law presumes that it is accepted by him. This presumption may be rebutted by evidence of dissent. The law also presumes that a deed clearly beneficial to an adult is accepted by him, when it is placed in the hands of a third party for his use and benefit. There are, however, some authorities which dissent from this view. They hold that evidence of acceptance, or of some act which is equivalent to an acceptance, is necessary." The weight of authority is clearly that acceptance will be presumed where the grant is beneficial. This rule obtains in Alabama, Connecticut, Illinois, Indiana, Massachusetts, Missouri, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, and Tennessee, and is the rule followed by the supreme court of the United States. In Kentucky, Wisconsin, Iowa, and Maine, knowledge of the execution and delivery of the conveyance, and some act of acceptance, are held to be necessary. It is generally held that an acceptance relates back to the delivery, but in Indiana, Iowa, Massachusetts, Vermont, Wisconsin, and Maine the doctrine obtains that, if an attachment writ is served between the date of delivery and that of acceptance, the acceptance will not relate back to the delivery, but the attaching creditor will thereby acquire a priority. 9 Am. & Eng. Enc. Law (2d Ed.) p. 161. The same rule is announced in *Jones, Chat. Mortg.* (8d Ed.) § 106, and in 1 *Cobbey, Chat. Mortg.* § 413. We think, however, that the rule in Missouri and in the majority of the states, that acceptance will be presumed where the conveyance is clearly beneficial to the grantee or beneficiary, in the absence of a disavowal or disaffirmance by him, is the better rule, and is more logical and promotive of justice. In this view, it is immaterial that the grantee or beneficiary did not know of the conveyance before other persons seized the property under attachment. In the case of infants and persons under disability, acceptance is presumed, where the grant is beneficial, because of the legal incapacity of the grantee to accept. In the case of adults, it is prima facie presumed because it is beneficial. Under the rule that obtains in the states pointed out, requiring express acceptance before the property is seized by process of law, some grotesque difficulties and incongruities necessarily ensue. Under this ruling, a failing debtor is admitted to have a right to prefer one or more creditors. If they are all residents of the same place with the debtor, or can be reached by telegraph, they can be notified and their acceptance obtained before the unsecured creditors can attach, and hence the preference is effective. But if any one of the preferred creditors happens to be

temporarily traveling in Europe, or is absent from home, or lives at a point any considerable distance from a telegraph station, and hence there is not sufficient time to notify him and get his acceptance, the preference to him is unavailing, as against attaching creditors, although it is good as to the other preferred creditors who were accessible. Thus, while recognizing the right of a failing debtor to prefer one or more of his creditors by executing a mortgage in their favor, thereby doing all he can do to effectuate his purpose, such a construction makes the proximity or accessibility of residence of the preferred creditors an element in determining the efficacy of the act of the debtor.

We have therefore concluded to modify the opinion delivered in this case in division No. 1, and to hold that the delivery of the deed of trust to Harding as trustee for the secured creditors is a good delivery, and that the acceptance of the beneficiaries therein named must be presumed, as they did not disaffirm it after they had notice of it, and hence that their rights are paramount to those of the plaintiff, whose rights were obtained by attachment after the execution of the deed of trust to the trustee, after he had accepted it and placed it upon record, after he had taken possession of the property, and after he had been for nearly a month engaged in selling it for the benefit of the beneficiaries. There is not the slightest evidence of fraud in this case. The debts secured were each and all bona fide. The debtor did only what he had a right to do. Hence there is no merit in the plaintiff's first contention, that "the effect of the deed of trust was to place on record a false showing of the title of defendant's property, and the effect was to hinder and delay defendant's other creditors. The conveyance is therefore fraudulent and void as to other creditors, and will sustain attachment." There was no false showing on the record. The record spoke the truth. The other creditors were not hindered or delayed, except as all honest preferences hinder and delay unsecured creditors. There was no fraud, for the debts secured were bona fide, and the conveyance was for the sole benefit of the creditors. There was no secret use for the debtor. Hence the cases cited by plaintiff, which correctly hold that conveyances fair on their face, but intended for the secret use of the debtor, are fraudulent, have no application. Neither is the second contention of the plaintiffs, that the deed of trust is fraudulent in law, tenable. There is, of course, fraud in law, as distinguished from fraud in fact. But no such condition is present in this case. The debtor only did what he had a lawful right to do,—make a preference. The secured creditors only did what the law allows them to do,—accepted preference. There was no covin, collusion, secret trust, or prohibited act done or attempted to be done in the case. It is a clean, lawful transaction, which, under the law, must be upheld. The plaintiff made out no case, and the trial court should

have so instructed the jury. The judgment of the circuit court is therefore reversed, and the cause remanded to be proceeded with in accordance herewith.

GANTT, C. J., and SHERWOOD, BRACE, and VALLIANT, JJ., concur. BURGESS and ROBINSON, JJ., dissent.

CORNWALL v. McFARLAND REAL-ESTATE CO.

(Supreme Court of Missouri, Division No. 2.
May 23, 1899.)

CONTRACTS—RESCISSON—REPRESENTATIONS
—MATTER OF OPINION—REVIEW—EVIDENCE SUSTAINING JUDGMENT.

1. Representations made concerning the money and rental value of property, constituting the security for notes which formed the consideration of a trade, are mere matters of opinion, and, though false, are not sufficient grounds on which to rescind the contract, where the property was open to observation, and such money and rental value could be easily ascertained.

2. A statement in a representation as to the money and rental value of property, to the effect that the property had actually been sold for a certain sum, is merely a circumstance tending to show the rental value of the property, and, though false, is not ground for rescission of a contract.

3. Where the only question is whether the evidence, as a matter of law, sustains the conclusion reached by the trial court, the supreme court will not interfere, unless the judgment is wholly unsupported by substantial testimony.

Appeal from St. Louis circuit court; L. B. Valliant, Judge.

Action by John Cornwall against the McFarland Real-Estate Company for rescission of a contract. There was a judgment for the defendant, both on plaintiff's case and on a counterclaim, and both parties appeal. Affirmed.

Fisee & Kortjohn, for appellant. McKeighan, Barclay & Watts, for respondent.

BURGESS, J. This is a proceeding in equity for the rescission of a contract entered into by plaintiff and defendant, by which plaintiff sold to defendant a certain "tonic beer" business belonging to him, and conducted in the city of St. Louis, in consideration of the amount of \$14,000, secured by a deed of trust on property in that city. As part of the consideration, plaintiff obligated himself to lease the business from defendant during part of the year 1896, and to pay therefor the sum of \$3,500. In addition to what has been stated, the petition alleges, as part of the transaction, that defendant agreed to obtain for him on 10 days' notice, and at any time within 30 days after October 24, 1896, the price of \$5,000 in cash for the \$14,000 deed of trust. The ground alleged for rescission of the contract is that plaintiff was induced to enter into it by reason of the defendant's false and fraudulent representations concerning the value and income of the property, which constituted the security for

the notes which formed the consideration of the trade. These representations are alleged to be: First. Assurances that the property in question, though incumbered with debts to the amount of \$66,000 (including the deed of trust for \$14,000 in question here), was actually worth \$100,000, and that, within a short time previous to this transaction, it had actually been sold at that price. Second. That the property was actually of an annual income value of \$9,600 per year, and actually paid in rental income a sufficient sum to provide for the payment of all taxes against the property, for interest on senior mortgages, and leave about \$2,000 per year to be applied to the discharge of certain incumbrances senior to this \$14,000 deed of trust, which last-mentioned deeds, by their terms, were payable out of the rents, which had been assigned for that purpose. The answer of defendant admits the trade, and its terms, the delivery by it, in payment of the contract price, \$14,000 in notes secured by deed of trust, the lease of the property by plaintiff from May 1 to September 1, 1896, at \$3,500, all as alleged, but denies all other allegations in the petition. And, by way of counterclaim, it alleges the assignment by defendant to plaintiff of the note for \$14,000 dated September 4, 1895, and the deed of trust, by which its payment was secured, as alleged in plaintiff's petition, and then proceeds as follows: "That on and prior to the said 29th day of October, 1895, the plaintiff, John Cornwall, was the owner of a certain business conducted by him in the city of St. Louis, wherein he was engaged in the manufacture of what is known as 'Doctor Cornwall's Tonic Beer,' the formula of which beer or tonic was secret and wholly unknown to any person other than the plaintiff herein; that plaintiff was also the owner of certain personal property, used by him in conducting said business as aforesaid, which said property is more particularly described as "one lot of machinery, one lot of appliances, patented and otherwise, used in and for said business, certain wagons and fixtures, certain live stock and harness on hand, all feed for said live stock, one lot of advertising matter of any nature, one lot of bottles and cases for shipping same, subject to customers' rebate for same, one lot of labels, a stock of beer on hand in factory and in city of St. Louis, one lot of office fixtures, certain raw material for compounding said beer or tonic, and certain trade-marks and letters patent"; that, being the owner of said business and property used in conducting same, plaintiff, John Cornwall, represented to the defendant herein that said business was very profitable, earning over \$8,000 per annum, and, together with its good will, was reasonably worth, at least, the sum of \$14,000, and at the same time plaintiff offered to sell said business, the good will thereof, and the property used in conducting same, as aforesaid, together with the disclosure to the defendant of the formula

for making said tonic beer, and an agreement thereafter to preserve the secret of said formula inviolate, and never thereafter to engage in the manufacture of said beer or tonic, for the sum of \$14,000; that defendant then and there offered to purchase said property of plaintiff, if plaintiff would lease the said business for the months of May, June, July, and August, 1896, for \$3,500, payable the 1st day of May, 1896, said lease to be executed in due form, accompanied by an agreement to accept the plant and business as found, and leave said business in like condition, the usual wear and damage excepted; that, in consideration of the delivery to him by defendant of said note for \$14,000, and said interest notes, together with the deed of trust securing said notes, as hereinbefore particularly described, plaintiff, John Cornwall, thereafter, to wit, on the said 29th day of October, A. D. 1895, by instrument of writing by him executed and delivered to defendant, transferred to defendant the property and good will of said business so carried on by him as aforesaid, and also agreed and bound himself to disclose to defendant the full details for the receipt or formula for the preparation of said beer or tonic so manufactured by him, and that he would never disclose said formula to any one else, and that he, his heirs or assigns, would never thereafter engage in the manufacture or sale of said beer or tonic, either in the city of St. Louis or elsewhere, and also executed and delivered to defendant his lease of said business for the months of May, June, July, and August, 1896, wherein he agreed to pay defendant for the use and occupation of said business during the said months the sum of \$3,500 as aforesaid, payable on the 1st day of May, 1896; that thereafter, when defendant went to take actual possession of said property and business, the plaintiff, wholly without any legal justification or excuse, denied defendant entrance to the place where said property was, and unlawfully and fraudulently refused to deliver the possession of same, or any part thereof, to defendant, but converted the same to his own use. Defendant further states that the said business so conducted by plaintiff is a large and profitable one, and the property thereof, its good will, the formula for making said beer and tonic, and the letters patent and trade-marks thereof are reasonably worth the sum of \$14,000; that defendant, in addition to being damaged to the extent of the value of said business so sold to it by plaintiff, and subsequently by him converted to his own use in fraud of the rights of this defendant, has also lost the amount to be paid to it by plaintiff for the lease of said business for the months of May, June, July, and August, 1896, all to defendant's damage in the sum of \$20,000. Whereof defendant prays judgment against plaintiff herein for the sum of \$20,000," etc. Plaintiff replied, denying all new matter contained in the answer. The case was tried by the court,

a jury being waived. There was a finding in favor of defendant, both on plaintiff's case and upon the counterclaim set up by defendant, upon which its damages were assessed at the sum of \$5,000. After unsuccessful motions for a new trial, both parties appeal.

The evidence tended to show that defendant, through its members and agents, made false representations to plaintiff with respect to the value of the property, its rental value, its sales during the past year, first for \$75,000, and twice thereafter for \$100,000, which constituted the security for the payment to him of the \$14,000, and by which he was induced to make the trade; but it also showed that the property was open to observation, and that he either knew, or might have known, both its money and rental value. As to the representations in regard to the money and rental value of the property, they were mere matters of opinion, and, although untrue, furnished plaintiff no ground for a rescission of the contract. It is clear that no warranty was intended as to these values by the representations with respect thereto; and "a mere false assertion of value, where no warranty is intended, is no ground of relief to a purchaser, because the assertion is the matter of opinion, which does not imply knowledge, and in which men may differ. Mere expression of judgment or opinion does not amount to warranty. Every person reposes, at his peril, in the opinion of others, when he has equal opportunity to form and exercise his own judgment." 2 Kent, Comm. 486; Anderson v. McPike, 86 Mo. 293; Nauman v. Oberle, 90 Mo. 668, 8 S. W. 380. But plaintiff insists that this rule applies only to representations which are mere matters of opinion, and that the representations in regard to the money and rental value of the property were not limited, but there were added thereto specific statements of facts relating to the defendant's own transactions with the property, and its own experience in dealing with it; that the statement of these specific facts, of material importance in passing upon the value of this security, removes the representations out of the realm of mere opinion. But, after all, these sales, had they actually occurred, could only have been considered as a circumstance tending to show the rental value of the property, which, as we have said, was matter of opinion. Moreover, plaintiff could have made personal examination of the property covered by the mortgage, had he desired to do so, and thus formed his own judgment as to its value, and also have learned whether it was rented or not. Nothing was done by defendant to prevent him from so doing, and, if he chose to rely upon defendant's representation with respect to its cash and rental value, rather than do so, it was his own fault. It follows that plaintiff failed to make out his case, and is therefore not entitled to any relief. The judgment for defendant upon the counterclaim is assailed upon various grounds; but as the counterclaim was in the nature of

an action at law, and no declarations of law were given or refused, and as it is not suggested by plaintiff in his brief wherein the court erred in the admission or exclusion of evidence, the only question is whether the evidence, as a matter of law, sustains the conclusion reached. Under such circumstances, this court will not interfere, unless the judgment is wholly unsupported by substantial testimony. About the only testimony of the value of the "tonic beer" business was that of plaintiff and Alexander L. Shultz. According to plaintiff's statement, he began with \$10,000, and had been adding to the establishment since. The value of the formula was utterly speculative, and no value could be fixed upon it. By the terms of the contract, plaintiff was to pay \$3,500 for the rental of the "tonic beer" plant and business for the months of May, June, July, and August, 1896. According to this testimony, the earning capacity of the business could not have been less than the sum of \$14,000. The witness Shultz also testified that plaintiff told him that the business in question was worth \$30,000, and that it produced an income of from \$6,000 to \$8,000. So that it is clear that there was abundance of evidence to authorize the finding and judgment of the court. For these considerations, we affirm the judgment.

GANTT, P. J., and SHERWOOD, J., concur.

WETMORE v. CROUCH.

(Supreme Court of Missouri, Division No. 1.
May 23, 1896.)

JOINT ADVENTURES — SHARING PROFITS — CONSTRUCTION OF CONTRACT — PLEADING — DRAWING CONCLUSION — RELEASE — PAYMENT OF PART OF DEBT.

1. In an action by plaintiff to recover her share of the profits which accrued in a venture entered into jointly by herself and defendant, the evidence showed that plaintiff advanced to defendant, at his request, \$250, to be invested, for their joint interest, in options on certain real estate; that all that was said about a division of profits was that, if the venture was a failure, defendant was to refund half the money advanced, and, if profitable, both were to make considerable profit out of it; that plaintiff knew nothing about options, and intrusted all the business to defendant; that in subsequent conversations, and in their correspondence, it was understood by both parties that they had a joint interest in the business, but nothing was said at any time as to the share of each; that, in the numerous trades and transfers, defendant had part of the property put in plaintiff's name and part in his own name. Held, that plaintiff is entitled to recover one-half of the profits which accrued from the venture.

2. If facts stated in a petition are such that the law implies an agreement, the pleader may, after stating the facts, draw that conclusion, and such conclusion will not be construed to be the pleading of an express contract.

3. Where there is no express agreement as to the share that each is to have in the profits resulting from a joint venture, and the conditions are such that the law implies an agreement for an equal division, that implication is conclusive, and will not be changed by the interpretation

that the parties by their actions seemed to put upon the contract.

4. The payment of a smaller sum than is unquestionably due, with no other element of accord in the transaction, is not a satisfaction of the debt, even though accepted as such at the time.

5. Where one party contributes the money, and the other the skill, for their joint benefit, in a venture, the law implies an equal division of the profits, in the absence of an express agreement.

Appeal from St. Louis circuit court; Rudolph Hirtzel, Judge.

Action by Octavia Wetmore against James N. Crouch to recover her share of profits which accrued in a joint venture. There was a judgment for defendant, and plaintiff appeals. Reversed.

This is an action begun April 17, 1894, to recover the value of the plaintiff's share of the profits which she claims accrued in a venture entered into jointly by herself and defendant. The petition states, substantially: That in 1888, at the proposal of defendant, plaintiff advanced him \$250 to purchase upon their joint account a half interest in an option on certain real estate near the city of St. Louis, with the understanding and agreement that the profits and losses of the venture should be shared equally between them. That the purchase was made by defendant, and afterwards sold by him to a real-estate corporation called the Kenwood Investment Company, whereby the defendant received in cash \$3,700, and 260 shares of stock in the Kenwood Investment Company, worth \$25 a share. That defendant represented to plaintiff that the 260 shares of stock were all that he had realized, fraudulently concealing that he had received \$3,700. The defendant procured this stock to be issued in three certificates,—one for 40 shares, amounting to \$1,000, face value, in his own name; one for 200 shares, face value \$5,000, in plaintiff's name; and one for 20 shares, face value \$500, also in plaintiff's name,—which two last-named certificates, plaintiff, at the request of defendant, transferred to defendant's wife, for the purpose of enabling defendant to handle them in the market for the joint benefit of plaintiff and defendant. That defendant sold all this stock May 9, 1889, and received in payment \$2,100 in cash, and a house and lot in St. Louis, at a valuation of \$4,000, the title to which he took in his wife's name. Thus, with the \$3,700 above mentioned, defendant realized in all \$9,800, of which \$4,900 justly belongs to plaintiff, on which the defendant has paid her \$650, and refuses to pay her more. Judgment for \$4,250 and interest is prayed. The answer was a general denial and the statute of limitations. The reply was that this suit was brought within one year after a nonsuit in the same cause of action suffered by plaintiff.

Plaintiff, in her own behalf, testified, substantially: That she was a teacher in the public schools of St. Louis, and the defendant

was the husband of her sister. In the spring of 1888 she loaned defendant \$250, and took his note for the amount. Shortly afterwards he came to her, prepared to pay the note, and was willing to do so, but proposed to her that, instead of taking the money back, she allow him to invest it for their joint interest in an option on what was known as the "Benton Farm." There was some discussion about the risk, in which he said there was not much risk, and he thought they would make a good deal of money out of it. Then she agreed to let him use the money in that venture, and he gave her a receipt in these words, "Received of Miss Octavia Wetmore \$250, to be used on the Benton-farm option," and she gave him back the note she had held. After the note was returned to him, and the receipt had been given, he said, "We are liable to make a good deal of money out of this, and I would like to limit you;" and just before he left he said, "If we don't succeed, I will refund half of this \$250." That is all that was said on the subject of sharing the profits and losses. The next meeting between plaintiff and defendant was in August, 1888, when he came to her and informed her that he and Mr. Greenwood, who owned the other half, had sold the option at a net profit of \$13,000, to be paid in stock of the Kenwood Investment Company. Plaintiff told him that he had done well, to which he replied that he would rather have had money. Proceeding, the witness said: "Then he asked me if I wanted money. I told him I didn't need any money, and he took out the \$250 that I had given him to pay for the option, and said, 'Well, take this any way, and I will have some certificates of stock made out.' He did not at that time say anything about the receipt which he had given me for the \$250. A day or two after that he brought up some certificates of stock. One was made out for \$5,000 worth of stock in my name, being for 200 shares; another for \$500 worth of stock, being 20 shares, also in my name; and one for \$1,000 worth of stock, being for 40 shares, in his own name. And he then asked me to transfer the 200 shares of stock to his wife, and I did so. I had not had at this time any experience in dealing either in options or real estate. I did not know anything about dealing in options. It had been Mr. Crouch's business for some time to deal in options and real estate generally. He had been in the business two or three years. It was at Mr. Crouch's request that I indorsed the certificate for 200 shares of this stock to his wife, and he then took the certificate. After he had taken the certificate he said: 'Now, I wish you would give me that receipt, because, if you should die, it might be found among your effects, and people would wonder.' He then took the receipt and the certificate for 200 shares of stock away with him. He held the certificate until the next spring, either in April or May, 1889, when I asked him why he did not dispose of the

stock. He replied that he had tried to, but had not succeeded. A short time after this he came to me and said he could exchange it for a house and lot and some money, and asked me what I thought of it. I told him, if that was the best he could do, to do so. He said the stock would have to be pooled (that is, his stock,—mine and his wife's); and he afterward informed me that the stock had been exchanged for a house and lot and some money,—I think, about \$2,200. By 'his wife's stock,' I mean the certificate for 200 shares which I transferred to her at his request the previous August. He had the deed to this house and lot made out in my name. He put into the pool the two certificates made out in my name, the one in his own name, and one for ten shares in the name of Mr. Spencer. For all this stock he got the house and lot and about \$2,200 in money. He said he would retain about \$1,700 of this money and gave me about \$400, and he did give me \$430 of it about May 9, 1889. [At this point appellant offered in evidence the deed to this house and lot from Redmond Cleary to herself, dated May 9, 1889, which recited a consideration of \$4,000.] I afterwards authorized him, in writing, to collect the rents. This was done at his request. A few days afterwards he requested me to go to the office of Mr. Greenwood and execute a deed for this house and lot to his wife, which I did. [This deed was also offered in evidence, and was dated May 10, and acknowledged May 17, 1889, and recited a consideration of \$4,500.] Some time after August 22, 1889, I wrote Mr. Crouch a letter, asking him for a settlement, and telling him 'that, as I had furnished the money for the option, I was entitled to at least half the proceeds, as I was to bear half the losses.' To this letter he made no reply. I again wrote him on the same subject, and received a postal card in reply, dated February 14, 1890, in which he excused himself for not calling on me, but promised to see me in a few days." In a letter written by respondent to appellant, dated September 18, 1888, and read in evidence, he refers to this \$6,500 worth of stock, and says: "Mr. G. wishes to know to-day what I would take to-day for my \$6,500 worth of stock, and, as you are the owner of a portion of this stock, I would like to have your price on all or any portion of yours." Testifying further, witness said she first learned about a year before the trial, viz. in November, 1895, that Mr. Crouch received a sum of money, as part of the profits of the deal, in addition to the \$6,500 worth of stock. The amended petition charging that fact was filed April 23, 1896.

On cross-examination the witness was led back to the original conversation when the \$250 was advanced, and this occurred: "Q. What did you say to him? A. I said it was a good deal of money for me to put up on an option. Q. What did he then say? A. He said he thought I didn't run much risk in doing it. Q. What then did he say? A. That

he thought we would make a good deal of money out of it. I thought the matter over a little while, and said I would do it. Then he wrote the receipt. Q. He said he wanted this \$250 from you for the purpose of buying a half interest in the Benton farm? A. Yes, sir. Q. And you say that you gave him the money for that purpose, and this receipt was given, saying that was the purpose for which it was given? A. Yes, sir. He said after he wrote out the receipt, 'I would like to limit you,' and just before he went away he said, 'If we don't succeed, I will pay you back one-half.' Q. Now, that was all that was said? A. That is all I remember. Q. What did he say to you in August about this transaction? A. He said that Mr. Greenwood had made a sale; that the profits were \$15,000; that \$2,000 would have to be reserved for expenses, and that would leave \$6,500, or \$13,000, to be divided between Mr. Greenwood and us. He then asked me if I wanted money. I said I did not need money. He then took out the \$250 and said: 'Well, take this. This is the money that was put up on the option,' and I took it. He did not say where he got the money. He said he would much rather have money, but that we would have to take the \$6,500 in stock. He asked me how much of the stock I wanted. I said I did not know, because I did not know my rights in the case at the time. Q. Now, if 'we had made \$6,500,' why didn't you tell him the amount of stock you were entitled to? A. I didn't know my rights, and he did not inform me. He was the business man of the firm. It was my first experience in options. At our second interview, in August, he brought two certificates of stock. One was for 200 shares, and the other for 20 shares, of the value of \$25 each, and both were in my name. He requested me to transfer the one for 200 shares to his wife, and I did it. Q. Why did you do this, Miss Wetmore? A. Because I had the utmost confidence in Mr. Crouch, and didn't think for a moment he would try to deceive me, and \$5,000 out of \$6,500 would have been more than my share. That was my only reason." The witness' attention was then called to the letter of Sept. 18, 1888, above quoted, and her answer to it, in which she says: "I shall certainly not set any price on your stock. * * * but I would be willing to take \$400 cash for my 20 shares." Concerning this she testified: "At the time I wrote this letter, 200 shares of this stock had been transferred to Mrs. Crouch, Mr. Crouch had 40 shares, and I had 20 shares. I could not very well consider the 200 shares as mine, under the circumstances, and I referred to the 20 shares as mine, and the 40 shares as Mr. Crouch's. At the time all of this stock was sold (May, 1889), I got something less than \$450. I did not at that time say anything to Mr. Crouch, nor he to me, about wanting more than this sum as my share out of this transaction, because I was waiting for him to get out of

his business difficulties to make a final settlement with me." To sustain the allegation that defendant had received \$3,700 in money besides the 280 shares of stock in question, the petition in a suit in the circuit court of the city of St. Louis wherein this defendant was plaintiff and Moses Greenwood, Jr., was defendant, was read in evidence, in which petition that fact was stated. The deposition of one Hugh A. Wetmore was read, in which he testified that on Thanksgiving Day, 1888, defendant said to him: "I would not have gotten into that Kenwood option without Octavia's money. She furnished \$250, and, had the deal failed to go through, I would have paid back \$125. By rights, she should have half of all I made; but she is very generous, and has not asked for it."

Here the plaintiff rested, and at the request of the defendant the court gave an instruction to the effect that under the pleadings and evidence the plaintiff could not recover. After a motion to set aside the nonsuit, which was overruled, the bill of exception was filed, and the case brought here on appeal.

W. M. Kinsey and J. J. McCann, for appellant. John H. Drabelle, for respondent.

VALLIANT, J. (after stating the facts). The learned trial judge, in giving the instruction forcing a nonsuit, doubtless deferred to the opinion of the St. Louis court of appeals in *Wetmore v. Crouch*, 55 Mo. App. 441, which was a suit between these parties growing out of this same transaction. But, while the same transaction which is the subject of this was at the bottom of that suit, yet the two cases are quite different in essential particulars. In the former suit the plaintiff's chief difficulty was in her petition, which essayed to be a bill in equity to set aside an alleged settlement and for an accounting, without stating any grounds to impeach the validity of the settlement, and without stating what share the plaintiff had in the business. In her petition in this suit the plaintiff states a cause of action for a certain amount of money which has come into defendant's hands, belonging to her, as her share of the profits arising out of a business venture for which she had furnished the capital, and which was conducted by defendant for their joint interest. The difference between the positions assumed by the plaintiff in the two suits consists more in the deductions made from the facts stated, than from the facts themselves. Courts are more tolerant of a change of front where it consists of a change in legal conclusions drawn in the light of an adverse decision, than where an attempt is made to change the facts to suit the emergency. The testimony as to what passed between the parties when the money was advanced is substantially the same in this as it was in that case, but there the only statement in the petition in regard to an

agreement for division of profits was that, if the venture was a failure, defendant was to refund half the money advanced, and, if profitable, "both were to make considerable profit out of it." And so, as to the facts which went to make up what in the petition in the former suit was called a "settlement," and which are here treated as partial payments on account, they were substantially the same. The petition in this case concludes the statement of the agreement as follows: "It being further understood and agreed that the profits and losses, if any, of the venture, should be shared equally between them." Counsel for respondent construe this to be the pleading of an express agreement, and contend that plaintiff must fail because there was no evidence of an express agreement to divide the profits equally. But we do not agree with that view. If the facts stated are such as that the law implies such an agreement, the pleader may, with propriety, after stating the facts, draw that conclusion. The counsel is correct to this extent: If the contract relied on is express, it must be so pleaded; but, if it is implied, the facts out of which it is claimed to arise must be pleaded. *Wells v. Railway Co.*, 35 Mo. 164, and the other authorities cited in the brief of respondent, sustain this view. There was no express agreement between these parties as to how the profits that were expected to arise out of this venture were to be divided between them, but the facts are given in evidence, and the law will supply by implication what they intended, but failed, to express.

Under the circumstances of the case as testified to by the plaintiff, we must reach one or another of the following conclusions: That the plaintiff loaned defendant the \$250 to invest for his own account, in which event she would have no interest in the result, or that she intrusted it to him to invest for her own account, in which event she would be entitled to all the profits, or that she intrusted it to him to invest for their joint account, in which event she would be entitled to one-half the profits. That it was not a loan is shown by the fact that she gave him back his note, which up to that time had evidenced a loan, took a receipt which specified that the money was to be invested, and discussed the risk and prospective profits. His promise to pay back half the amount in case the scheme failed can scarcely be called a part of the contract, since it occurred after the transaction had been closed, and just before he went away. It was rather as a voluntary promise. Nor is the inference that the investment was to be for the plaintiff's sole benefit the most reasonable, because, although she furnished all the money, yet his skill and services were as essential to the business as her money. The natural inference is that it was a putting together her money and his skill for their joint benefit. The transaction did not constitute them part-

ners, in the full sense of the term; but they became jointly interested in the venture, and to some extent in a relation analogous to that of co-partners. Under the law of partnership, where there is no express agreement as to division of profits, "it is certainly the general rule, both in law and equity, that the profits shall be shared equally among the partners." *Pars. Partn.* (4th Ed.) § 172, note 1, and cases there cited. And "the rule that the shares of partners are equal, unless they have otherwise agreed, applies, not only to persons who are in business generally, but also to those who are partners as regards one single matter only." *Lindl. Partn.* (2d Ed.) *p. 350. That rule so commends itself in reason and justice that it needs no authority to support it.

It is insisted by respondent that the parties themselves put a different construction on the contract, and that their "actions speak louder than words." The interpretation that parties by their actions seem to put upon it is of service in the interpretation of an ambiguous contract, or in ascertaining what the contract really was, if its terms are in dispute. But when the terms of the contract are certain, and its meaning is clear, the conduct of the parties under it, indicating that they put a construction upon it at variance with its true meaning, will not control the court in construing it, nor in adjudging the rights of the parties under it, unless the conduct of the one has been such as to mislead the other to his disadvantage. And so, in the case at bar, if in point of fact there was no express agreement as to the share that each was to have in the profits, and if the conditions were such as that the law implied an agreement for an equal division, that implication was conclusive, and would not be changed, even though the plaintiff, through inexperience or ignorance of law, might have supposed that she was entitled only to what defendant chose to give her. A transaction which consists only in the payment of a smaller sum than is unquestionably due, and which has no other element of accord in it, is not a satisfaction of the debt, even though accepted as such at the time. *Riley v. Kershaw*, 52 Mo. 224; *Swofford Bros. Dry-Goods Co. v. Goss*, 65 Mo. App. 55. But the transactions that occurred between these parties, so far as the evidence has gone, do not indicate that they were intended as a final settlement by either party. First, after refunding the \$250, the defendant caused the stock to the amount of \$5,500 to be issued in the name of the plaintiff. That was the first division of the profits. Then this stock, without consideration, was transferred to defendant's wife, who had no interest in it at all. Then it was, together with the 40 shares held in defendant's name, sold to a stranger for \$2,100, and a house and lot valued at \$4,000; defendant receiving the money, and taking title to the real estate in plaintiff's name. Then the house and lot were transferred without con-

sideration to the defendant's wife. After that, defendant paid plaintiff \$430. Thus, we see that which represented the profits in this venture was shifted from one to the other, in unequal proportions, from time to time, as the defendant requested; and there is no more reason for defendant to claim the \$430 payment to be a final settlement, than there would have been for the plaintiff to have kept the \$5,500 worth of stock, or to have kept the house and lot, and insisted that either of those transactions was a final settlement. The whole business shows that plaintiff confided implicitly in defendant, and whatever disadvantage she is laboring under now is referable to that fact. The court erred in giving the instruction which forced a nonsuit. The judgment of the circuit court is reversed, and the cause remanded to that court, to be retried in accordance with the law as herein declared. All concur.

LANDER v. ZIEHR et al.

(Supreme Court of Missouri, Division No. 2.
June 6, 1899.)

FRAUDULENT CONVEYANCES—EVIDENCE—EXISTING AND SUBSEQUENT CREDITORS.

1. A voluntary deed from a husband to a wife, without any pecuniary consideration moving from the wife, is void as against all existing creditors of the husband.

2. A husband, while largely indebted, made a voluntary conveyance to his wife of all the property he had to which his creditors could look for the payment of their claims. He subsequently paid a large amount of debts due when the conveyance was made, but contracted others while he was continuing to exercise acts of ownership over the property, and while his creditors supposed he was still the owner. One person loaned him money on his promise to give the property for security, and he put off giving the security on various pretexts, until he finally declared that he had conveyed it to his wife. *Held*, that a decree canceling the conveyance as being fraudulent as against subsequent creditors was sustained.

Appeal from circuit court, Linn county; W. W. Rucker, Judge.

Suit by Harry Lander against John Ziehr and others. Decree for plaintiff, and defendants appeal. Affirmed.

This is an appeal from a decree of the circuit court of Linn county adjudging certain conveyances of the defendant John Ziehr to his wife, Emma Ziehr, and to Judge Brownlee as trustee for her, to be fraudulent and void. The trustee is a mere formal party, and has no interest in the cause, save as the holder of the legal title. One of the deeds purports to have been made by John Ziehr to his wife on December 22, 1891, and recorded March 17, 1892, and conveys the residence of John Ziehr in Brookfield and a brick building known as his saloon property, for the consideration of love and affection. The other deed, made long after the levy of the attachment and long after the accruing of the debts for which the property was sold, was to W. H. Brownlee, as trustee for Mrs. Ziehr, and

was recorded February 23, 1895. John Ziehr inherited the said real estate from his father in 1890. Previous to this time he and his brothers, George and William, were in partnership in the coal, wood, beer, and ice business in Brookfield, and also engaged in draying. He was married to his co-defendant Emma Ziehr in 1889. She brought him no property, and was possessed of none in her own right. In 1890 he received as his share of his father's estate a residence worth \$3,000, the saloon property worth \$6,000, and an ice house worth about \$500. In the partition of the property the defendant John Ziehr obligated himself to his mother, brothers, and sisters to the amount of \$1,700, and, to secure one of the brothers \$450, mortgaged the ice house for that sum, and on a subsequent foreclosure it sold for \$25, subject to that mortgage. To liquidate the claims of the others, he made an overdraft of \$800 on the Bank of Brookfield, and continued to owe his mother \$200 in 1892. Outside of the foregoing real estate, John Ziehr owned some personal property, several horses and mules, drays, and personal effects, all of which was afterwards sold under a chattel mortgage for \$350. He was a partner in a saloon, and obtained \$820 for his share therein in January, 1892. He testified, however, that he kept \$500 in money on hand at his home as "a reserve." He testified, also, to book accounts due him to the amount of \$714; but on cross-examination it appeared that these were so largely offset by counter accounts of merchants, and others to whom he was indebted, that they could scarcely be called assets. After the dissolution with his brothers, John Ziehr, the defendant, continued in the ice, coal, and beer business alone; and it was soon apparent that his brothers were selling better ice than he was, and he began to look about for an artificial ice plant. He had little or no capital invested in his business at this time. He bought coal and beer on time, and relied on selling it to meet his payments. No one, from his evidence, can approximate what his real financial condition was for several years. He says he was making money, but the result demonstrates that he was either mistaken or has secreted his property. He owed the coal men and the brewing company of whom he bought considerable money, and he made them payments; but it appears that when he paid them he increased his indebtedness to the Bank of Brookfield, which permitted him to overdraw on the faith of his ownership of property. The evidence does not show the exact date of the delivery of the deed he made directly to his wife, and which bore the date of December 22, 1891; but it does appear that between that date and its record, March, 1892, he was indebted to the Bank of Brookfield from \$700 to \$1,000, which debt was a running account, and increased from time to time until the spring of 1894, when it reached \$2,400, and has never been paid. On the 22d of December, 1891,

he owed Anheuser-Busch \$137, and this sum increased to \$460 before the record of the deed in March, 1892. The indebtedness increased until the spring of 1894, when it amounted to \$1,800, and has never been paid. This business was done at Brookfield, and these creditors did not know that he had put to record the deed to his wife at Linneus, the county seat. It is entirely clear that this credit was extended to him on the assumed ownership of the dwelling house and saloon property. The evidence of his partner, Gordon, tends to establish that in October, 1891, John Ziehr conceived the plan of erecting an artificial ice plant, which he ascertained on a visit to St. Louis would cost \$20,000. With this purpose in view, he conveyed the only available real estate he had to his wife, and by this deed practically rendered himself insolvent. After making this deed, he continued to be the ostensible owner of this real estate, as if it was his own. He gave it in to the assessor for 1891, 1892, and 1893 as his own. He paid the taxes out of his own money, insured it in his own name, and paid for the insurance out of his own funds to the local agency in Brookfield. Gordon, his tenant, knew nothing of the transfer, and continued to pay him the rent monthly, and John Ziehr receipted to him in his own name therefor. He says himself he used these rents in his own business, and never paid his wife a cent. He kept no account of it with her. He contracted for expensive improvements, and paid for them out of his own money. In 1894, for the first time, he caused the property to be assessed to his wife, and had it insured in her name; and never, until pressed by De Graw, who had loaned him \$6,000, did he state that the property belonged to his wife. In the meantime he had become indebted to the amount of \$13,000. When he and Gordon went to De Graw to borrow of him \$6,000, De Graw told them that he would not take security on any unfinished building like the ice plant, but would advance the money and take as security his saloon property and other property. When this statement was made, John Ziehr assented, and did not by word or deed indicate that he did not own the property, but said that they wanted to get the money along from time to time, as they needed it, and when he got the full amount of \$6,000 he would secure it as desired. Ziehr was regarded as the responsible party, and according to the evidence it was fairly understood between De Graw, Ziehr, and Gordon that Ziehr was to secure the \$6,000 by deed of trust on his saloon property, and other property sufficient to make ample security. This was in the spring of 1894. And, on the strength of these representations and his apparent ownership of this substantial property, De Graw, through the Linn County Bank, from time to time advanced to Ziehr and Ziehr & Gordon \$6,000; and, when security was asked by De Graw on the saloon property as promised, John Ziehr pleaded business engage-

ments from time to time, but promised to give the security and have it fixed up as soon as possible, and when pressed by Arbuthnot, acting for Bank of Brookfield and De Graw, he claimed that his wife objected to signing the deed of trust. These pretexts and excuses by Ziehr continued for some time, and when, at last, De Graw and Arbuthnot proposed to accept the deed without the signature of his wife, he could "trim" no longer, and announced to them "that his property was in his wife's name." So with the debt of the Anheuser-Busch Brewing Company. It was created and the credit given to him on the faith of his ownership of these two pieces of property. He had no other tangible property available to creditors.

John Ziehr's claim on the trial that he was solvent until the spring of 1894, when he commenced the construction of the ice plant, and that he lost his wealth in the ice-plant venture, is completely exploded by a consideration of the record in this case. He only claims to have invested in the ice plant \$3,500 in all. Gordon says he invested only \$3,300, including the work he did and his draying.

He got from the Bank of Brookfield....	\$2,400
From Anheuser-Busch	1,800
From Linn County Bank.....	1,000

Making a total of..... \$5,200

This sum of \$5,200 he got personally. This sum is aside from the \$5,000 got by Ziehr & Gordon from De Graw, and is aside from the \$2,000 or \$3,000 debts contracted by Gordon & Ziehr, and their indebtedness to Fred W. Wolff for machinery. He claims that his dray, ice, coal, and beer business was profitable,—that he was making money all this time; but, according to his own statement, he only claims to have invested in the ice plant \$3,500 of his own individual money. This would leave him a net reserve, of the money obtained by him of the Bank of Brookfield, Anheuser-Busch, and De Graw alone, between \$1,700 and \$2,200, individually to himself.

Suits were brought by the Anheuser-Busch Company against John Ziehr for \$1,846, and by the Linn County Bank for the sum of \$5,000. The Bank of Brookfield and the Linn County Bank had also brought suits by attachment against Ziehr for \$2,400 and \$1,000, and interest, both of which last-mentioned suits were transferred to the Sullivan county circuit court on the application of the defendant John Ziehr. Under these attachments the property described in the petition had been levied upon, and the same property levied upon and sold under the judgments obtained by the Anheuser-Busch Brewing Company and the Linn County Bank, above mentioned, in the Linn county circuit court; and at the sheriff's sale of said property, by agreement of all these creditors, the respondent Harry Lander became the purchaser of the property described in the petition, for the benefit of all these creditors, and he thus prosecutes this suit. As already stated, the

circuit court rendered a decree that the deed to the homestead was not fraudulent, but that to the saloon property was void as to his creditors, and confiscated the rents paid by Gordon after the attachment. It is to reverse that decree that this appeal is prosecuted.

Chas. K. Hart, M. M. Crandall, and A. W. Mullins, for appellants. S. P. Huston, Lander, Johnson & Lander, and J. A. Arbuthnot, for respondent.

GANTT, P. J. (after stating the facts). The deed from John Ziehr to his wife, Emma, of date December 22, 1891, on its face declares that the consideration therefor was only love and affection, and was therefore a pure gratuity; but, in addition to this recital, it is made entirely clear that the wife had in no way contributed to the acquisition of this property. She had only been married to defendant John Ziehr about two years when the deed was executed. She brought him no estate whatever by her marriage, being entirely without means. This property was not the product of the joint savings or labor of John Ziehr and his wife, but was inherited from his father. Being voluntary and without any pecuniary consideration moving from the wife, it was void as to all existing creditors of John Ziehr. *Jordan v. Buschmeyer*, 97 Mo. 94, 10 S. W. 616. It having been shown and conceded that the deed was made to the wife of property inherited and acquired by his means during coverture, the transaction, as to all existing creditors, was fraudulent in law. *Patton v. Bragg*, 113 Mo. 595, 20 S. W. 1059; *Bump, Fraud. Conv.* (2d Ed.) p. 200. The case presents no feature which requires a court to uphold the deed in equity, though it was void at law. *Woodsworth v. Tanner*, 94 Mo. 124, 7 S. W. 104. While the deed was fraudulent at law, because voluntary, as to existing creditors, it has long been held in this state that a voluntary conveyance, as to subsequent creditors, although the party be indebted at the time of its execution, is not fraudulent per se as to them, but the fact whether it is fraudulent or not is to be determined by all the circumstances. *Pepper v. Carter*, 11 Mo. 542; *Payne v. Stanton*, 59 Mo. 158; *Frank v. Caruthers*, 108 Mo. 509, 18 S. W. 927. What, then, are the circumstances which would justify a court in holding a conveyance fraudulent as to subsequent creditors? The proof of prior debts; the insolvency of the debtor at the time of the conveyance, or, though solvent, rendering himself insolvent by the conveyance he makes; a design or purpose to hinder, delay, or defraud those to whom he is about to become indebted,—are some of the marked indicia of fraud. In a word, an intent to contract debts, and a design to avoid the payment of such debts by the conveyance. It was pointed out by this court in *Snyder v. Free*, 114 Mo. 360, 21 S. W. 847, that the statute simply requires "an intent to de-

fraud" to be shown. Applying these tests to the facts of this case, and we have a grantor, not only indebted at the time of the conveyance, but that conveyance confessedly gratuitous and voluntary, of all the property to which creditors would naturally look for the payment of their debts. That conveyance is kept off of record for three months. It is true that this deed was afterwards recorded at the county seat, but it must be borne in mind that John Ziehr lived in Brookfield, and the property was all there, and that he continued to use it and control it just as he always had, and that, as a matter of fact, it was not suspected by De Graw when he loaned him \$6,000 that the property was in the wife's name. It requires no corroborative evidence to demonstrate that neither De Graw nor any other prudent investor would not have loaned John Ziehr \$6,000, had he known that the very property on which he was to be secured was in Ziehr's wife's name. Nor did the record of this deed, under the circumstances, relieve it of its fraudulent character. Bump, Fraud. Conv. (4th Ed.) § 293, and cases cited.

Much stress is laid by counsel for defendants upon the fact that the items due the Brookfield Bank at the date of the conveyance were afterwards paid; but, as to this contention, we answer that a great deal depends upon the mode in which this is done. Proving that prior debts have been paid amounts to nothing, if, as in this case, it appears Ziehr was contracting other debts to an equal amount. Any other rule would simply permit a debtor to take the property of subsequent creditors and give it to his grantee. A mere change of creditors while the debt continues will not cheat the statute. Bump, Fraud. Conv. (4th Ed.) § 296, and cases cited; Brown v. McDonald, 1 Hill, Eq. loc. cit. 304; Taylor v. Coenen, 1 Ch. Div. 636; Madden v. Day, 1 Bailey, loc. cit. 340, 341; Antrim v. Kelly, 4 N. B. R. 189, Fed. Cas. No. 494. That John Ziehr kept up his credit by paying old debts with the proceeds of goods purchased and overdrafts, from time to time, we think is abundantly established. But that this evidence makes out a case of actual, intentional fraud can scarcely be questioned. John Ziehr had learned that an ice plant would cost him nearly or quite \$20,000. He knew he had no other property on which he could possibly expect a loan to erect so costly an establishment, except his real estate. His subsequent conduct convicts him of a deliberate purpose to defraud. He testifies himself that, aside from this property in dispute, he had nothing at all, because the \$3,500 which he attempts to say he had has vanished and left not a trace behind. When he came to De Graw to borrow the money, he permitted De Graw to believe he still owned the saloon property. He admits De Graw told him he would not take a lien on the ice plant. Indeed, at that time he did not even own the land on which it was later

constructed. It is absolutely incredible that De Graw would have considered the loan at all, if he had not supposed Ziehr owned the saloon property, as he had nothing else with which to secure De Graw. He was exercising every indicia of ownership. When he told De Graw he would give him ample security, he knew he had nothing but this property. His shuffling and procrastination when De Graw required the deed of trust which he had promised to give are in harmony with his deception throughout. Without recapitulating all the evidence, it is sufficient to say that it would be against all reason and conscience to permit John Ziehr, through his wife, to continue to enjoy this property as he has from the execution of the deed, after having contrived to obtain the money of his creditors to a large amount on the faith of his ownership, and cover it up in his wife's name, when she had not invested a farthing in it. The courts of equity cannot countenance a scheme like this. The circuit court properly found that it was John Ziehr's property when it was attached and sold, and that plaintiff, as the trustee of an express trust, had a right to have the deeds to his wife canceled and held for naught; and, under the prayer for general relief, the rents and profits were properly adjudged also to plaintiff for the creditors. The decree is affirmed.

SHERWOOD and BURGESS, JJ., concur.

WONDERLY v. LAFAYETTE COUNTY.

(Supreme Court of Missouri, Division No. 1.
May 23, 1899.)

JUDGMENTS—JURISDICTION OF UNITED STATES COURT—COLLUSIVE ASSIGNMENT—POWER OF STATE COURT—HARMLESS ERROR—LACHES.

1. Where defendant sued on a judgment admits in his answer the rendition of the judgment as alleged, error in admitting an imperfect transcript thereof is harmless.

2. An assignment of a judgment of a United States circuit court is not a judicial proceeding, within Rev. St. 1899, § 4881, giving faith and credit to the judicial proceedings of any court of the United States attested by the clerk thereof, and certified by the judge, and hence is not admissible in evidence, without proper proof of its execution.

3. Error in admitting such proof of the assignment is not cured by the fact that there was other evidence of the assignment, since the other proof alone may or may not have been satisfactory to the trial court.

4. The owner of county bonds, knowing that the state courts had decided that the legislative act under which they were issued was unconstitutional, and the bonds were invalid, and that the federal courts had held the act constitutional and the bonds valid, and knowing that he could not recover on his bonds in the state court, but could in the federal court, and that he could not sue the county in the federal court, because he was a citizen of the state, assigned the bonds to a nonresident for the purpose of conferring jurisdiction on the federal court, and after judgment had it assigned to himself. *Held*, that this was a fraud on the federal court in procuring the judgment, and the state court in equity would set it aside, notwithstanding the true ownership of

the bonds might have been ascertained in the federal court, if plaintiff had not concealed the true state of affairs to prevent defendant from making that defense.

5. In a suit on such a judgment, the answer alleged that the fraud practiced on the federal court and defendant, to wit, the actual ownership of the bonds, was known only to the owner and his assignee, and was by them concealed, so that defendant did not discover it until after institution of the suit in the state court. *Held*, that there could be no laches, on the part of defendant, under these circumstances.

Appeal from circuit court, Lafayette county.

Action by Charles P. Wonderly against Lafayette county. There was a judgment for plaintiff, and defendant appeals. Reversed.

This is a suit begun September 18, 1895, in the circuit court of Lafayette county, upon a judgment rendered October 31, 1885, in the circuit court of the United States for the Western division of the Western district of Missouri, in favor of one Francis D. Owings against Lafayette county for \$11,791.45, and alleged to have been assigned to the plaintiff, Wonderly. The petition alleges the issuance and service on defendant of the summons, the return of same, and rendition of judgment, and assignment thereof to plaintiff; that the cause of action on which it was founded consisted of bonds and coupons bearing interest at 10 per cent. per annum from maturity. The petition did not state facts showing that the suit in which the judgment was rendered was within the jurisdiction of the federal court, nor did it state that the judgment had not been paid. Defendant, by its amended answer, admitted the rendition of the judgment, and denied the assignment. Then the answer proceeded affirmatively to state a case for equitable cognizance, charging that the judgment was procured by fraud, and praying that it be set aside and annulled. In substance, the charge of fraud was that the bonds and coupons on which the judgment was founded were issued under a certain act of the general assembly of Missouri named, which was in conflict with the constitution of the state, and was therefore invalid, and the bonds and coupons were null and void; that, under the laws then existing, the circuit courts of the United States within this state had jurisdiction of suits involving more than \$2,000, wherein a citizen of another state was plaintiff and a citizen of this state defendant; that, prior to the institution of the suit in which the judgment sued on was rendered, the supreme court of this state had in numerous decisions adjudged the act of the legislature mentioned unconstitutional and void, and bonds purporting to be issued thereunder of no force and effect, but that the courts of the United States had taken a contrary view, and had decided that the act was constitutional and valid, and bonds issued under it binding obligations; that, prior to the institution of that suit, the plaintiff in this suit was fully advised of the decisions of the supreme court of this state, and also

of those of the United States courts, on that subject, and he knew that, if he sued on those bonds and coupons in a court of this state, the result would be a judgment for defendant, but, if he sued in the federal court, the probability was that the bonds would be held valid, and he would obtain a judgment on them; that, at the time that suit was instituted in the name of Owings, he was not the owner of the bonds or coupons, but the same were the property of the plaintiff in this case, and he and Owings, both knowing how the Missouri courts had held, and also how the federal courts had held, "combined and conspired together for the purpose of wronging, cheating, and defrauding this defendant, and of imposing and perpetrating a fraud upon the jurisdiction of the United States circuit court within and for the Western division of the Western district of the state of Missouri, and, in pursuance of such combination and conspiracy, the said plaintiff and the said Owings falsely and fraudulently pretended the said plaintiff had sold and assigned and transferred to said Owings the aforesaid bonds, and thereupon the said Owings, pretending to be the holder and owner of said bonds, instituted said suit in said United States court"; that all the time the plaintiff was and still is a citizen of Missouri, and Owings was and still is a citizen of Illinois; that the pretended transfer to Owings was to enable the plaintiff in that name to use the United States court to obtain a judgment which he knew he could not obtain in his own name; that defendant had no knowledge or information as to the real ownership of the bonds, or of the facts in regard to the pretended assignment, until November, 1895; that, if defendant had had any knowledge or information of the fraud, it would have made the defense in that court, but that the plaintiff and Owings, knowing that the defendant was ignorant of the real ownership and pretended transfer, kept the facts secret, and defendant was thus prevented from raising the question of jurisdiction in that court; and that defendant had no information or intimation of the real ownership of the bonds, and the fraud that had been practiced, until after the institution of the present suit. There is a prayer asking that the judgment be set aside, etc. Defendant then proceeds, by way of a cross bill, to state the rendition of the same judgment, and that in October, 1895, a writ of scire facias to revive the judgment had issued out of the United States court in the name of Owings, to the use of plaintiff, against defendant. Then the same facts, to show that the judgment was obtained by fraud, as above stated, are pleaded again, and the cross bill concludes with a prayer for an injunction to restrain the plaintiff from further prosecuting the writ until the final determination of this suit. On motion of the plaintiff, the court struck out all of defendant's answer except the first clause, which admitted the rendition of the judgment

and denied the assignment, to which the defendant duly excepted. The cause was tried by the court without a jury. On the trial the plaintiff introduced in evidence a document marked "Transcript of Judgment," which purports to set out a copy of the petition, summons, and return, showing service on defendant and the judgment in question, and a certificate purporting to be signed by the clerk, to the effect that on September 12, 1891, there was presented an assignment of the judgment "duly acknowledged to Charles P. Wonderly, of St. Louis, Mo., dated November 20, 1885." To the whole document there is the attestation of the clerk, duly certified by the judge, that it is a "true copy of the judgment record in the above-entitled cause." Defendant objected on the ground that the certificate of the clerk was not sufficient, the objection was overruled, and defendant excepted. Then plaintiff offered what purported to be an assignment of the judgment dated November 28, 1885, signed by Francis P. Owings, acknowledged before one William H. Bradley, as clerk of the circuit court of the United States for the Northern district of Illinois. The defendant objected on the ground that the judgment was in the name of Francis D. Owings, and the purported assignment was in the name of Francis P. Owings, and also on the ground that the purported certificate of acknowledgment was not evidence. Objections overruled, and exception taken. Then there was a certificate of the clerk of the court in which the judgment was rendered, to the effect that he had noted the assignment on the margin of the entry of the judgment, "12th Sept., 1891." This was objected to as incompetent, objection overruled, and exception taken. That was all the evidence for plaintiff. Defendant offered evidence tending to prove the facts alleged in that portion of the answer which had been stricken out, but, on objection of plaintiff, it was excluded, and defendant excepted. The court found for plaintiff, and rendered judgment in his favor for \$23,928.63. Motions for new trial and in arrest followed, which were overruled, and the cause is here on defendant's appeal.

Wm. Aull, J. M. Lewis, and Elijah Robinson, for appellant. Frederick A. Wind, for respondent.

VALLIANT, J. (after stating the facts).
1. The answer of defendant admits the rendition of the judgment, as alleged in the petition. Therefore there was no necessity for plaintiff to introduce in evidence what purported to be a transcript of the judgment, and, if there was any error in admitting it, it was immaterial. The answer, however, does deny the alleged assignment, and the burden of proving that devolved on the plaintiff. The proof offered was a paper purporting to be signed by one Francis P. Owings, and attested by and acknowledged before one William H. Bradley, as clerk of the circuit

court of the United States for the Northern district of Illinois, and a certificate of the clerk of the court in which the judgment was rendered that he had noted that assignment on the margin of the entry of the judgment. The noting of the assignment on the margin of the judgment entry was, for the purposes of this case, immaterial. The material question related to the fact of assignment. The only evidence on that point was a paper purporting to have been acknowledged before a clerk in Illinois. The acknowledgment was in the form prescribed for proof of a deed to land to be recorded, but the statute on the subject of acknowledgment of deeds, etc., does not provide for the acknowledgment of an assignment of a judgment, and the certificate was not evidence for that purpose. Section 6043, directing how judgments may be assigned, and the assignments entered on the judgment record, relates only to judgments of the courts of this state. The general assembly has no control over the records of a federal court, and, although it might lay down as a law of evidence for use in a state court a rule for the proof of the assignment of judgments of a federal court in the form that is here offered, yet it has not done so. This alleged assignment, purporting to have been made in Illinois, although it relates to a record of a court of the United States, yet is in no sense a judicial proceeding, within the meaning of section 4881, Rev. St. 1889, and therefore not a subject of proof by clerk's certificate. In plaintiff's addition to the abstract of the record it is stated that there was other proof of the assignment besides that certificate. That does not cure the error. The other evidence may or may not have been satisfactory to the trier of the fact. The attestation of the clerk and the certificate of acknowledgment were not legal evidence of the alleged assignment, and the defendant's objection to it should have been sustained.

2. But the serious question in this case relates to the action of the court in striking out of defendant's answer its equitable affirmative defense. That clause in the answer was shaped to all intents and purposes as a regular bill in equity, in the form of a direct proceeding, making an attack on the judgment upon the ground that it was obtained by fraud, specifying the acts which it is charged constitute the fraud, and praying the relief of cancellation and annulment of the judgment; and it is evident, from reading the answer, that the pleader had in his mind to charge that the fraud complained of was in the procurement of the judgment, as distinguished from fraud in the cause of action. The ground of equity jurisdiction in such case is clearly marked out in recent decisions of this court. *Hamilton v. McClean*, 139 Mo. 679, 41 S. W. 224; *Bates v. Hamilton*, 144 Mo. 1, 45 S. W. 641. The very able briefs of the counsel in this case discuss the questions of law involved and review the au-

thorities with so much learning and industry that our labors are greatly lightened. In reading a court's decision, it is always important to understand the facts of the particular case, in order to obtain a correct view of the law declared in the opinion. The observance of that precaution is particularly needed in reading the authorities encountered in the search for the law of this case, because one is constantly running across decisions treating of indirect or collateral attacks on judgments, and of judgments of courts of peculiar or limited jurisdictions, and of charges of fraud relating to the cause of action on which the judgment is founded. There are several propositions contended for by the counsel for the plaintiff, which, for the purposes of this case, may be conceded without discussion, viz.: In a suit upon a judgment of a circuit court of the United States it is not necessary to set out in the petition facts to show that the court had jurisdiction; nor can such a suit be defeated on a plea at law that the facts required to confer the jurisdiction did not exist. The judgment of that court is not subject to attack in that way. If the facts conferring jurisdiction do not appear on the face of the whole record, the judgment may be reversed on appeal or writ of error; but the proceedings cannot be treated as *coram non jure*, as would be the case if it were a court, not only of limited, but also of inferior, jurisdiction. The circuit courts of the United States are of limited, but not inferior, jurisdiction. *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552, 8 Sup. Ct. 217. The judgments of such courts are entitled to equal rank and presumption of regularity as are judgments of the circuit courts of this state. *Reed v. Vaughan*, 15 Mo. 141. The jurisdictional facts in a suit in a federal court, although they may be independent of the facts constituting the cause of action, are yet facts to be pleaded, and, if denied, proven; but, when the judgment is rendered, the presumption goes with it that the court tried all the issues that were raised, and found all the facts necessary on which to found the judgment, and that judgment does not depend for its validity upon the ability of the plaintiff therein to be always ready to verify his statements as to the jurisdictional facts. All of these propositions summed up mean that such a judgment is not subject to a collateral attack; and no one is here contending that it is. But the judgment of a circuit court of the United States, like that of a circuit court of the state, may be attacked in a direct proceeding, in equity, upon the ground that it was concocted and procured by fraud; and no one is here disputing that proposition. The attack made on the judgment in this answer is not collateral, but a direct proceeding, in equity, to annul the judgment. The plaintiff's motion to strike out confesses the facts, and the only question, therefore, is, do the facts stated make out a case of a judg-

ment concocted and procured by fraud? Taking those statements to be true, the plaintiff was the owner of these county or township bonds, and he knew that this court had in numerous cases decided that the act of the legislature under which they were issued was in violation of the constitution of the state, and the bonds were invalid; he knew that the United States courts had held that the act was constitutional and the bonds valid; he knew that he could not get a judgment on his bonds in any court in the state; he knew that, if he could sue in the federal court, he could get a judgment, but, being a citizen of Missouri, he knew he had no right to sue a county of Missouri in a federal court. Then, to obtain under false pretense what he could not obtain by truth, he impersonated a citizen of Illinois, and under that disguise went into the federal court and obtained his judgment. He did not go in with his own face or his own name. But equity, which looks at the substance, and not at the shadow, which regards the real, and not the sham, looks through the mask, and recognizes the plaintiff in this suit as the real plaintiff in that suit. The scheme was a fraud on the court, whose jurisdiction was betrayed, and a fraud on the defendant, who was tricked out of its defense. True, the statement in the petition in that suit that Owings, a citizen of Illinois, was the owner of the bonds, is a statement which, under fair conditions, might have been traversed, and the plaintiff put to his proof. But there were no such fair conditions there. The fact that that statement was false was known only to the plaintiff and Owings, and they concealed it for the purpose of preventing defendant from making that defense. Not only was the true ownership of the bonds known to them, but the false appearance of ownership was a fact of their own creation, concocted for the purpose of deceiving the court into entertaining a case which, if the truth appeared, it would have rejected on the ground that it had no jurisdiction. 18 Stat. U. S. 472, c. 137; *Williams v. Nottawa*, 104 U. S. 209; *Farmington v. Pillsbury*, 114 U. S. 138, 5 Sup. Ct. 807; *Hartog v. Memory*, 116 U. S. 588, 6 Sup. Ct. 521; *Morris v. Gilmer*, 129 U. S. 324, 9 Sup. Ct. 289. Cases are cited to support the contention that a sale made to a nonresident for the purpose of enabling the grantee to sue in a federal court is not a fraud, within the meaning of the federal judiciary act; but those cases, if they bear out the contention, do not help the plaintiff in this suit, because, according to the averment in the answer, there was no sale of the bonds to Owings. They were the property of Wonderly while they were in suit under the false pretense that they were the property of Owings. *Barney v. City of Baltimore*, 73 U. S. 280. *Farmington v. Pillsbury*, *supra*, was a case where municipal bonds of a village in Maine had been issued under an act of the legislature which the supreme court of that state had declared to be

unconstitutional, and the bonds invalid. The holder of some of them made a collusive transfer to a citizen of Massachusetts for the purpose of suing on them in a United States court. The supreme court of the United States in that case, per Waite, C. J., said (114 U. S., loc. cit. 143, 5 Sup. Ct. 809): "And upon the question of transfer it was uniformly held that if the transaction was real, and actually conveyed to the assignee or grantee all the title and interest of the assignor or grantor in the thing assigned or granted, it was a matter of no importance that the assignee or grantee could sue in the courts of the United States when his assignor or grantor could not. * * * But it was equally well settled that, if the transfer was fictitious, the assignor or grantor continuing to be the real party in interest, and the plaintiff on record but a nominal or colorable party, his name being used only for the purpose of jurisdiction, the suit would be essentially a controversy between the assignor or grantor and the defendant, notwithstanding the formal assignment or conveyance, and that the jurisdiction of the court would be determined by their citizenship rather than that of the nominal plaintiff. * * * Such was the condition of the law when the act of 1875 was passed, which allowed suits to be brought by the assignees of promissory notes negotiable by the law merchant, as well as of foreign and domestic bills of exchange, if the necessary citizenship of the parties existed. This opened wide the door for frauds upon the jurisdiction of the court by collusive transfers, so as to make colorable parties and create cases cognizable by the courts of the United States. To protect the courts, as well as parties, against such frauds upon their jurisdiction, it was made the duty of the court, at any time when it satisfactorily appeared that a suit did not 'really and substantially involve a dispute or controversy' properly within its jurisdiction, or that the parties 'had been improperly or collusively made or joined for the purpose of creating a case cognizable under the act,' to proceed no further therein. * * * This, as was said in *Williams v. Nottawa*, 104 U. S. 209, 211, 'imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings, and dismiss the suit the moment a fraud on its jurisdiction was discovered.'" We have thus quoted at length the language of the supreme court of the United States to show that that court denounces the conduct of the parties in such transactions as a fraud on the courts as well as on the defendants. The same unvarnished terms are used in the other cases above cited. The reason of the doctrine that equity will not entertain a bill to set aside a judgment merely on the averment that the cause of action on which it is founded is tainted with fraud is that the party had an opportunity to interpose that defense in the suit in which the judgment was rendered.

Irvine v. Leyh, 102 Mo. 200, loc. cit. 207, 14 S. W. 717, and 16 S. W. 10. But when the defendant is prevented by the fraud of the plaintiff from making the defense, and when, as in this case, the defense rests in the peculiar knowledge of the plaintiff, and he conceals it from defendant, the fraud attaches to the judgment itself, and vitiates it. It is a fraud in procuring the judgment. *Black*, Judgm. § 371; *Freem. Judgm.* § 491; *Fish v. Lane*, 2 Hayw. (N. C.) 522; *Reed v. Harvey*, 23 Ark. 44; *Spencer v. Vigneaux*, 20 Cal. 442; *Insurance Co. v. Fields*, 2 Story, 59, Fed. Cas. No. 10,406. In the case last cited the decision was by Judge Story, wherein he says: "Now, the very reason upon which the present bill is founded is that this, a perfect and valid defense at law, was by the fraudulent concealment of the defendant, and the total ignorance of the plaintiffs in the facts, incapable of being set up in the original action; and the recovery was therefore inequitable and iniquitous. It would be against all principles of a court of equity to allow one party to practice a fraud upon another innocent party, and by another act of fraudulent concealment recover a judgment against him founded upon the prior act, and then to be permitted to assert this double inequity as a bar to all equitable relief against the judgment." Even if the suit in which the judgment now in question was rendered had been in a state court, it would have been necessary for the nominal plaintiff, Owings, to have averred in his petition that he was the owner of the bonds, because that was a fact essential to his cause of action; but that averment in that case in the federal court had a double significance,—the one bearing on the plaintiff's right of action, the other on the right of the owner of the bonds to sue in that court. In the one sense it was a fraud on the defendant alone, and in the other it was a fraud on both the court and the defendant. The law which required the owner of the bonds to be a citizen of another state, in order to give the federal court jurisdiction, was a law of that court, and the plaintiff's act of masking as Owings, and thus gaining entrance, which, with his own face, he could not have gained, was a fraud on that law; and since, by that means, he evaded the law of this state applicable to his cause of action, as pronounced by this court, his judgment is to be deemed as in fraud of the law of this state, and not entitled to the protection of its courts. *Freem. Judgm.* § 566; *Dunlap v. Cody*, 31 Iowa, 260; *Duringer v. Moschino*, 93 Ind. 495. In the Iowa case just above cited, the plaintiff's cause of action was barred by the statute of limitations in Iowa, where the defendant resided; and the plaintiff, to evade that defense, by a fraudulent scheme induced defendant to go to Illinois, where the claim was not barred, and there served process on him, and obtained judgment. In a suit on the judgment in Iowa, the supreme court of that state, by Day, C.

J., said: "Counsel representing plaintiff in this court, and who, it is but just to say, were not concerned in obtaining the judgment in Illinois, do not seriously controvert the position that the mode of obtaining jurisdiction was fraudulent. They concede that it 'smells somewhat of fraud.' The only palliation which they are able to offer is the suggestion of a doubt whether it may not be considered a pious fraud, in which the end justifies the means. We do not think that it is entitled even to that small measure of charity. An enlightened and just administration of the law, no less than sound public morals, condemns such practices, and demands that the client whose cupidity could sanction, and the attorney whose venality could execute, such a purpose, should alike be disgraced." We quote the words of these high courts and distinguished jurists to show in what estimation they hold the conduct of those who, by cunning, would pervert the administration of justice. There is no difference, in principle, between the fraudulent concoction of a scheme that brings the defendant within the jurisdiction of a court of a foreign state and the fraudulent concoction of a scheme that brings him within the jurisdiction of a federal court, which otherwise would not have had jurisdiction over him. In whatever aspect we view it, we cannot fail to see that the judgment in question was obtained by a fraudulent abuse of the court which rendered it, and a fraudulent scheme by which the defendant was tricked out of the defense it had a right to make, and could have made in the only forum in which the real plaintiff could have sued.

The point is advanced in plaintiff's brief that a judgment can be annulled, on the ground that it was obtained by fraud, only in the court in which it was rendered. But there is no foundation in reason or authority for that proposition, and the contrary has been declared in *Marx v. Fore*, 51 Mo. 69; *Payne v. O'Shea*, 84 Mo. 129; *Doughty v. Doughty*, 27 N. J. Eq. 315; *Pom. Eq. Jur.* § 919. A suit to set aside a judgment is a suit in equity, and it was necessarily in another court than that in which the judgment was rendered when courts of law and courts of chancery were separate, and when the judgment attacked was a law judgment. In the case at bar, if the defendant could have no relief in a state court, it could have none at all. If the suit at bar had been brought in the United States circuit court, the defendant could not have pleaded the equitable defense it has pleaded here, because, under the practice in that court, only legal defenses can be pleaded to legal actions. The defendant would have been compelled to have filed a separate suit in equity, under that practice, to obtain the relief it seeks. But, being a citizen of this state, it could not have maintained such a suit there, because the doors of that court are not open to this defendant. Hence, if the plaintiff's contention is correct, a citizen of Missouri, against whom a judgment should be ob-

tained by fraud in a United States court, would be absolutely without remedy. A suit in equity to set aside a judgment in no sense assails the court in which the judgment was rendered. It is simply a proceeding in personam, and the decree adjudges the rights of the parties inter sese in relation to that judgment. *Story, Eq. Jur.* § 875; *Black, Judgm.* § 919; *Pearce v. Olney*, 20 Conn. 544; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62. A judgment of a United States circuit court sitting in this state is to be accorded such effect, and such effect only, as a judgment of a circuit court of this state. *Black, Judgm.* § 938; *Crescent City Live-Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U. S. 141, 7 Sup. Ct. 472. The federal circuit courts have never claimed for themselves higher authority than the highest courts of original jurisdiction of the state in which they sit, and the lofty spirit in which those courts administer justice repels the idea that they would claim that a judgment of theirs, procured by fraud and abuse of their jurisdiction, should be held exempt from a direct attack in the only forum in which the injured party could obtain relief. There are decisions to the effect that a state court will not interfere with the due course of a writ issuing out of a federal court or a trial there; and in like manner, and for the same reason, a federal court would not interfere with the process of a state court, or with a trial there. But the principle on which those decisions are founded has nothing to do with a proceeding in equity to set aside a judgment on the ground that it was obtained by fraud. In such case a federal court of equity will entertain a bill to set aside a judgment obtained in a state court, and a state court of equity will entertain a bill to set aside a judgment obtained in a federal court. The distinction here made is pointed out by the supreme court of the United States in *Marshall v. Holmes*, supra. The circuit courts of this state are courts of general jurisdiction, and there is no subject of litigation between citizens of this state beyond their jurisdiction, except such subjects as are by our law conferred on other courts of limited jurisdiction. When a suit on a judgment is brought in a circuit court in this state, the defendant may, under our Code of Civil Procedure, plead as an equitable defense facts showing that the judgment was procured by fraud. *Marx v. Fore*, 51 Mo. 69; *Ward v. Quinlivan*, 57 Mo. 425.

Plaintiff in his brief insists that the defendant has not shown due diligence in discovering the fraud. The answer avers that the fraud was known only to plaintiff and Owings, and by them concealed, so that defendant did not discover it until after the institution of this suit. There could be no laches, on the part of defendant, under those circumstances. The facts pleaded in that portion of the answer now under discussion constitute a complete equitable defense to the suit, and, if sustained on the trial, the defendant will be entitled to a decree annulling the judgment on the ground that it

was procured by fraud, and perpetually enjoining the plaintiff from proceeding or attempting in any manner to enforce it or make any use of it whatever. The circuit court erred in striking out that part of the answer.

3. There was another paragraph of defendant's answer also stricken out which contained a statement of the same facts, and the additional fact that the plaintiff had sued out of the United States court a scire facias to revive the judgment, and prayed an injunction to restrain the plaintiff from prosecuting that writ. It will not be necessary for us now to decide whether or not the action of the court in striking out that paragraph was right, because its sole object was to obtain an injunction against the prosecution of the scire facias, which injunction was denied, and that writ has doubtless taken its course, and its force is spent. The suing out of that writ serves to illustrate what has been said above on the point of the jurisdiction of the state circuit court to adjust the rights of the parties according to the equities pleaded in the answer. The defendant in that writ, whatever its equities, was entirely defenseless. That court could hear nothing in answer to that writ, except that the judgment had been paid. No equitable defense could be pleaded, and the defendant, being a citizen of Missouri, could bring no independent suit in equity in that tribunal. It would be a very imperfect system of jurisprudence if the courts of the state, which alone have jurisdiction of both parties, were powerless to enforce justice between them. The judgment of the circuit court is reversed, and the cause remanded, to be retried according to the law as herein expressed. All concur.

YOUNG v. DOWNEY et al.

(Supreme Court of Missouri, Division No. 2.
June 6, 1899.)

APPEAL—RECORD—MOTION FOR NEW TRIAL—MOTION IN ARREST OF JUDGMENT—BILL OF EXCEPTIONS—TIME FOR FILING—SALE OF DECEDENT'S LANDS—NOTICE—RATIFICATION BY INFANT—EVIDENCE—STARE DECISIS—GUARDIANS—APPEARANCE.

1. A record recited that a verdict was rendered at the August term, 1898, and that "on the same day, and within four days after rendition of judgment," a motion for new trial was filed. *Held*, that the motion for new trial was filed within four days after trial, as required by Rev. St. 1899, § 2243, providing that the motion shall be made within four days after the trial, if the term shall so long continue, and, if not, then before the end of the term.

2. A motion in arrest of judgment cannot be considered on appeal, where it is not set forth in a bill of exceptions, and the record does not show when it was filed or when it was overruled.

3. Under Rev. St. 1899, § 2168, requiring the filing of a bill of exceptions during the term at which the exceptions were taken, or within such time thereafter as the court may allow, a bill of exceptions filed during a term subsequent to that at which the trial was had is filed in time, where the cause was continued to such subsequent term on motions for a new trial and in

arrest of judgment, and the bill was filed within the time fixed by the court on overruling the motions.

4. Gen. St. 1895, p. 498, § 25, requiring that a notice to show cause why a decedent's land should not be sold to pay debts shall be published four weeks before the term of court at which the order of sale is to be made, is not complied with, where the first publication is made less than 28 days prior to the first day of the term, though four insertions in a weekly newspaper are made before said day, and a sale made thereon is void.

5. A decision will not be adhered to on the ground of stare decisis, where it is not supported by reason or authority, and is in conflict with prior decisions, and is of so recent promulgation that it is not probable that property rights will be seriously affected by its being overruled.

6. An appearance in a probate court, and objection to a void sale of decedent's land, by a mother for her infant child, will not render an order confirming the sale binding on the child, where she had not been appointed as legal guardian, and her appointment a few days later will not confirm her unauthorized act.

7. In ejectment, on an issue as to whether a sale of an infant's interest in the land of his deceased ancestor had been lawfully made, a receipt by his guardian, who was also administrator, of all claims growing out of the guardianship or administration in favor of the ward is inadmissible, as it does not tend to show a confirmation of the sale of the land by the infant.

Appeal from circuit court, Platte county; W. H. Roney, Judge.

Ejectment by Stephen Leo Young by his guardian, John W. Young, against John M. Downey and another. Judgment for plaintiff, and defendants appeal. Affirmed.

J. W. Coburn, Anderson & Carmack, and C. O. Tichenor, for appellants. Jas. W. Boyd, J. W. Coots, and Benj. Phillip, for appellee.

BURGESS, J. This is an action of ejectment, and is before us upon the second appeal. The former appeal was by the plaintiff. The judgment was then reversed, and the cause remanded for further trial. *Young v. Downey*, 146 Mo. 261, 46 S. W. 1086. From the judgment rendered upon the last trial, both parties appealed; but, plaintiff having abandoned his appeal, the case is now before us upon defendants' appeal. The facts on the last trial, as disclosed by the record, are substantially the same as upon the former trial, and are fully stated in the opinion in that case.

Plaintiff's contention is that no matter of exception can be passed upon in this appeal, because neither the motion for a new trial nor in arrest of judgment is properly preserved in the bill of exceptions; that the bill of exceptions does not affirmatively show that the motion for a new trial was filed in time; that the bill of exceptions shows upon its face that it was not filed at the term at which the motions for a new trial and in arrest were overruled; and there is nothing in the bill showing that any leave was granted to file it at any subsequent time. The verdict was rendered at the August term, 1898, and it is recited in the record: "And on the same day, and within four days after rendi-

tion of judgment in the cause, the defendants filed their motion for a new trial of this cause, as follows." Then follows the motion, which is set out in full. But it is insisted that, as the statute (Rev. St. 1889, § 2243) requires that all motions for new trials and in arrest of judgment shall be made within four days after the trial, if the term shall so long continue, and, if not, then before the end of the term, the record must affirmatively show that the motion was filed within four days after verdict, and that this is not done by the fact that the record shows that the motion was filed within four days after judgment, because the presumption must be indulged that the judgment was not entered until four days after the return of the verdict. But no such presumption can or should be indulged, for the reason that the record shows that the verdict was returned and the judgment rendered upon it at the same time. This is the universal practice in this state; and, as the record shows that the motion for a new trial was filed within four days after judgment, it must of necessity have been filed within four days after the verdict. This we think a fair construction of the record. The record shows that a motion in arrest was also filed by defendants, taken up, and overruled; but it does not appear when it was filed, whether within four days after verdict or not, or when overruled, nor is the motion set forth in the bill of exceptions, and cannot, as a matter of course, be considered.

Another contention is that the bill of exceptions was not filed in time, and that no matter of exception therein contained can be considered. But this seems to be a misconception of what the record does in fact show. While the bill was not filed at the August term, the record shows that, by an entry of record made at said term, the cause was continued on the motions of defendants for a new trial and in arrest, and that at the next term, which began on the first Monday of December next following, and on the 7th day of the month, the motions were overruled, and defendants, by entry of record, given leave to file bill of exceptions on or before the 31st day of January, 1890, which the record also shows was filed on the 30th day of that month. It is clear from these record entries that the bill was filed in time. Rev. St. 1889, § 2168.

It is insisted by defendants that the opinion of the court when the case was here before is not in harmony with the well-established cases on the points in controversy, and especially with respect to the sufficiency of the notice given by the administrator of his purpose to apply to the probate court of the county for an order to sell the land in controversy for the payments of debts, in which it was held that the notice was insufficient, upon the ground that it was only published for twenty-four days, when the statute (Gen. St. Mo. 1865, p. 498, § 25) required that it be published for four weeks. Haywood v. Rus-

sell, 44 Mo. 252, is relied upon as sustaining this contention; but that case is distinguishable from the one in hand in this: In that case the statute required that the notice should be published for four weeks, and that the last insertion should be at least four weeks before the commencement of the term, not that the last week should be four weeks before the term. The notice was published in a weekly paper in four consecutive numbers, which made four weeks, and it was held that the four weeks should end before the time, and that it was sufficient if the notice was published for four weeks, and if the last insertion, which was the commencement of the fourth week, was four weeks before the commencement of the term, it was a compliance with the law.

But the question with which we have to deal is not as to whether the last insertion of the notice in the paper was four weeks before the term, as in that case, but whether the notice was published for four consecutive weeks before the first day of the term at which the application for the order to sell the land was made; and in this respect there is, we think, a very material difference in the two cases, and that there is no conflict between them. *State v. Tucker*, 32 Mo. App. 620. The notice in this case was published on the 8th, 15th, 22d, and 29th of September, while the first day of the court at which the order of sale was made began on the 2d of October thereafter, so that it is impossible that it could have been published for four weeks before the last-named date. *Cruzen v. Stephens*, 123 Mo. 337, 27 S. W. 557, is another case relied upon by defendants as supporting their contention. In that case it was held that the insertion of an order of publication in a weekly newspaper "for four weeks," namely, on March 7, 14, 21, and 28, 1889, was a compliance with a statute requiring four weeks' publication, and the case of *Haywood v. Russell*, supra, is cited with approval, although the facts in the two cases are as widely different as they are between the Haywood Case and the case in hand. These are the Missouri decisions relied upon by defendants as supporting their position.

Now, as to the decisions which sustain our former ruling upon this question: In *Valle v. Fleming*, 19 Mo. 455, it was ruled that an administrator's sale of land is void, when it appears affirmatively that the publication of notice required by statute previous to the order, could not have been made. That case was followed and the same rule announced in *Agan v. Shannon*, 103 Mo. 661, 15 S. W. 757, in which *Sherwood, J.*, speaking for the court, said: "If there is nothing in the probate records affirmatively showing the contrary, it will be presumed that the order of sale was made upon proper publication of notice. * * * The order of sale itself is evidence of any fact which it is necessary to give the power to make it, and it is only when the record shows that it was impossible that the notice

could have been given that the order of sale would prove invalid." So in *Hutchinson v. Shelley*, 133 Mo. 400, 34 S. W. 838, it was ruled that an order of sale of land of a decedent for the payment of debts, made on petition on the day of filing the same, without giving notice to the heirs, either by publication in some newspaper for 4 weeks or by 10 printed handbills 20 days before the term of court at which the order was made, as required by section 147, Rev. St. 1899, was void, and passed no title to the land. If, then, an administrator's sale of land is void when it appears affirmatively that the publication of notice required by statute previous to the order could not have been made, or that it was not made, why is such sale not void when it affirmatively appears from the record, as in this case, that it was not made for four consecutive weeks before the order of sale was applied for? There is no difference in principle. The statute is mandatory, and must be strictly complied with. Wap. Proc. Rem. 98. "In all cases where constructive or substituted service is had, in lieu of that which is personal, there must be a strict compliance with statutory provisions and conditions." *Charles v. Morrow*, 99 Mo. 638, 12 S. W. 908, and authorities cited. In *Wilson v. Railroad Co.*, 108 Mo. 596, 18 S. W. 292, *Sherwood, P. J.*, in speaking for the court, said: "Wherever service is had or notice given with the view of subsequent adjudication, such service or notice must comply with statutory requirements, in order to possess any legal efficacy. *Allen v. Manufacturing Co.*, 72 Mo. 326, and cases cited. Mere notice of service, not according to law, brings no one into court, nor does mere knowledge on the part of the party notified of the pending proceedings have any more valid effect. *Potwine's Appeal*, 31 Conn. 381; *Smith, Merc. Law*, 322. Wherever proceedings are intended to result in an adjudication, and such proceedings differ from the course of the common law, a strict compliance with all material directions of the statute is essential. *Freem. Judgm.* (3d Ed.) § 127, and cases cited." See, also, *Railway Co. v. Hoereth*, 144 Mo. 136, 45 S. W. 1085. *Gibson v. Roll*, 30 Ill. 172, was an action upon all fours like the case at bar. The action was ejectment. Plaintiff claimed title, under an administrator's deed, to the land, which was sold for the payment of debts. The statute under which the proceedings by the administrator were had required that notice of the intended application for the sale of the land should be published for three successive weeks, the first publication to be at least six weeks before the presenting of the petition. There was less than six weeks between the 24th of July, when the notice was first published, and the 3d day of September, when all persons interested were notified that the petition would be presented. It was held that notice by an administrator, of an application to sell lands, must be published for six full weeks before the day therein specified

51 S.W.—48

as the time when his petition would be presented, and, as the notice showed that this was not done, that it was void upon its face, and the court without jurisdiction to make the order. In *Davis v. Robinson*, 70 Tex. 394, 7 S. W. 749, it was held, under a statute which requires that a "citation shall be published once in each week for four successive weeks previous to the return day thereof," that full twenty-eight days before return day, once in each week, for four successive weeks, was required. Again, in *Loughridge v. City of Huntington*, 56 Ind. 253, it was held that the publication of an ordinance, as required by the act incorporating said city, for three consecutive weeks in some newspaper, was a publication for twenty-one days, and not simply three insertions in such newspaper. In 1 *Elliott, Gen. Prac.* p. 450, it is said: "Where the notice is required to be published once each week for a certain number of weeks, the full number of days necessary to constitute the requisite number of weeks must, according to the weight of authority, elapse between the date of the first publication and the return day. So, it has been held that a statutory provision requiring publication for 'three successive weeks' means that twenty-one days must elapse between the first publication and the return day, and not simply three insertions in a weekly newspaper, covering only fifteen days." In *Harness v. Cravens*, 126 Mo. 233, 23 S. W. 971, *Sherwood, J.*, speaking for the court, said: "This doctrine is abundantly established, that, when a mode of securing jurisdiction differing from that of the common law is prescribed by statute, nothing less than a rigid and exact compliance with the statute is an indispensable requisite to obtaining jurisdiction," citing 1 *Elliott, Gen. Prac.* § 247; *Granger v. Judge*, 44 Mich. 384, 6 N. W. 848. There is then quoted with approval the following from that case, to wit: "Where cases and proceedings are not according to the usual course, and are special in their character, they are held void on slighter grounds than regular suits, because the courts have not the same power over their records to correct them. So, where there has been no personal service within the jurisdiction, the doctrine prevails that proceedings not conforming to the statutes are void. But this is on the ground that there has been no service whatever, and the party therefore has not been notified, in any proper way, of anything. The purpose of the statutory methods is to furnish means from which notice may possibly or probably be obtained. But, as a court acting outside of its jurisdiction is not recognized as entitled to obedience, the special statutory methods stand entirely on their own regularity, and, if not regular, cannot be said to have been conducted under the statutes. The distinction is obvious, and is not imaginary." In 1 *Freem. Judgm.* (4th Ed.) § 127, it is said: "The judgment is based on the service as much as subject-matter. The

petition simply says, 'I have a cause of action against the defendant.' The law says, 'Notify the defendant of the proceedings, and the court will hear you.' Hence the notice must be given under the forms of law. Where it provides a form, or gives direction as to the manner of service by publication, the statute must be complied with strictly; the direction is mandatory." In the *Harness-Cravens Case*, supra, Judge Sherwood also said: "It will not do to say that the unauthorized order of publication would be just as likely to apprise the then defendant of the suit against him as if he had been proceeded against according to the specific method prescribed by law, because, if this were all that is required, then a printed circular or letter sent out by the clerk would answer the end and accomplish the purpose just as well. The test is, was the method used in a given instance the one prescribed by the statute? If the answer is in the negative, that answer, without more, condemns the method employed, and announces its nullity. Whether that method actually notified the party is of no importance whatever. The end of the law has been attained when, and only when, its forms have been observed." As was said in *Hollingsworth v. Barbour*, 4 Pet. 466, there is an obvious distinction, in reason, between this case and the case where there has been personal service of irregular or erroneous process. In that case the party has notice in part, and may, if he will, appear and object to or waive the irregularity; in this, the publication, being unauthorized, is not even constructive notice, and, unless the proceedings are considered as void, the injured party may be remediless." *Parry v. Woodson*, 33 Mo. 347. Where the service of process is personal, no question is better settled in this state than that a judgment by default, rendered upon such service within the time prescribed by statute, is void, and may be attacked collaterally. *Sanders v. Rains*, 10 Mo. 770; *Williams v. Bower*, 28 Mo. 601; *Howard v. Clark*, 43 Mo. 344. *Bird v. Norquist*, 46 Minn. 318, 48 N. W. 1132, was an action before a justice of the peace, commenced by attachment levied upon the property of the defendant, who was a nonresident of the state, the summons was ordered to be served by publication, but the return day was less than six after the expiration of the period of publication, and on that day the justice entered judgment for the plaintiff, the defendant not appearing, and it was held that the justice had no jurisdiction, and the judgment void. So, in *Brownfield v. Dyer*, 7 Bush. 505, it was held that, in all proceedings upon constructive notice, the provisions of a statute regulating the same must be strictly complied with, and that, when it requires that the defendant shall be warned to appear in the action on the first day of the next term of the court which does not commence within 60 days of the time of making the order, an order of the clerk warning

the defendant to appear and answer on the first day of a term commencing less than 60 days from the date of the order is not only irregular, but absolutely void.

This question was fully discussed by the Kansas City court of appeals in *State v. Tucker*, supra, and, after an elaborate review of the authorities, under a statute which requires that notice of an election shall be given by publication in some newspaper published in the county for four consecutive weeks, the last insertion to be 10 days next before such election, it was held that there must be four weeks' notice (28 days' notice) of the election, the computation to be made by excluding the first day of the notice, and including the day of the election. There are cases which seem to sustain defendants' contention; but the decided weight of authority in this state and elsewhere is in accord with the views which we have expressed, which we think supported by the soundest reasoning. It was only by a strict compliance with the statute that the court could have acquired jurisdiction to make the order, in absence of which the sale by the administrator must be held to be void. When the statute requires 4 weeks' publication of such notices, it does not mean 24 days, or any less number than 28. If 24 days' publication of the notice will suffice, then a still less number will also, or the publication may be dispensed with entirely. But it is insisted that the case of *Haywood v. Russell*, supra, should be adhered to upon the ground that the rule therein announced has become a rule of property, on the faith of which many titles founded on judicial sales depend. We have, however, pointed out wherein that case differs from this, and given our reasons why it should not be regarded as an authority in favor of defendants' contention that four insertions in a weekly newspaper of the notice by the administrator of his purpose to apply to the probate court for an order for the sale of the land was a compliance with the statute requiring such notice to be published for four weeks before such application, and this, too, notwithstanding the notice was only published for twenty-four days. If we are correct as to what that case decides, the doctrine of *stare decisis* cannot be invoked by defendants on account of the ruling in that case, for the reason that, as we have said, its facts are entirely dissimilar from the facts in this. The question then arises as to whether the doctrine should apply to the *Cruzen Case*, which does sustain defendants' position. That case was decided in June, 1894, while the case of *Valle v. Fleming*, supra, which announces a different rule, was decided in March, 1854,—over 40 years ago,—and has been repeatedly followed without ever having been called in question. In the light of these authorities, should the ruling in the *Cruzen Case*, which we think not in line therewith, and not supported by either reason or authority, be adhered to upon the

ground of stare decisis? It is of so recent promulgation that it is not probable that property rights will be seriously affected by its being overruled, especially when what seems to us to be the repeated adverse rulings of this court, referred to, are taken into consideration, as they should be, and it is only upon this ground that the rule can be invoked in this case. In 23 Am. & Eng. Enc. Law, 36, it is said: "No prior decision is to be reversed without good and sufficient cause, yet the rule is not in any sense ironclad, and the future and permanent good to the public is to be considered, rather than any particular case or interest. Even if the decision affects real-estate interests and titles, there may be cases where it is plainly the duty of the court to interfere and overrule a bad decision. Precedent should not have an overwhelming or despotic influence in shaping legal decisions. No elementary or well-settled principle of law can be violated by any decision for any length of time. The benefit to the public in the future is of greater moment than any incorrect decision in the past. Wherever a correction can be made, without working more harm than good, it should be done." To let the decision stand, when the rule therein announced as to what constitutes four weeks' publication of a notice is so at war with what everybody understands to be 28 days, can but result in more harm than good, and be the source of much litigation in the future. It should therefore be overruled.

Another contention is that the case, as now presented, is somewhat different than what it was when here before, in that it then appeared, inferentially at least, that Angelina Downey's objection to the order of sale in the probate court was simply for herself and for her own interest, when in fact the record now shows that she appeared for herself and for her infant child, Lewis Downey, and objected to the sale of the land until his interest could be ascertained, and that, as she appeared for him, he is bound by the order of sale. But it also appears from the record that Angelina Downey was not at that time the legal guardian of Lewis Downey; consequently no act of hers was binding on him, nor did the fact that she was within a few days thereafter duly appointed and qualified as his guardian confirm what she had theretofore done without authority. Nor was error committed in excluding the written receipt from Young, the guardian of Lewis Downey, in full for himself personally, and as administrator for all claims growing out of the guardianship or out of the administration in favor of his ward, Lewis Downey, as it had no tendency to show a confirmation of the sale of the land by Downey. For these considerations, the judgment should be affirmed, and it is so ordered.

GANTT, P. J., and SHERWOOD, J., concur.

RISSLER v. AMERICAN CENT. INS. CO. OF ST. LOUIS.

(Supreme Court of Missouri, Division No. 2.
June 6, 1899.)

ACTION ON POLICY COVERING TWO CLASSES OF PROPERTY—COMPELLING ELECTION—EVIDENCE—INACCURATE REPRESENTATIONS OF APPLICATION INDUCED BY AGENT.

1. In an action on a policy which insures two classes of property in designated amounts, a petition which alleges loss of both classes by one fire, and seeks to recover for both, is not open to the objection of joinder of two causes of action in one count, and he cannot be compelled to elect on which he will rely.

2. In an action on a policy which provided that insured should take an inventory annually, and keep books showing his daily transactions, testimony as to the value of the property destroyed is competent, though defendant had a right to demand the production of the books.

3. Insured, in answer to the question in the application blank as to when his last inventory was taken, stated to the agent, who was writing the answers, that he did not remember whether it was in 1894 or 1895, but that he could ascertain by looking at his books; whereupon the agent said it was immaterial, and wrote in "1895." The last inventory was taken in 1894. The insured signed the application, which stipulated that the answers therein should be considered as warranties, and the policy was issued pursuant thereto. The agent had authority to solicit insurance and issue policies for the company. *Held*, that the company was estopped to repudiate its liability on the ground that his statement as to when the last inventory was taken was false.

4. An insurance company is estopped to repudiate its liability on a policy when an applicant has been misled into making a false statement in his application therefor, though it is stipulated that the representations shall be considered as warranties, by the erroneous explanation of its agent as to the scope of a question, when the insured has truthfully stated the facts to the agent.

Appeal from circuit court, Cooper county; D. W. Shackelford, Judge.

Action by George C. Rissler against the American Central Insurance Company of St. Louis. From a judgment in favor of plaintiff, defendant appealed. Affirmed.

Fyke, Yates & Fyke, for appellant. W. F. Johnson and W. M. Williams, for respondent.

GANTT, P. J. This is an action on a policy of insurance issued by defendant to plaintiff. The policy contains this provision: "In consideration of the stipulations herein named, and of \$72.85 premium, the American Central Insurance Company of St. Louis does insure George C. Rissler for the term of one year from the twenty-first day of December, 1895, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding \$4,700, to the following described property, while located and contained as described herein, and not elsewhere, to wit, \$200 on store and office furniture and fixtures, including show cases and iron safe; \$4,500 on stock of general merchandise." The petition is one count. Defendant filed a motion to compel plaintiff to elect upon which cause of action stated in the petition he would rely, which motion was overruled, and

defendant excepted. The risk was solicited by E. H. Harris, a banker at Pilot Grove, and agent of defendant at that place. The execution and delivery of the policy, the ownership of the property by plaintiff, and its destruction by fire during the term covered by the policy are not denied. In the written application prepared by Harris, the agent, is the following stipulation: "And the said applicant hereby covenants and agrees to and with said company that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, and said answers are to be considered the basis upon which this insurance is effected, and the same is understood to be incorporated in, and as forming a part and parcel of, the policy to be issued hereon, and a special warranty by and upon the part of the applicant." Plaintiff's name was signed immediately under the foregoing. In the application the following questions and answers appear: "How often do you take an inventory of stock? A. Yearly. Do you carefully preserve the inventory? A. Yes. What was the date of the last? A. January, 1895. What was the amount of the last inventory? A. \$6,200. Do you keep a cash book and merchandise account? A. Yes. Have you ever suffered loss of property by fire? A. No." It is admitted that plaintiff signed the application, after the answers were written as above, with full knowledge that they were so written. The defendant, in its answer, sought to avoid liability on the policy solely on the ground that the above answers were untrue; that plaintiff did not make an inventory yearly; did not take an inventory January, 1895, but his last inventory was January, 1894, and did not amount to \$6,200, but to \$5,500 only; and plaintiff previous to the time of the application had suffered loss by fire. The reply was set up, and the evidence introduced upon the trial established these facts: E. H. Harris, who issued the policy, was the agent of the defendant company. He had authority from it to solicit insurance, receive premiums, and issue policies, which were left with him in blank. He could make it a completed contract of insurance. He visited plaintiff at his place of business, and offered to insure his stock of goods, as well as the furniture and fixtures contained in his storehouse. Defendant's said agent had with him a blank application, which he filled up in plaintiff's presence. When the questions in regard to the last inventory were asked, plaintiff told the agent that it was taken in 1895 or 1894, and that he did not remember which; that he had said inventory in his safe; and started to get it, and give the exact date. The agent wrote "1895," and the amount, and told plaintiff that it was not material to examine the inventory for the exact date; that the train was coming upon which the agent desired to leave, and asked plaintiff to sign the application, which he did. The

agent said in his testimony that Rissler told him that he would look at the inventory, and get its date, but that he (the agent) replied that it did not amount to anything anyhow; that the agent knew he had taken the inventory in 1894, because he had seen it; and that he had a full stock of goods. Plaintiff was prevented by the agent himself from giving him the exact date, and signed the application after having told the representative of the company that he did not know whether the last one was taken in 1895 or 1894, and upon the representation, by the said agent, that it was not material for him to be particular about the exact date. In answer to the question whether he had ever suffered loss by fire, he called the attention of the agent to the fact that Huyett & Rissler, about five years before, had suffered a loss in a company represented by said agent. Mr. Harris replied that he knew all about that, but the question referred to fires where the plaintiff was alone concerned, and that it did not mean partnership loss. The agent had full information upon this subject, and it was expressly called to his attention by plaintiff, and the agent represented to plaintiff that the question did not refer to any losses, except those sustained by him individually. The agent wrote and filled all the answers in the application, and upon his statement that they were satisfactory, and that he was in a hurry to make the train, plaintiff signed the application. The circuit court instructed the jury that, if they believed the application was prepared by defendant's agent, with full knowledge as to the date and amount of the plaintiff's last inventory, and of the loss by fire suffered by plaintiff and his partner five years previous, and that said agent had authority to solicit insurance for defendant, to collect premiums, and issue its policies, and that plaintiff had truthfully disclosed all the facts to said agent, then the policy would not be avoided on account of the written answers contained in the application. Plaintiff, upon the trial, testified that the goods destroyed by the fire were worth, at the time of the destruction thereof, about \$7,500, and his fixtures and furniture \$300 or \$400. He also proved the value of the goods by his two clerks, who were familiar with the same. The defendant objected to this evidence, because the policy required that an inventory should be taken, and books kept showing the daily transactions, the amount purchased for cash and on credit, and, if plaintiff had these books, the loss could be arrived at with some certainty, and that his opinion of the value of the goods was not competent. The court overruled this objection, and permitted the witnesses to state what the goods destroyed were worth, and defendant excepted. No notice was given by the defendant, requiring the production of the books and papers, and no request made for an opportunity to examine them. There were verdict and judgment for plaintiff for the amount of the

policy, and the case is now here on defendant's appeal. The three rulings of the lower court, referred to in the above statement, are the errors assigned.

1. There was no error in refusing to require plaintiff to elect which cause of action he would prosecute. The petition only alleged one cause of action. When a contract contains several stipulations, a petition which alleges breaches of the different stipulations is not open to the objection of having joined two causes of action in one count. *Comstock v. Davis*, 51 Mo. 569; *Brooks v. Ancell*, 51 Mo. 178; *Newton v. Miller*, 49 Mo. 298. There is nothing in *Trabue v. Insurance Co.*, 121 Mo. 84, 25 S. W. 848, which changes the rules of pleading. It was simply ruled in that case that the contract was a severable one, and where, for some reason, the policy might be avoided as to the real estate insured, it might still be good as to the personal property.

2. The objection to the testimony of plaintiff as to the value of the goods is clearly not tenable. Let it be granted that the plaintiff was required to keep a set of books, and that defendant, by giving notice, could have required plaintiff to produce said books, still this does not change well-settled rules of evidence, and determine that nothing but the books are evidence. The competency of the books did not render other evidence incompetent. *Seyfarth v. Railroad Co.*, 52 Mo. 449. The evidence was not otherwise objectionable.

3. The decisive point, however, in this case was raised by the demurrer to the evidence, which was based upon the proposition that the written answers to the questions in the application were not true, and that the knowledge of the agent who prepared the application and his construction of what the questions meant could not vary the policy. The case certainly presents the question very sharply. The evidence does not admit of a doubt that plaintiff frankly and truthfully stated the true facts to the agent in regard to the previous fire which had destroyed the store of Huyett & Rissler, and that the agent advised him that the question only referred to a previous fire by which the plaintiff alone suffered loss. Equally clear is the fact that, when the question was asked as to the time when the last inventory was taken, plaintiff distinctly stated that he was not certain, but would get the inventory itself, and ascertain the date, and was assured by the agent that he need not get it; that it was not material to look for the date of the inventory; that he knew he had taken an inventory in 1894, and was in a hurry to make the train, which was then in sight, and the agent wrote "1895," and by this means obtained plaintiff's signature. There is not the slightest ground for charging fraud or collusion between the agent and plaintiff, and none is charged. Clearly, the agent misled the plaintiff into supposing—First, that the firm's fire should

not be reported; and, secondly, that the date of the last inventory was wholly immaterial. Do the facts that his former firm had been burned out, and that the last inventory was made in 1894, instead of 1895, under the circumstances, avoid the policy?

In *Parsons v. Insurance Co.*, 132 Mo., loc. cit. 592, 31 S. W. 121, it was held by this court "that an agent of an insurance company, authorized to make contracts of insurance in the name of his principal, to countersign, issue, and deliver policies, and receive the premiums therefor, is clothed with the full authority of his principal, and may waive conditions contained in the printed policy he issues to the insured, to whom he stands in the place of his principal in making the contract of insurance." The agent, Mr. Harris, in this case had all the powers enumerated in the *Parsons Case*, and that he waived the date of the last inventory and the mention of the fire by the assured is not open to doubt under the evidence. That such an agent may waive the printed stipulations in the policy is now well supported by the highest authority. 1 *Joyce, Ins.* §§ 472, 477, 493, and authorities cited. In 2 *Wood, Ins.* (2d Ed.) pp. 842, 844, it is laid down by the learned author that "in all cases where the agent filling up the application is clothed with real or apparent authority to make a contract of insurance, or to insure and to bind the company in that respect, the agent knowing the fact, the principal is estopped from claiming he has been misled by such omissions or misstatements"; and "it has been held that the explanation of questions is within the scope of the agent's authority, and, if through his direction or advice a question is erroneously answered, the principal must bear the consequences, and not the assured." These conclusions accord with our experience. The agent represents the company. He is presumed to be more intimately acquainted with the business of insurance than those whom he solicits. The average man relies upon the knowledge and skill of the agent to properly prepare the application, and relies upon the authority which the agent assumes. He rightly considers that, when the agent is told the facts, he knows which are material and which are not. It is within the apparent scope of the agent's authority to decide what is a satisfactory answer, and when, with full knowledge of the facts, he assures the applicant for insurance that a portion of them are immaterial, and himself erroneously misstates others, without the slightest suggestion of fraud on the part of the insured, the company who accredits him must suffer from his mistakes, and not the innocent policy holder. *Franklin v. Insurance Co.*, 42 Mo. 456; *Combs v. Insurance Co.*, 43 Mo. 148; *Insurance Co. v. Olmstead*, 21 Mich. 246; *Kausal v. Association*, 31 Minn. 17, 16 N. W. 430; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Insurance Co. v. Baker*, 94 U. S. 610; *Hotchkiss v. Insurance Co.* (Wis.) 44 N. W.

1106; *Parsons v. Insurance Co.*, 182 Mo. 583, 31 S. W. 117, and 34 S. W. 476. In the *Combs* Case this court said, "where the disclosure respecting the solicited risk is frank and full, and the insurance company accepts it and appropriates the premiums, and a subsequent loss occurs, the indemnity contracted for should be fairly met and realized to the assured."

This case presents the naked question whether an insured must lose his insurance because the agent to whom he made a full and honest disclosure made a mistake as to what statements were material to the risk, and by his advice leads the insured to make an erroneous statement or a misstatement. We hold that the loss must fall on the company, on the ground that the knowledge of its agent is imputable to it, and, knowing all the facts when it takes the premium and assumes the risk, it is estopped to set up and repudiate the indemnity because of the carelessness, ignorance, or fraud of its own representative, which it has clothed with the full authority of the principal. Were we to hold otherwise, in the language of Judge Cooley, in *Insurance Co. v. Olmstead*, "it is easy to see that the community will be at the mercy of the insurance agents, who will have little difficulty, in a large proportion of cases, in giving a worthless policy for the money they receive." It is no hardship to hold an insurance company bound for the acts of its agents whom it authorizes to solicit insurance and countersign, issue, and deliver its policies. The old maxim, "*Qui facit per alium, facit per se*," applies in all its ancient vigor to such a case. We find no error in the judgment of the circuit court, and it must be and is affirmed.

SHERWOOD and BURGESS, JJ., concur.

OGLESBY v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. May 30, 1899.)

RAILROADS—INJURIES TO EMPLOYEES—HIDDEN DEFECTS—INSPECTION—PRESUMPTIONS.

1. A railroad company is not liable to a brakeman for personal injuries incurred in a wreck caused by rotten sills in a freight car belonging to another company, where it was ignorant of the defect, and had made such an inspection of the car as a man of ordinary prudence would have made under the circumstances.

2. In an action for such injuries, an inspection proven to have been made by the company will be presumed to have been a proper one, in the absence of evidence to the contrary.

Gantt, C. J., and Brace and Valliant, JJ., dissenting.

In banc. On rehearing. Reversed.

For former opinion, see 37 S. W. 829.

SHERWOOD, J. The petition contains two specific charges of negligence against defendant. The first alleges that defendant negligently took into its train a car that was rotten, defective, unsafe, etc. The second avers that the train in which this was being transported was run at a rapid and danger-

ous rate of speed, etc. Both the foregoing grounds of negligence are charged in the petition to have caused the wreck and plaintiff's injuries. The answer is a general denial. The instructions which it will be necessary to notice hereafter are the following, to wit:

Plaintiff's instructions, given by the court: "(1) The court instructs the jury that if you believe, from the evidence in this case, that at the time of the wreck of the defendant's train the timbers of the car No. 7,919, Union Line, mentioned in evidence, were rotten and decayed, and that by reason thereof the said car was not in a reasonably safe condition for use in defendant's said train, and that defendant knew of, or by the exercise of ordinary care might have known of, the condition of said car, and that by reason of the said condition of said car, if the jury believe, from the evidence, it was in such condition, the said car broke, and the said train was wrecked, and plaintiff, while in the line of his employment, and without fault on his part, was injured thereby, the jury must find for the plaintiff. (2) If the jury find for the plaintiff, in estimating his damages they will take into consideration not only his age and condition in life, the physical injury inflicted, and the bodily pain and mental anguish endured, but also any and all such damages, if any, which it appears, from the evidence, will reasonably result from said injury in the future, not to exceed, in all, the sum of \$25,000."

Defendant's instructions which were given are as follows: "(1) Even if the jury should find, from the evidence, that said Union Line car 7,919 was the first one of the train to leave the track, still this, in and of itself, does not prove that said car was unsafe, unsound, or improperly loaded. (2) It is further charged in petition that said train on which plaintiff was injured was run at a rapid and dangerous rate of speed. You are instructed that defendant was guilty of no negligence in running said train at the rate of speed disclosed by the evidence. (3) Even if the jury should find and believe, from the evidence, that some portion of said car 7,919, Union Line, after the accident, appeared to be unsound or defective, yet the plaintiff is not entitled to recover herein unless the jury believe and find, from the preponderance of the evidence, that said defects were known to defendant prior to said accident, or by the exercise of ordinary care upon its part said defects or unsoundness could have been discovered, by ordinary inspection upon the part of said defendant. (4) 'Ordinary care,' as used in these instructions, means such care as an ordinarily prudent person would exercise under the circumstances detailed in evidence. If, therefore, the jury believe, from the evidence, that defendant, through its proper servant or servants, after having received said Union Line car 7,919 for the transportation of flour, mentioned in evi-

dence, inspected the same at Atchison, Kan., then the presumption is that said servant exercised ordinary care in the inspection of said car, and did his duty, and it devolves upon plaintiff to show, by a preponderance of the evidence, that said defendant failed to exercise ordinary care in inspecting said car; and unless the jury shall find, from the evidence, that said plaintiff has overcome the presumption aforesaid by the greater weight of all the testimony, it should find the issues herein in favor of defendant, notwithstanding said car may have been defective, and by reason thereof caused the injury to plaintiff. (5) Even if the jury should find, from the evidence, that said Union Line car 7,919 was the first one on the train to leave the track, that it was unsound, and that it caused the wreck and plaintiff's injury, still, unless the jury believe, from the greater weight of the evidence, that defendant's servants failed to exercise ordinary care in inspecting said car before the accident, their verdict should be for the defendant. The jury are further instructed, in this connection, that, in the absence of any evidence to the contrary, the law presumes that the servants of defendant who inspected said car performed their duty properly. (6) The court instructs the jury that defendant was not required, under the law, upon receipt of said Union Line car 7,919, to make tests to discover hidden defects in the construction, or in the materials used in the construction, of said car. (7) If the jury believe, from the evidence, that there was nothing patent upon the face of said Union Line car 7,919 indicating that it was unsound and unfit for use, and that there was nothing to indicate, upon reasonable inspection of same by the servants of defendant, that said car was unsound and unfit for the use it was then put to in transporting said flour, then your verdict must be for the defendant, notwithstanding you may also believe that said car was unsound, and that said unsoundness caused the wreck which resulted in plaintiff's injury. (8) The jury are further instructed that the defendant was not bound to furnish to plaintiff absolutely safe appliances and cars with which to work, but was only required to use ordinary care in inspecting this and other foreign cars which came upon its road, so as to ascertain whether any defects or unsoundness appeared thereon which were open to inspection, and which could be ascertained by ordinary inspection of same. (9) You are further instructed that, in considering the charges of negligence alleged against defendant, you are confined solely to said Union Line car 7,919, and cannot consider any other supposed negligence which may have caused the injury to plaintiff. (10) The court instructs the jury that defendant was guilty of no negligence in running its train at the rate of speed at which it was run at the time of the accident. If the jury are unable to determine, from the evidence, whether said Union Line car 7,919

caused plaintiff's injury, or whether it occurred from some other source, then it is your duty to return a verdict for defendant, as the burden of proof herein devolves upon the plaintiff. Even if the jury should find and believe, from the evidence, that said Union Line car 7,919 was the first car which went off defendant's track, yet this does not prove that said car was unsound or defective, and your verdict must still be for defendant, unless you further find and believe, from the greater weight of the evidence, that said car was unsound and defective, and either known to have been so by defendant, or by the exercise of ordinary care upon its part could have been known, and, further, that said unsoundness of said car directly caused plaintiff's injuries. (11) The burden of proof in this cause is upon the plaintiff. Before the jury can, therefore, find for the plaintiff, it must believe and find from the preponderance or greater weight of all the evidence—First, that the Union Line car 7,919, next to defendant's tender, caused plaintiff's injuries; second, that said car was defective, unsafe, and unfit for the purposes for which it was then used; third, that said defects were known to defendant, or by the exercise of ordinary care upon its part could have been ascertained by reasonable inspection upon the part of said defendant. Unless the jury find, from the greater weight of all the evidence, in favor of plaintiff upon all three of the propositions aforesaid, the verdict must be in favor of the defendant. (12) The jury are instructed that, although you may find and believe, from the evidence, that the train upon which plaintiff was acting as brakeman was, at the time of the injury, being run at a rapid or dangerous rate of speed, and by reason thereof was ditched or wrecked, and the plaintiff injured thereby, yet, under the evidence in this case, your finding should be for the defendant. (13) Unless the jury believe, from the preponderance of the evidence, that the Union Line car 7,919 broke before it left the track, then your verdict must be for defendant, notwithstanding you may further believe that some portion of said car was unsound or rotten."

The case was tried in the circuit court of Bates county, upon change of venue, at the June term, 1894, and a verdict returned for plaintiff in the sum of \$15,000. Motions for new trial and in arrest were filed and overruled, and a bill of exceptions duly filed in said cause. The cause was brought to this court upon a transcript of the evidence, and was originally docketed in division No. 1 of this court. The case was certified to the court in banc, without an opinion. The first opinion was written by MACFARLANE, J. (37 S. W. 829), in which the writer hereof dissented. The defendant filed a motion for rehearing, which was sustained by the court, the cause reargued, and the last opinion, filed by the same judge, now stands as the opinion of the court. A motion for rehearing having

been again filed and fully argued, the cause is for review upon said last motion.

The injury occurred west of Little Blue station, in Jackson county, Mo., on the 11th day of December, 1892. The plaintiff was a brakeman upon defendant's freight train, and had been in the service of defendant for about one year in such capacity. He was on top of the train when the same was wrecked. They were going down a grade between Independence and Little Blue, Mo., when the injury occurred. Some 14 cars were derailed and practically torn to pieces. The engine and tender likewise were derailed, with the exception of the two small wheels of the engine. There were no eyewitnesses to the transaction, except the train crew, whose testimony will hereafter be discussed. Practically all the testimony offered by plaintiff was from witnesses who went there to the scene of the accident after the wreck, and with the preconceived idea that the Union Line car mentioned in evidence was the cause of the wreck, and made their examination accordingly. Many of the defendant's witnesses examined, not only the Union Line car, but likewise the other cars which were broken, and gave it as their opinion that the other cars were in no better condition before the accident than the Union Line car. I shall here undertake to refer to the facts in general, without quoting from the record, as the principal contention in the case will arise upon the demurrer to the evidence. It being necessary to quote from the evidence in the opinion hereafter, we shall not undertake to do so in our present statement of the case. As the petition charges the defendant with negligence in running the train at a rapid and dangerous rate of speed, and in having in its train a rotten and defective car, we shall take up the propositions in the order mentioned: (1) Plaintiff testified that the train was running too fast at the time of the accident, and that the engineer did not shut off the steam, nor did the other brakemen set the brakes as they came down this grade immediately before the accident. The train was about two hours late. The train was running upon passenger train time, and the crew were endeavoring to make the side track and get out of the way of the passenger train. The petition likewise charged that the train was being run at a rapid and dangerous rate of speed, and the court, in its instructions given upon the part of defendant, Nos. 2-10 and 12, *supra*, tried the case upon the theory that the train was run at a rapid and dangerous rate of speed, although it instructed the jury that defendant was guilty of no negligence in running its train as aforesaid, although the co-servant of plaintiff may have run it in such manner. (2) The next charge is that defendant was guilty of negligence in taking into its train a rotten, unsafe, and defective car (Union Line car 7,919), and that, by reason thereof, it, in conjunction with the rapid and dangerous rate of speed aforesaid, caused the wreck-

ing of the train and plaintiff's injury. As correctly stated by Judge MACFARLANE, in his opinion: "The car in question was what is known as a 'Union Line' car, and did not belong to defendant. It was built by the United States Rolling-Stock Company, for the Pennsylvania Company, in December, 1886. was marked 'U. L.' and numbered '7,919.' It was built of good materials, according to proper plans and specifications, and was marked as having the capacity of 60,000 pounds." In the same connection the record further shows that the capacity of this car has never been reduced, and that the average life of said car was from 15 to 20 years; that on February 7, 1891 (the injury occurring December 11, 1892), said car 7,919 had Graham draft rigging placed on it, which greatly increased its strength, and, if any rotten sill had been in said car, it is claimed by the superintendent that it would have been found at that time and changed; that it is not within probability (according to his testimony) that sound timber in such a car would rot in 5½ years, or that the timber in this car was rotten at the time of the accident; that no defects in any part had ever been called to the attention of the company. As stated by MACFARLANE, J.: "On December 7, 1892, the car came into defendant's possession in St. Louis, loaded with 31,800 pounds of nails, and, so loaded, was hauled over its road to Atchison, Kan., where it was unloaded, and remained until December 10, 1892, when it was loaded with 30,000 pounds of flour, to be carried to St. Louis. The car was inspected at Atchison, and no defects were noted by the registry of the inspector." In the same connection Elder, witness for plaintiff, testified: "Q. Do you ever inspect the cars before you load them? A. Not myself; I always tell the teamsters to get good cars. Q. Some one under you always notices, to see whether or not the cars are defective? A. Yes, sir. Q. You never load into defective cars? A. Not if we know it. Q. That is your purpose in loading the cars in the manner you described a minute ago? A. Yes, sir." Judge MACFARLANE, in his statement of facts, then continued: "So loaded, the car was carried to Kansas City, when it was again inspected, and no defects were noted." In this connection Conductor Butts testified: "Q. You do not know whether this car had been inspected or not? A. Yes, sir. Q. Did you see it done? A. Yes, sir. Q. Who by? A. The car repairer, that morning. Q. When? A. That morning. Q. Did you see him doing it? A. Yes, sir; I seen him going around doing it." Judge MACFARLANE, in regard to his facts, then continued: "On the 11th of December, 1892, the car was put into a St. Louis train. The train consisted of 18 loaded cars, No. 7,919 being placed next the engine. Plaintiff was a brakeman on this train. While descending a grade east of Independence, about 14 of the cars were thrown from the track, and plaintiff, who was on top of one of them

at the time, was badly injured. The court gave two instructions at the request of plaintiff, and all asked by defendant except those in the nature of demurrers to the evidence." The car, after having left Kansas City, came back over the same road it had previously traveled, until near Little Blue station, when the wreck occurred as above stated. No witness testified that any defects of any kind or description had ever been noticed in the Union Line car at any time prior to the accident.

The following physical facts appear uncontradicted from the record: At least one of the rails was found, immediately after the wreck, bent, turned up, or out of place. Three witnesses (two of whom were introduced by plaintiff,—Lehel and Settles) testified as to the condition of the rail aforesaid. Witness Keller, for defendant, says he noticed one rail out of place. No other testimony contradicting the foregoing, that I can find, is in the record. It likewise appears from the testimony that the tender went off first. The undisputed testimony of Conductor Butts is to the effect that a car going off, as the Union Line car did, could not have pulled the engine and tender off the track, as the latter weigh from 60 to 70 tons. The uncontradicted evidence also shows that the engine and tender were off the track, with the exception of the two small wheels of the engine. It is likewise uncontradicted that one truck off will take the engine off with it. It is likewise testified to by Conductor Butts that the wreck itself might have damaged the Union Line car, as shown by the testimony. The evidence, without dispute, is to the effect that the other cars which were wrecked were in no better condition than this Union Line car. In fact, there is no testimony even tending to contradict the foregoing. The undisputed evidence likewise shows that the link which fastened the Union Line car to the tender was twisted half over when found after the wreck. (Lafferty's evidence.) It also stands without contradiction that the sills were found freshly broken after the wreck. There were six or eight sills under the car. These sills were from six to eight inches in diameter. No other witnesses testified for the plaintiff upon this subject. The cars, when the wreck occurred, went off upon each side of the track. According to the testimony of Conductor Butts and Engineer Donnelly, the engine and tender must have gone in the neighborhood of 200 yards after leaving the track, and after the wreck occurred. The track, at the place of the accident, runs north and south. The engine and tender, with one-third of the Union Line car, went off on the west side of the track. The hind portion of the car remaining with the wreck, having evidently plowed along in the track or on the ground, must have broken some of the sills, or left them in different shape from the way they appeared when the wreck first occurred. At least two or more of plaintiff's witnesses say that the rear portion was shoved to one

side. The other witnesses upon this subject paid no especial attention to the matter. The cars were jammed together, and the one next to the Union Line car went off to the west. The sills were not, as stated by MACFARLANE, J., broken "squarely" off, but nearly so. Witness Conway speaks of a "square break," or "off break," but this was in reference to the hind portion, which had plowed along on the ground. The testimony of plaintiff's witnesses tends to show that after the wreck, after the car was dismantled, from an examination of the freshly-broken places, and by looking at the breaks in the sills, these witnesses discovered some defects in the breaks, the size of which are not shown by the testimony. They likewise testify as to only four of the sills being defective. The undisputed evidence tends to show that the two outside sills were painted over, and apparently appeared to be sound. The others testified that the two inside or middle sills were not painted, and seemed to be defective, as they appeared with the car dismantled, and as disclosed by the freshly-broken places in plain view as the car then stood. All the testimony disclosed the facts, in respect to the last matter, as just stated. The testimony by defendant's witnesses upon this subject is to the effect that the sills were in sound condition, or practically so. The only eyewitness who testified to the condition of the Union Line car when it left the track is Brakeman Keller, who says that the car was whole when it left the track, and that the damage was done after it left the track; that he saw the whole car going down, and then undertook to protect himself.

Upon these physical facts, with the other testimony, the court gave the instructions heretofore set out, and the jury returned a verdict for \$15,000. The record discloses that in his closing argument counsel for plaintiff used the following language: "Gentlemen of the jury, it is not for me to say how much, but I think he ought to have a liberal judgment, and in my humble opinion \$12,000 would not be too much." Notwithstanding this modest suggestion, the jury returned a verdict for \$15,000, as shown above, and the defendant now complains in this court: (1) That its demurrer to the evidence should be sustained, for the reason that plaintiff failed to make out a case. (2) Because the plaintiff's first and second instructions are erroneous. (3) Because the verdict is the result of partiality, passion, or prejudice, and that such facts are disclosed by the record, and conceded to be so, in both the original and last opinion on file in this court. (4) Because the case was submitted to the jury upon mere matter of conjecture, without evidence warranting a verdict in favor of the plaintiff. (5) Because there is no evidence tending to show a failure upon the part of defendant's inspectors to exercise ordinary care in regard to the performance of their duty concerning the inspection of said car. (6) Because there

is no evidence tending to show that, if the defects which were discoverable had been seen by the inspector or the jury, the inspector or inspectors were guilty of negligence in permitting the car to pass, in the absence of any showing that the 60,000-pound car, constructed as this was, could not have carried 30,000 pounds of freight over the same road which it had traveled a few days before with 31,000 pounds. (7) It is likewise contended that the verdict is grossly excessive, and that, as the law of remittitur was in force in this state when the case was tried in the court below and appealed here, the same rule of law should be applied that was in vogue when the case was tried below, and that the case should be tried upon in the court below. (8) It is likewise contended that when this court judicially determines, as it has done, that the verdict is for \$3,000 more than ample compensation, it is the duty of the court, by virtue of its inherent and constitutional right, to direct a new trial, in order that the ends of justice may be subserved thereby.

I shall endeavor in the following pages to take up all, or the principal portion of, the foregoing propositions, and, after citing facts fully in support of my opinion, endeavor to demonstrate that the majority opinion here is unsupported either by the law or the facts in the case.

1. "Respondent must stand or fall in this court by the theory on which he tried and submitted his case in the court below." *Walker's Adm'r v. Owens*, 79 Mo. 568; *Holmes v. Braidwood*, 82 Mo. 617; *Witascheck v. Glass*, 46 Mo. App. 214; *Martinowsky v. City of Hannibal*, 35 Mo. App. 78, 79; *Fell v. Mining Co.*, 23 Mo. App. 224; *Brooks v. Yocum*, 42 Mo. App. 521.

(a) A plaintiff is bound by the allegations of his petition, and although the latter may contain unnecessary averments, yet, as long as the petition stands unamended, he is bound thereby. *Bruce v. Sims*, 34 Mo. 251; *Speck v. Riggin*, 40 Mo. 406; *Bank v. Armstrong*, 62 Mo. 65; *Chapman v. Callahan*, 66 Mo. 312; *Donnan v. Publishing Co.*, 70 Mo. 175; *Kuhn v. Weil*, 73 Mo. 215, 216; *Weil v. Posten*, 77 Mo. 287; *Wilson v. Albert*, 89 Mo. 546, 1 S. W. 209; *Bensieck v. Cook*, 110 Mo. 182, 19 S. W. 642; *McManamee v. Railway Co.*, 135 Mo. 447, 37 S. W. 119. In the case of *Bruce v. Sims*, supra, the rule was clearly announced at an early date, and has since been followed with uniformity, as follows: "The answer of the defendants averred that Davis was at the time of the levy the full and absolute owner of the slave, and they cannot be permitted to contradict their own pleading by setting up that the slave belonged to the partnership. Their averment was probably unnecessary, but, having made it, they must abide by it."

(b) The rule of law is equally as well settled in this state that where a party to a suit testified at the trial, and makes material

admissions affecting his own interest, he is bound thereby. *State v. Curtis*, 70 Mo. 595; *State v. Peak*, 85 Mo. 190; *Bogie v. Nolan*, 96 Mo. 91, 9 S. W. 14; *State v. Brooks*, 99 Mo. 137, 12 S. W. 633; *State v. Bryant*, 102 Mo. 32, 14 S. W. 822; *State v. Turlington*, 102 Mo. 663, 15 S. W. 141; *Payne v. Railway Co.* (Mo. Sup.) 30 S. W. 150; *Ephland v. Railway Co.* (Mo. Sup.) 38 S. W. 926; *Robbins v. Butler*, 24 Ill. 387. The plaintiff testified at the trial upon this question as follows: "I looked back, the conductor gave a signal to go ahead, and I looked at my watch, and saw we were close on the passenger train time. We went down to the first sag going out of Elm Park, probably about for a mile or three quarters from the hill, and from there down to Little Blue is downgrade, around several curves, and when we came over the grade I noticed the engineer did not shut off, as he generally does. I looked back, and saw the middle brakeman about four cars from the caboose, with his hands behind him. He did not seem to make any motion to set brakes, and I did not set my brakes until I got down, but I noticed the train was going too fast. I never looked to see whether anybody else was setting brakes or not. I commenced setting brakes when we turned the curve. I looked out to see what condition the drivewheels were in. I had not been on the road long enough [from 6 to 12 months] to tell the speed of the train by riding. I thought we were running too fast, and I think about this time we were going in the ditch." The plaintiff not only charges in his petition that defendant was guilty of negligence in permitting said train to run "at a rapid and dangerous rate of speed," but likewise testified accordingly, and gave the circumstances under which it was done. This court is, therefore, legally bound to consider the case as it was presented below, and upon the admitted facts, supra, unless it can be gleaned from the record that the foregoing matter was, at the instance of defendant, withdrawn from the jury, which I will now proceed to consider.

Judge MACFARLANE, in his opinion, disposes of the question as follows: "(32) Defendant's counsel insists that, under this evidence, the accident could as well be attributed to the rapid rate of speed of the train, or to the tender first leaving the track, as to the breaking of the defective car; that the entire evidence is equally consistent with any of the three causes, and what the real cause was is a matter of mere conjecture. (33) It may be stated here that there was no evidence that the train was run at a negligent rate of speed, and the court so instructed the jury." If it should turn out, from a careful consideration of the pleadings, evidence, and instructions given by the trial court, that the author of the opinion, herein concurred in by the other judges, has received an erroneous impression in respect to the facts aforesaid, and that directly the reverse

of the foregoing appears, then defendant's contention is well supported, and the judgment should be reversed, for the obvious reason that it is unsustained by any legal evidence, being predicated alone upon conjecture. The court below, in unmistakable language, sustained defendant's contention, when it gave, at the instance of defendant, and without objection upon the part of the plaintiff, instruction No. 2, as follows: "It is further charged in petition that said train on which plaintiff was injured was run at a rapid and dangerous rate of speed. You are instructed that defendant was guilty of no negligence in running said train at the rate of speed disclosed by the evidence." The court instructs the jury that defendant was guilty of no negligence in running its train at the rate of speed at which it was run at the time of the accident. But the trial court put the question in controversy completely at rest in giving, upon the part of defendant, instruction No. 12, as follows: "The jury are instructed that, although you may find and believe, from the evidence, that the train upon which plaintiff was acting as brakeman was, at the time of the injury, being run at a rapid or dangerous rate of speed, and by reason thereof was ditched or wrecked, and the plaintiff injured thereby, yet, under the evidence in this case, your finding should be for the defendant." The plaintiff, as to the conductor, engineer, and rest of his train crew, was a fellow servant. *Higgins v. Railway Co.*, 104 Mo. 418, 419, 16 S. W. 409; *Relvea v. Railway Co.*, 112 Mo. 86, 20 S. W. 480; *Murray v. Railway Co.*, 98 Mo. 574, 12 S. W. 252; *Card v. Eddy*, 129 Mo. 517, 28 S. W. 979. The plaintiff, having charged defendant with negligence in running its train at a rapid and dangerous rate of speed, and having sworn at the trial that the train was run too fast, that the engineer did not shut off the steam, nor the brakeman set his brake, and it appearing that the train was two hours late, and that they were trying to get out of the way of the passenger train, by making the side track, it is perfectly manifest that the jury might, and probably would, have found against defendant, and held it liable for the running of the train at a rapid and dangerous rate of speed, had not the court, in the foregoing instructions, in the most explicit language, told them that defendant was not liable on that account, even if the train were run at a dangerous and rapid rate of speed, and thereby caused plaintiff's injuries. There is not the slightest intimation upon the part of the trial court, in the giving of said instructions, to withdraw from the jury the right of the latter to consider whether the accident was caused by the dangerous rate of speed with which the train was run, and, if so found to be the cause,—instead of the Union Line car,—to return a verdict for defendant.

The defendant still insists that, as against plaintiff, on account of his pleadings and evi-

dence, as well as the instructions aforesaid, this court is compelled to review the case upon the theory that the train was run at a rapid and dangerous rate of speed, and that defendant is not liable therefor. This contention, it seems to me, is well founded, and for that reason I cannot concur in that portion of Judge MACFARLANE'S opinion where it is said: "It may be stated here that there was no evidence that the train was run at a negligent rate of speed, and the court so instructed the jury." There was evidence to the effect that the train was run at a rapid and dangerous rate of speed. The plaintiff himself swore to it, and stated fully the facts connected therewith. He charged in his petition that such was the case, and the court below, in instruction 2, *supra*, told the jury so. The most casual examination of the record will disclose that the court below did not tell the jury that the train was not run at a rapid and dangerous rate of speed, nor intend to do so. On the contrary, the court simply said that, although the train may have been run at a rapid and dangerous rate of speed, and thereby caused plaintiff's injuries, yet defendant is not liable therefor, for the obvious reason that such negligence was that of plaintiff's co-servants, and not the result of the violation of any duty which defendant owed the plaintiff. I therefore conclude, for the reasons aforesaid, that the opinion, as it now stands, is predicated upon an erroneous idea of the undisputed facts appearing of record, and for that reason a rehearing should be granted.

2. Having attempted to show, in the foregoing proposition, that we should consider the case here upon the theory that the train was run at a rapid and dangerous rate of speed, and that defendant should not be held responsible for any damages resulting therefrom, I shall now consider the evidence appearing of record for the purpose of determining whether the case was submitted to the jury upon mere conjecture, or whether there was substantial evidence introduced at the trial which can be held sufficient to sustain the verdict as returned.

(a) The trial court properly gave defendant's instruction No. 10, which contains the following: "If the jury are unable to determine, from the evidence, whether said Union Line car 7,919 caused plaintiff's injury, or whether it occurred from some other source, then it is your duty to return a verdict for defendant, as the burden of proof herein devolves upon the plaintiff." And this instruction is abundantly sustained by the following authorities: *Railway Co. v. Schertle*, 97 Pa. St. 450; *Wintuska's Adm'r v. Railway Co.* (Ky.) 20 S. W. 820; *Duncan v. Telephone Co.* (Wis.) 58 N. W. 75; *Orth v. Railroad Co.* (Minn.) 50 N. W. 384; *O'Malley v. Railway Co.*, 113 Mo. 325, 20 S. W. 1079; *Perkins v. Railway Co.*, 103 Mo. 52, 15 S. W. 320; *Peck v. Railway Co.*, 31 Mo. App. 126; *Glick v. Railway Co.*, 57 Mo. App. 105; *Moore*

v. Railway Co., 28 Mo. App. 625 et seq.; Hughes v. Railway Co. (Ky.) 16 S. W. 275; Cotton v. Wood, 8 C. B. (N. S.) 568-571 (cited Thomp. Neg. p. 364); Beck v. Allison, 56 N. Y. 366; Hayes v. Railway Co., 97 N. Y. 259; Baulec v. Railway Co., 59 N. Y. 366; Megow v. Railway Co. (Wis.) 56 N. W. 1099. Leaving out of consideration for the present the common-law rule with respect to fellow servants, and assuming that, if plaintiff was injured by the negligence of the train crew in running the train at a rapid and dangerous rate of speed, he would be entitled to recover, this cannot change the result in ascertaining the real cause of the accident; for, if the rapid and dangerous rate of speed with which the train was run was the direct and proximate cause of plaintiff's injury, it should be considered, in arriving at the real truth, to the same extent as though the plaintiff were entitled to recover upon such showing.

The case, then, stands in this court with the charges of negligence separately stated as follows: (1) Plaintiff in his petition charges that defendant negligently permitted its train of cars, upon which he was brakeman, to be run at a rapid and dangerous rate of speed, and thereby derailed the train, and caused the injuries complained of. Had a verdict been rendered for plaintiff upon this proposition, leaving out of consideration the rule in regard to negligence of co-servants, could it be sustained by the record in the cause? I affirm, without hesitation, that the plaintiff, upon the undisputed facts in respect to the foregoing matter, would have plain sailing in this court. As heretofore shown, we are bound by the allegations of the petition to the effect that the train was negligently run at a rapid and dangerous rate of speed, and this caused plaintiff's injuries. (2) The train was two hours late, and running closely on passenger train time. The crew were endeavoring to make a side track at Little Blue, to get out of the way of the passenger train. Here, then, was a motive for fast running. (3) Plaintiff testified: "I looked at my watch, and saw we were close on the passenger train time. We went down to the first sag going out of Elm Park, probably about for a mile or three quarters from the hill, and from there down to Little Blue it is downgrade, around several curves, and when we came over the grade I noticed the engineer did not shut off, as he generally does. I looked back, and saw the middle brakeman about four cars from the caboose, with his hands behind him. He did not seem to make any motion to set brakes, and I did not set any brakes until I got down, but I noticed the train was going too fast. * * * I thought we were running too fast, and think about that time we were going in the ditch." We have, in this connection, the plaintiff watching the conductor to see whether they should go ahead. The engineer failed to shut off steam as he usually did. The middle brakeman was standing there with his hands behind him,

without making any motion to set the brakes. The plaintiff saw these things with his own eyes, and then says the train was running too fast. (4) Engineer Donnelly testified: "Q. Did you know where the engine stopped? A. Yes, sir. Q. State to the jury, starting with that as a point, how far it was to where the first car went off the track, and struck the tie. A. I could not state correctly; I should judge 250 or 300 yards. Q. From where you stopped the engine to where the cars went off? A. Yes, sir." Conductor Butts testified: "Q. How much of a grade is it? A. Well, it is a pretty good grade; it takes a 70-ton engine, to pull 16 or 17 cars up; 18 is a heavy load." The same witness likewise swore that a car, jumping the track, could not have carried with it the engine. He likewise gives it as his opinion that the Union Line car might have been crushed by the wreck itself. Witness Scow testified that he thought it was 600 or 800 feet from where the engine stood to where the first car went off. The foregoing, with much other testimony, tended to show that the train was traveling at a very rapid rate of speed. (5) Engineer Donnelly must have had in mind the rapidity with which the engine and the train were run, without shutting off steam or setting the brakes, when he testified as follows: "Q. You did not make any examination of the car next the engine, and the others, to see what caused the wreck? A. No, sir; I did not know but that there would be some censure attached to me. Q. What did you suppose they would censure you about? A. I did not know; when you are working for a railroad company, there is a great many things spring up; every man is supposed to look out for himself." (6) The undisputed evidence of the following witnesses shows that every wheel of the engine and tender were off the track, except the two small wheels of the engine: Patrick, Ashcraft, Conway, Settles, Lafferty, Scow, Donnelly, Welsh, and Downey. Judge MACFARLANE, in his opinion, says, "Two wheels of the engine were off the track." when the uncontradicted evidence supra shows that they were all off, except the two small wheels of the engine. (7) It is correctly conceded in the opinion that, when the Union Line car broke, one-third of same remained attached to the engine, and the link fastening same was twisted. (8) Witness Hesler says that the first car which he observed going down was the Union Line car. This, of course, would be true, if the tender went off first. (9) Fireman Rast testified as follows: "Q. What was the first thing you observed on that occasion? A. Well, the first thing that I observed was that the tender was off the track, and I started to get off. Everything stopped, and I saw the cars piled up behind us." (10) The foregoing testimony is corroborated by that of Engineer Donnelly, who testified: "A. This crash happened before the engine left the track. My attention was called when the fireman halloped, 'We're

off the track.' I jumped off my seat, preparatory to reverse the engine. I did not hardly get the engine reversed before she stopped. She had four pair of drive wheels off." This witness further testified: "Q. You do not tell the jury that the engine ran 200 yards off the track, after it left the track? A. No; not all off, but part off, and part off will help the engine getting off. Just one truck off will be the means of throwing the rest of the engine off." (11) But the testimony of witness Keller, who was on top of the train, where he could and did view the wreck, is uncontradicted by a single witness. His evidence is as follows: "Q. Do you know whether the damage which was done to the car was caused by its leaving the track, or whether it was broken before it left the track? A. The damage was caused after it left the track. The car was whole when it left the track." This testimony stands undisputed by a single witness or circumstance, and completely demonstrates to my mind that he and the fireman are both correct, and that, when the tender went off, it carried with it the Union Line car. (12) The Union Line car was built of first-class material. It was built new in 1886. It was greatly strengthened by the Graham draft rigging on February 7, 1891, while the accident occurred December 11, 1892. Supt. Potter testifies that in his opinion the car was sound in December, 1892. Its average life was 15 to 20 years. Its capacity was 60,000 pounds. It was presumably inspected, and received by defendant, containing 31,800 pounds of nails, about one week before the accident, at St. Louis, and hauled over same road where accident occurred, to Atchison, Kan. It remained there a few days, and Elder, the owner of the flour, directed his teamster to get good cars; and, presumably, at least, the Union Line car was selected by the teamster as a sound one. Defendant's inspector at Atchison inspected this car, and, as the jury were instructed, presumably did his duty. It was put in defendant's train, and carried to Kansas City, where it likewise was inspected, and presumably in a proper manner, as instructed by the court. Conductor Butts saw the car inspected at Kansas City the morning of the accident. No defects of any kind or description were observed in regard to said car before the wreck. The inspector at Kansas City testified that they usually spend as much as 25 minutes inspecting foreign cars (like this). The train then, containing this apparently sound car, started from Kansas City, on said morning of the 11th of December, 1892, and had traveled over the worst portion of the same road, when the accident occurred. It only had 30,000 pounds of flour at the time, while its carrying capacity was 60,000 pounds. It had just gone over the same road, a few days before, with 31,800 pounds of nails, in apparently the same condition. (13) The undisputed evidence shows that none of the other cars which left the track were any bet-

ter than the Union Line car. Wilson, Dunningan, Scow, and Welsh were the only witnesses who testified upon the subject, and they all say the Union Line car was as sound as either of the others. (14) The uncontradicted testimony of Lehel, Keller, and Settles shows that at least one of the rails was bent, broken, or out of place. (15) None of the witnesses put the rate of speed at which this heavily loaded train was run down the grade, around the curves, at less than 20 miles per hour. No witness testified that a train, on such a grade, over and around such curves, and running with 18 heavily loaded cars (as this one was), could have traveled in safety at even 20 miles per hour.

With all the foregoing testimony, taken in connection with the physical facts, could any court in Christendom say, aside from plaintiff's allegations in the petition that the train was run at a rapid and dangerous rate of speed, that plaintiff had not made out a clear case tending to show that the train was run at a rapid rate of speed, and by reason thereof jumped the track, and caused plaintiff's injury? Aside from the positive testimony of plaintiff that the train was running "too fast"; that "he noticed the engineer did not shut off," as he usually did; that he looked back, and saw the middle brakeman with his hands behind him, and making no effort to set brakes,—we have the undisputed evidence that the train was about two hours late, and in the way of the passenger train; that the crew were attempting to make a side track at Little Blue to get out of the way of the passenger train. This disclosed the motive for running fast. The statement of the engineer, that "I did not know but that there would be some censure to me," indicates that he knew he had been traveling too rapidly. His evidence, heretofore set out, in which he says his engine ran 200 to 300 yards after the first car left the track, is a clear admission that he must have been traveling at a rapid and dangerous rate of speed. How, then, did the engine and tender get off the track, unless from the rapid rate of speed, with the heavy load, around those curves, and down such a grade? Only about one-third of the shell of the Union Line car, without any of its load, remained attached to, and went with, the engine and tender. The conductor swears the Union Line car could not have gone off and carried the engine and tender with it. The fireman says that the first thing he observed was that the tender was off. He then halloosed to the engineer, "We're off the track." The positive testimony of the eyewitness Keller is to the effect that the Union Line car was whole when it left the track, and that the damage was done after it left the track. With the foregoing array of physical facts and testimony upon the subject, does it not conclusively appear that the train was wrecked alone by the rapid and dangerous rate of speed at which it was run? If this is not conclusively true,

upon what theory can you account for the engine and tender being off the track? If the wreck occurred as claimed by plaintiff, then there was nothing but the one-third of the shell portion of the Union Line car attached to the engine and tender. How, then, could the latter get off? I apprehend that any careful searcher after the truth cannot escape the foregoing conclusion. When the physical facts, as in this case, stand out in bold relief, undisputed, we have no right to disregard the same, and, in lieu thereof, sustain a verdict at war with such physical facts. *Kelsay v. Railway Co.*, 129 Mo. 362, 30 S. W. 339; *Hayden v. Railway Co.*, 124 Mo. 566, 28 S. W. 74; *Lane v. Railway Co.*, 132 Mo. 4, 33 S. W. 645, 1128; *Huggart v. Railway Co.*, 134 Mo. 680, 36 S. W. 220; *Nugent v. Milling Co.*, 131 Mo. 258, 33 S. W. 428; *Payne v. Railway Co.* (Mo. Sup.) 38 S. W. 808. The record, therefore, showing, as it does, upon its face, affirmatively, that the injury complained of, is the result of the negligent and rapid rate of speed with which the train was run, and was occasioned in no other way, the plaintiff, upon whom the burden of proof rests, has completely failed to make out a prima facie case. A rehearing should be granted, and, in my opinion, the judgment reversed, and judgment entered here for defendant.

3. The second charge of negligence alleged in the petition is in respect to a failure upon the part of defendant to properly inspect the Union Line car, and in taking same into its train when it was rotten, defective, and unfit for use. As heretofore shown, this charge is somewhat blended with the one charging that the train was run at a rapid and dangerous rate of speed. It is alleged that both produced the injury complained of. I have endeavored to show, by the preceding portions of this opinion, that the real cause of the injury was the rapid and dangerous rate of speed with which the train was run. I shall now take up the remaining proposition, for the purpose of determining whether there is any evidence upon which the jury could find that defendant was guilty of negligence in failing to inspect the car. In this connection, however, it is proper to observe that the court below, without objection upon the part of plaintiff, gave, at the instance of defendant, instruction No. 13, which reads as follows: "Unless the jury believe, from the preponderance of the evidence, that the Union Line car 7,919 broke before it left the track, then your verdict must be for the defendant, notwithstanding you may further believe that some portion of said car was unsound or rotten." The court likewise, among other things, in instruction No. 10, upon the part of defendant, given without objection, correctly stated the law as follows: "Even if the jury should find and believe, from the evidence, that said Union Line car 7,919 was the first car which went off defendant's track, yet this does not prove that said car was

unsound or defective." It will thus be seen that the issues, as to the present charge of negligence, are, as against this plaintiff, confined to a narrow limit. It is unnecessary to again repeat the testimony set out in the last proposition as to the condition of the Union Line car before the wreck. Suffice it to say that it was built in 1886; that its average life was 15 or 20 years; that it was made of first-class materials; that it was properly inspected before it was received; that its carrying capacity was 60,000 pounds; and that in February, 1891,—the injury having occurred in December, 1892,—this car was greatly strengthened by the Graham draft rigging, which was placed upon it. The superintendent—an expert railroad man—gives it as his opinion that it is not within probability, with such sound timber in a car of this description, that it would rot in 5½ years, and also states that, in his opinion, the timber was not rotten at the time of the accident. Said car was loaded with 31,800 pounds of nails, presumably inspected by the person who loaded it. The defendant railway company, which received it for transportation at St. Louis, presumably inspected it, before it came over the road where the wreck occurred. The teamster of Mr. Elder, who was shipping the flour, presumably inspected the car, and selected it because it appeared to be sound. Defendant's inspector at Atchison likewise inspected said car; it was likewise inspected at Kansas City before it went into the train, and found to be in good condition; and Conductor Butts saw the car inspected. It is conceded that no one ever saw any defect of any kind or description in this car, prior to the accident. All the testimony of defendant goes to show the car was sound. It only had 30,000 pounds of flour at the time of the accident, and had traveled over the same road which it had gone over, less than a week before, with 31,800 pounds of nails. It likewise had traveled back from Atchison, over the worst portion of the road, and done those grades and around the curves between Independence and Little Blue, before the train was wrecked. Immediately after the accident, as heretofore shown, one of the rails was found to be broken. The first thing which any of the trainmen observed in regard to the wreck was that the fireman noticed the tender off the track. The engineer testified that the fireman hallooed to him, "We're off the track." The conductor swears that the Union Line car could not have carried the engine and tender off the track. The engineer swears that, with one truck off, it will carry with it the balance of the engine and tender. The undisputable evidence shows that none of the other cars were in any better condition than the Union Line car. No witness puts the speed of the train at less than 20 miles per hour, and, if the Union Line car had broken down, as claimed by plaintiff, it could not have possibly dropped where it was found by the witnesses aft-

er the wreck. This was a physical impossibility, as the speed aforesaid would have carried it quite a distance, and necessarily have left the sills and other timber of the car dragging along in a dilapidated condition. The undisputed evidence likewise discloses that one-third of the shell of the car remained attached to the engine and tender, and were all found on the west side of the track. The sills were six or eight inches in diameter, and from six to eight in number. They appeared to be freshly broken after the wreck. Witness Hessler says that the first car which he saw go down was the Union Line car. This was perfectly consistent with the testimony of the fireman and defendant's evidence, upon the obvious theory that, if the engine and tender went off first, this car, which was next to them, necessarily had to leave the track before either of the others. In this connection, however, the positive testimony of Keller, who was on top of the train, and saw the whole performance, is to the effect that said Union Line car was whole when it left the track, and the damage was done to it after it left the track.

With this undisputed testimony, and the conceded physical facts, what does the plaintiff offer in this court in the shape of testimony to overcome the overwhelming array of facts against this contention? No one pretends to have seen the Union Line car break down before it left the track. No one saw any portion of it break. On the other hand, Keller swears positively that it was whole when it left the track, and that the damage was done to it afterwards. This is fully corroborated by the history of the car, by the inspections theretofore made, and by the fact that it had just gone over the same track a few days before, with a larger load, when its carrying capacity was 60,000 pounds, and it only had on 30,000 pounds at the time of the accident. But in the majority opinion it is suggested, as the rear portion of this car was found on the track, therefore it must have dropped down. It strikes me as being unreasonable to say that the testimony of any witness discloses when and where the rear portion of this Union Line car first struck the track. Witnesses Conway and Lafferty, for plaintiff, both testified that the forward end of the rear portion of the car was across the track, and not lying on the track. But, conceding that plaintiff had some testimony to the effect that the rear portion was found on the track, other cars were likewise found in the same condition; for it is manifest that the plaintiff himself was taken out from under a portion of one of the other cars, close to the track. As heretofore suggested, however, if the train was only traveling 20 miles per hour, and this car broke in two, and two-thirds, with the load, fell upon the track, can any one, in the face of these physical facts, say that it stopped suddenly, and occupied the same position, when found after the wreck, that it did when the wreck first occurred?

No one pretends to swear that such a state of facts did exist. As this court, of late, holds that the physical facts will overcome oral testimony to the contrary, how much stronger should the rule obtain in the present case? Here there was no oral testimony in support of plaintiff's theory, while Keller (an eyewitness to the transaction) swears directly the opposite. The physical facts support Keller, to the extent, at least, of saying that where the witnesses, after the wreck, found this car was no evidence of where and how it fell, nor of the condition of the sills at the time they broke. Even if the sills of the rear portion had been broken squarely off, they would not necessarily have appeared in that condition after the wreck, when this portion of the car had confessedly, from the very necessity of the case, plowed along on the ground some distance, on account of the momentum of the train. It therefore seems plain that on this proposition the plaintiff's theory, as well as that of this court, is too untenable for serious consideration. But while the jury have a right to draw inferences from the facts proven, yet, where the facts are conceded and known, this court has the right, and it is its duty, to apply the law thereto, and govern itself accordingly. Assuming, therefore, that the rear portion of the Union Line car was found on the track, with its sills broken squarely off, does this prove, or tend to prove, that it broke before it left the track? If so, the argument would apply to each of the other cars; for there is no evidence tending to show that they were in different condition. The undisputed evidence shows that the cars went off on both sides; and would it not be mere conjecture for the jury to say that, upon the testimony of witnesses who viewed the track, after it had occurred, because they described a portion of the car, found on or near the track, at a place where it finally stopped, therefore the car must have broken down, in the face of the physical facts aforesaid, and the positive testimony of Keller? What conjecture could be drawn from any evidence which authorized this conclusion? In other words, suppose it to be conceded in this court that this portion of the car was found with its sills squarely off after the wreck, and nothing said about the other cars, nor about the force which was used in breaking this and the other cars; would it not be mere conjecture to assume that this car broke down, because of its defective condition, on the track, and caused the injury? In other words, this would simply be assuming the very fact in issue, and assuming that which was shown not to be true by the positive testimony of Keller.

Again, it is likewise contended that, after the wreck, defects were shown in the sills of this car, and that, therefore, the jury had the right to draw the inference that the car broke down, before it left the track, on account of such defects. Assuming that such an inference could properly be drawn, yet can

a single defect disclosed by any witness be pointed out, designating its dimensions and size, and the effect it would have upon the sills of the car? On the other hand, if these defects were such as to render the car unfit for use, why did they not give way when the same car, with a larger load, had gone over the same track a few days before? Again, why did they not give way when the same car had come back from Atchison, down these grades and around the curves between Independence and Little Blue, before the accident occurred? This, it strikes me, is sufficient answer to the inference attempted to be drawn to support the verdict. But to overcome it entirely we only have to refer to the positive and undenied testimony of the witness Keller, who saw the car go off, and says it was whole when it left the track. To this same proposition let us apply, also, the testimony of the fireman that the tender went off first, and, as said by the engineer, this would necessarily carry the others with it. Again, to overcome this same inference, I have shown that the most reasonable hypothesis is that the rate of speed caused the wrecking of the train; otherwise, the engine and tender could not and would not have left the track. This is the testimony which this court has placed itself upon record as saying authorized the jury to infer, in the face of the overwhelming and undisputed testimony and physical facts to the contrary, that the car broke before leaving the track. As the burden of proof devolved upon plaintiff, and as he was required to show that this car broke down before it left the track, and that it was unsafe and unfit for use, I cannot yield assent to the opinion which sanctions a verdict of the character returned for. In my opinion, it does not attain the dignity of respectable conjecture. In concluding this proposition, after a careful perusal of the testimony, as well as the briefs of counsel, we assert that, leaving out the whole of defendant's testimony upon this branch of the case, the plaintiff has signally failed to produce any substantial testimony, and the jury has simply returned a verdict predicated purely upon conjecture. With the physical facts, with the history of the car, and with the positive testimony contradicting plaintiff's theory in respect to the foregoing matter, I am at a loss to understand how any judicial mind can sustain the verdict found, upon the facts disclosed by this record. I therefore conclude, not only that the wreck was caused by the rapid and dangerous rate of speed with which the train was run, as shown in the preceding proposition, but likewise conclude that the overwhelming and uncontradicted testimony shows that the Union Line car did not break down before it left the track, nor produce the injury complained of.

(a) From these facts and circumstances, detailed in the preceding proposition, I insist: (1) The record shows beyond any reasonable doubt that the wreck occurred in consequence

of the rapid and dangerous rate of speed with which the train was run at the time and place and under the conditions mentioned in the evidence. (2) And, if the engine and tender could have broken the rail as it went over, and thereby have caused the tender to jump the track, as testified to by the fireman, as the Union Line car was next to it, it necessarily would have been the first car to have left the track, as testified to by witness Hessler. (3) If you leave out of consideration the fact that the Union Line car left the track first, whether broken or otherwise, the plaintiff could, in this court, have taken up either of the other cars, which were in no better condition than the Union Line car, and have presented the same case, as against defendant, predicated upon conjecture, as he now presents in reference to said Union Line car. As, under the instructions aforesaid, he was required to prove, not only that it left the track first, but broke before it left the track, he could just as well attribute the accident to either of the other cars, under the admitted facts in this case, as the Union Line car aforesaid. If this case, upon inspection and examination of the facts, does not disclose one predicated purely upon conjecture, I am at a loss to know when the facts bring it within the range of surmise and the domain of assumption.

4. This brings me to one of the most important propositions in the case, to wit, whether the car was shown to be unsound and unfit for use, and, if so, whether the defects attempted to be pointed out were of such character as that the jury had the right to draw the inference that the inspectors had failed to perform their duty in regard to this car; as to which see, 3 Elliott, R. R. § 1308, and cases cited; *McPadden v. Railway Co.*, 44 N. Y. 480, 481; *Shear. & R. Neg.* (3d Ed.) § 87; *Wood, Mast. & Serv.* (2d Ed.) p. 819, § 419; *Pierce, R. R. p.* 383; 2 *Ror. R. R. pp.* 1200, 1201; *Ray, Neg. Imp. Duties* (Pera.) p. 133 et seq.; *Krampe v. Brewing Ass'n*, 59 Mo. App. 283; *Moss v. Railway Co.*, 49 Mo. 170; *Murphy v. Railway Co.*, 71 Mo. 202; *Roblin v. Railway Co.*, 119 Mo. 484, 24 S. W. 1011; *Sack v. Dolese* (Ill. Sup.) 27 N. E. 64; *Railway Co. v. Bates* (Ind. Sup.) 45 N. E. 110, 111. In 3 Elliott, R. R. § 1308, it is said: "The mere fact that, after the occurrence of an accident, defects are discovered in the machinery or appliances, is not sufficient to fasten a liability upon the employer. Where reasonable care is exercised in buying machinery and appliances, and inspections are made by competent inspectors, in a reasonably careful manner, there is no liability, although defects may in fact exist, unless there is, after knowledge, a failure to repair." A large number of authorities are cited by the learned author in support of this proposition. In *McPadden v. Railway Co.*, 44 N. Y. 480, 481, it is said: "There is no presumption that the rail was broken before this train reached it. It is unquestioned that the accident was

caused by the broken rail; and, if the plaintiff claimed that defendant was liable because the rail was broken before the train upon which he was riding reached it, it was incumbent upon him to prove it. This he failed to do; and, if the jury upon the evidence had found it, it would have been the duty of the court to set the verdict aside, as against evidence." In this case plaintiff was a passenger, and yet the court held that it devolved upon him to prove affirmatively that the rail broke when the preceding train went over the track, and not the one which went over at the time of the wreck. In the case of *Sack v. Dolese*, supra, it is said: "In order to charge the employer, when such an accident happens, it must be shown that the defect is one which could be discovered by a proper inspection, even though, from the nature of the accident, it may be readily concluded that some defect did, in fact, exist." *Shear. & R. Neg.* (3d Ed.) § 87, announces that "a railroad company is, therefore, not prima facie liable to any of its servants for defects in its rolling stock, rails, or bridges, even where such servant is not employed upon the particular thing which is defective, but upon work wholly unconnected therewith." In *Wood, Mast. & Serv.* (2d Ed.) p. 819, § 419, it is laid down: "Therefore the mere fact that a fellow servant is incompetent, that materials have proved defective, or that the appliances or machinery used in the prosecution of business have proved insufficient, does not tend, even prima facie, to establish negligence on his part; but the burden in all such cases is upon the servant seeking a recovery to establish the fact that the injury resulted to him because the master did not exercise reasonable and proper care in these respects, or either of them; and this must be established as a fact in the case, and cannot result as an inference from the circumstances that the servant causing the injury was in fact incompetent, or that the materials or resources of the business were in fact defective." This is one of the clearest expositions of the law upon this subject cited in any of the books. In *Pierce, R. R.* 383, it is declared: "The company's negligence is not to be inferred from the fact of the injury by the collision or explosion, in case of injuries to passengers or third persons." In 2 *Ror. R. R.* pp. 1200, 1201, it is said: "The onus of proof is not shifted onto defendant by the fact that an injury has occurred from the alleged defect, or, we may add, from proof of the injury and of the defect as the cause thereof. The defect must have resulted from the carelessness of the defendant in selecting or using, or in continuing to use, the objectionable article, with knowledge thereof, or such means of knowledge as will charge the party with negligence." In *De Graff v. Railroad Co.*, 76 N. Y. 129, I find it stated: "Upon the next proposition, that the exercise of ordinary care would have discovered the defect, and that

51 S.W.—49

the defendant neglected to exercise such care, a careful examination has failed to satisfy me that the evidence was sufficient to warrant a verdict. In the first place, assuming a defect, there is no evidence what it was, or the nature of it. The car was in a train going west, and it does not appear that any one ever saw the chain afterwards, except the person who took the plaintiff's place, after the accident, and he only looked at it with a lantern at a station, and saw that it was broken. There is some evidence, although slight, that the car did not belong to the defendant. There was an entire absence of evidence as to the nature and character of the defect, or the cause of the breaking. We may imagine several causes: First, from an original defect in the iron; or, second, in its manufacture; or, third, by reason of weakness and ordinary decay by use; or, fourth, by getting misplaced on the trip on which the accident occurred. There is no evidence that ordinary care and observation would have discovered all and either of these defects if they had existed, and they must have so found, as they could not have singled out a defect which ordinary care would have discovered, because the particular defect was entirely unknown. In the next place, there was a failure of evidence to show that the defendant, its servants or agents, did not exercise reasonable care or make suitable and proper examination. It appears that the train was made up at West Albany, that the defendant employs six men in the daytime and six at night to inspect freight cars, and there was no evidence what examination was made by those persons of this car, or its brake chain, before it started on the trip. The only evidence bearing upon the question at all was that of the train dispatcher at West Albany, called by the plaintiff, who stated, in effect, that the inspectors were in the habit of examining the chains, to see if they were in their place and apparently sound, but did not test their strength." Upon page 131 of same volume it is further said by the chief justice: "I have been unable to find any evidence that this chain was not perfect when it was put on, or that proper care was not exercised in examination by the servants of the company, or what was the cause of its failure, or whether such cause could have been discovered by the usual and ordinary means. It is argued that the jury might have found negligence from the fact that there was some defect; but negligence is not to be presumed, and it is apparent that the chain might have become weak from use, without being discovered from any ordinary examination, and it is not improbable that this was the condition of the chain, from the fact that on three occasions on this trip, before the accident, it had been used, and proved efficient in controlling the train. It broke when used the fourth time, from a cause unknown; and I think that the evidence is not sufficient to charge the defendant

with a knowledge of such weakness, or any negligence or omission to examine." In *Ray*, Neg. Imp. Duties (Pers.) p. 133 et seq., it is said: "The proper inquiry is, not whether the accident might have been avoided if the one charged with negligence had anticipated its occurrence, but whether, taking the circumstances as they then existed, he was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor of any particular means which, it may appear after the accident, would have avoided it. The requirement is only to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident. In an action for an injury occasioned by the alleged negligence of defendant, the negligence, if any, of either plaintiff or defendant, is to be measured by the condition of things at the place where the accident took place, as they were known to exist by each of the parties at the time the acts of each are complained of as being negligent; and these acts cannot be characterized, one way or the other, by the subsequent determination of conditions unknown at the time to both or either, except so far as that knowledge may properly affect the act of the one so informed."

It strikes me that the foregoing states the law of this case with peculiar aptness. There is absolutely not a scintilla of evidence tending to show that the inspectors did not perform their whole duty in a perfectly proper manner, as all other competent men through the country do. The mere fact, therefore, that an accident occurred, and that some of the defects were found by plaintiff's witnesses after the car was wrecked and dismantled, does not, *prima facie*, establish any negligence upon the part of defendant's inspectors. In *Krampe v. Brewing Ass'n*, 59 Mo. App. 283, Judge Rombauer, with his characteristic clearness, announces the law under consideration as follows: "The trial court evidently misconceived the law governing cases of this character. It was for the plaintiff to prove his whole case, and, unless he did so, the defendant was under no obligation to show that the plaintiff had no case. It was for the plaintiff to show that the defendant failed to exercise that reasonable care which the law imposes upon the master, and, until he had done this, either by his own evidence or that of the defendant, the defendant was under no obligation to explain the cause of the accident on a theory consistent with due care on its own part. Giving to the defendant's evidence its greatest probative force in favor of plaintiff's claim, it still falls short of tending to show the probable cause of the accident, and fails entirely to show that the probability was one which the master, in the exercise of reasonable care, was bound to foresee and guard against. It results from the foregoing that the trial court erred in re-

fusing the instructions to find a verdict for the defendant." In *Moss v. Railway Co.*, 49 Mo. 170, Judge Bliss declares the law upon a similar question as follows: "The pleader evades the real question, and tenders an immaterial issue. It is the duty of defendant's officers to employ proper servants, but the duty is not an absolute one. If they make careful inquiry into the habits and competency of the men employed, and upon such inquiry believe, and have reason to believe, them sober, careful, and competent, they can do no more. They have honestly and faithfully endeavored to do their duty, and there is no contract for anything more. Hence the pleader should have charged a want of care and diligence in the selection of defendant's servants, and not a failure merely to select those who were competent, for such failure may be consistent with proper care." It will thus be seen in this case that the facts under consideration were similar to those at bar. The petition charged that the defendant failed to employ skillful servants, but failed to allege a want of care or diligence in the selection of the servants. It was held that the petition, upon demurrer, was bad. That is exactly this case. The mere fact that the servant was afterwards found to be incompetent did not show that defendant was guilty of negligence in employing him; so, in the case at bar, the fact that the defects pointed out by plaintiff's witnesses were shown to exist after the wreck did not in any manner show that the servants of defendant, who were presumed to have done their duty, had failed to do so. In other words, the inspector may have done everything that ordinary care required, and still might not have discovered the defects complained of. In *Murphy v. Railway Co.*, 71 Mo. 202, upon a similar question, it was ruled: "The mere fact of the incompetency of a servant for the work upon which he was employed is not enough to warrant a jury in finding the master guilty of negligence in employing him. *Shear. & R. Neg. 91*; *Moss v. Railroad Co.*, 49 Mo. 169; *Elliott v. Railway Co.*, 67 Mo. 272." In *Roblin v. Railway Co.*, 119 Mo. 484, 24 S. W. 1011, the court declares the law upon the question under consideration as follows: "But, aside from Tracey's testimony, whenever the law imposes a duty on another, it presumes that such duty was properly performed. Therefore the mere fact that a fellow servant is incompetent does not tend, even *prima facie*, to establish negligence on the part of the master in employing him; but the burden in all such cases is upon the servant seeking a recovery to establish the fact that the injury resulted to him because the master did not exercise reasonable and proper care in these respects, or either of them, and this must be established as a fact in the case, and cannot result as an inference from the circumstance that the servant was in fact incompetent. *Wood, Mast. & Serv. (2d Ed.) § 419*." In *Bailou v. Railway Co.*, 54 Wis. 257, 11 N. W. 563, Judge

Cassoday, in behalf of the supreme court of Wisconsin, said: "There should be at least some testimony tending to show that the tests applied to determine the sufficiency of the brake rod were inadequate, and not in accordance with the most approved methods, to justify the finding of the jury."

With the foregoing propositions of law announcing the rule so clearly, let us examine and see whether the facts in this case form an exception to the rule. Judge MACFARLANE, in his opinion (propositions 12 to 20 inclusive), undertakes to set up the testimony of the witnesses in respect to the question of inspection, as follows: Charles Patrick, Ashcraft, Conway, Lehel, Settles, Lafferty, and John Downey. I shall not undertake to quote fully from the testimony of each, but will simply supplement the testimony already quoted from the record by Judge MACFARLANE by adding thereto that which he failed to state, and which, in my opinion, completely modifies and puts a different light altogether on the testimony of such witnesses when considered as a whole.

Charles Patrick, in extravagant language, quoted in the opinion, would have the court understand that the sills of the car were rotten, worm-eaten, and doty, and that the sills broke squarely in two. It will be found, upon an examination of the testimony of this witness, that he only described four sills, and then testifies as follows: "Q. What else did you notice then,—those sills as you describe as being unsound? A. Yes, sir; and I do not know that the balance of the car was unsound. Q. These two little sills run right along the bottom of the car? A. Yes, sir." This witness also described the two outside sills and the two middle ones. In reference to the outside sills he said: "Q. Describe whether that portion looked sound, and simply the outside looked worm-eaten. A. No, sir; the outside of those sills, that had been painted, would look sound." The same witness testified, further, in reference to said outside sills: "A. Well, I know they were painted." The same witness testified as follows: "Q. Did the break look fresh where they were broken? A. Yes, sir." Said witness further testified: "Q. How could you examine this car from where you were, if the floor was above? A. Very easily. They lay in a position for me to see everything. Q. Tell the jury. Explain that. A. The car was broken in two, right in the center, and the sills of the car dropped right on the track, and the front end right on down, and was tilted to one side, exposing them plain to my view, as those gentlemen sitting there,—the end of those sills. Q. You saw the ends? A. Yes, sir." The same witness further testified: "Q. You say only two of them were not painted? A. Two in the center were not painted at all. * * * Q. They were the two middle ones? A. Yes, sir. * * * Q. Wasn't there a fresh break on these two? A. Yes, sir. Q. The part that looked fresh,—how

was that? A. It all looked fresh, and all was a fresh break. * * * Q. That was painted so that the break could not be seen? A. Any one could have seen that, if they had looked at it,—if their attention had been drawn to it. Q. In the position you occupied? A. Yes, sir. Q. They could have seen it standing where you were? A. Yes, sir." It will thus be observed that this witness swears that the sills did not break squarely in two, but nearly so. He likewise says that the two outside sills were doty and unsound, but does not state to what extent, and states that they were painted over, and appeared to be sound on the outside. He likewise says that the two inside sills were unsound, but does not say to what extent, but concedes that he saw these defects by looking at the sills, as they were then exposed to view, tilted to one side, after the wreck, and after the car was dismantled. He likewise saw the defects by looking at the freshly-broken places. He does not say, nor was he asked, whether any defects were seen, or could have been seen, in any other portion of the car outside of those places disclosed by the fresh breaks themselves.

Witness Ashcraft likewise did not testify that the sills broke squarely in two. His testimony is as follows: "Q. How had those sills broken? A. They had all pretty near broken in two; not square in two." It will thus be seen that he emphasizes the fact that they did not break squarely in two. The learned judge quotes from his testimony as follows: "Q. The sills of that car were rotten? * * * They had. I never examined closely, but a person could see. They had all pretty near broken square in two,—short in two." It will be seen that the words "not square in two" were omitted from the quotation. This witness testified: "Q. How many sills did you look at? A. I paid more attention to two inside sills. They were the most rotten. Q. Was any portion of them unsound? A. Well, I couldn't say whether they were or not. Q. You don't know whether there was only a portion of them rotten or not? A. No, sir. Q. You cannot say how much was rotten? A. No, sir. Q. The outside ends were painted over? A. Yes, sir." The same witness testified further: "Q. The outside part,—wasn't that painted over? A. Yes, sir. Q. Wasn't that sound on the outside? A. It was hid with the paint." The same witness further testified: "Q. The only thing that you did look at, concerning the whole wreck, was the sills? A. Yes, sir." Now, this witness saw the car dismantled, saw the sills exposed to plain view after the wreck, and yet could not tell what part of them was rotten, and what not. He confesses that he noticed no other part of the car, except the sills, and admits that the two outside sills were covered with paint. Here, then, was this witness, who swears that the sills were not broken squarely in two, stating that he saw the two middle sills, after the

wreck, by looking at the freshly-broken places, and then does not and could not tell whether any defects of any size or consequence existed in regard to even these two sills.

The next witness referred to was Thomas Conway. His testimony is quoted as follows: "A. We walked around the wreck to see what was the cause of the wreck." Also the following is quoted: "It broke square off, and fell down. I could not call it rotten wood, but bad wood." This witness, in saying that the sills broke squarely off, was referring to the rear portion of the Union Line car, which had plowed along on the ground, and must necessarily have broken some of the sills, after the wreck occurred. He testified as follows: "Q. You didn't examine the part next to the tender? A. No, sir; I didn't." This same witness further testified: "A. I couldn't hardly tell, of course, whether it was an off break, or wasn't." It will be noted that this witness does not claim that the car, or any portion of it, was rotten. In reference to the sills breaking squarely off, it is not surprising that those under the rear portion should have been found in this condition, as the car must necessarily have plowed along on the ground for some distance after it broke. This does not tend to prove that the sills were broken squarely when the car first came down. This witness further testified, in reference to the sills: "Q. Wasn't it oak? A. I guess it was oak. Q. It was hard wood? A. It was hard wood sometime, but didn't look very hard then. Q. It was made out of hard wood, then? A. It was made out of hard wood." He further testified: "Q. These sills were all that you investigated? A. Yes, sir; that's all that I noticed."

The next witness referred to by the court was Philip Lehel. The testimony of this witness is quoted as follows: "A. I saw the car on the track, loaded with flour. I looked at the car. The car was rotten, the sills of it, and was worm-eaten. The car dropped right down on the track." It will be observed that this witness did not examine that part attached to the engine and tender, but simply the rear portion. He testified as follows: "Q. You didn't see that part attached to the tender? A. Yes, sir; but didn't examine it." Said witness further testified: "Q. How many sills? A. I couldn't see the sills under the car. I saw the two outside ones. Q. Were they painted? A. Yes, sir. Q. The wood was better on the outside than the inside? The wood next the paint was all right? A. Sound a little." Said witness further testified: "Q. How could you tell it was rotten when it was broken? A. You could see from the inside. Q. What was on the outside? A. Paint; dirty looking." This witness further testified: "Q. What part of the car did you examine? A. That is all. Q. Then you examined these sills? A. That's all." It will be likewise observed that this witness was speaking of the rear portion,

which had plowed along, and was describing simply the two outside sills, which he saw after the wreck, and could then see they were defective by looking at the fresh breaks alone. He concedes that these sills were painted on the outside, and that he discovered the defects mentioned by looking at the inside, or freshly-broken places. He likewise does not undertake to say whether the defects which he saw were merely nominal or otherwise. In other words, he has stated no facts from which the court or jury can have any idea as to the extent of the defects complained of.

The next witness referred to in the opinion is J. S. Settles, for plaintiff, whose testimony is quoted as follows: "A. The timber was doty, and looked to me like it was rotten; that was the appearance to me." It will be observed that this witness swears that the car did not break squarely in two. He testified as follows: "A. The car was broken in two. It broke at the west door, and came pretty near to the other door. Wasn't in the middle exactly. The rails broke in two and the car went down." This witness examined that part of the car attached to the engine and tender. He further testified as follows: "Q. Did you examine the timber of that portion that was attached to the tender? A. Yes, sir." He further testified: "Q. Which part of this portion attached to the tender did you say was unsound? A. Stringers or rails; stringers on each side of the car. Q. Sills, you mean? A. Yes, sir. Q. Those running along the side of the car? A. Yes, sir. Q. Bottom of the car? A. Yes, sir. Q. How many were there of those sills under the bottom of the car? A. I don't know how many. I noticed the two on the outside. Q. Were they painted? A. The outside of them was." Said witness further testified: "Q. What part of it did you say was unsound? A. Outside sills; we call them stringers. Q. How could you tell? A. I could see where they were broken. They were doty. I would call them rotten. Q. You could tell by seeing those broken places? A. Yes, sir. Q. They were unsound towards the middle of these sills? A. Yes, sir; unsound where broken. * * *" Said witness further testified: "Q. The question I ask you is whether or not the rotten part of this sill wasn't in the middle. A. In the middle and towards the middle of the car." It will be observed that this witness, confessedly, examined the two outside sills alone, and no other portion of the car. He concedes that these two sills were covered with paint, and likewise admits that he concluded they were unsound and doty by looking at the freshly-broken places, and arrived at this conclusion by what the breaks themselves alone disclosed. He also entirely fails to say whether these defects were only nominal, or to what extent they appeared. Such testimony as this would throw no light on the question as to whether the inspectors could have discovered any defects, because they were, as described by these witnesses,

latent, and could not be discovered or seen until the car was broken down, and then only by an examination of the fresh breaks themselves.

The next witness referred to by the court was Richard Lafferty, for plaintiff. His testimony is quoted as follows: "A. I looked over the wreck to see what caused it, and in looking in this car I seen that the inside sills was doty and rotten, and had broken pretty square off." It will be observed that the court simply quoted a part of his testimony in regard to the sills breaking squarely off. Said witness further testified on this subject: "Q. I asked you whether it was a square break, or diagonal. A. Those two inside sills was square break. Q. But the whole car? A. The whole car went diagonal." This testimony shows that only two of the sills broke squarely across, and that the remainder of the car broke diagonally. This witness further testified: "Q. Tell the jury exactly, and show them exactly, the position of the hind end of the broken car. A. The hind end of that freight car was setting almost on the track, while the forward end was shoved to the southwest." This witness further testified: "A. The outside sills are always covered with the outside of the car outside." Said witness further testified: "Q. The unsoundness was at the place that was broken? A. Yes, sir. Q. You could tell that by looking at the broken places? A. Yes, sir. * * * Q. With reference to the sills? A. They seemed to be sound. Wasn't broken any way so you could say they wasn't sound." This witness further testified: "Q. It was fresh broke. You could tell that by looking at it? A. Yes, sir." The substance of the testimony of this witness is that the car broke diagonally; that the outside sills were painted, and covered with the car; that the two inside sills were doty at the freshly-broken places, and as shown by the breaks themselves. In other words, if you leave out of consideration the breaks, and consider the car as it was before, his testimony shows that no defects were observable. He likewise falls entirely to describe the extent or size of any defects, or to show what effect they had upon the strength of the car. From these recited facts it appears that there is nothing in the testimony of this witness which discloses any defects that a car inspector, in the exercise of ordinary care, with the car standing in the train, could have discovered. The witness saw only what he mentioned by looking at the car dismantled, and by an examination of the fresh breaks alone.

The only other witness referred to by the court on this subject is John Downey. It is said by the court that he testified that the car broke square across, and that it looked rotten where the break went through. But an examination of the testimony of John Downey will disclose that he swore that the sills along the side were sound. Said witness testified as follows: "Q. Did you ex-

amine the timbers of that car, so as to state whether it was rotten or otherwise? A. I didn't examine them. I noticed the car looked tolerably new. The timbers looked pretty sound. Q. State to the jury whether or not you noticed any of these sills. State whether they were rotten or otherwise. A. No, sir. The sills looked tolerably sound; didn't look rotten." The witness then testified, as said by the court: "Q. You did observe that this car was broken in two? A. Yes, sir. Q. Square across? A. Yes, sir. Q. Did it look rotten where the break went through? A. Yes, sir." It will be further observed that this witness, on further examination, says that the rotten places which he saw were in reference to the cross sills, running crosswise of the car, and that he discovered this by looking at the breaks themselves. This testimony shows that the sills complained of were apparently sound. The witness did not undertake to describe any defects which were discoverable, or could have been discovered, as the car stood prior to the accident. Those defects which he did see were disclosed by the breaks found after the car was wrecked. He likewise falls entirely to describe the nature or extent of any of these defects, or to say what effect they could have had upon the car in question.

The foregoing is all the testimony mentioned by the court to sustain the verdict below, and is all that could possibly have been quoted in favor of the verdict. On the other hand, all the testimony introduced by the defendant, as well as the former history of the car, and the physical facts disclosed that this car was a comparatively new one, and in a reasonably sound condition. It likewise shows that there was nothing which could have indicated to an inspector, or any other reasonable person, examining the same, that there was anything wrong with the car in any manner whatever. In concluding this testimony, I agree with counsel for defendant in saying that all the testimony offered by plaintiff concerning the defects was in reference to the four sills, or two outside and two inside ones. The undisputed evidence of plaintiff shows that the two outside ones were covered with paint, and could not, by ordinary inspection, have been examined by the inspector, so as to have observed the defects which were pointed out by the witnesses after the car was wrecked, in plain view, and as it was shown by the fresh breaks. On the other hand, every witness for plaintiff who described the defective condition of the two middle sills also admit that they discovered these defects by an examination of the car, after the wreck, with the car dismantled, with the sills in plain view, and that such breaks were only observable by an examination of the fresh breaks themselves. It will likewise be conceded, upon an examination of the record, that not a witness has testified to the nature or extent of a single defect mentioned. Can this court say, upon such

general testimony, under such circumstances, that the jury had the right to infer that these defects were sufficient to render the car unfit for use, when the evidence does not show whether they were the size of a pin head or otherwise? In other words, as the burden of proof was upon plaintiff, the presumption of law being that the inspectors had done their duty, he was bound to show such defects as would reasonably render the car unfit for use. It is therefore asserted that there is an entire failure of proof in respect to this matter, and, aside from the overwhelming testimony and physical facts produced by the defendant, there was a signal failure of proof upon the part of plaintiff to make out a prima facie case. Again, after a thorough examination of the record, I have been unable to find where a single witness has testified that he saw a single defect or unsound place in the car, outside of those disclosed by the freshly-broken sills, and at the places where broken. Nor am I able to find where a single witness was ever asked to point out any other defects in the car, except those as shown by the fresh breaks after the wreck; yet, upon this testimony, the court has erroneously held that the jury, upon mere assumption, had the right to find that defendant's inspectors, as well as the others who must have examined this car, had failed to perform their duty, when not a single witness has ever testified to any particular act or failure upon their part.

In this connection I desire to call especial attention to the case of *Railway Co. v. Bates* (Ind. Sup.) 45 N. E. 109 et seq., where the questions involved were similar to those in the present case, and where the supreme court of Indiana, in an elaborate opinion, delivered by Monks, C. J., said: "The special verdict shows that appellant received a car from another company at Frankfort, Ind., for transportation over its line, and that appellee was injured while attempting to couple the same to a locomotive on appellant's road. The first question presented by the motion for a judgment on a special verdict in favor of appellant is as to the liability of a railroad company to employes for injuries occasioned by a defect in foreign cars, received only for transportation over its lines. * * * The inspection which a company is required to make of such a car is not merely a formal one, but should be made with ordinary care; that is, the inspection should be such as the time, place, means, and opportunity, and the requirements and exigencies of commerce, will permit. If the company has used ordinary care to secure competent inspectors, and inspection is made with ordinary care, under the circumstances, taking into consideration the time, place, means, and opportunity for inspection, and the defects, if any, are discoverable, are repaired, or due notice thereof given to the employe, the duty resting upon the company is discharged. It is not liable for injuries caused by hidden defects which could not be discovered by such inspection

as the exigencies of the traffic will permit. *Railroad Co. v. Fry*, 131 Ind. 327, 28 N. E. 991. The company receiving such foreign car is not bound to repeat the tests which are proper to be used in the original construction of the car, but may assume that all parts of the car which appear upon ordinary examination to be in good condition are in such condition. *Ballou v. Railway Co.*, 54 Wis. 257, 11 N. W. 559. It would seem that, if such car were old, dilapidated, or obviously defective, ordinary care would require a more careful inspection than if there was nothing unusual in its appearance. *Railroad Co. v. Fry*, supra. A railroad company is not negligent in receiving and passing over its lines cars different in construction from those owned and used by itself, if the same are not so out of repair or in such a defective condition as can be discovered by ordinary care. *Baldwin v. Railway Co.*, 50 Iowa, 680; *Railroad Co. v. Flanagan*, 77 Ill. 365; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298, and cases cited. * * * Appellant insists that the special verdict does not find facts from which the court can say that the inspection made was not such as is usually made by ordinary, careful, and prudent inspectors under like circumstances, and that, therefore, as there is no finding of facts showing the want of ordinary care on the part of appellant, the judgment should have been rendered on the verdict in favor of appellant. The purpose of a special verdict is that the jury may find the facts within the issues made by the pleadings, and the court then declares the law thereon. If the special verdict includes findings of evidentiary facts, conclusions of law, and matters without the issues, the same are to be disregarded by the court in applying the law to the facts found. That part of the special verdict essential to the determination of this question is as follows: '(13) When standing upon the track, the drawbar and couplings of said oil-tank car were apparently in proper position and in good repair, and the defects and lack of repair were not observable to said Douglas, nor did he have any notice or reason to think that said drawbar or couplings were in any way insufficient or out of repair. They could only have been ascertained by close inspection under the car. * * * (14) At said station (Frankfort) the defendant maintained a resident car inspector, whose duty it was to inspect all cars of defendant and of other companies before placing them in the trains of defendant at said station. Said inspector did inspect said car, but only superficially and hurriedly, by looking it over without tools or other manual tests, occupying not to exceed 5 minutes in said inspection, and failing to discover the need of repair of said drawbar and attachments. To have made an efficient and proper inspection thereof would have required not less than 15 minutes; and, with no other inspection, said car was ordered into the train. The defective condition of said drawbar and attach-

ments could have easily been discovered by a reasonable and ordinary inspection thereof by said inspector, if competent to make the same; but said inspector did not make the same, and it has not been shown by the evidence that said inspector was sufficiently skilled and competent to make the same.' This court cannot say, as a matter of law, that the car could not have been inspected properly in less than 5 minutes, or that it was necessary to use tools or other manual tests. Neither are there any facts from which we can determine whether the standard of inspection designated as an efficient and proper inspection thereof is the one required by the law. In making an inspection, it is the duty of the inspector to use the usual and ordinary tests, and such tools as persons of ordinary prudence use, if any, under like circumstances. No man is held to a higher degree of skill or care than a fair average of his trade or profession, and the standard of due care is the conduct of the average prudent man. If the inspection is made in the usual and ordinary way, the way commonly adopted by those in like business, it cannot be said that it was done negligently. In determining whether an inspection was made with ordinary care, a jury can only find facts showing whether the same was made in the usual and ordinary manner, the one commonly adopted by men of ordinary care and prudence engaged in the same business under like circumstances. If it were so performed, it was made with due care, and a jury cannot be permitted to say it was negligent. They cannot be allowed to set up a standard which shall, in effect, dictate the custom or control the business of a community. *Titus v. Railway Co.* (Pa. Sup.) 20 Atl. 516; *Ship-Building Co. v. Nuttall*, 119 Pa. St. 149, 13 Atl. 65; *Tuttle v. Railway Co.*, 122 U. S. 194, 7 Sup. Ct. 1166. The finding 'that to have made an efficient and proper inspection and examination thereof would have taken 15 minutes' is a mere conclusion. The standard thus fixed by the jury may be predicated upon the proposition that such searching and critical inspection must be made as would insure absolute safety to the employes. This, as we have shown, is not required. Facts, not conclusions, must be stated. The special verdict should state such facts as would show whether the inspection made was such as is usually made, under like circumstances, by inspectors of ordinary care and prudence; and this would include all facts, showing whether the inspection was such as the time, place, means, opportunity, and the requirements and exigencies of the traffic will permit. The special verdict does not state any facts showing that the car inspector was incompetent. Appellant was not required to prove that the car inspector was sufficiently skilled and competent to act as inspector at Frankfort. The presumption in this case is that he was competent until the contrary is shown. *Railroad Co. v. Tohill*, 143 Ind. 49, 56, 41 N. E. 709-

711, and 42 N. E. 352; *Railroad Co. v. Duel*, 134 Ind. 156-160, 33 N. E. 355, 356, and cases cited. The presumption is that appellant exercised ordinary care in the selection of car inspector with reference to fitness and competency, and that the car was inspected with ordinary care; that is, the inspection was such as the time, place, means, and opportunity, and requirements and exigencies of commerce would reasonably permit. Disregarding the improper matters contained in the special verdict, the facts set forth do not overcome or contradict this presumption. It follows that the court erred in rendering judgment in favor of appellee."

The above case, from which I have just quoted thus at large, in the clearest manner possible declares the law applicable to the present case. The inspector for the defendant at Atchison, in answer to plaintiff's question, swears as follows: "Q. How much time do you spend in inspecting cars? A. From 5 to 25 minutes. Q. The 25-minute examination is principally on cars on which you find something wrong? A. Mostly foreign cars." As testified to by Conductor Butts, he saw the inspector at Kansas City inspecting the car in controversy. Now, it will be observed that no one claims or testifies that either of the inspectors did not take sufficient time to examine this car, nor that they did not perform their duty in the usual and ordinary manner. No one points out anything which they omitted to do that might have been done, nor has a single witness testified to a single defect which the inspectors, by ordinary care, and without making tests to discover hidden defects, could have seen by an examination of the car as it then stood. With the presumption of law that these two inspectors had performed their duty, with the presumption of law that the car was inspected before it left St. Louis, and by the teamster of Mr. Elder, and as the car was comparatively new, and had only been repaired 18 months before, and had gone over the same track less than a week before with a larger load, with a carrying capacity of 60,000 pounds and having only 30,000 pounds at the time, it is simply impossible to say, under such physical facts and testimony as heretofore shown, that there is a scintilla of evidence upon which the jury could find that this car should have been pronounced unsound and unfit for use, when it had been used under the conditions aforesaid. If this is not mere conjecture, then what would you call it? In the case just cited the special findings of the jury might have been drawn from the testimony, yet it was held in the case supra that they did not warrant a recovery on the charge of negligence against the inspector. The case supra presented a much stronger one of negligence against the inspector than the one at bar, for it was said he made a superficial examination, and did not spend sufficient time to make the examination. In the case at bar there is no evidence that the

inspector, or either of them, failed in any particular, or in respect to that which was usual or ordinary. The court, in the most emphatic language, instructed the jury that the presumption of law was that the inspectors had performed their duty. The burden of proof devolved upon plaintiff, and it was required of him, by affirmative evidence, to show that the inspector had failed to perform his duty, and that the injury resulted therefrom. There being a signal failure of proof upon this branch of the case, I think a rehearing should be granted.

5. Conceding, for the sake of argument, that I have erred in matter contained in previous paragraphs, in respect to the rapid rate of speed at which the train was running, causing the injury; assuming, likewise, that the evidence authorized the jury to find that said car broke down before it left the track; and assuming that the jury had the right to infer, from the testimony of the witnesses heretofore set out, that these defects existed in the sills, as testified to by them,—yet the proposition again recurs as to the extent of the defects pointed out by the witnesses. I may also waive, in this connection, the proposition that there is not a word of testimony that any of said defects were discovered, or could have been discovered, at any other places than as disclosed by the fresh breaks alone. The case was submitted to the jury with the right to draw any inference which might be legally drawn from the facts shown, yet they had no right to draw any inference not warranted by facts. Concede, therefore, for the sake of argument, that the defects existed as pointed out by the witnesses, which were discoverable at the freshly-broken places; and still there is nothing in this record to show that either of said defects rendered this 60,000-pound car unsafe to carry 30,000 pounds of freight, when it was comparatively new, had gone over the same road a week before with 31,800 pounds of freight, and had come back in safety over the roughest portion of the road, yet no defects had ever been noted. Could the jury, without any evidence upon the subject as to the nature or extent of the defects, and without any experience or information upon the subject, draw the inference that these skilled inspectors and car experts had violated their duty, in regard to the exercise of ordinary care, in permitting this car to pass, even if they had discovered all those defects which were discoverable before the wreck occurred, and as testified to by the witnesses? I search this record in vain for a syllable of testimony which indicates in the least that any of these defects could have been known to the inspector; but, assuming that those testified to had been known, what, we ask, was there in the record to indicate to an experienced railroad man that he should condemn the car, under such circumstances? I think that judicial notice may be taken of the fact that all cars, after they have been subjected to the inclemency of the weather

for a few years, must necessarily, to some extent, become somewhat worn and out of repair; and yet, if the former opinion is to stand, the railroad company, instead of being required to exercise ordinary care towards its employes in respect to furnishing safe machinery and appliances, would be compelled to stand absolutely as an insurer; and this court in effect so holds. I am unwilling to go to this extent, and, aside from the other questions heretofore discussed, think there was a signal failure of proof upon the part of plaintiff to make out a prima facie case which required of the inspectors the duty of rejecting this car, in making up the train, even with the defects pointed out after the wreck, and as disclosed by the fresh breaks when the car was dismantled as aforesaid.

6. In the opinion of the court we find the following language: "I quite agree with counsel that \$12,000 would have been ample compensation to plaintiff for the injuries sustained, and would require a remittitur to that amount, if it were allowable. * * * The circuit court approved the verdict, and we can, under the circumstances, do nothing but affirm the judgment." It is likewise said in the opinion: "Counsel [for plaintiff] had in mind the law, as it then existed, that this court would require a remittitur in case the verdict was excessively large." But in this connection the suggestion may be made that the court below, likewise, had in view the law, as it then stood, that the supreme court would require a remittitur if it saw fit to do so. That rule of law has been settled from time immemorial, in this state, that, when a case is appealed to the appellate court, it must be tried upon the same theory on which it was tried in the court below. See authorities cited under proposition 1 of this opinion. This case was tried in June, 1894, and a transcript filed in this court on the 12th day of August, 1894. When the transcript was so filed, the decision of this court, in the case of *Furnish v. Railway Co.*, 13 S. W. 1044, as well as the case of *Burdick v. Same Defendant*, 27 S. W. 453, was in force in this state, which permitted this court, when a verdict was excessive, to require a remittitur. After the transcript was filed in this court, the latter adopted the rule as declared in the case of *Rodney v. Railway Co.*, 127 Mo. 676, 28 S. W. 877, and 30 S. W. 150, on the 19th day of March, 1895, repealing the former rule, which had been in force for years prior thereto, and then held that this court was powerless to require a remittitur. It is here suggested that the court has placed itself in the attitude of adopting a rule, and then giving it a construction retrospective in its operation, to the injury of the defendant. If the cause is to be tried upon the same theory on which it was tried below, then the rule, finally adopted in the *Rodney Case*, should only have been applicable to those cases which were tried in the court below after the rule had been changed by this court. In this con-

nection, however, I desire, once for all, to place myself upon record in respect to this question of remittitur. Whenever a record discloses a state of facts from which the court can say that the ends of justice require a remittitur, then, in our opinion, the court judicially determines that the appellant has not had a fair and impartial trial under the laws of our state. It is untenable to assert that a remittitur will not be required, because we have not the right to do so, and at the same time assert, as in the case at bar, that injustice has been done by returning a verdict for \$3,000 more than ample compensation, and that we are powerless to grant any relief. The true rule ought to be, when the record shows a state of facts from which this court can say that injustice has been done, and that a larger verdict has been returned than just compensation and the ends of justice require, the defendant has not had a fair and impartial trial, and it then becomes the duty of this court, in order that justice may be done, to remand the case for a new trial. If we cannot, in a case like this, remand it for that reason, then where can you mention a case, to which the rule should be applied? The entire court, upon the very face of this record, concedes that the plaintiff is recovering \$3,000, with interest, more than that which is admitted to be ample compensation. It is likewise said that, if it were allowable, a remittitur would be required. If this is not, then, a judicial declaration that injustice has been done the defendant, and that the verdict must have been either the result of partiality, passion, or prejudice, then what would you term it? To say the least, the rights of defendant, confessedly, have been violated, and yet it is told by this court that it is without a remedy.

(a) In respect to that part of the opinion, heretofore quoted, in which it is said, "We would require a remittitur to that amount, if it were allowable," I desire further to say that the opinion, as it thus stands, is absolutely in conflict with the decisions throughout the country, as well as the very maxims of the law. It will be found, from the very earliest history of the courts, that they have uniformly amplified their jurisdiction to meet the requirements of justice whenever occasion demanded. It is asserted in *Broom, Leg. Max. (6th Ed.)* § 80, that it is the duty of a judge, when requisite, to amplify the limits of his jurisdiction. "*Boni iudicis est ampliare jurisdictionem.*" The same rule is clearly followed and announced in its broadest terms by Judge Elliott, in his recent work on *Appellate Procedure* (section 21), as follows: "It is inconceivable that a high court of justice, such as an appellate tribunal, may not, upon an investigation of the record, so frame its judgment as to prevent the defeat of justice by technical and arbitrary rules. The denial of this right involves the affirmation that the highest courts cannot award justice,

and this conclusion cannot be vindicated, since the underlying and sovereign principle is that the right of appeal insures to litigants who have obeyed the substantive rules of law, and conformed to the rules of procedure, a judgment awarding them justice under the laws of the land. It must be true, therefore that a high appellate tribunal may deliver and enforce a judgment that will prevent wrong and award justice to the parties entitled to it." The rule of law so clearly announced by Judge Elliott, *supra*, appeals to reason as well as to common sense. This is what one of the most learned luminaries who ever sat upon the bench in this state said upon the question involved, in the case of *Goetz v. Amba*, 22 Mo. 172: "As a new trial will be granted on account of the excessiveness of the damages, we deem it inappropriate to make any comments on the case. Upon looking over the record, we are satisfied that the ends of justice will be subserved by granting a new trial. Although the injury sustained was a serious one, we do not think the circumstances warranted so heavy a verdict." In the case of *Whitsett v. Ransom*, 79 Mo. 280, it is said: "The court told the jury, in one of the instructions, that if defendant willfully and in anger spat in the plaintiff's face, they should find for plaintiff; and yet this jury went out, under the sanction of an oath, and came back with a verdict for defendant. Such a trial is a travesty on justice, and a mockery of the courts. I [Judge Phillips] yield to no one in my reverence for the 'right of trial per pais,' as Blackstone calls it, and due respect for the proper domain of jurors. But the courts owe a duty of paramount concern to the cause of good government and orderly society. Under a sense of that obligation we reverse the judgment of the circuit court, and remand this cause for a new trial, if the plaintiff so desires." In *Garret v. Greenwell*, 92 Mo. 125, 4 S. W. 441, this court again said: "Looking at all these things, it is a matter of profound surprise that a jury, with all the evidence before them, could have found as they did. But, inasmuch as they have done so, our duty, under the rule announced in the cases of *Whitsett v. Ransom*, 79 Mo. 258, and *Spohn v. Railroad Co.*, 87 Mo. 74, is clear, and so the judgment is reversed, and the cause remanded." In the case of *Caruth v. Richeason*, 96 Mo. 192, 9 S. W. 635, Judge Black, in delivering the opinion of the court, said: "This court rarely interferes with the verdict of a jury when there is any substantial evidence to support it, though the trial court has a large discretion in the matter. [Cases cited.] But, in extreme cases, this court must and will interfere, and that, too, whether the verdict be for plaintiff or defendant." In the case of *Spohn v. Railway Co.*, 87 Mo. 84, 85, it is said: "A proper administration of the law demands a new trial,"—and it was granted in the case. In *Hunt v. Railway Co.*, 89 Mo. 609, 1 S. W. 123, Judge Ray said:

"Section 3776, Rev. St. 1879, provides that: 'The supreme court, in appeals or writs of error, shall examine the record and award a new trial, reverse or affirm the judgment or decision of the circuit court, or give such judgment as such court ought to have given, as to them shall seem agreeable to law.' In reversing the judgment as to one of the defendants, and affirming it as to the other, as we have done in this case, we think we have hereby given such judgment as the lower court, under the facts and the law of the case, ought to have given. In a case like this the ends of justice do not require that the whole case should be reversed and remanded, and for further proceedings. In numerous instances this court has modified and affirmed judgments, as seemed agreeable to law and justice." In the case of *Scott v. Smith*, 133 Mo. 623, 34 S. W. 865, Judge Macfarlane, who delivered the opinion in the case at bar, cites with approval a portion of Judge Scott's opinion from *Stout v. Lewis*, 11 Mo. 439, as follows: "The case is different when the court below refuses to interfere. There the party is remediless, and cases may arise where this court will interpose. * * * These motions are addressed to the sound discretion of those courts, to be liberally exercised in furtherance of justice. A wise judge has said that it is not alone sufficient that justice be administered, but it must be administered in a manner satisfactory to suitors."

7. In addition to the elementary principles of law heretofore recognized by this court, it is proper to advert to section 2304, Rev. St. Mo. 1889, which in express terms authorizes this court, when the ends of justice require it, to reverse or remand the cause. It reads as follows: "The supreme court * * * shall examine the record, and award a new trial, reverse or affirm the judgment or decision of the circuit court, or give such judgment as such court ought to have given, as to them shall seem agreeable to law." What more should be asked in the way of conferring power upon this court to dispose of a case, in order that the ends of justice might be observed thereby, than that which is given in the statute just quoted? Speaking for myself, I cannot escape the conclusion that the jury in this cause were not only actuated by sympathy or prejudice in regard to the amount of the verdict rendered, but likewise as to the merits of the controversy. As heretofore shown, the overwhelming testimony upon the merits of the case is with the defendant. The verdict stands without any legal evidence to support it, and yet this jury, upon such facts, with plaintiff's counsel in his closing argument appealing to them not to return a verdict for more than \$12,000, returned one for \$3,000 more than ample compensation, and also more than this court, upon the face of the record, says is adequate; yet I am told that this court is powerless to grant any relief. If it is not granted, it is because the judges of this court refuse to exercise

the power conferred upon them by plain law. In my opinion, there is no middle ground. This case, if not reversed without remanding, should, upon general principles, be reversed and sent back for new trial, in order that the ends of justice may be attained.

ROBINSON, J., concurs in this opinion.

SHERWOOD, J. To the foregoing separate opinion, filed by me in this cause on October 11, 1897, I deem it proper to add a few additional remarks; and I do this because of two additional opinions which have been filed in this cause, and which seem to call these remarks forth. The one opinion holds that the demurrer to the evidence was properly denied, and that there was no error as to the instruction; the other, that the evidence was clear and uncontradicted that the proper inspection of the car was made, and that, while the jury had the right to disbelieve such testimony, yet that they could not disregard the instructions of the court "that unless they believed, from the evidence, that defendant failed to use ordinary care in inspecting the car, and in consequence thereof failed to discover its defective condition, if it was defective, they would find for defendant," but that, inasmuch as it was uncertain which they did, this uncertainty as to the basis of the action of the jury warrants granting defendant a new trial. The prominent and predominant question in this case is whether the court properly refused an instruction in the nature of a demurrer to the evidence. If this refusal was improper, then it is wholly immaterial what were the instructions given or refused, as such a ruling necessitates a reversal of the judgment. Without adverting to other deficiencies in the evidence, I address myself, therefore, to the main point in and of the evidence upon which this cause hinges, to wit, whether the car was properly inspected. But this stands uncontradicted, so that it seems to me that, if the jury have the right to disbelieve the evidence on the point mentioned, and their action was founded on such disbelief, then it stands to reason that in contemplation of law there was no evidence, and therefore the jury was right in disregarding instructions which had no evidential basis on which to rest; and it will be presumed that they acted by right, and not by wrong, and consequently did not "disregard the instructions of the court." But I maintain that the idea that the jury, "without rhyme or reason," may arbitrarily disregard evidence which is based on well-known probabilities and the daily experience of common life, and is not unreasonable in its nature, nor impeached, nor contradicted, is at war with every principle which lies at the foundation of the law's proper administration. If a chancellor, trained and bred to the law, with long experience on the bench, decides a case contrary to the evidence, even if there be some conflict therein, or decides that there is

no evidence, when we think there is, this court does not hesitate to reverse the decree, and will frequently enter in this court a decree for the unsuccessful party.

"On what meats has this our jury fed,
That it has grown so great,"

that they may disregard the clearest and most indisputable and uncontradicted evidence, and their act pass unchallenged and without remedy, and then the unsuccessful suitor, though justly entitled to a verdict, be blandly told, "The jury had the right to disbelieve your witnesses, and they have done so"? If the utterance of such an edict does not affix the bar sinister upon the escutcheon of public justice, I know not by what words to express the name and nature of the confiscatory outrage. But, though this court has frequently made deliverances of the tenor and effect above noted, yet it has also far more frequently given expression to rulings wholly at variance with those deliverances. For instance, it has often said that, if the evidence be undisputed, the lower court may, without error, assume in an instruction the existence of such undisputed facts. *Hall v. Railroad Co.*, 74 Mo. 298; *Fields v. Railroad Co.*, 80 Mo. 203; *Barr v. Armstrong*, 56 Mo. 577; *Caldwell v. Stephens*, 57 Mo. 589. Now, what right has the court to assume to be true what the jury may immediately assume to be false and incontinently disbelieve? We have frequently, also, declared that the trial court may direct the jury to find a verdict for a party in whose favor there is undisputed evidence. *Reichenbach v. Ellerbe*, 115 Mo. 588, 22 S. W. 573, and cases cited. How does this tally with the theory that the jury may absolutely disbelieve such undisputed evidence? Elsewhere it is held that a trial court may, in proper circumstances, direct a verdict for either party. 2 *Elliott, Gen. Prac.* 887, and cases cited. This method of procedure has largely superseded the practice of demurring to the evidence, and is as much a matter of right, when demanded, as a demurrer to the evidence. *Id.* It is unnecessary for me to go into this subject more fully, since it has been so recently and exhaustively discussed by Marshall, J., in *Gannon's Case*, 145 Mo., loc. cit. 544, 46 S. W. 968, and 47 S. W. 915, where the authorities in this and other states are reviewed with great elaboration. So far as I am aware, no other state but our own has ever announced such a doctrine as that which I have condemned. In the very recent case of *May v. Crawford* (decided in division No. 1 of this court) 51 S. W. 693, the doctrine announced in the dissenting opinion in *Gannon's Case* has been reaffirmed. The opinion from which I have quoted does not discuss the point whether the trial court erred in denying defendant's demurrer to the evidence, but it is quite plain to me that if, as is indisputably and uncontradictedly true from that evidence, a proper inspection was had of the car, then the plaintiff has no case, and the demurrer to the evi-

dence should have prevailed. It was the clear duty, therefore, of the lower court to have given an instruction in the nature of a demurrer to the evidence; and this view is abundantly supported by the opinion of Brace, J., in *Reichenbach's Case*, supra.

The opinion which goes in for affirmance of the judgment evidently feels the force of the undisputed evidence, showing with convincing clearness that the car was properly inspected, and so, by way of parrying that force, asserts: "The manner of making those inspections was in evidence. From this it appeared that the inspector in Atchison inspected about 150 cars in a day, and the Kansas City man inspected about 100 cars in a night. This car passed through such inspections, and as the inspectors made no note of the car, as they would have done if they had seen a defect, they presumed it was in good condition." The evidence in this case, be it remembered, does not tell us how many cars can be properly inspected in a day, and so it seems this opinion attempts to fill the hiatus by taking some sort of judicial notice, as it were, which, without extraneous aid, determines for itself and of itself and within itself just what number of cars could receive the proper inspection within a given time. I hardly think that judicial notice can extend itself as far as that, nor do I think that the jury, in the absence of evidence on the point in question, could resort to their inner consciousness, with the view to supply what the evidence failed to furnish. The fourth paragraph of the opinion under review discusses defendant's fourth instruction, to wit, that the law presumes "that defendant's servants did their duty in inspecting the car, and the burden is on the plaintiff to show that they failed to do so." After making the above quotation, that paragraph thereupon proceeds thus: "There is no such presumption in defendant's favor. On the contrary, when it appears that the servant is injured by a defective appliance furnished by the master, the burden is on the master to show that he exercised the ordinary care that the law requires." This is the first time I have ever observed the existence of this familiar presumption denied. In *Lenox v. Harrison*, 88 Mo., loc. cit. 496, it is said: "The subject of the favorable presumptions which are indulged in behalf of persons acting in an official capacity, especially after a long lapse of time has intervened, has been quite extensively discussed in *Long v. Smelting Co.*, 68 Mo. 422. In similar circumstances the like lenient presumptions are indulged in favor of persons who occupy no official station. Every one is presumed to govern himself by the rules of right reason, and consequently that he acquits himself of his engagements and his duty. 1 *Phil. Ev. (Cow. & H. Notes)* pp. 604, 605, § 10." Judge Elliott, in his excellent work on Railroads, when speaking of the point in hand, says: "The presumption, in the absence of anything to

the contrary, is that the company and its employes did their duty and complied with the law." Volume 4, § 1701. Elsewhere the learned author observes: "Test of the employer's liability: The mere fact that after the occurrence of an accident defects are discovered in the machinery or appliances is not sufficient to fasten a liability upon the employer. The duty of the employer is to exercise ordinary and reasonable care to provide and keep reasonably safe machinery and appliances, but he is not an insurer, so that he cannot be held liable unless it is affirmatively shown that he was guilty of negligence. The test of liability, therefore, is the presence or absence of negligence. If there is no negligence, there can be no liability, although there may be defects, and the defects may be the proximate cause of the injury." 3 Elliott, R. R. § 1308. In the same connection it is said: "The employé who seeks a recovery for personal injury has the burden of proving a negligent breach of duty on the part of the employer." Id. § 1309. In another work of merit the law is laid down: "The burden is upon the employé to establish, not only that the appliances were defective, but also that the company was negligent in respect thereto. * * * The mere fact that the appliances are defective is not sufficient to charge the master with liability for an injury resulting therefrom. It must also be shown that the master knew, or ought to have known, of the defect, and negligently failed to repair it." Wood, Mast. & Serv. (2d Ed.) § 335. These pertinent quotations suffice to show that there is such a presumption as that aforesaid; that the burden is not on the employer, as has been alleged, but on the employé; and that the mere fact that defects are discovered after an accident happens does not fasten liability on the employer. But in this case, as before stated, the evidence is uncontradicted that the proper inspection of the car was made. Everything that the law required at the hands of the master was done, and properly done, and there is not a scintilla of evidence to the contrary. Where, then, and how, then, does the master's liability attach?

MARSHALL, J. I am of opinion that there was no evidence that the car was not properly inspected, and want of proper inspection was the only act of negligence upon which the plaintiff could predicate a recovery under the facts as disclosed by this record. The defendant showed that it had inspected the car, and the plaintiff offered no evidence that the inspection as made by defendant was not a proper inspection, or such an inspection as a man of ordinary prudence would have made under the circumstances. In the absence of such showing, I think that the negligence as to inspection was not sufficiently shown, and therefore the judgment should be reversed and the cause remanded.

VALLIANT, J. This is a suit for damages for personal injuries sustained in the wreck of a freight train of defendant by plaintiff, who was a brakeman on the train. The petition states substantially that defendant railroad company was the owner of a line of railway, engines, and trains of cars, and engaged in operating the same between Kansas City and St. Louis, and plaintiff was in the service of defendant as brakeman on a freight train that started from Kansas City on December 11, 1892, bound for St. Louis; that the defendant negligently furnished and placed in the train "a car, numbered 7,919, with the initials 'U. L.' thereon, which was at the time unfit for service, unsafe, old, worn, and out of repair, and the timbers of which were decayed and rotten, and which was by defendant overloaded and improperly loaded, and caused and permitted said train to be run at a rapid and dangerous rate of speed"; that defendant knew, or by the exercise of ordinary care might have known, the condition of the car; that because of this condition, and of the rapid and dangerous rate of speed at which the train was run, the car broke, the train was wrecked, and the plaintiff, while in the line of his duty and without fault on his part, was thrown into the wreck and seriously injured. The answer was a general denial. The cause was tried July 2, 1894, in the circuit court of Bates county. The testimony on the part of the plaintiff tended to show that the train left Kansas City December 11, 1892, about 9:35 a. m. There were 18 cars in the train, of which this U. L. No. 7,919 was the one next to the engine; that there were three brakemen, of whom plaintiff was the one most forward; that when the train reached a point near what is called "Little Blue" switch, in Jackson county, it was wrecked; that when the crash was over, and the wreck was accomplished, this was the condition of things, to wit: The engine, except the two front small wheels, was off the track. The tender was off. This front car was broken in two. One part, being about one-third of it, was still coupled to the tender, and was off to the right of the track. The other part was still on the track, the front end of this rear part having fallen down and plowed into the ties. The space between these several parts of the car was 70 to 80 feet. Nearly all of the other cars to the rear of this one were crushed and broken, some of them falling to the right and some to the left of the track. A few of the cars in the rear were not broken. Plaintiff was found under one of the wrecked cars, his right leg crushed and broken, his left mangled and torn, and other wounds. The plaintiff's testimony also tended to show that this front car was loaded with flour in barrels; that it was an old car; that several of its sills were rotten and worm-eaten, and they appeared to have broken squarely in two, or nearly so; that the iron truss rods that ran the length of the car had not broken, but the ends which

were held with nuts had pulled out at the rear end, pulling the nuts through the cross sills,—the rods remaining with the front part of the car, which was attached to the tender. It was stipulated by the parties that this car (U. L. 7,919) was received in Atchison, Kan., December 5, 1893, having come over defendant's road from St. Louis loaded with 31,300 pounds of nails, and it remained in Atchison, in defendant's possession, unloaded, from that date until December 10, 1893. The testimony on part of defendant tended to show that the car was sound, in good condition, and comparatively new; that it was built to carry 60,000 pounds, and at the time of the wreck was loaded with 30,000 pounds of barreled flour; that it was inspected at Atchison and Kansas City, and no defect was noticed; that the train, which consisted of 18 cars, with the U. L. 7,919 car in front, was running at the rate of 20 to 25 miles an hour; that when the engine stopped it was from 100 to 200 yards from the wrecked cars. At the close of the whole case defendant demurred to the evidence, the court overruled the demurrer, and defendant excepted.

At the request of plaintiff the court instructed the jury as follows: "(1) The court instructs the jury that if you believe, from the evidence in this case, that at the time of the wreck of the defendant's train the timbers of the car No. 7,919, Union Line, mentioned in evidence, were rotten and decayed, and that by reason thereof the said car was not in a reasonably safe condition for use in defendant's said train, and that defendant knew of, or by the exercise of ordinary care might have known of, the condition of said car, and that by reason of the said condition of said car, if the jury believe, from the evidence, it was in such condition, the said car broke, and the said train was wrecked, and plaintiff, while in the line of his employment and without fault on his part, was injured thereby, the jury must find for the plaintiff. (2) If the jury find for the plaintiff, in estimating his damages they will take into consideration not only his age and condition in life, the physical injury inflicted, and the bodily pain and mental anguish endured, but also any and all such damages, if any, which it appears, from the evidence, will reasonably result to him from said injury in the future, not to exceed, in all, the sum of \$25,000."

At the request of defendant the court gave the jury the following instructions: "(1) Even if the jury should find, from the evidence, that said Union Line car 7,919 was the first one of the train to leave the track, still this, in and of itself, does not prove that said car was unsafe, unsound, or improperly loaded. (2) It is further charged in petition that said train on which plaintiff was injured was run at a rapid and dangerous rate of speed. You are instructed that defendant was guilty of no negligence in running said train at the rate of speed disclosed by the evidence. (3)

Even if the jury should find and believe, from the evidence, that some portion of said car 7,919, Union Line, after the accident, appeared to be unsound and defective, yet the plaintiff is not entitled to recover herein unless the jury believe and find, from the preponderance of the evidence, that said defects were known to defendant prior to said accident, or by the exercise of ordinary care upon its part said defects or unsoundness could have been discovered, by ordinary inspection upon the part of said defendant. (4) 'Ordinary care,' as used in these instructions, means such care as an ordinarily prudent person would exercise under the circumstances detailed in evidence. If, therefore, the jury believe, from the evidence, that defendant, through its proper servant or servants, after having received said Union Line car 7,919 for the transportation of flour, mentioned in evidence, inspected the same at Atchison, Kan., then the presumption is that said servant exercised ordinary care in the inspection of said car, and did his duty, and it devolves upon plaintiff to show, by a preponderance of the evidence, that said defendant failed to exercise ordinary care in inspecting said car; and unless the jury shall find, from the evidence, that said plaintiff has overcome the presumption aforesaid by the greater weight of all the testimony, it should find the issues herein in favor of defendant, notwithstanding said car may have been defective, and by reason thereof caused the injury to plaintiff. (5) Even if the jury should find, from the evidence, that said Union Line car 7,919 was the first one on the train to leave the track, that it was unsound, and that it caused the wreck and plaintiff's injury, still, unless the jury believe, from the greater weight of the evidence, that defendant's servants failed to exercise ordinary care in inspecting said car before the accident, their verdict should be for the defendant. The jury are further instructed, in this connection, that, in the absence of any evidence to the contrary, the law presumes that the servants of defendant who inspected said car performed their duty properly. (6) The court instructs the jury that defendant was not required, under the law, upon receipt of said Union Line car 7,919, to make tests to discover hidden defects in the construction, or in the materials used in the construction, of said car. (7) If the jury believe, from the evidence, that there was nothing patent upon the face of said Union Line car 7,919 indicating that it was unsound and unfit for use, and that there was nothing to indicate, upon reasonable inspection of same by the servants of defendant, that said car was unsound and unfit for the use it was then put to in transporting said flour, then your verdict must be for defendant, notwithstanding you may also believe that said car was unsound, and that said unsoundness caused the wreck which resulted in plaintiff's injury. (8) The jury are further instructed that defendant was not bound to furnish to plaintiff

absolutely safe appliances and cars with which to work, but was only required to use ordinary care in inspecting this and other foreign cars which came upon its road, so as to ascertain whether any defect or unsoundness appeared thereon which were open to inspection, and which could be ascertained by ordinary inspection of same. (9) You are further instructed that, in considering the charges of negligence against defendant, you are confined solely to said Union Line car 7,919, and cannot consider any other supposed negligence which may have caused the injury to plaintiff. (10) The court instructs the jury that defendant was guilty of no negligence in running its train at the rate of speed at which it was run at the time of the accident. If the jury are unable to determine, from the evidence, whether said Union Line car 7,919 caused plaintiff's injury, or whether it occurred from some other source, then it is your duty to return a verdict for defendant, as the burden of proof herein devolves upon the plaintiff. Even if the jury should find and believe, from the evidence, that said Union Line car 7,919 was the first car which went off defendant's track, yet this does not prove that said car was unsound or defective, and your verdict must still be for defendant, unless you further find and believe, from the greater weight of the evidence, that said car was unsound and defective, and either known to have been so by defendant, or by the exercise of ordinary care upon its part could have been known, and, further, that said unsoundness of said car directly caused plaintiff's injuries. (11) The burden of proof in this case is upon the plaintiff. Before the jury can, therefore, find for plaintiff, it must believe and find from the preponderance or greater weight of all the evidence—First, that the Union Line car 7,919, next to defendant's tender, caused plaintiff's injuries; second, that said car was defective, unsafe, and unfit for the purposes for which it was then used; third, that said defects were known to defendant, or by the exercise of ordinary care upon its part could have been ascertained by reasonable inspection upon the part of said defendant. Unless the jury find, from the greater weight of all the evidence, in favor of plaintiff upon all three of the propositions aforesaid, the verdict must be in favor of the defendant. (12) The jury are instructed that, although you may find and believe, from the evidence, that the train upon which plaintiff was acting as brakeman was, at the time of the injury, being run at a rapid or dangerous rate of speed, and by reason thereof was ditched or wrecked, and the plaintiff injured thereby, yet, under the evidence in this case, your finding should be for the defendant. (13) Unless the jury believe, from the preponderance of the evidence, that the Union Line car 7,919 broke before it left the track, then your verdict must be for defendant, notwithstanding you may further believe that some portion of said car was un-

sound or rotten. (14) It is the duty of the jury under the law to try this cause as they would a suit between two individuals. The fact that plaintiff is an individual and the defendant a corporation should make no difference with the jurors in arriving at their verdict. In considering and deciding the case, the jury should look solely to the evidence for the facts, and to the instructions of the court for the law of the case, without any reference as to who is plaintiff and who defendant. You are further instructed that each and all the instructions herein are in harmony with each other, and must be considered and construed together in arriving at your verdict."

Defendant also asked the following instructions, which the court refused: "(15) Under the pleadings and evidence in this case, it is the duty of the jury to return a verdict for defendant. (16) The court further instructs the jury that defendant was guilty of no negligence in transporting said car 7,919 as it was loaded at the time of the accident with the flour mentioned in evidence. (17) It is charged in petition that defendant was guilty of negligence in having placed and furnished, and allowed to be placed, operated, and used in its train, car numbered 7,919, with the initials 'U. L.' thereon, which was at the time unfit for service, unsafe, old, worn, and out of repair, and the timbers of which were decayed and rotten, and which was by defendant overloaded and improperly loaded. You are instructed that the facts detailed in evidence are insufficient to establish any negligence upon the part of defendant in the foregoing respects, causing plaintiff's injury. (18) It is further charged in petition that said car was improperly overloaded with flour. You are instructed that defendant was guilty of no negligence in transporting said car, loaded, as it was, with the flour aforesaid."

To the giving of those instructions asked by the plaintiff, and the refusing of those refused asked by defendant, the defendant duly excepted. There was a verdict and judgment for plaintiff for \$15,000, motions for new trial and in arrest by defendant, which were overruled, exceptions preserved, and the cause brought here for review.

1. It is contended by defendant that the plaintiff has stated himself out of court by averring in his petition that the defendant was guilty of negligence in running the train at a dangerous speed, and testifying himself to that effect. The proposition is that it appears from plaintiff's pleading and proof that the wreck was caused by the negligence of plaintiff's fellow servants in running the train. The petition does charge that the train was being run at a rapid and dangerous rate of speed, and that by means of the defective car and the dangerous rate of speed the accident occurred. If this petition, under a strict construction *contra proferentum*, is liable to the interpretation that the rapid and dangerous speed of the train was the cause

of the accident, it would have been held bad on demurrer, if a demurrer had been in season interposed; but after issue joined, and trial and verdict, the court will not construe the petition most strictly against the pleader, but the pleading will "be liberally construed with a view to substantial justice." Rev. St. 1889, § 2704; *Young v. Iron Co.*, 108 Mo. 324, 15 S. W. 771; *McDermott v. Claas*, 104 Mo. 14, 15 S. W. 995; *Bank v. Sealzo*, 127 Mo. 164, 29 S. W. 1032. If a petition founded on negligence states two acts, each constituting negligence, and each sufficient in itself to sustain the cause of action, if there be proof to sustain one and no proof of the other, the action will not fail; and if one of the acts charged as negligence is not, under the law of the case, such negligence as defendant is liable for, the petition is vulnerable to special demurrer or motion to strike out. But a party who wants to insist on his right to have his adversary state his case under the strict rules of pleading must make his demand known to the court in due season and in due form. If he waits, and takes his chances on a verdict, he will not be relieved from the effect of an unfavorable result of his venture, if, by a liberal construction, as the statute requires, there is sufficient in the petition to support the verdict. The petition charges defendant with negligence in two particulars,—defective car, and dangerous speed of train. The one is cause for which defendant is responsible to plaintiff; the other is not. No demurrer is interposed, nor motion to strike out, but issue is joined, and the cause is tried. If, in that condition of the pleadings, the evidence shows that the injury complained of was the result of that act stated in the petition for which the defendant is not responsible to the plaintiff, the court should then, on demurrer to the evidence, take the case from the jury; but if the evidence shows that the injury resulted from the cause for which the defendant is liable to the plaintiff, the court would not allow the plaintiff's just cause to be defeated on account of an uncovered defect in the petition, easily susceptible of amendment. The demurrer in this case was not directed to the petition before trial, nor was it leveled at the plaintiff's evidence alone at the trial, but came after all the evidence of defendant was in, and must be considered in that light. Now, what was the evidence to support the demurrer on the ground that the accident was caused by a dangerous speed? Plaintiff testified that he noticed that the engineer did not shut off as he generally did, and the train was going too fast; that he looked to see what condition the drivewheels were in; that he had not been on the road long enough to tell the speed of the train by riding. "I thought we were running too fast, and think about that time we were going in the ditch." That is all the evidence in the case tending to prove that the train was running at a dangerous speed, and that the opinion of a boy

19 years old, with experience less than a year as a brakeman. Suppose we leave out of view for the moment the fellow-servant doctrine, and suppose the defendant would have been liable to plaintiff if the accident had been caused by running the train too fast, and suppose that was all the evidence of the fact the plaintiff had to rely on; is there a court in all the land that would have suffered a judgment to go against the defendant on that evidence? Then, if it would not justify a verdict in his favor, would justice allow it to preclude him from a recovery that he was otherwise entitled to? Granting all that may be said about the difference between an admission of a fact by a party against his interest, and the assertion of the same in his interest, still how much does this boy's opinion, formed under those circumstances, weigh, whether you put it in one side of the scales or the other? But defendant's witnesses completely negative the idea that the train was running too fast. They say it was running from 20 to 25 miles an hour. The conductor said they were two hours late, but were not trying to make up time; that they were not using steam, and it was not necessary; that they were in half a mile of the side track where they were to wait for the passenger train. Plaintiff did not try to show that the road was in bad order, so that a train could not safely run over it at the speed of 25 miles an hour. No witness said that 20 to 25 miles an hour was a dangerous speed, and no witness would have been believed if he had said so. The idea that the train was running at a dangerous speed was effectually removed from the consideration of the jury, even if it had had a lodging there, by two instructions, which were written by counsel for defendant and given at their request. The argument is now made by the counsel that those instructions meant that defendant was not liable to plaintiff, even though the train was being run at a dangerous speed, because it was the work of his fellow servants; but that is not what defendant's second and tenth instructions say, and that meaning in them is not obvious. The last paragraph in defendant's instruction 14 directs the jury to construe the instructions all together and in harmony. If the second and tenth instructions for defendant were intended to mean what it is now contended they mean, the twelfth instruction was useless, because the twelfth instruction is that, although they may find that the train was running at a dangerous speed, still, as plaintiff was brakeman on the train, defendant was not liable. Counsel who drew those instructions did not intend to mislead the court or jury. There was nothing covert in them. They were plain, straightforward, and meant what they said. But not only did the second and tenth instructions for defendant eliminate that question from the case, but the first instruction for plaintiff, emphasized by the eleventh instruction for defendant, limited the inquiry of

the jury to the real matter in controversy, so that it would be impossible for an intelligent juror to make a mistake as to the issue he was to try. There was nothing in the pleadings or evidence that would have justified the court in taking the case from the jury on the fellow-servant doctrine.

2. But defendant insists that there was no evidence tending to show that it was liable on the theory that the wreck was caused by the alleged defective car. Under instruction 1 given for the plaintiff, the jury were directed to find for plaintiff if they were satisfied, from the evidence, that the car was rotten, and for that reason unsafe; that defendant knew, or by the exercise of ordinary care might have known, its condition; that because of such condition it broke, and the train was thereby wrecked, and plaintiff was injured as the result, without fault on his part. This was followed by instructions for defendant elaborating and guarding each proposition from defendant's standpoint, and finally analyzing and summarizing the issues in instruction 11, and placing the burden of proof on the plaintiff. Defendant has nothing to complain of in those instructions. The jury found for plaintiff, and the court overruled the motion for new trial. In this condition of the record this court is not called upon to weigh the evidence to ascertain on which side is the preponderance. We are to look at it only to see if there was substantial proof to support the plaintiff's side of the issues. There was no doubt in the minds of those who were upon the scene, at and immediately after the accident, that it was the breaking in two of the front car that caused the wreck; and, if they have described that scene to us truthfully, we can have no doubt of it. There was the front car broken in two, the rear end still on the track, its timbers dropped down in front, having plowed against the ties, and all the other cars piled in a wreck against and behind it. And the front end,—where was it? Still coupled fast to the tender, off the track, and distant, according to some of the witnesses from 70 to 80 feet, and according to another from 100 to 200 yards ahead. How did the parts get severed in that way? No witness has said, and no witness need say. The thing speaks for itself. All the witnesses who undertook to investigate the cause of the wreck examined this car, and some of them examined no further. That was to be expected. If a chain is broken, one looking for the cause naturally examines the broken link, and for the purpose of that inquiry need go no further. There was one witness, and only one, who said that the car was whole when it left the track, and the damage to it was caused after. If that was true, then all the other witnesses, both for plaintiff and defendant, were mistaken when they said that they found one end of the car on the track, and the other end coupled to the tender, some distance ahead. This statement was not made by this

witness in his direct examination, nor in his cross examination, but was his last utterance on his redirect examination and is in contradiction of his own statements in his chief and cross examinations, in which he said that the car was broken in two about the center, and the front half remained attached to the tender. The jury doubtless came to the conclusion that it was improbable that the car had gone off whole, been broken afterwards, and the parts got back in the positions they were, by the time the people in the neighborhood collected on the scene. On the question of whether or not the car was rotten, there were also some facts to speak for themselves. Defendant produced in evidence the plans and specifications under which this car was built in 1887, calling for first-class material and workmanship. It was designed to carry 60,000 pounds, and that was its record capacity. In 1891 its strength had been fortified with what was called "Graham draft rigging." Why that was done we are not informed. A few days before this accident the car was sent from the East over defendant's road, loaded to one-half its record capacity. Defendant kept it five days in its yards at Atchison, when it was loaded to one-half its record capacity, and put into this train. This was an ordinary freight train, of 18 cars. It was running at not an unreasonable speed, and yet, under these not unfavorable conditions, the car broke in two. If it was a sound car, capable of sustaining the draft incident to railroad traffic in an ordinary freight train while carrying a load of 60,000 pounds, why did it go to pieces in this ordinary train, while carrying only 30,000 pounds? The great noise caused by the wreck attracted many people living in the vicinity, who collected on the scene. Some of them felt interest enough in the matter to examine the broken car, and they testified that its timbers were rotten. We will not now attempt to analyze or review the evidence, nor will we weigh it. It was sufficient to carry the case to the jury on that question. It seems to have satisfied them and the trial judge, and there is no occasion for our looking further into it. Assuming that the car was unfit for service, was its defect such as defendant might, by the exercise of ordinary care, have discovered it? The testimony of the plaintiff's witnesses on that subject was to the effect that the sills of the car were rotten. The witnesses differed somewhat in their forms of expression, and to some extent in the degree of decay; but they all gave the idea that the sills were rotten, and caused the destruction of the car. The outside sills were painted, and the defect in them was not observable to the eye from the outside; but the inside sills were not painted. It was left to the jury to say whether or not the defects, as described by the witnesses, were such as might have been discovered by ordinary care. Defendant undertook to show that the car was inspected in

Atchison and in Kansas City by the regular car inspectors. The manner of making these inspections was in evidence. From this it appeared that the inspector in Atchison inspected about 150 cars in a day, and the Kansas City man inspected about 100 cars in a night. This car passed through such inspectors, and as the inspectors made no note of the car, as they would have done if they had seen a defect, they presumed it was in good condition. It was for the jury to say whether or not they were satisfied, from that evidence, that defendant had used reasonable care to discover the defects. Evidently, by their verdict, the jury were not satisfied that such inspection came up to the standard of ordinary care. There was substantial testimony to sustain every fact necessary to be proven by the plaintiff under the instructions given, and there was nothing to indicate any fault on his part. Therefore there was no foundation for the demurrer to the evidence.

3. The next point pressed on our attention is the contention that the jury awarded excessive damages. In estimating the damages of plaintiff, there is no certain measure to guide us. The law calls for compensation for the injury, but gives us no table of weights or measures by which the compensation is to be determined. The solution of the question, guarded only by some general limitations, is left to the judgment and conscience of the jury. It must be so from necessity. We say compensation, but compensation is a synonym for satisfaction, and in that sense there can be no full compensation for an injury like that the plaintiff has sustained. But still compensation as nearly as it can be estimated is what the law demands, and it relies, as it must of necessity rely, in a great measure, on the sense of right and justice of the jury, subject in some degree to the correcting power of the court. The injuries and suffering of the plaintiff in this case have been of the most distressing character. He was a youth 19 years old, full of health and strength and spirit. He was thrown under this wreck, and broken and mangled to a shocking degree. His right leg was crushed. First his foot had to be cut off; then his leg was amputated to within seven inches of his hip joint. The flesh was torn from his left leg, from the knee to the ankle, leaving the bone exposed. The details of his suffering are shocking to contemplate, and all that remains of him now is a helpless, hopeless cripple. Counsel for plaintiff, in his closing argument before the jury, said: "Gentlemen of the jury, it is not for me to say how much, but I think he ought to have a liberal judgment, and in my humble opinion \$12,000 is not too much." It is now contended that that statement put a limit to the amount the jury could assess, and going beyond indicated a spirit of passion or prejudice. We see nothing in that remark upon which to base that contention. It was simply the opinion of the counsel, given as such,

51 S.W.—50

couched in terms of deference, and disclaiming at the time any controlling influence on the subject. The jury thought that \$15,000 was just compensation. There is nothing in the record to indicate that that was anything else than the result of their honest judgment, and there is no reason why we should disturb their verdict.

4. What has gone before, in discussing the demurrer to the evidence, disposes of the defendant's instructions refused, since they were also in the nature of demurrers to the evidence, and there is, therefore, no necessity for further discussion of them. But some of the instructions given for the defendant should not be passed without notice. Although this is defendant's appeal, and therefore there is no exception to the ruling of the court in giving defendant's instructions, yet, as those instructions will be published in this record, and as they contain erroneous views of the law, they are liable to be considered as having passed with the approval of this court and might be followed as precedents. The first instruction is that, although the jury find that the Union Line car 7,919 was the first to leave the track, yet that does not prove that the car was unsound. That is true as a matter of fact, and a plain common-sense proposition; but it is not a legal proposition, and is not within the province of the court to instruct the jury upon. The third instruction given for defendant is to the effect that, if the jury find that the car was defective, yet the defendant is not liable on that account, unless it knew of the defect, or by the exercise of ordinary care could have discovered it "by ordinary inspection." The evidence in this case showed the system of inspection that defendant ordinarily employed, and that was the "ordinary inspection" that the instruction referred to, and the effect of the instruction was that, if the car passed through the inspection, it was all that the law required. The vice of the instruction is that it substitutes the defendant's "ordinary inspection" for the law's ordinary care. Defendant's fourth instruction is that the law presumes that defendant's servants did their duty in inspecting the car, and the burden is on the plaintiff to show that they failed to do so. There is no such presumption in defendant's favor. On the contrary, when it appears that the servant is injured by a defective appliance furnished by the master, the burden is on the master to show that he exercised the ordinary care that the law requires. The fifth instruction contains the same error. There is no error in this record of which the defendant has a right to complain. The judgment of the circuit court ought to be affirmed.

PER CURIAM. The foregoing opinions, expressing the views of the different members of the court, are ordered filed.

GANTT, C. J., and BRACE, J., concur with VALLIANT, J., for the affirmance of the

judgment. BURGESS and MARSHALL, JJ., hold the judgment should be reversed, and the cause remanded for a new trial. SHERWOOD and ROBINSON, JJ., hold the judgment should be reversed without remanding, but, in order to dispose of the case, concur with BURGESS and MARSHALL, JJ., in ordering the judgment reversed and the cause remanded. GANTT, C. J., and BRACE and VALLIANT, JJ., dissent.

McNAMARA v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. June 17, 1899.)

CRIMINAL LAW—CONTINUANCE.

1. Accused was not entitled to a continuance to enable him to give notice and get up the necessary affidavits for a motion for a change of venue, though he had been informed by his attorney that his case would be assigned to a later day of the term, as he had ample time to take the steps necessary to make the application for a change of venue.

2. Accused cannot complain that he was tried when there was great feeling against him, where the verdict is moderate on the testimony as given, and no reason appears why all the facts might not have been shown on the trial.

Hazelrigg, C. J., dissenting.

Appeal from circuit court, Fayette county.
"Not to be officially reported."

W. J. McNamara was convicted of the offense of maliciously shooting and wounding, and he appeals. Affirmed.

W. S. Bronston and Geo. Denny, for appellant. W. S. Taylor, for the Commonwealth.

HOBSON, J. Appellant, W. J. McNamara, was indicted in the Fayette circuit court for the crime of maliciously shooting and wounding George Knickerbocker, and, having been found guilty, and his punishment fixed at three years in the penitentiary, he seeks by this appeal a reversal of the judgment. The proof shows that appellant and Knickerbocker came into the saloon of Ed. Chenault, on Water street, in Lexington, together, one night about 9 o'clock. Knickerbocker ordered drinks, and they drank together. Some dispute arose between Knickerbocker and the barkeeper about paying for the drinks, and appellant then paid for them. Knickerbocker, so far as the evidence shows, then said something about Annie, and appellant asked, "You know her, do you?" Knickerbocker replied, "Yes, I have known her ever since she was a girl." Appellant then stepped back, drew his pistol, and began to shoot at Knickerbocker, who had no weapon, and did not make any advance on appellant, or offer to strike him. Appellant fired three shots, one of which inflicted a serious wound. Knickerbocker was a negro, then in the United States service, and stationed at Lexington. All the conversation passing between them after they took the drinks is not shown, but there is nothing shown by any of the parties

in the room excusing in any degree appellant in drawing his pistol, and continuing to shoot at the negro, when he had made no attack, and beat a precipitate retreat as soon as appellant attacked him.

The chief ground of complaint is that a continuance was not granted, but no sufficient ground was set out in the affidavit filed for that purpose. It did not show that any witnesses were absent. The only ground stated was that appellant wished to enter a motion for a change of venue, and that he had been informed by his attorney that his case would be assigned to a later day of the term, and so he desired time to give notice, and get up the necessary affidavits for a change of venue. He had had time enough to do all this before his case was called for trial, and showed no diligence or sufficient excuse for the neglect to seasonably take the steps necessary to make application for a change of venue, and, if such grounds were sufficient to secure the continuance of a criminal case, justice would often be defeated altogether. It is earnestly argued that appellant was tried when there was great feeling against him, and the sentiment was so hostile that it was impossible for him to have a fair trial. But there were a number of persons in the saloon when the shooting occurred; and, as the trial also took place in the city of Lexington, we see no reason why the real facts might not have been shown on the trial. Appellant could certainly have had these witnesses subpoenaed if their testimony was not in effect the same as those introduced. On the testimony as given on the trial, the verdict is moderate, and we do not see, on all the evidence, that appellant has any cause to complain of the jury for prejudice on their part.

Appellant testified that Knickerbocker cursed him, and said, "You kept me from killing that boy this afternoon; now we will have this out right now;" that his right arm was thrown behind him, as if to draw a weapon, and, as he started towards appellant, the latter, deeming himself in danger, drew his pistol, and fired on him, wounding him as charged in the indictment. But no bystander substantiated this testimony, though it seems appellant had several friends present. The instructions of the court clearly submitted the disputed questions of fact to the jury, and on the whole case we find no reversible error in the record. Judgment affirmed.

HAZELRIGG, C. J. (dissenting). Some time in the fall of 1898 the appellant got into an altercation with and shot one Knickerbocker in a saloon owned by appellant's mother in Lexington. The wound was apparently a slight one, and, appellant claims, was inflicted by him in self-defense. The accused was discharged on the examining trial. Knickerbocker, who was only temporarily in Lexington, left there, and has not appeared

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

since. No indictment followed this occurrence in usual course, but one was found on February 23, 1899. During the last-named month there was an alleged murder committed on the street of Lexington by a brother of the appellant. He escaped, and intense excitement and indignation were thereby aroused, resulting in public indignation meetings, and general clamor for the punishment of crime in that locality. There was a widespread determination to punish violators of the law, and through the public press and in the public meetings this sentiment was thoroughly aroused. It may be that the feeling of the community did not go beyond what the occasion authorized or demanded, but that there was unusual and undue excitement is clear, and that intense indignation was aroused against the McNamaras is equally clear. A special grand jury—although the regular term for criminal trials was to commence in about two weeks—was impaneled, and an indictment found against the appellant for malicious shooting and wounding Knickerbocker with intent to kill him. At this special criminal term, if it may be so designated, there were found for trial one or more cases for minor offenses against the accused, and finally, when the case for shooting Knickerbocker was reached, after several days had been consumed in his trials for the misdemeanors, he applied for a continuance, insisting by his affidavit that he was not ready to try the case, and that he could not, in view of the circumstances of recent occurrences, and the excitement as proclaimed by the public press, etc., get a fair and impartial trial. He also asked for further time in which to get ready for trial, because his attorney had informed him that, as the indictment had been returned only within the last few days, the case would be assigned for trial to a later day in the term, to the end that he and his attorney might have opportunity to prepare for his defense; and further, that, in view of the public excitement and passion and prejudice against him, he asked for time in which to give notice to the commonwealth's attorney, and prepare affidavits for a change of venue, as he could not obtain a fair and impartial trial in that county. The court overruled his motions, and on the trial appellant was convicted, and sentenced to three years' confinement in the penitentiary.

There are many reasons which, on a careful examination of the record, lead us to the conviction that the trial ought to have been postponed, at least until reasonable opportunity was had for the preparation of the notice and motion for change of venue and the necessary affidavits therefor. We do not deem it necessary to present in detail the extraordinary circumstances which surrounded the case when it was called for trial, and rendered it necessary, in our opinion, that the trial should have been postponed as requested. Even had the very large number of

criminal cases then on the docket and standing for trial ahead of the cases against appellant been called and disposed of in regular order, the opportunity for preparation would not have been afforded appellant in due course. I do not think the defendant has had a fair and impartial trial.

LOUISVILLE SAVINGS, LOAN & BUILDING ASS'N v. HARBESON, Circuit Judge, et al.¹

(Court of Appeals of Kentucky. May 25, 1899.)
BUILDING AND LOAN ASSOCIATIONS—VENUE OF ACTION FOR USURY.

Under Civ. Code Prac. § 72, an action against an incorporated building and loan association to recover usury growing out of a contract of borrowing and lending may be brought in the county in which the contract was made.

"Not to be officially reported."

Motion by the Louisville Savings, Loan & Building Association for a writ of prohibition against James P. Harbeson, circuit judge of Fleming county. Denied. Rehearing denied.

W. G. Dearing, for petitioner. Jos. H. Power, John S. Power, G. A. Cassidy, J. D. Pumphrey, and B. G. Grannis, for defendant.

HAZELRIGG, C. J. We are inclined to think that the Fleming court is not proceeding out of its jurisdiction in assuming the right to try the cases now before us in the motion for writs of prohibition. It may be that the business of the corporation, if its affairs are in process of liquidation, or if the corporation is insolvent, can be wound up, and the equities of all stockholders adjusted, to better advantage in a single suit in Jefferson county, where its home office is located. But if it is made to appear in these Fleming county suits brought to recover usury that the borrowing members have heretofore received or been credited with the full book value of their stock, without regard to the embarrassed or insolvent condition of the concern, it may be they can be required to bear their proportionate share of the losses at least to the extent of, if not beyond, their alleged claims for usury. It is to be kept in mind, of course, that, if the demand for usury is barred by time, so is the corporation's demand for the members' share of losses. Motion for writ denied.

On Rehearing.

(June 9, 1899.)

The suits of the various plaintiffs in the Fleming circuit court are for the recovery of usury growing out of contracts of borrowing and lending made in that county. They are based on the implied obligation resting on the lender to repay to the borrower any excess of legal interest collected. These contracts were made in Fleming county, and un-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

der Civ. Code Prac. § 72, the actions are maintainable in the Fleming circuit court. It is true that the original petitions did not disclose the fact that the contracts were made in that county, but this was made to appear in an amended petition in each of the cases. The fact that the contracts were there made was true when the original petitions were filed, although such fact was not made to appear until after the motion had been made here for the writ. This does not affect the question of whether the writ should issue, because, as the pleadings below now stand, that court has jurisdiction. In one of the cases, if not others, it is also averred that the applicant has a branch local office and place of business in Fleming county. The petition for rehearing is overruled.

STONE, Auditor, v. SAUNDERS.¹

(Court of Appeals of Kentucky. June 10, 1899.)
JURY—NUMBER OF JURORS CONSTITUTING
REGULAR PANEL—COMPENSATION OF JURORS.

1. Under Ky. St. §§ 2243, 2246 (part of the act of May 22, 1893, relating to juries), providing that the jury commissioners, in selecting jurors for the term, shall place a certain number of names in a wheel, and then draw therefrom the names of 30 persons, from which list of 30 names the "regular panel" of the petit jury shall be selected "in the order in which their names appear," the regular panel consists of 24 persons, that being the meaning of the term as used in the old law, which has come to be its fixed meaning.

2. As a juror who is sworn and serves more than one day is entitled to pay, whether he be called a member of the regular panel or a bystander, it must be presumed that the amount ordered by the circuit court to be paid to the jurors in attendance is correct, in the absence of anything to rebut that assumption.

Appeal from circuit court, Franklin county.

"To be officially reported."

Action by L. Saunders against S. H. Stone, auditor, to compel defendant to draw his warrant in favor of plaintiff. Judgment for plaintiff, and defendant appeals. Affirmed.

W. S. Taylor and M. H. Thatcher, for appellant. N. L. Bronaugh, for appellee.

HAZELRIGG, C. J. The question on this appeal is whether the regular panel of the petit jury, as provided by the act of May, 1893 (chapter 74, Ky. St.), shall consist of 24 or 30 members. The old law provided that the jury commissioners, at a given term of court, should select 100 persons, or less if so directed by the circuit judge, to serve as petit jurors at the next term of court; and from a box containing the names of these possible jurors the commissioners were to draw "the names of thirty persons, one by one, and record the same," etc. This list was to be opened within 30 days of the next term, and the sheriff, at least 3 days before the first

day of the term, was to summon the persons named thereon "to attend on the second day of the term as petit jurors"; and then follows this provision: "The list shall be returned by the sheriff on the first day of the term, with a certificate thereon of the date and manner in which each juror was summoned, from which list twenty-four shall be selected from those summoned in the order in which their names appear thereon, who shall compose the regular panel." When our lawmakers, in 1893, came to revise the manner of selecting juries, they undertook to gather together or unite the somewhat fragmentary and independent provisions respecting grand and petit juries found in our law, and make the same provisions cover the mode of selecting both grand and petit jurors. After providing for the placing of a number of names, written on slips, in a prescribed drum or wheel case, the provisions of the law pertinent to the question involved here are that the commissioners (section 2242, Ky. St.) or the judge (section 2243, Id.) shall draw therefrom a sufficient number of names to procure 20 persons, qualified, as hereinafter provided, to act as grand jurors, and these names were to be placed in a list, from which list the next grand jury for the county should be impaneled as thereafter directed. The drum or wheel case was then to be revolved or shaken up, and the commissioners were "to draw therefrom, one by one, the names of thirty persons, and record the same," etc., and "from which list of thirty names the next petit jury for said county should [shall] be selected and impaneled," etc. The language of section 2243 is, "From the list of twenty names the next grand jury shall be drawn, and from the list of thirty names the next petit jury shall be drawn as hereinafter directed." Section 2246 then provides for the opening by the clerk of the envelopes containing the two lists, and the summoning of the jurors, and the return of the sheriff; "from which lists, respectively, the regular panels of the grand and petit juries shall be selected in [the] order in which their names appear." A succeeding section (2248) provides that "a grand jury shall consist of twelve persons," etc., but there is no law fixing the number of the panel of the regular petit jury, although a subsequent section (2252) provides that "a petit jury in the circuit court shall consist of twelve persons." A provision is also found (section 2247) to the effect that the judge during the term, if the regular panel is for any reason exhausted, may draw from the drum or wheel other persons to act as grand or petit jurors. These provisions seem to be the only ones, either of the old or the present law, possibly affecting the question. It is to be understood at the outset that by the expression "regular panel" is to be meant the number of persons who are to constitute the regular attendance of the court during the term as regular jurors; that is, as the "standing jury." This panel

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

or standing jury, we are to remember, is to be obtained from the list of 30 names, and the names of these standing jurors are to be selected in the order in which their names appear on the list of 30. If, as contended by appellee, the implication is strong that the entire list of 30 is to constitute the regular panel because the new law omits the words, "from which list twenty-four are to be selected," which are found in the old law, it seems to us clear that this implication must go for nothing when we consider the necessary force of the language, "from which lists [of thirty] the regular panels of the grand and petit juries shall be selected in the order in which their names appear thereon." This is wholly inconsistent with the contention that the regular panel shall consist of the entire list of 30. At most, the omission of the word "twenty-four" in the law would leave the number not fixed, but it must still be true that the number must be something less than 30, because it was from the list of 30, beginning at the top of the list and going down, that the requisite number was to be drawn,—a process bordering on absurdity if the entire list was to be taken. It would be wholly absurd to say, "Take the panel from the list, but take it in the order in which the names appear on the list," if the entire list was to be selected. The result appellee contends for—that is, the selection of the entire list—would be obtained as well by commencing at the bottom and going up, or commencing at the middle and going each way. Admitting, then,—and it is true,—that the only conclusive result of our reasoning, based upon the language of the statute, is that the number of the regular panel is something less than the list of 30, it still remains to find the number that the lawmakers had in view when this statute was enacted. In our opinion, as the number of the regular or standing petit jury had been for very many years 24, no change was intended. The omission was likely the result of the attempt to provide in the same clause or sentence for both grand and petit juries. The words "regular panel for the term or standing jury" had come to have, we think, a fixed meaning in the minds of all, and the number, 24, was a part and parcel of that meaning. As the new statute left the number unnamed, we must look to the old law, and the general meaning of the words "regular panel" as crystallized in the public mind, to ascertain the number meant by the lawmakers to compose such panel. The same process must have been resorted to as to the meaning of the words "regular panel of the grand jury" and in the ascertainment of the number to compose it, except that, as the constitution provided a change from the old number, 16, to 12, the statute, of course, followed the organic law. It is said that when the list of 30 was selected the language of the law is that these 30 are drawn from the drum or wheel "to act as petit jurors"; but the inference can hardly be

drawn from this that they were to act whether or no. The old law provided for the names of 100 "to serve as petit jurors," and for a list of 30, which should constitute "a list of the standing jury," and the sheriff was to summon these 30 to attend "as petit jurors"; nevertheless there were to be only 24 who should compose the regular panel. Gen. St. c. 62, art. 4, §§ 4-6. The language as to the grand jury in the new law is, "The judge of the court shall draw the names of twenty persons qualified as hereinafter prescribed, to act as grand jurors," etc., and this is but to say that the names of 20 qualified persons were to be drawn "to act as grand jurors." Again, in the old law and the new we are to note as significant that a greater number is always provided for attendance on the court than is actually needed. The reason is obvious. Some may be disqualified as grand jurors; some may be disqualified as petit jurors; and others on both lists may fail to attend, or, attending, may be excused. So it is that 20 in the one case and 30 in the other are to be summoned, so that the business may not be delayed by resort to the drum or wheel; and we therefore conclude that the regular panel—the standing jury—for the term shall be composed of 24 members. It does not follow from this, however, that the amount ordered by the circuit court by the appellee, trustee of the jury fund, to the jurors in attendance at the Jessamine circuit court at its March term, 1898, is not to be paid by the appellant. If jurors are sworn, and serve more than one day, they are entitled to pay, under the express language of the statutes; and there is nothing in the record before us to rebut the presumption the order of the court carries with it that the amount due the jurors is correct. It is not material whether the juror, while serving, is called a member of the regular panel or is a bystander. If he serve under the orders of the court, he is entitled to pay. Judgment affirmed.

COOPER v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. June 17, 1899.)

FALSE SWEARING—RES JUDICATA.

A judgment acquitting accused under an indictment for adultery is conclusive in his favor upon his trial for the offense of false swearing, alleged to have been committed by swearing falsely upon the trial under the former indictment that he had not had sexual intercourse with the woman with whom it was alleged he had committed adultery.

Hobson, J., dissenting.

Appeal from circuit court, Rowan county.
"To be officially reported."

Lem Cooper was convicted of the offense of false swearing, and he appeals. Reversed.

A. T. Wood and R. Blair, for appellant.
W. S. Taylor, for the Commonwealth.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

BURNAM, J. The appellant and one Libbie Purvis were jointly indicted in the Rowan circuit court for the offense of adultery. The trial under that indictment resulted in a verdict of acquittal for appellant. The grand jury of Rowan county thereupon reported this indictment against him, in which it is charged that upon the trial of appellant and Libbie Purvis upon the charge of adultery "he did knowingly, willfully, and corruptly swear that he had not had carnal sexual intercourse with Libbie Purvis, when same was false and untrue, and was known by him to be false and untrue." The trial under this indictment resulted in a verdict of guilty, and a judgment sentencing appellant to confinement in the penitentiary, which we are asked upon this appeal to reverse.

The principal question to be considered is the effect which is to be given to the indictment, trial, verdict, and judgment of acquittal of appellant under the indictment for adultery, as it is manifest that appellant cannot be guilty in this case if he was innocent of the charge contained in the other indictment. His guilt or innocence of the offense of having had carnal sexual intercourse with Libbie Purvis was the exact question which was tried in the first proceeding, and as a result of that trial the defendant was found not guilty. In order to convict him in this case, it was necessary for the jury to believe that he was guilty of the identical offense for which he had been tried and acquitted under the other indictment, as it is evident that, if he was innocent of having had carnal sexual intercourse with Libbie Purvis, he was not guilty of false swearing when he stated that he had not had such intercourse with her. We therefore have, as a result of the trial of appellant under these two indictments, a verdict and judgment finding him not guilty of the offense of having had carnal sexual intercourse with Libbie Purvis, and in the second case a verdict and judgment finding him guilty of false swearing when he testified that he had not had such intercourse with her; in other words, the first jury found him innocent of the misdemeanor with which he was charged, and the second jury found him guilty of a felony because he testified that he was not guilty of such misdemeanor. It certainly was never intended that the enginery of the law should be used to accomplish such inconsistent results. It appears to us from the conflicting character of the testimony in the case upon the question of defendant's guilt or innocence that a verdict of the jury might have been upheld in the first case whether found one way or the other, but certainly the finding of the jury must be conclusive of the fact considered as against the commonwealth, and preclude any further prosecution which involves the ascertainment of such fact.

A question analogous to the one at bar was considered in the case of Coffey v. U. S., 116 U. S. 436, 6 Sup. Ct. 437, the facts in

which case are about as follows: Coffey was a distiller, and was proceeded against under a section of the statute for defrauding, or attempting to defraud, the United States of the tax on spirits distilled by him, and the copper stills and other distillery apparatuses used by him and the distilled spirits found on his distillery premises were seized. One section of the statute provides, as a consequence of the commission of the prohibited act, that this certain property should be forfeited, and that the offender should be fined and imprisoned. Coffey was first proceeded against on the criminal charge, and acquitted. Subsequently a proceeding to enforce the forfeiture against the res was instituted. The defendant in the proceeding in rem relied upon his acquittal under the criminal charge, and Judge Blatchford, in delivering the opinion of the court, said: "Where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person on the subsequent trial of a suit in rem by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit in rem. It is urged as a reason for not allowing such effect to the judgment that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States in the suit in rem. Nevertheless, the fact or act has been put in issue, and determined against the United States; and all that is imposed by the statute as a consequence of guilt is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it." And the conclusion reached in that case is in consonance with principles laid down by the United States supreme court in the case of Gelston v. Hoyt, 3 Wheat. 246. In the case of Rex v. Duchess of Kingston, 20 Howell, St. Tr. 356, 538, the court held: "The judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court." And in the case of U. S. v. McKee, 4 Dill. 128, Fed. Cas. No. 15,688, the defendant had been convicted and punished under a section of the Revised Statutes for conspiring with certain distillers to defraud the United States by unlawfully removing distilled spirits without the payment of taxes thereon. He was afterwards sued in a civil action by the United States, under another section, to recover a penalty of double the amount of the taxes lost by the conspiracy and fraud. The court held that the two alleged trans-

actions were but one, and that the suit for the penalty was barred by the judgment in the criminal case. The decision was put on the ground that the defendant could not be twice punished for the same crime, and that the former conviction and judgment were a bar to the suit for the penalty. And Judge Van Fleet, in his Treatise on the Law of Former Adjudication (page 1242, § 628), says: "If there is a contest between the state and the defendant in a criminal case over an issue, I know of no reason why it is not res adjudicata in another criminal case;" citing a number of American decisions in support of the text. Appellant in this case had already been tried and acquitted of the offense of having had carnal sexual intercourse with Libbie Purvis, and the judgment in that case is res judicata against the commonwealth, and he cannot again be put on trial where the truth or falsity of the charge in that indictment is the gist of the question under investigation. It therefore follows that appellant was entitled to a peremptory instruction to the jury to find him not guilty. For reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

HOBSON, J., dissents.

DUVALL v. DUVALL.¹

(Court of Appeals of Kentucky. June 16, 1899.)

CONTRACTS — RECOVERY FOR FUTURE BREACHES—INCONSISTENT POSITIONS.

1. Under an agreement by defendant to furnish money to pay plaintiff's board, plaintiff cannot recover money for the future according to her expectancy of life.

2. The conduct of a mother, in suffering judgment by default to be rendered against her in favor of her daughter for board for the entire time she had lived with the daughter, is inconsistent with her claim that her son is liable to her for one-half of the amount thus recovered against her, under an agreement by him and his sister to pay each one-half of her board.

Appeal from circuit court, Clark county.

"Not to be officially reported."

Action by Mary Duvall against Mary A. Duvall, administratrix of John D. Duvall, to recover money due upon a contract. Judgment for defendant, and plaintiff appeals. Affirmed.

Beckner & Jonett, for appellant. J. M. Benton and Rodney Haggard, for appellee.

HOBSON, J. Appellant brought this suit against the appellee, as the administratrix of her deceased son, John D. Duvall, alleging that, in consideration of certain matters referred to in the petition, it was agreed between her and her two children, John David Duvall and Rachel F. Smith, that she should stay an equal portion of her time with each

of them, but that if she did not find it agreeable, or should not feel inclined to stay an equal portion with either of them, then she should have the privilege of staying all of her time or any part of it with the other, and pay board for the time so spent over the one-half, or, in case she should not feel disposed to stay with either of them, she could board where she pleased, and they would furnish her the money to pay for her board, each paying one-half of the amount necessary; that she did not find it agreeable to remain with the son, and preferred to make her home with her daughter, and so she had boarded the whole time at her daughter's; that her board a part of the time amounted to \$200 a year, and a part of the time to \$350 a year, making in all, for the time charged, \$2,460.66, for one-half of which (\$1,230.33) she prayed judgment. She also alleged that she was 75 years of age; that her expectancy of life was eight years; and that her board for these years would be \$2,800, for one-half of which, or \$1,400, she also prayed judgment.

To so much of the petition as sought to recover for board for the future, according to her expectancy for life, the court sustained a demurrer. This was proper, for the reason that the contract alleged was only to furnish the money to pay the board as it accrued, and no personal judgment could be rendered against the administratrix for board that had not been furnished. It is true appellant may live eight years or longer, but she may die very soon, and no personal judgment in her favor was warranted as to the future, because, as to this, there had been no breach of the contract.

Appellee filed answer denying the allegations of the petition. Proof was taken, and, on final hearing, the court dismissed the petition. It is earnestly contended that in this the court erred. To a proper understanding of the case, it will be necessary to state the facts somewhat in detail. Appellant and her two children owned a farm, which they sold, about the year 1877, for \$5,500. It is alleged, on one hand, that she owned only a life estate in the land as widow, and that they owned the remainder; on the other hand, it is claimed that she owned in her own right part of the land. The deeds are not filed, and the proof is not clear on this point; but it is shown very satisfactorily that upon the sale of the land \$1,500 was paid to the son, \$1,500 to the daughter, and \$2,500 was reserved for the appellant. This money was put in the son's hands, and his note was taken for the amount, under an agreement that the interest was to be used for appellant's support as long as she lived, and so much of the principal as might be necessary. At the time of the sale of the land, which was the home of appellant and her two children, it was agreed that she should live with her children, or, if this was not satisfactory, then the proceeds of the \$2,500 note was to be used for that purpose;

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

and it is contended for appellant that, in addition to this, the son and daughter were each to pay one-half of her board, in case she did not spend the time at their homes. On the other hand, it is contended for appellee that it was never contemplated or agreed that her intestate was to pay any part of his mother's board out of his own estate. Soon after the land was sold, appellant went to live with her daughter, and has lived with her ever since. It appears that originally the reason for her living with her daughter was to give the latter the financial aid which the interest on the \$2,500 note annually furnished her. The old lady appears to have been in good health, and to have been perhaps a benefit, and not a burden, for many years. Finally, a breach occurred between the brother and sister, and a very bad state of feeling seems to have existed between their families ever since. About the year 1883 his health failed, and he seems to have been something of an invalid until his death, in the year 1889, during which time he spent a large part of what he had on many physicians, and was nothing bettered. In December, 1888, while living at her daughter's house, appellant filed suit against the son on the \$2,500 note above referred to, or rather a renewal of it, which she then held. In defense of this suit, he pleaded that she owned only a life estate in the land, and that the \$2,500 was put in his hands out of the proceeds of the sale of the land under an agreement that he was to pay the interest to her annually, and such part of the principal as might, from time to time, be necessary for her reasonable support, and that this he had done. Issue being joined on this plea, a jury to whom the case was submitted found a verdict for the defendant, and judgment was so entered. On October 19, 1891, a few days after the trial of this case, while appellant was still living with her daughter, Rachel Smith, a suit was filed by the latter, in which she alleged that she had boarded, nursed, and cared for her mother for 13 years last past, and that it was reasonably worth \$200 per year for the first 10 years, and \$300 for the last 3, making \$2,900; for which she prayed judgment against her mother, less a credit for some \$1,100, paid by an assignment of one-half the \$2,500 note above referred to, which she alleged had been assigned to her by her mother. Judgment by default was taken on this petition for the amount prayed for, \$1,700.50, and, execution having been issued on the judgment and returned, "No property found," the daughter, on October 20, 1891, filed suit against her mother and brother's widow and administratrix to enforce satisfaction of this judgment by subjecting to it the proceeds of this note. About the same time she also filed suit against her brother's administratrix, alleging that her mother had assigned to her one-half on the \$2,500 note, and prayed judgment on it. These two suits were consolidated, and at the September term, 1893,

a judgment was entered adjudging Rachel Smith one-half of the balance due on the note, on condition that she relinquished all claim to the other half of the fund, and the administratrix should hold this half subject only to the right of the mother to receive the interest thereon during her life, with the remainder in fee to the heirs at law of the son, John D. Duvall. All other relief was refused. This judgment having been paid, on April 26, 1894, the present action was brought, in the name of the mother against the son's administratrix, by the same attorneys who managed the other suits referred to for Rachel Smith, seeking to recover on the alleged agreement of the son to pay one-half of his mother's reasonable board while at his sister's house.

Thus, it will be seen that this contract was not alleged until all other means of coercing money out of the dead man's estate had failed. The old lady, according to the testimony of her physician, is now suffering with senile dementia, or something akin to it. If the contract now alleged was the real agreement between the parties, then the personal judgment against the old lady in favor of Rachel Smith should never have been rendered; for, in that event, Rachel Smith owed one-half of this board herself. Her allegation in that petition, that her mother owed her the board for the whole time, which was confessed by the mother, is utterly inconsistent with the claim set up in this case. John David Duvall lived for something like 12 years after the alleged agreement was made, but it was not asserted until something like 5 years after his death. The proof of the alleged contract is very unsatisfactory, and, considering all the facts and circumstances of the case, we concur in the conclusion of the chancellor that the evidence did not warrant a recovery. Judgment affirmed.

DARLING et al. v. HANKS.¹

(Court of Appeals of Kentucky. June 17, 1899.)
COURTS — CONFLICT BETWEEN STATE AND UNITED STATES COURTS—CONTROL OF TRUST FUND.

While the state court may not be able to attach a fund in the United States court, it can compel a trustee, of whose person it has jurisdiction, and who has control of the fund, to exercise his control in the interests of justice.

"Not to be officially reported."

Petition for rehearing. Denied.

For former report, see 42 S. W. 1180.

DU RELLE, J. It is to be regretted that the crowded state of the docket and the approaching adjournment do not leave us time in this response to go fully into the argument of the questions presented by the two petitions for rehearing, and that we can merely state our conclusions. Appellee claims that there is no second personal judgment given in this case against Darling, and a re-exami-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

nation of the judgment shows that the statement therein, "The court adjudges that the defendant, A. W. Darling, is indebted to the plaintiff, Richard Hanks, in the sum of \$336.25," etc., might possibly be construed to be a mere recital of the indebtedness shown by the judgment, the collection of which is here sought to be enforced. But this is immaterial, as the judgment must be reversed for the other reasons stated in the opinion. We cannot undertake, from the record, to say what amount was in the federal court at Covington, unappropriated by assignment or transfer at the time of the judgment. In appellant's petition for rehearing it is claimed that the second amended petition, which is undenied by the answer of Mrs. Darling, was not filed in court, but merely filed in the clerk's office, and that, if the amendment is to be treated as a part of the record, she having filed her answer subsequent to the filing of the amendment, it is controlled by the agreed statement of facts, which showed the money to be in the United States court. To this it might be responded that a paper which, by agreement, is only to have the effect of a deposition, cannot control an undenied averment of the pleading. But that question need not be considered, for, though the state court may not be able to attach a fund in the custody of the United States court, it can compel the trustee, who is a party to the agreement which shows the existence and situation of the trust fund, to exercise his control over it in the interests of justice. The trustee himself signed the agreement as counsel for Mrs. Darling. The agreement refers to the fact of the assignment of the judgment to him as trustee as being mentioned in the pleadings, and from the language used a court would be justified in finding that the fund was subject to his control, and compelling him to exercise such control; and in exercising jurisdiction over the person of the trustee, who is before the court, we see no ground for apprehension or conflict of jurisdiction. In the time at our disposal it would be useless to attempt a discussion of all the cases on the subject of a husband's obligation to repay funds obtained from his wife's estate, and the wife's right to such repayment against his creditors, under the law as it existed before the adoption of the Weissenberger act. It is sufficient to say that of no class of cases can it be said with greater truth than of this that isolated expressions in the opinions are misleading, unless read in conjunction with all the circumstances of the cases in which they were rendered, for there are no cases in which slight circumstances effect greater changes in the equity of the case. We regard the case of *Meade v. Stairs* (Ky.) 10 S. W. 272, as controlling in this case. But the opinion should have indicated that the value of the wife's potential right of dower should be estimated as of the date when she gave it up. With this modification, the petitions are overruled.

GEORGE et al., Commissioners of Penitentiaries, v. LILLARD, Warden.¹

(Court of Appeals of Kentucky. June 13, 1899.)²

PRISONS—PAROLE LAW—REPEAL OF STATUTE—INTERFERENCE WITH GOVERNOR'S PARDONING POWER.

1. Act May 2, 1888, known as the "Parole Law," which confers upon the governor and certain other state officers, as commissioners of the sinking fund, the power to parole convicts, was not repealed by the act of 1898, creating a board of penitentiary commissioners; there being no reference in that act to the parole law or to the subject of paroling convicts.

2. Though the control of the state penitentiaries, which was at the time of the passage of the parole law vested in the commissioners of the sinking fund, has since been vested in another board, the power to parole convicts remains in the commissioners of the sinking fund.

3. The parole law, conferring upon the sinking fund commissioners the power to parole convicts, is not unconstitutional, as interfering with the governor's power to commute sentences and grant pardons, or as violating Const. Ky. § 263, which provides that "persons convicted of felony and sentenced to confinement in the penitentiary shall be confined at labor within the walls of the penitentiary."

Guffy, J., dissenting.

Appeal from circuit court, Franklin county. "To be officially reported."

Action by Henry George and others, commissioners of the penitentiaries, against Eph Lillard, warden, to compel defendant to release a prisoner. Judgment for defendant, and plaintiffs appeal. Affirmed.

John W. Ray and C. P. Chenault, for appellants. W. S. Taylor and M. H. Thatcher, for appellee.

PAYNTER, J. The questions here involved are: (1) Is the act known as the "Parole Law" still in force? If so, is it to be executed by the board of penitentiary commissioners or by the commissioners of the sinking fund? (2) Is it constitutional?

Until 1898 the control and management of the penitentiaries of the state was vested in the commissioners of the sinking fund; the governor, auditor, treasurer, secretary of state, and attorney general ex officio constituting the commissioners. By the act of May 2, 1888, upon specified conditions, the commissioners of the sinking fund were authorized to allow persons confined in the penitentiaries, except those who were convicted of certain offenses, to go on parole outside of the buildings and the inclosure of the penitentiaries, free from the custody and control of the warden, but to remain in the legal custody and control of the commissioners, subject at any time to be taken back and confined in the penitentiary. Full power to enforce rules and regulations for retaking and reimprisoning any convict upon parole existed. To retake such prisoner, the written order of the commissioners, when signed by the governor and attested by the secretary of state, constituted a sufficient warrant

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

² For dissenting opinion, see 51 S. W. 1011.

to authorize sheriffs and other officers to arrest such convict and deliver him to the custody of the warden. The expense of rearrest was to be paid by the state treasurer when the commissioners certified it for payment to the auditor of public accounts. The act provided a penalty against the warden or any other officer in the state who failed to execute and obey the orders of the commissioners made or issued under the act. It is contended that this law is no longer in force, because it has been repealed by the act which became a law in 1898, entitled "An act to create a board of penitentiary commissioners and regulate the penal institutions of this commonwealth." It is true that under that act the management and control of the penitentiaries was taken from the commissioners of the sinking fund, and placed in the hands of the board of penitentiary commissioners, but there is nothing in the act which makes any reference whatever to the parole law. That subject is not referred to in any way in the act. Repeals by implication are not favored. We are of the opinion that the parole law has not been repealed.

It is contended, however, that, because the control and management of the penitentiaries was placed in the hands of the board of penitentiary commissioners, the power to execute the law is vested in them. We do not think this is true, in the first place, because no express authority was conferred upon them, and, in the second place, the act provides for the reimprisonment of parole convicts. By the terms of the act, they can only be arrested and imprisoned upon the order of the commissioners of the sinking fund, when signed by the governor and attested by the secretary of state. As the act denounces a penalty only for disobeying the orders of the commissioners of the sinking fund, it would follow that no penalty could be imposed on any officer for disobeying the orders of the penitentiary commissioners. The legislature might have been perfectly willing to vest the power to parole prisoners in the commissioners of the sinking fund, of which body the governor was a member, but it might not have been willing to enact a law conferring such authority upon the board of penitentiary commissioners. If the present commissioners were permitted to exercise this power, the governor would not be associated with them in determining what convicts should have the benefit of the law. We are of the opinion that the board of penitentiary commissioners have no power to parole a prisoner under the law, and that that power is vested in the commissioners of the sinking fund. Section 77 of the constitution, in reference to the power of the governor, reads: "He shall have power to remit fines and forfeitures, commute sentences, grant reprieves and pardons." If paroling a prisoner is not a pardon of the prisoner, or commutation of the sentence, then the power vested in the governor is not attempted to be interfered with. "A 'pardon' is an act of grace, proceeding from the

power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." U. S. v. Wilson, 7 Pet. 150. "A full and absolute pardon releases the offender from the entire punishment prescribed for his offense, and from all the disabilities consequent on his conviction." Com. v. Bush, 2 Duv. 284. A pardon discharges the individual designated from all or some specified penal consequence of his crime. It may be full or partial, absolute or conditional. Bouv. Law Dict. tit. "Pardon"; 1 Bish. Cr. Law (6th Ed.) § 914. It cannot be said to be a pardon because the prisoner remains subject to the control of the commissioners of the sinking fund, and is subject to be rearrested, and, when rearrested, is compelled to remain in the penitentiary without getting any credit for the time between the parole and redelivery to the warden. He is not exempt from the entire punishment which the law inflicts. The governor could at any time pardon him, and thus place it beyond the power of the commissioners of the sinking fund to reimprison him. It is not a commutation of the sentence, because it is not a change of the punishment of a person who has been condemned into a less severe one. If a man is sentenced to the penitentiary for 20 years and the governor reduces the time to 10, if a party is sentenced to hang and the governor changes the penalty to confinement in the penitentiary for life, or if a man was condemned to serve in the penitentiary for a given period and the governor would say he should serve in the county jail for a shorter term, then we would understand in each case that there had been a commutation of the sentence. While, in the case of a paroled prisoner, he enjoys his liberty outside of the walls of the penitentiary, yet he remains under the sentence to which he has been condemned, and may be reimprisoned at any time, as we have heretofore said. So, strictly speaking, it cannot be said there has been a change of punishment to a less severe one. The parole law is not an interference with the judicial functions of the court, but is the exercise of the power of discipline which the state possesses, to be exercised through the legislative department of the government. The legislature declares what shall constitute offenses, and prescribes the punishment, and the power to regulate the penal institutions of the state is there vested. It is said the act is invalid by reason of section 253 of the constitution, which reads as follows: "Persons convicted of felony and sentenced to confinement in the penitentiary shall be confined at labor within the walls of the penitentiary; and the general assembly shall not have power to authorize employment of convicts elsewhere, except upon the public works of the commonwealth of Kentucky, or when, during pestilence or in case of the destruction of the prison buildings, they cannot be confined in the penitentiary." The purpose of the enactment of that section of the consti-

tution was to prevent the working of convicts by the state outside of the prison walls. That was the evil intended to be remedied by the prohibition contained in the section. It was not intended to prohibit the legislature from enacting a law like the one under consideration, because, at the time of the adoption of the constitution, such a law was in force, and the constitutional convention certainly would have, in express terms, declared the legislature should not have power to enact such a law if it regarded it unwise to do so. The judgment is affirmed.

GUFFY, J., dissents.

HEWITT et al. v. DODD et al.¹

(Court of Appeals of Kentucky. June 3, 1899.)
BILLS AND NOTES—SURRENDER OF NOTE—
DISCHARGE OF LIEN.

Where C., who held four purchase-money notes of D., proposed "to surrender" two of them to the widow of D. for a note in which D. was surety for his father, saying that this would leave two of the notes unpaid, and this proposition was accepted by the widow, who paid off the note in which D. was surety, there was not a sale of the two notes to the widow, although they were indorsed by C., and therefore the lien exists for the sole benefit of a bona fide purchaser of the other two notes.

Appeal from circuit court, Lee county.

"Not to be officially reported."

Action by Fayette Hewitt and L. C. Norman against Sallie Payne Dodd and Mattie Payne Dodd to enforce a vendor's lien. Judgment for defendants, and plaintiffs appeal. Reversed.

W. S. Pryor and William Lindsay, for appellants. W. B. Dixon and L. M. Day, for appellees.

HAZELRIGG, C. J. Thomas F. Carter held the four notes of James W. Dodd, for \$970.50 each, due in 12, 24, 36, and 48 months after date, which represented the purchase money of a tract of land in Lee county. Before paying either of these notes, Dodd died, leaving the appellee as his widow. It appears that appellee's husband was the surety of Thomas Carter, the father of Thomas F. Carter, in a note for some \$2,000, to the Farmers' Bank, and, to further secure this note, the bank held some 30 shares of stock in the Kentucky River Mills, which stood in the name of, and belonged to, appellee, though her husband also owned some 20 shares of that stock, but whether this was also pledged to the bank does not appear. Thomas Carter seems to have been insolvent, or, at any rate, was unable to meet this bank debt. Under these circumstances, Thomas F. Carter, then at Nashville, Tenn. (19th September, 1887), wrote to Mrs. Dodd at Shelbyville, Ky., in answer, doubtless, to a letter written by her to him on this matter, as follows: "If

he [meaning the father of the writer] were able, I know it would give him great pleasure to pay the \$2,000 due Mr. Dodd's estate, but it is impossible, as he has no means at all. * * * There is due you my father's note for \$2,000, with interest, and there is due us four notes, for \$970.50 each, with interest. Now, what I propose is to surrender two of the latter notes to you for the \$2,000 note. There would be in settlement but a few dollars on one side or the other (after the few other small matters are included), so the whole thing would resolve itself into a simple matter. You would continue to hold the Baker tract (which before long is sure to be of great value), and two of the notes for it would still remain unpaid. I wish I were able to own the tract, and to pay the \$2,000, but it would be impossible for me now to raise \$100," etc. This proposition was accepted, and two of the notes were accordingly surrendered to Mrs. Dodd. Later on, Thomas F. Carter, on the strength of the fact, as he represented the fact to be, that two of the Dodd purchase-money notes had been paid, and that the other two notes were secured by a lien on the entire tract of land he had sold to Dodd, induced the appellants to buy these two notes. Subsequently, when appellants brought suit in the Lee circuit court to enforce their lien, making the widow and infant child of James W. Dodd parties defendant, Mrs. Dodd answered, and by counterclaim asserted that she was the owner of the two notes, which had been surrendered to her by Thomas F. Carter; that she had taken up the bank debt, and eventually had paid it by a sale of her Kentucky River Mills stock. These averments as to the payment of the bank note she made good by proof, although it also appears that her husband's stock, which he still owned at his death, had also been transferred to her by his administrator. This stock, however, she says she bought, but just how she paid for it does not very clearly appear. The inference from her testimony is that she paid for this stock out of the insurance policy of \$5,000 on her husband's life, and which was for her benefit. The chancellor sustained her contention, and adjudged the land under lien to secure the four purchase-money notes. When sold, it seems to have brought about one-half the debt.

The result is that Carter, who stands back of appellants because of his representation that only two notes were unpaid at the time he sold them to appellants, has, by a transaction with Mrs. Dodd the natural and reasonable import of which was to increase the security for his remaining notes, been made to lessen the security of the unpaid notes remaining in his hands, and which he was subsequently able to sell, presumably on the representation that they were amply secured. Of course, it may be that the son desired, as a mere matter of sentiment, to pay his father's debt, but he was not bound to do so;

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

and it is reasonable to suppose that he would not have surrendered these two notes in payment of the \$2,000 note which he did not owe, except by reason of the statement in his proposition to Mrs. Dodd, namely, that "two of the notes for it [the land] would still remain unpaid." Mrs. Dodd confessedly accepted this proposition. She introduced this letter, and is bound by every material statement in it. And certainly so, when, in consideration of the truth of the statements therein, Carter is led to assume a burden he would probably not have assumed. The letter of Carter is the contract, and by it he surrendered the notes to Mrs. Dodd. He did not "sell" them to her, or "transfer" them to her. It is true his name appears indorsed on one of them, and his name and that of his father appear on the other, but this circumstance is not incompatible with his "proposition to surrender" the notes; and, if such indorsement is attempted to be treated as a sale of them, it would be incompatible with the statement that the surrender of two of them left only "two of them unpaid." As we construe the testimony and the written evidence of the transaction, the only lien on the land, after the surrender of the two notes to Mrs. Dodd, was a lien for the remaining unpaid purchase-money notes afterwards sold to the appellants. Wherefore the judgment is reversed, with directions to adjudge the entire purchase money to appellants.

LOUISVILLE & N. R. CO. v. MILLIKEN'S
ADM'X.¹

(Court of Appeals of Kentucky. June 13, 1890.)

MASTER AND SERVANT—MAINTAINING MAIL
CRANE TOO CLOSE TO RAILROAD TRACK
—SPEED OF TRAIN AS NEGLIGENCE.

1. A railroad company is liable for an injury to a brakeman on a freight train from coming in contact with a mail bag on a mail crane near the track, if the mail crane is erected closer to the track than is reasonably necessary, to enable mails to be taken by the levers furnished by the United States government for catching the bag; but, in an action to recover for such an injury, the court should have expressly instructed the jury that the company was not liable unless the mail crane was so erected.

2. Whether a brakeman who was thus injured was guilty of contributory negligence in sitting on top of the car, with his feet hanging over the side, was a question for the jury; there being evidence tending to show that it is customary for brakemen to occupy that position, because impracticable for them to stand all the time on long runs.

3. The risk arising from the unusual speed of a freight train, whereby it is caused to oscillate so that a brakeman sitting at the side of a car comes in contact with a mail bag on a mail crane near the track, is one of the ordinary risks of the service, which the brakeman assumes, unless the mail crane is closer to the track than is reasonably necessary; and therefore evidence as to the speed of the train is inadmissible.

4. While evidence as to the custom of brake-

men to sit at the side of a car with their feet hanging down, and as to the reasons for the custom, is admissible, the opinion of a witness that it is not improper for a brakeman to occupy such a position is inadmissible; that being a question for the jury, to be determined by common knowledge and observation.

Appeal from circuit court, Oldham county.
"Not to be officially reported."

Action by Milliken's administratrix against the Louisville & Nashville Railroad Company to recover damages for the death of plaintiff's intestate. Judgment for plaintiff, and defendant appeals. Reversed.

B. D. Warfield and D. H. French, for appellant. Carroll & Carroll and B. H. Young, for appellee.

HOBSON, J. Appellee's intestate was a brakeman in the employ of appellant, and on October 4, 1896, was killed at Camden Station, between Louisville and Cincinnati, by reason, as alleged, of the negligence of the company. Appellant insists that no negligence was shown, and this is the first question to be determined.

The mail train did not stop at that station, and to catch the mail bag there was what is known as a "mail crane" erected on the side of the road. At the time required by law, the postmaster hung the mail bag on this crane. This was 10 minutes before the time of the mail train. The postmaster was also the agent of the railroad, but that is immaterial; for in hanging out the mail bag he was acting as postmaster, and not for the company. The train on which appellee's intestate was employed came along soon after the mail bag was hung out. The crane has a movable arm at the top, and when the mail bag is put on this movable arm is pulled down, and the bag is fastened on between that and the arm below, so that, as the mail car passes, the postal clerk can turn out an iron lever on the side of the car, and take in the bag. When the bag is pulled off, the movable arm of the crane flies up again. Just before reaching this station, the intestate was sitting on the top of one of the freight cars, with his feet over the side; it being a freight train which did not stop at that station. He was on the side of the car next to the mail bag. The bag hung so that a man sitting on the top of this car, with his feet hanging down over the side of the car, would come in contact with it if he allowed his feet to hang naturally. This appears from actual photographs taken of the car passing this crane, with a man on it sitting as the intestate was, which have been filed with the record. Just after the car passed the crane it was observed that the movable arm flew up, and the intestate was missing from the top of the car. On examination, he was found about 60 feet from the crane, in the direction in which the train was going, and the mail bag a few feet from him, and between him and the crane. His

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

neck was broken by the fall. No one saw the occurrence, and we are left to determine entirely from the circumstances how it occurred.

It is insisted that the proof does not show that his feet came in contact with the mail bag as he passed the crane, or that he was knocked off in this way. It is true he might have kicked at the mail bag, and so become entangled with it, and lost his balance; but negligence is not to be presumed against him. The flying up of the arm of the crane, and the finding of his body and the mail bag so near together, make it clear to us that his striking the bag is the cause of the fall; and as, when last seen, he was in a position when this result would naturally follow, without any fresh action or impulse on his part, it seems to us the more natural conclusion that, while sitting there and unconscious of the movable arm of the crane being pulled down, he was struck by the bag and knocked off.

It is insisted for appellant that, even if this is true, there can be no recovery; and we are referred to the case of *Sisco v. Railway Co.*, 145 N. Y. 296, 39 N. E. 958, as sustaining this conclusion. In that case a brakeman, while going up a ladder on the side of a freight car, was struck by the stationary arm of a mail crane, and knocked off, receiving injuries from which he died. The crane in that case had stationary arms, but was otherwise similar to the one before us. Both are required to be erected by the United States government, so that mails can be taken by moving trains. In both the mail bag is required to hang close enough to the car that the lever or sweep attached to the car by the postal authorities may take in the bag. In that case the court, after showing that the contrivance was a useful one, which defendant had to maintain, held that there could be no recovery, because there was no proof that the crane was placed nearer the track than cranes upon other roads, or that it was practicable to place a crane at a greater distance, or to construct it with a shorter arm; and have it answer the purpose in view. Among other things, the court said: "It was not found, nor was there any evidence upon which a jury could infer, that the crane in question could be placed any further from the track than it was and perform the function for which it was designed. The plaintiff was bound to show a state of facts indicating negligent construction or location, to raise a question for the jury upon this point. It was not sufficient for him to show an injury, or that operating the device involved danger to the brakeman. He took the risk of all the structures necessary and reasonably adapted to the business of the railroad. The burden was upon him to show that the appliance, concededly useful in the business of the defendant, was improperly constructed or located, and this he wholly failed to do.

Proof that it was dangerous was not enough. He was bound to go further, and show that the defendant might, by the use of reasonable care, have accomplished its purpose, and at the same time protected its employes from the danger."

This seems to us to be a fair statement of the law. But in this case there was evidence that the crane was not upright, but leaned towards the road about four inches. The swing of the arms and the hanging of the bag, always on the side next to the road, would have a tendency to pull the upright post over. This would throw the bag nearer the car, the greater the inclination became. It was also in proof that this crane was set some four and one-half inches nearer the track than other cranes from which the mail was taken. If this proof was true, this mail bag hung something like eight inches nearer the track than required by the government; and if it had hung eight inches further off, from the photographs exhibited, it would seem that the intestate would not have been knocked off. We cannot, under this evidence, say that he failed to show that the defendant might, by the use of reasonable care, have accomplished its purpose, and at the same time protected its employes from the injury. There was therefore sufficient evidence of negligence to submit the case to the jury, and the court did not err in refusing to give the peremptory instructions asked for. There was proof that the duties of the brakemen required them to be on top of the cars, and that on long runs it was impracticable for them to stand up all the time they were on top of the cars, and so it was customary for them to sit on the side of the car, as the intestate was sitting when hurt, this being as safe a place as any other for the purpose. Under the proof, the question of contributory negligence was properly left to the jury.

Appellant asked the court to give this instruction: "The court instructs the jury that if they believe from the evidence that the mail crane at Camden station, in the petition complained of, was not put closer to the track than necessary for the mail catcher furnished by the United States government to take the mail bag therefrom, then the mail bag being in that position was not negligence in the company, and the jury cannot find against the defendant on account of the position of the said mail crane." This instruction was refused, and the idea was not sufficiently presented by any other instruction given, as to whether the mail bag was in fact any closer to the track than required for the catcher to take it as the mail car passed. The evidence was very conflicting on this subject. If it was not, the jury should have found for the defendant, and they may not have understood this from the other instructions. The government furnishes the lever on the side of the car. It requires the railroad to erect the cranes so that this lever will catch the mail bag. Although this may endanger the brake-

men, and although it may place the crane closer to the track than really necessary, the railroad company is not responsible; for it has no power to make the levers on the car longer, or to prescribe when the mail shall be hung on the crane.

The court also erred in allowing proof to the jury of the unusual speed of the train at the time of the accident. Appellant has a right to run its train at any rate of speed it chose, and if, from the oscillation of the train, the intestate's feet were swung out in contact with the mail bag, by reason of the unusual speed of the train, this was one of the risks incidental to the business in which the intestate was engaged, which he assumed in entering the service. The court should have told the jury that the intestate, when he engaged in the service of appellant as brakeman, assumed all the risks usually incidental to the business, and, if by reason thereof he received the injury, there could be no recovery. If the oscillation of the train caused him to strike against the mail bag, and to be knocked off, this would be one of the risks incidental to the service, unless the crane was closer to the track than it should reasonably have been placed for the lever on the car to catch the bag, and but for this the accident would not have occurred. On another trial appellee should introduce in chief all her evidence tending to show how the injury occurred or negligence on the part of the appellant, and the evidence in rebuttal should be confined to matters brought out by the evidence for the defense.

The court erred in allowing testimony that it was not improper or an act of carelessness for a brakeman to sit on top of a car at the side, with his feet hanging down. In *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, the United States supreme court said: "The question whether the place where the plaintiff stood on the wharf was reasonably safe was one of the questions to be determined by the jury, depending on common knowledge, and requiring no special training or experience to decide, and upon which, therefore, no opinions of witnesses were admissible." To same effect, see 1 Whart. Ev. § 509. It was proper to prove by the witnesses what the custom was in regard to sitting on the side of cars, and all facts known to the witnesses showing the reasons for it. But the conclusion whether it was proper or improper for a brakeman to ride in this way on the side of a rapidly moving train, considering the objects along the side of the track and the other dangers incident thereto, was a question for the jury, to be determined by common knowledge and observation, and not from the opinion of witnesses, to whose judgment the jury might defer, instead of exercising their own, as the law contemplates they should do. The judgment is therefore reversed, and cause remanded for a new trial and further proceedings not inconsistent with this opinion.

FARMER v. BANK OF WICKLIFFE et al.¹
(Court of Appeals of Kentucky. June 13, 1890.)
NEW TRIAL—POWER TO EXTEND TIME FOR MAKING MOTION.

Under Civ. Code Prac. § 342, providing that application for a new trial must be made at the term at which the verdict or decision is rendered, the court has no power to give time until a day in the succeeding term to make a motion for new trial.

Appeal from circuit court, Ballard county.

"Not to be officially reported."

Action by the Bank of Wickliffe and J. B. Wickliffe against L. D. Burton, and by D. W. Sullivan against L. D. Burton and others. Judgment denying claim of J. W. Farmer to attached property, and he appeals. Affirmed.

Thos. E. Moss, for appellant. Bugg & Wickliffe, for appellees.

BURNAM, J. The controversy in this case arises over the true ownership of a lot of tobacco which was attached by appellees as the property of L. D. Burton, and by appellant as the property of C. L. Ethridge. The testimony shows that in February, 1890, Ethridge, a member of the firm of Farmer & Ethridge, employed Burton to buy tobacco for him in the vicinity of Wickliffe, which was to be paid for by drafts on the firm of Farmer & Ethridge, and was to be shipped to the firm at their place of business in Paducah, Ky.; that, under this agreement, Burton did purchase a considerable amount of tobacco, which was prized and forwarded in accordance with the agreement. It also appears that at the same time Burton was engaged in buying tobacco on his own account, which was prized and handled in the same warehouse. J. B. Wickliffe testified that Burton rented the warehouse in his own name, and carried on the business of buying, prizing, and shipping tobacco in his own name; that he sold him his crop, and, at the request of Burton, he became his surety in bank for \$700, which was used by Burton to buy tobacco for himself; that the \$700 note on which he became his surety was used to pay for the crops of Naves & Dunn; that these identical crops were in the warehouse at the time the attachments were sued out; and that the tobacco shipped by Burton was always in his own name. The trial resulted in a verdict in favor of appellees, and, the court having overruled appellant's motion for a new trial, he has appealed to this court. The verdict of the jury was rendered on the last day of the January term. As soon as it was read by the clerk of the court, appellant asked the court that he be given until the fourth day of the next April term to file motion and grounds for new trial on the issue determined by the verdict, to which appellees objected; which objections were overruled, and the time extended, to which appellees excepted. As soon as this order was entered, the court adjourned until

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

court in course. On the first day of the succeeding term of the court, which convened in April, appellant filed his motion and grounds for a new trial, which motion was overruled.

It was held by this court in the case of *Insurance Co. v. Kiernan*, 83 Ky. 468, that: "The return of the verdict into court, and its reception by the court, is all that is necessary in order to entitle the party to make his motion and file his grounds for a new trial. This he is required to do within three days after the verdict has been rendered, and, if he fails to make the motion within said time, such failure is fatal to his right to maintain an appeal upon any of the grounds that are required to be presented by motion as the basis of obtaining a new trial." And in the case of *Ruhrwein v. Gebhart*, 90 Ky. 147, 13 S. W. 447, the court said: "In all cases where the law requires a motion to be made, and reasons for a new trial to be filed, to authorize this court to review the action of the lower court thereon, such motion must be made and the reasons must be filed within three days after the verdict is rendered." And in the case of *Louisville & N. R. Co. v. Board of Public School Trustees* (Ky.) 49 S. W. 84, the court said, in passing upon the question involved in this case, that: "By no stretch of construction can the agreement and understanding between parties be made to embrace the right of either party to make motions at the ensuing term, the right to make which would have expired by lapse of time." In the case of *Beeler v. Sandidge* (Ky.) 49 S. W. 583, the court said: "The requirements of section 342 of the Civil Code of Practice are imperative. The grounds for new trial must be set out in writing, and a motion based thereon must be made at the same term at which judgment was rendered." Section 342, *Id.*, provides that "application for a new trial must be made at the term at which the verdict or decision is rendered." This provision of the statute is imperative, and the circuit judge had no power to extend the time for making this motion until a day in the subsequent term, and the motion made at that time was too late to be available for any purpose. It therefore follows that the only question before the court is, do the pleadings authorize the judgment? We think they do. Besides, there is sufficient testimony to support the finding of the jury. Wherefore the judgment is affirmed.

SKINNER v. CARR.¹

(Court of Appeals of Kentucky. June 15, 1899.)

HUSBAND AND WIFE—DECREE CONFERRING POWERS OF FEME SOLE—LIABILITY OF WIFE AS SURETY FOR HUSBAND.

Under a decree empowering a married woman to contract and be contracted with as a feme sole, she had power to become surety for her husband; and having done so prior to the act of March 15, 1894, regulating the property rights of married women, she is liable on a

renewal of the note thereafter executed, whatever may be the powers of a married woman under that act, or its effect on the status of a married woman under a decree empowering her to contract as a single woman.

Appeal from circuit court, Cumberland county.

"Not to be officially reported."

Action by D. R. Carr against James and Mary S. Skinner on a promissory note. Judgment for plaintiff, and defendant Mary S. Skinner appeals. Affirmed.

Sandidge & Sandidge and T. L. Edelen, for appellant. Allen & Ewing and W. H. Holt, for appellee.

BURNAM, J. This action was instituted by appellee against James Skinner and Mary S. Skinner upon this note: "On or before the 25th day of December, 1895, we promise to pay D. R. Carr four hundred and ten dollars, value received of him in borrowed money, this 12th of August, 1895. The note for which this is a renewal is lost, but same is secured by mortgage of even date herewith. James Skinner. Mary S. Skinner." It is alleged, in substance, that the obligation sued on is the renewal of the balance remaining unpaid upon a note of \$300 dated the 30th day of July, 1892, and one for \$500 dated the 30th day of September, 1892, which were executed and delivered to appellee by appellants in consideration of money loaned to the appellant Mary S. Skinner to erect a dwelling house on her farm. It is also alleged in the pleadings that, previous to the execution of the original obligations, appellant, Mary S. Skinner, who was the wife of James Skinner, had been adjudged the powers of a feme sole by the Cumberland circuit court, and at the date of the execution of the original obligations had the right to contract and be contracted with as a single woman. The defendants James and Mary S. Skinner filed separate answers. They both admit the execution by them of the \$300 and \$500 notes mentioned in the petition, and that the \$410 obligation sued on was given in satisfaction and payment of the balance due on these two obligations, but they allege that the obligation sued on was executed by mistake for an obligation of the same amount, under the impression that such previous obligation had been lost and remained unpaid, but that as a matter of fact the defendant James Skinner had fully paid off and discharged the original obligation for \$410, in lieu of which the note sued on was executed, and plead same in bar of recovery. The appellant, Mary S. Skinner, for additional answer, says that at the time she signed the note for \$300 and the note for \$500, and when she signed the obligation sued on, she was a married woman, laboring under the disability of coverture, and that she signed same as the security for her husband, and derived no benefit or advantage from them. She admits that the right to contract and be contracted with

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as a feme sole had been conferred upon her by decree of the Cumberland circuit court previous to the execution of any of these obligations, but denies that she had been empowered to become surety for her husband by such decree.

We hardly think it necessary to discuss the facts relied on to support the plea of payment. The only evidence of such alleged payment is that appellant, Mary S. Skinner, produced the original \$410 obligation, which was supposed to be lost, and in lieu of which the note sued on was executed, which she says she found among her husband's papers. There is no pretense that she paid it, and no explanation is attempted to be given as to how it was paid; and her husband, whom she claims paid the obligation, has failed to testify in the case, although he has filed an answer to that effect. We think the evidence conclusively establishes the fact that the note was never paid, and that the money was really borrowed by appellants for the benefit of appellant, Mary S. Skinner, and was used to erect a dwelling house on her land for her benefit.

At the date of the execution of the original obligations, in 1892, appellant, Mary S. Skinner, had the power to bind herself as the security of her husband for borrowed money, under the authority conferred on her by the decree of the Cumberland circuit court, giving her the power to contract and be contracted with as a single woman. This question was very thoroughly considered by this court in the case of *Hart v. Grigsby*, 14 Bush, 542, in which it was held that "a married woman, empowered to act as a feme sole as provided by the act of February 14, 1866, has all the powers she would have possessed without the statute, had she been unmarried," and that "she is bound as a feme sole upon any contract she might make under the power, and is subject to all the remedies to which she would have been subject if unmarried." And in the case of *Sypert v. Harrison*, 88 Ky. 463, 11 S. W. 435, it was expressly held that under such a judgment a married woman could bind herself in all respects as if she were unmarried, and therefore could become surety for her husband; and this has been the consistent doctrine of this court ever since. And the case of *Bidwell v. Robinson*, 79 Ky. 29, is not in conflict with these former cases, as the judgment in that case did not authorize the feme covert to make contracts, sue and be sued, as a single woman, and trade in her own name. It was held that: "This court will not by implication enlarge the powers of the feme covert by speculating upon what might have been the intention of the chancellor when entering his judgment. He is given the discretion to limit the rights of the wife as to the exercise of the powers conferred by the Code, and this court would be reluctant to hold the wife liable for the contracts or duties of the husband, unless the intention of the chancellor

is so manifest as to leave but little doubt as to the extent of the power given." The case of *Lane v. Bank* (Ky.) 43 S. W. 442, has no application; it being expressly stated in the opinion in that case that the married woman was sued as principal, and not as surety. We therefore conclude that Mary S. Skinner had the power, under the judgment, to bind herself as surety upon the original obligations, and that in the renewal thereof for the balance due on these obligations she assumed no new liability, that note being simply the evidence of an indebtedness which she had created at a time when she was authorized to do so by law. Even if she was not, the proof justifies us in believing her the real beneficiary of all these transactions.

It is unnecessary for us to discuss or determine the effect of the act of March 15, 1894, regulating the property rights of married women, upon the act of February 14, 1866, which authorized courts of chancery jurisdiction to confer upon married women the powers of a feme sole, or the effect of that law upon the status of married women who have been granted by a court of competent jurisdiction all the powers of single women while that law was in full force and effect. It is manifest, however, that, while the latter statute has changed radically the property rights of married women, it does not give to them as much power to bind their estates as sureties as was enjoyed by those who had been specially empowered with the rights of a feme sole under the old law. Whatever may be the construction given these statutes, appellant is clearly liable on the obligation sued on. For reasons indicated, the judgment is affirmed.

STEWART'S ADM'R v. CARNEAL et al¹
(Court of Appeals of Kentucky. June 13, 1899.)
TRUSTS—LIABILITY OF TRUSTEE FOR MISAPPROPRIATION OF FUND BY ATTORNEY.

It was error to sustain a demurrer to the answer of a trustee pleading the misappropriation by his attorney of the trust fund sued for, though some facts were alleged tending to show defendant's negligence in retaining his attorney after he should have known of the misappropriation of a part of the fund, as these facts may be capable of explanation.

"Not to be officially reported."

Petition for rehearing. Granted.

For former report, see 44 S. W. 442.

W. S. Pryor, Hill & McRoberts, and R. P. Jacobs, for appellant. R. J. Breckinridge, W. G. Welch, R. J. Breckinridge, Jr., and W. H. Holt, for appellees.

HAZELRIGG, C. J. On a reconsideration of this case on petition for rehearing we are inclined to think that the averments of the answer of the appellant with respect to sum alleged to be due from him because of his attorney's defalcation are sufficient to support

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a defense, and the demurrer should have been overruled. The facts which seemingly show negligence on the part of appellant, and which in large measure induced our conclusions originally, may be capable of explanation. In all respects we adhere to the original petition. From his own original assumption of the duties of trustee, through a long course of years down to 1889, and even up to the institution of this suit, the appellant has not only not repudiated the trust, but has openly acknowledged himself as trustee under Stewart's will, and the statute of limitation does not apply. To the extent indicated, the judgment is reversed on the original and on the cross appeals.

PENCE v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. June 14, 1899.)
HOMICIDE—ABSENCE OF INTENT TO KILL—INSTRUCTIONS TO JURY—EVIDENCE.

1. The common-law rule that an intent to kill is not necessary to constitute the offense of murder or manslaughter has not been changed by statute in Kentucky.

2. Accused was not entitled to an instruction as to his right to eject deceased from his home if he had reason to believe he was there for the purpose of debauching his wife, as deceased was not asked to leave until after he was assaulted.

3. Though the defense was that accused had reason to believe that deceased had come to his home for the purpose of debauching his wife, evidence that deceased "was a bad man after women" was not admissible.

4. Declarations of deceased, and other facts tending to show a criminal intimacy between deceased and the wife of accused, were inadmissible as evidence, those facts being unknown to accused at the time of the assault.

Appeal from circuit court, Madison county.

"Not to be officially reported."

Alex. Pence was convicted of the offense of manslaughter, and he appeals. Affirmed.

R. H. Crooke, W. B. Smith, and Lewis Walker, for appellant. W. S. Taylor, for the Commonwealth.

HOBSON, J. Appellant was indicted in the Madison circuit court for the murder of James Smith, and was convicted of manslaughter, his punishment being fixed at 10 years in the penitentiary. Appellant is 60 years old; his wife 17. They have been married 4 or 5 years. The deceased, James Smith, was about 24 years of age, and the appellant suspected him of improper relations with his wife. He testified that on the day his wife's sister died—November 20, 1897—she called him to her, sending everybody else out of the room, a few minutes before she died, and told him that he must keep James Smith away from his house, or he would cause a separation between him and his wife. He stated that, acting upon this information from his sister-in-law, he observed his wife and Smith that night, and saw enough to confirm what she had said;

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51 S.W.—51

so he told Smith that he must not come to his house any more, and Smith promised to stay away. He also stated that he saw Smith going to his house after this, but he would leave before appellant got to the house. Appellant lived in Madison county, on the Kentucky Central Railroad, about one-half mile from Ford, and had a saloon on the Madison side of the river, near Ford, about 600 yards from his residence, and on the other side of the tunnel from it. He stated that on February 23, 1898, about 2 o'clock in the afternoon, he started to go to Ford, to take his laundry, and when he got to the bridge he found he had forgotten it. James Smith and another were standing on a porch on the opposite side of the railroad, and when he got back from the saloon with the laundry he noticed that Smith was gone, and, looking up the railroad, he saw him going out of the tunnel at the far end. He then watched Smith, and, when he saw him stop at his house, went back to the saloon, left his laundry, put his pistol in his pocket, and started home, he says, to investigate. When he got there, he found the kitchen door locked. He then went around to the front door, and went in, finding his wife, her brother, Charles Casey, James Smith, and Sadie Green, a young lady 16 years old, in the room together. He said, "Good evening," and then asked his wife to go upstairs, and look for his watch key. Smith was sitting near the center of the room, and as Mrs. Pence went out to look for the key appellant followed her to the door, which he closed behind her, and, being then at the back of Smith, who was not noticing what he was doing, he turned, and struck Smith on the head, with the butt of the pistol, two blows, and as Smith started out he followed him, and pushed him, telling him to leave his premises, and stay away. Charles Casey then took Smith's hat and gloves to him, and he went home, bleeding very profusely, and died of his wounds about 11 o'clock that night. When he struck Smith the first blow, Smith raised and threw his hand back. He then struck him a harder blow, which seemed to daze him, and he started towards the door. Smith had a pistol on his person, but did not draw it, or show it in any way. Appellant stated that he did not intend to kill Smith, but only to bruise him, and make him stay away from his house. On these facts the court instructed the jury that if appellant willfully assaulted and beat Smith with the pistol, thus killing him, and that the beating was with such violence and to such a degree as to be evidently dangerous to life, they should find him guilty of murder, if the beating was with malice aforethought, or of manslaughter if it was done in sudden heat and passion, without previous malice. He also instructed them that if the beating was not done with such violence, or carried to such a degree, as to be evidently dangerous to life, and appellant

did not intend to kill Smith, they should find him guilty of involuntary manslaughter. Counsel earnestly insists that these instructions were erroneous, and, in effect, that appellant was not guilty either of murder or voluntary manslaughter, unless he intended to kill Smith. He admits that this was not the common-law rule, but insists that it has been changed in this state by statute. We see nothing in the statutes to evince such a purpose. The legislature seems to have intended no more than to prescribe the punishment for murder and manslaughter, leaving the nature of the offenses as defined at common law. The sections now in force are the same as the General Statutes, and in construing those provisions this court, in *Conner v. Com.*, 13 Bush, 719, said that they "prescribe the punishment for murder and voluntary manslaughter by name, and without attempting a definition of either of those crimes. We are therefore to look to the common law for the definition of the terms 'murder' and 'voluntary manslaughter.'" In the same case it was held that a killing by willfully striking, under the statute which is now embraced in section 1151 of the Kentucky Statutes, is a new offense, and cannot be punished under an indictment for murder or manslaughter. See, also, to same effect, *Buckner v. Com.*, 14 Bush, 601; *Trimble v. Com.*, 78 Ky. 176. That an intention to kill is unnecessary to constitute the offense of murder or manslaughter, see, also, *Sparks v. Com.*, 3 Bush, 111; *Peoples v. Com.*, 87 Ky. 487, 9 S. W. 509, 810.

The instructions asked by the defendant as to his right to eject Smith if he had reason to believe he was there for the purpose of debauching his wife were properly refused, because Smith did not decline to leave, and was not asked to do so, until after he was beaten. He was doing nothing wrong at the time, and appellant's going up behind him and striking him without warning was entirely unjustifiable. For the same reason the instruction asked as to self-defense was properly refused, as there was nothing in the case upon which it could be predicated. Appellant testified himself that he assaulted Smith for the purpose of giving him a beating.

Appellant also complains that the court refused to allow him to prove that Smith was a bad man after women; that he had been seen taking liberties with Mrs. Pence, and had stated that he had had criminal relations with her. The evidence of Smith's character might show some ground for appellant not wanting him about his place, but it did not warrant and was no excuse for his covertly going up behind him and suddenly dealing him a deadly blow with his pistol, in his own house, after speaking to him politely, and giving him no intimation that his presence was undesirable. The evidence as to the conduct of Mrs. Pence and Smith on other occasions, or what Smith said

about it, was properly rejected, because this had not been communicated to appellant, and did not throw any light upon his motives for making the assault. He who kills another cannot show by way of mitigation or in defense that the deceased had done him a great wrong, if that fact was unknown to him at the time of the homicide. On the whole case it appears to us that the appellant has had a fair trial. Judgment affirmed.

SPICER et al. v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. June 15, 1899.)

CRIMINAL LAW—CONFESSIONS—INSTRUCTIONS TO JURY.

It was prejudicial error to instruct the jury that they could not convict defendants upon confessions made out of court, unless corroborated by other evidence, where there was no evidence of any confession.

Appeal from circuit court, Breathitt county. "Not to be officially reported."

James, William, and Stephen Spicer were convicted of the offense of hog-stealing, and they appeal. Reversed.

R. A. Hurst and W. H. Blanton, for appellant. W. S. Taylor and N. H. Thatcher, for the Commonwealth.

BURNAM, J. This is an appeal from the judgment of the Breathitt circuit court sentencing each of the appellants to the penitentiary for a term of two years for the crime of hog-stealing.

It is insisted for the appellants that there is no evidence to support the verdict and judgment, and that the court erred to their prejudice in the instructions given on the trial. The testimony in the case is meager. John Arrowood testified that in July, 1898, he lost a spotted sow which weighed about 150 pounds, and was worth about \$5; that he received information that a hog had been killed in the road on Lick branch, about one mile from where he lived, and in the neighborhood in which appellants lived; that he went to the place where he had been informed the hog had been killed, and found the head of a hog covered up with leaves, that looked like his, but that he did not know who killed it; that appellants James Spicer and William Spicer testified on the examining trial that they had found the hog dead just above where they lived, and had skinned it and carried it home; that appellant Stephen Spicer had not been arrested, was not present, and did not testify on the examining trial; and that the head he found in the leaves looked like it had been mashed. Sam Stidham testified that he was at the examining trial, and heard Stephen Spicer and James Spicer testify in their own behalf, and that they each stated that they had found the hog, and took it home and ate it. A. D. Strong testified that he found the foot of a hog

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on the branch a short distance from appellants' field, but that he did not know whose hog it was. George Fields testified that some time in June or July he saw James Spicer and William Spicer go up the creek by his house, and that they informed him that they had learned some dogs had killed a hog upon the creek, and they were going up to see about it; that in an hour or two after they came back down the creek, carrying 10 or 15 pounds of meat apiece, and that Jeff Spicer was with them, but that Stephen Spicer was not along; that they said they had found the hog where the dogs had killed it, and had skinned it and were carrying it home, and said that they would pay the owner—whoever he was—for the hog. George Deaton testified that he was present at the examining trial, and heard James Spicer and Stephen Spicer testify in their own behalf, and that they testified that they had found the hog, took it home, and ate it. This was all the testimony for the commonwealth. Appellants James and William Spicer testified that they had received information that their dogs had killed a hog upon the branch above their field, and, in company with their brother Jeff Spicer, they went up to where they had learned the dogs had killed the hog, and found the carcass of a hog which had been killed a short time before by dogs, and that they concluded to skin it and take it home, and, if the owner came for it, they would pay for the value of the hog. Stephen Spicer testified positively that he was not present when the hog was killed or skinned, and that he did not have anything to do with it. It seems to us that there is no proof which connects the appellant Stephen Spicer with the crime for which he is convicted. No witness testifies that he was present when the hog was killed, or that he was seen in possession of any of the meat. It is true that two of the witnesses for the commonwealth say that he testified at the examining trial, and that he was present, but in view of the testimony of Arrowood, the party whose hog was stolen, that he was not present at the examining trial, and had not at that time been arrested, it would seem that the witnesses have simply confounded him with his brother William Spicer, who did testify on that occasion; and, so far as he is concerned, the proof entirely fails to connect him with the crime, and the motion for a peremptory instruction should have prevailed.

The third instruction given to the jury by the court is in these words: "The jury cannot convict the defendants upon confessions made out of open court, unless the same is corroborated by other evidence that the offense was committed, and tending to connect the defendants with its commission." "A confession, in criminal law, is a voluntary statement made by a person charged with the commission of a crime or misdemeanor, communicated to another person, wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act, or the share and participation which he had in it."

See Black, Law Dict. There is no testimony in the record that either of the appellants ever made a confession or acknowledgment of their guilt of the offense charged. On the contrary, they most emphatically deny their guilt, and testify, both on the examining and in the final trial, to facts which conduce to show their innocence. We therefore think that this instruction was misleading to the jury, and highly prejudicial to appellants. The court, in substance, told the jury that appellants had confessed their guilt, but that, notwithstanding such confession, they must not convict them unless there was other proof tending to connect them with the crime. The instruction seems to have no application to any fact which was in evidence on the trial, and should not have been given. For the reasons indicated, the judgment in each case is reversed, and the cause remanded for proceedings consistent with this opinion.

MARCUM v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. June 16, 1899.)
HOMICIDE—SHOOTING OF OFFICER TO PREVENT ARREST—INSTRUCTIONS TO JURY.

1. One who shoots an officer to prevent the arrest of an offender is guilty of the offense of malicious shooting and wounding with intent to kill.

2. Upon the trial of accused for such an offense, he was not entitled to an instruction warranting his acquittal if he shot in the defense of a companion whom the officer was attempting to arrest; there being nothing to show that there was any reason for the apprehension of danger to his companion at the hands of the officer.

Appeal from circuit court, Whitley county.
"Not to be officially reported."

Artie Marcum was convicted of the offense of willful and malicious shooting with intent to kill, and he appeals. Affirmed.

R. S. Crawford, for appellant. J. N. Sharp and W. S. Taylor, for the Commonwealth.

HOBSON, J. Appellant, Artie Marcum, was tried in the Whitley circuit court under an indictment charging him with willfully and maliciously shooting Sampson Bolton with intent to kill him, and, having been convicted and sentenced to three years in the penitentiary, asks a reversal for alleged errors in the instructions. To understand these, it will be necessary to make a brief statement of the case. On November 9, 1898, appellant, Marcum, and a man named Williamson were in the town of Jellico, at a restaurant, and while there they were warned that some parties were seeking them for the purpose of bringing up a difficulty. They then left the restaurant, and went out on the railroad, where Williamson proceeded to shoot off his pistol. Bolton, who was the town marshal, with his deputy, named Veach, thereupon went to them to see what was the matter, supposing a man had been killed. As

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

they approached they were commanded to halt. Veach stopped, but Bolton went on and took hold of Williamson, saying to them both to consider themselves under arrest; and, Williamson trying to use his pistol, Bolton seized it. While Bolton and Williamson were struggling over the pistol, appellant, Marcum, in disregard of the command of the officers, advanced on the deputy, Veach, and commanded him to lay down his pistol, which Veach did. He then commanded Veach to back off, which Veach proceeded to do at greater speed than was consistent with dignity. Marcum then turned on Bolton, the marshal, and said to him to turn Williamson loose, or he would shoot his heart out; having previously said to him to hold up his hands, or he would shoot his head off. The marshal begged him to have no trouble, but did not obey him, and the third time he told him to let loose he shot the marshal in the side. The marshal testifies that he knew Williamson and Marcum well, and had known them for years. They lived only three miles from Jellico, and neither of them, on the witness stand, testified to not recognizing the marshal or his deputy, or being ignorant of their official positions. Their testimony, on the whole, confirms that of the marshal. It is argued that on these facts the court should not have submitted to the jury the question whether this shooting was malicious, as Marcum had no ill will towards the officer, as he testified on the trial. It is also argued that the court erred in not giving an instruction warranting an acquittal of appellant if he shot in the defense of Williamson, having reason to believe that Williamson was in danger.

Where death results, the shooting of an officer in discharge of his duty has always been held murder, when intentionally and knowingly done to prevent the arrest of offenders; and, where death does not result, such a shooting falls within the statute punishing a malicious shooting or wounding. There was no reason for any apprehension of danger to Williamson at the hands of the officers, and as they had a legal right to arrest him, and were in the discharge of their duty, the court properly refused to give the jury the instruction suggested. The instructions given by the court are more favorable to the appellant than he was entitled to. Judgment affirmed.

KEMERY'S ADM'R v. LOUISVILLE & N. R. CO.¹

(Court of Appeals of Kentucky. June 16, 1899.)
APPEAL AND ERROR—FINAL ORDER.

No appeal lies from an order granting a new trial, the order not being a final one.

Appeal from circuit court, Simpson county.
"Not to be officially reported."

Action by Kemery's administrator against the Louisville & Nashville Railroad Company.

Verdict for plaintiff. From an order granting a new trial, plaintiff appeals. Motion to advance for hearing. Granted, and dismissed.

Goodnight & Roark, for appellant. J. A. Mitchell and E. W. Hines, for appellee.

HAZELRIGG, J. On motion to advance for hearing it appears that the order from which the appeal is prayed is one granting a new trial by the trial court when the plaintiff (appellant here) had obtained a judgment against the appellee, the lower court being of opinion that the prayer for an appeal from that order deprived the circuit court of further jurisdiction over the same until the appeal so prayed was disposed of here, declining to proceed further with the case. Under the circumstances this court will, on its own motion, dismiss the appeal, because the order sustaining the motion for a new trial is not a final order, and this court only has jurisdiction of the case for the purpose of dismissing it. The appeal is therefore advanced for hearing, and, on hearing, dismissed.

GILBERT v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. June 17, 1899.)

HORSE STEALING—INSTRUCTIONS TO JURY—
MISCONDUCT OF COUNSEL IN ARGUMENT
—WITNESSES—JOINT DEFENDANTS.

1. It was error to give an instruction which might have been construed as authorizing the jury to convict accused of the offense of horse stealing, if he received the horse knowing it to be stolen.

2. Where, upon a trial for horse stealing, an affidavit for continuance was permitted to be read to the jury as the deposition of absent witnesses, it was improper and prejudicial to accused for the prosecuting attorney to say, in argument to the jury, "When a defendant is brought to trial for horse stealing, he always has an affidavit as to what two or three mythical witnesses will state that nobody knows;" though he added, when defendant objected, "Although in this case [naming the absent witnesses] are actually persons."

3. It was improper and prejudicial to accused for the prosecuting attorney to state to the jury in argument that he could have proved certain things if he had thought it necessary, and to refer to testimony as having been given at the examining trial which was not given.

4. The prejudicial effect of improper remarks of counsel to the jury was not removed by the court saying to the jury when counsel objected: "You will consider the proof before you."

5. One or more of several defendants jointly indicted are to be treated as accomplices, so that one of them may not be convicted upon the uncorroborated testimony of the others.

Appeal from circuit court, Owen county.

"To be officially reported."

R. Gilbert was convicted of the offense of horse stealing, and he appeals. Reversed.

Lindsay & Botts, for appellant. W. S. Taylor and M. H. Thatcher, for the Commonwealth.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

GUFFY, J. This appeal is prosecuted from a judgment of the Owen circuit court rendered upon a verdict against the appellant upon an indictment charging him and others with the offense of horse stealing. Numerous grounds were filed in support of the motion for a new trial, and, the same having been overruled, appellant asks a reversal on account of various errors of the trial court. We deem it unnecessary to notice, in detail, the several reasons assigned for reversal.

Appellant complains of instruction No. 1, given by the trial court. The instruction is not as clear as it should have been. It is open to the construction that it authorized the jury to convict, if appellant received the horse knowing it to have been stolen. Appellant was not accused of this offense, and the jury was not authorized to find him guilty of the offense charged, unless he stole the horse either by himself or in company with others, and the instruction should have so told the jury.

Appellant had moved for a continuance on account of the absence of several witnesses, which motion was overruled, but his affidavit was allowed to be read as the deposition of the witnesses. It appears that during the argument of the commonwealth's attorney, in closing the case to the jury, the following occurred: "He said to the jury: 'When a defendant was brought to trial for horse stealing, he always had an affidavit as to what two or three mythical witnesses would state that nobody knew.' The defendant objected, and the commonwealth's attorney then added, 'Although in this case James Refro and William Hedges are actually persons,'—to all of which defendant at the time excepted, and still excepts. The commonwealth's attorney, in the same argument, stated to the jury as follows: 'I could, if I had thought it necessary, prove, by fifteen or twenty as good men as live in New Liberty precinct, that Wm. Keefe and George See were in New Liberty until eleven o'clock that Saturday night, and could prove a perfect alibi for Wm. Keefe and Geo. See.' The defendant objected, and the court said to the jury that 'you are to consider only the proof before you,'—to all of which the defendant at the time objected and excepted, and still excepts. The commonwealth's attorney, in the same argument, stated as follows: 'That, when J. L. Piner testified at the examining trial, this defendant found out that his story to S. D. Duvall, the sheriff, would not work, and he changed it.' The defendant objected, and the court said: 'You will consider only the proof before you,'—to all of which the defendant excepted and objected, and still excepts. The commonwealth's attorney stated to the jury in the same argument as follows: 'I have somewhere the minutes of the examining court, and that the said minutes will show that J. L. Piner testified at the examining court to all that he testified to in this trial; when the fact was and is that J. L. Piner

only testified before the grand jury. The commonwealth said, 'Perhaps that is so, but I saw it somewhere in the record.' The defendant objected, and the court said to the jury, 'You will consider the proof before you.'" Under the evidence of this case, and the circumstances surrounding the trial, the remarks and statements of the attorney for the commonwealth were almost certain to be very prejudicial to the appellant, and ought not to have been made. The ruling of the court in respect thereto could not prevent the injury to the defendant naturally resulting from the statements complained of.

It is earnestly insisted for appellant that Keefe and See, who are jointly indicted with appellant, and to whom a separate trial had been awarded, were not competent witnesses against appellant. It is true that in *Edgerton v. Com.*, 7 Bush, 143, this court held that a party jointly indicted with another could not be allowed to testify for the commonwealth. But that decision was placed upon the ground that such persons could not testify for the defendant. But that decision was rendered before the enactment of the law allowing the defendants in criminal cases to testify in their own behalf and in behalf of each other. The law now permits defendants in all cases to testify in behalf of themselves and for each other. It seems clear now that such defendants may testify for the commonwealth, if they are willing to do so. The testimony of Keefe and See was competent, so far as it conduced to show the guilt of the appellant, but no further. The court, however, should instruct the jury that appellant could not be convicted alone upon the testimony of Keefe and See, both of them being charged with the same crime, and in law, at that time, should have been treated as accomplices. For the reasons indicated, the judgment is reversed and cause remanded, with directions to award appellant a new trial, and for proceedings consistent herewith.

SHELBYVILLE & EMINENCE TURNPIKE CO. v. LOUISVILLE & N. R. CO.¹

(Court of Appeals of Kentucky. June 17, 1899.)

EMINENT DOMAIN—BURDEN OF PROOF—OBJECTIONS—DAMAGES FOR CROSSING OF TURNPIKE BY RAILROAD.

1. On appeal by defendant to the circuit court from an order of the county court overruling exceptions of both parties to the report of commissioners assessing damages in a condemnation proceeding instituted by a railroad company, the burden of proof is on the company, and it is entitled to the concluding argument to the jury, as judgment would be rendered against it for the damages assessed if no proof were introduced by either party.

2. Where no objection was made to remarks of counsel in argument because the presiding judge was temporarily absent from the court room, an agreement, recited in the bill of exceptions, that the objection shall be considered

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as having been made, does not authorize the court to consider the remarks of which complaint is made.

3. A verdict of \$300 as damages to the easement of a turnpike company by a railroad crossing was not too small.

Appeal from circuit court, Shelby county.

"Not to be officially reported."

Proceeding by the Louisville & Nashville Railroad Company against the Shelbyville & Eminence Turnpike Company to condemn defendant's easement for a railroad crossing. Judgment of the county court overruling exceptions of both parties to the report of commissioners assessing damages, and the Shelbyville & Eminence Turnpike Company appealed to the circuit court. Judgment for damages, and the Shelbyville & Eminence Turnpike Company appeals, complaining that the amount is too small. Affirmed.

George Nicholas and Bennett H. Young, for appellant. Pryor J. Foree and Edward W. Hines, for appellee.

WHITE, J. The appellee, the Louisville & Nashville Railroad Company, began this proceeding in the county court of Shelby county, seeking to condemn the property of appellant, the Shelbyville & Eminence Turnpike Company, or a sufficient amount thereof, as appellee might require, to cross the turnpike. Commissioners were appointed by the county court, who fixed the compensation to appellant at \$10 for the land taken, and \$15 for damages to the residue. To this report both parties filed exceptions, and on a trial before a jury in the county court the same damages were awarded. Appellant appealed to the circuit court. A trial in the circuit court resulted in a verdict for \$25 for the land taken, and \$275 for consequential damages. After reasons and motion for a new trial by appellant, the Shelbyville & Eminence Turnpike Company, had been overruled, it prosecuted this appeal.

The reasons assigned for new trial, and urged here for reversal, are: Error of the court in awarding to appellee, the Louisville & Nashville Railroad Company, the burden of proof and closing argument to the jury; certain remarks of counsel in the closing argument to the jury; that the verdict is against the evidence, being for too small a sum.

It appears that appellee, the railroad company, had acquired the right over the land by condemnation of the title in fee from the owner of the land, and sought to condemn the right of appellant,—the easement it held,—to be used by the railroad in crossing the turnpike. The case came up for trial in the circuit court on the exceptions filed to the report of commissioners. On this trial, if neither party had offered any proof, the exceptions would have been overruled, and judgment entered in favor of appellant and against appellee for the damages as fixed by that report. This being true, under the Code the burden of proof was properly placed on ap-

pellee. It would have been the unsuccessful party.

The remarks of counsel to which objection is made do not appear to have been objected to at the time they were made, and we do not deem the question properly before us. The bill of exceptions shows that there was no objection or exception entered at the time the remarks were made, but the bill shows that it is agreed that there was objection, and the objection was overruled. The bill shows that this did not happen, although by agreement they say it would have done so if the presiding judge had not been temporarily out of the court room. These remarks may be outside the record, but, in view of the verdict rendered, it cannot be said they were any way prejudicial to the appellant.

As to the amount of damages fixed by the jury, we are of opinion that it cannot be said to be too small. Without deciding that it is ever necessary to condemn a turnpike for use by a railroad in crossing same, and without deciding whether the railroad had a right, under Ky. St. § 768, subsec. 5, to build its road across the appellant's road without condemnation,—for that question is not before us,—we are of opinion that the damages of \$300, in the aggregate, as fixed, fully cover the damages to the easement of appellant. Finding no error prejudicial to appellant, the judgment is affirmed.

ASHLAND & C. ST. RY. CO. v. FAULKNER.¹

(Court of Appeals of Kentucky. June 17, 1899.)

STREET RAILROADS—INJURY TO ABUTTING PROPERTY—PEREMPTORY INSTRUCTION.

Though the testimony of plaintiff himself fails to show any obstruction of the ingress and egress to and from his property from the construction of a street railway by defendant, yet, as the testimony of other witnesses tends to show such obstruction, and the jury would be authorized to determine from common observation that there is some obstruction, the question should be submitted to the jury.

"Not to be officially reported."

Petition for rehearing. Opinion modified and petition denied.

For former report, see 45 S. W. 235.

HAZELRIGG, C. J. This case was argued by counsel and considered by the court on the original hearing as one involving the location of a street railway on a street of a town. It developed from an inspection of an averment in one of the various pleadings—filed, not by the appellee, but by the appellant,—that the location of Faulkner's property is in fact not within the corporate limits of a town. We cannot, when presenting it for the first time, consider a matter of this importance on rehearing. In the opinion, however, we hold the evidence of injury by obstruction insufficient for submission, and to this ex-

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tent we modify the original opinion. It is true that the plaintiff himself neither in his examination in chief nor in his cross-examination made out a case of obstruction to his property. He rested his case on the claim that his lot had been absolutely invaded, and a part of it taken, by the company; and even when recalled, later in the progress of the trial, his testimony on the point involved is incompetent, and too general to support a claim for damages for obstruction. There is some testimony, however, by other witnesses, conducing to show that of ingress and egress had been obstructed by the track of the railway; and we know from common observation that the rails of such a road do in a measure obstruct the ingress and egress, when room is not left for passage between them and the abutting property. The question should be left to the jury to determine to what extent the property has been damaged by reason of this obstruction. We think the damages on this branch of the case are shown by the proof to be quite small, and we adhere to the original opinion that on the whole case the damages found are excessive. On return of the case, either party may amend their pleadings, raising such issues as may be involved. Petition overruled.

LONG et al. v. LOUISVILLE & N. R. CO.¹
(Court of Appeals of Kentucky. June 13, 1899.)

EMINENT DOMAIN—CONSTRUCTION OF CONSENT ORDER—POWER OF CITY ATTORNEY TO SURRENDER PROPERTY—CONSTRUCTION OF DEED—RES JUDICATA.

1. In a proceeding by a city to condemn, as a right of way for a railroad, a strip of ground owned by certain heirs, after a strip 110 feet wide had been condemned, and the time for making a motion for new trial had expired, it was ordered "by consent" that the previous orders "be confirmed and ratified," but was agreed that nothing contained in such orders should be so construed as to prevent the heirs from "having, using, building upon, and disposing of the property owned by them, or any of them, up to the line of the track of the railroad as laid down on the map filed," which track was to be 60 feet wide, the center of which was indicated on the map by a blue line, while the exterior lines of the strip of 110 feet were indicated by red lines; and it was then recited that the heirs aforesaid should have "full access to the aforesaid lines of the railroad for the use and enjoyment of their respective property and parts thereof." *Held*, that the consent order did not release any part of the 110 feet condemned, but merely gave the original owners full access to the remainder of their property notwithstanding the building of the railroad, and the right to use and dispose of the property owned by them up to the red lines on the map.

2. If the consent order be construed as attempting to release the title of the city to any part of the land condemned, it is void for want of authority in the city attorney to give such consent.

3. A deed from the city to a railroad company conveying the right of way, so far as the city owned the same, along the route described on

the map filed in the condemnation case, and set out and described in the verdict and judgment in that case, copy of the map being annexed to the deed, passes the city's title to the entire 110 feet condemned by the city and designated on the map, and not merely to the 60 feet designated for the track.

4. A judgment determining the title to one piece of property is not conclusive between the same parties as to another piece of property, though the titles be derived in the same way.

Paynter, J., dissenting.

Appeal from circuit court, Jefferson county, chancery division.

"To be officially reported."

Action by Dennis Long & Co. against the Louisville & Nashville Railroad Company to enjoin defendant from trespassing upon land. Judgment for defendant, and plaintiffs appeal. Affirmed.

Phelps & Thum and Pryor, O'Neal & Pryor, for appellants. Helm & Bruce, for appellee.

HOBSON, J. The question involved in this action is the width of the right of way of the railroad company for 300 feet eastwardly from Jackson street towards Hancock, in the city of Louisville. The land originally belonged to Wm. Preston, Sr. The city of Louisville, in 1873, condemned the right of way, and by deed conveyed it to the railroad company. By deeds made March 25, 1827, and January 23, 1839, by William Preston's representatives, title was vested in the railroad to all the property which they could then lawfully convey. There is no question of the regularity of the condemnation proceedings, and so there are but two issues in the case: (1) What land did the city condemn by the condemnation proceedings referred to? (2) What did it convey to the railroad company by the deed executed subsequently on May 6, 1880?

It is contended for the appellants that in the condemnation case, although the strip of land condemned by the city was 110 feet wide in most places, yet as to the heirs of William Preston, Sr., the strip condemned was only 60 feet wide. It is also contended that, if the city condemned a strip 110 feet wide as against William Preston's heirs, as well as everybody else, yet the city, by its deed to the railroad company, only conveyed a strip 60 feet wide. From the record of the condemnation case, it appears that the city, pursuant to a resolution of the general council, instituted that action on March 20, 1873, against a large number of property owners along Beargrass creek, in order to construct a roadbed from the line of the Louisville, Cincinnati & Lexington Railroad north to Pocahontas street; thence along said street to Beargrass creek bed and Water street; west to First street, as designated on the map of city engineer. On April 30, 1873, an amended petition was filed, and with it a map showing accurately the property sought to be condemned. In this amended petition it is alleged that the property sought to be condemned lies between the red lines on the map, and that it is needed

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for the purpose of constructing and maintaining a sewer, as well as for the purpose of constructing the railroad. The boundary of the land sought to be condemned did not run in straight lines, and was defined by two parallel red lines on the map 110 feet apart, between which ran a blue line, called the "center" or "stake" line. The case having been prepared for trial, the jury returned a verdict assessing the damages to each owner for the "land and property described as being within the red lines on the map, taken for municipal purposes," specifying in their verdict also the number of square feet of land taken from each owner. A copy of the old record, including this map, is filed in the transcript before us, and from it, under the evidence, we are satisfied, beyond question, that a strip 110 feet wide was condemned in this proceeding.

On May 29, 1872, the court, on the return of the verdict, entered a judgment that the title to the property described therein vested in the city of Louisville, upon the payment into court by the city of the sums specified in the verdict. On the next day the Preston heirs filed grounds, and moved the court for a new trial, and this motion, being heard on the following day, was sustained. Immediately, by consent, the case was submitted to the court without the intervention of a jury, to be heard upon the evidence already introduced; and thereupon the court fixed the compensation of the Prestons at \$10,700 for the land taken, instead of \$6,800, allowed by the jury. It thereupon again adjudged that the title to the property vest in the city of Louisville upon payment of the money into court by the city. On June 10th the city paid the money into court, no motion for a new trial having been made. On June 17, 1883, when the time for making a motion for new trial had expired and no steps had been taken for this purpose, the following order was made: "This day came Wm. Preston, Susan P. Hepburn, M. P. Pope, and the other heirs and devisees of Wm. Preston, deceased, by counsel, and by consent of the city of Louisville, by its city attorney, it is ordered that the orders heretofore entered in this case condemning the property of said heirs and devisees be confirmed and ratified and accepted by said defendants; but it is agreed that nothing contained in the orders aforesaid shall be so construed as to prevent the said heirs and devisees from having, using, building upon, and disposing of the property owned by them, or any of them, up to the line of the track of the railroad, as laid down on the map filed in this case, April 30, 1873, now on file, and marked 'Exhibit No. 2,' which track, when made, will be sixty (60) feet wide on top of said embankment, and the center line of which will be the blue line laid down on said map; and the aforesaid heirs, devisees, and their assigns, shall have full access to the aforesaid lines of the railroad for the use and enjoyment of their respective property and parts thereof." It is insisted that by this order the city re-

leased all the property condemned, except a strip 60 feet wide, the center line of which was the blue line on the map. It will be observed, from what we have stated, that, under the judgment of the court, the title to the entire strip of 110 feet had vested in the city on June 10th, upon payment of the money into court as directed in the judgment. It will also be observed that the time for making a motion for a new trial having expired, and no motion having been made, this judgment had become absolute, and the city attorney was without power to divest the city of title to property which it had bought and paid for after the judgment vesting the title in the city had become final. He could no more do this than he could divest the city of title to property conveyed to it by deed, after the deed had been accepted by the city. Being without power to divest the city of title to this property, the above agreed order should be construed within the limits of his authority, if it can fairly be done. The language of the order does not indicate an intention to undo what had been done. On the contrary, the orders theretofore entered in the case are confirmed and ratified. If it had been intended to release 60 feet of the land conveyed, the parties could have said this, and we think would have said it. When, instead of this, they ratified and confirmed the orders made, it must be concluded that they intended the title to remain as it was vested, and to make an arrangement consistent therewith. This construction is borne out by the following stipulation of the order, that nothing in the proceedings shall be so construed as to prevent the Prestons "from having, using, building upon, and disposing of the property owned by them," and that they shall have "full access" to the aforesaid lines of the railroad for the use and enjoyment of their respective property and parts thereof. Considering the circumstances under which this order was made, and its language, it can reasonably only mean that the Prestons were to have full access to the remainder of their property, notwithstanding the building of the railroad, and the right to use and dispose of the property owned by them up to the red lines laid down on the map.

It affirmatively appears in this case that the city attorney was not authorized by the general council to release the title to any of the land which had vested in the city, and, if that construction could be given to the consent judgment, it would be void for want of authority in him to make it. *Smith's Heirs v. Dixon*, 3 Metc. (Ky.) 438; *Harrow v. Farrow's Heirs*, 7 B. Mon. 126; *Holbert v. Montgomery's Adm'r*, 5 Dana, 11; *Holker v. Parker*, 7 Cranch, 452; *Town of North Whitehall v. Keller*, 45 Am. Rep. 361; 3 Am. & Eng. Enc. Law (2d Ed.) pp. 370-372, and cases cited. It follows, therefore, that the city acquired title to the entire strip, 110 feet wide, now claimed by appellee, and that appellee is entitled to the property in contest if it was conveyed by the deed made by the city above referred to.

This brings us to the consideration of the other question suggested, which is, what property did the city by this deed convey to the railroad company? The deed made by the city is as follows: "Whereas, an ordinance entitled 'An ordinance making an appropriation for the completion of the roadbed from a point near the roundhouse of the Louisville, Cincinnati & Lexington Railway Company, east of Southall street to Brook street, and directing a conveyance of the city's title to the roadbed, and granting the right of way, also directing the conveyance of the city's title or claim to the spaces or parcels of land between Brook and Second streets and the south line of the wharf and the north line of Water street,' was duly passed by the general council of the city of Louisville, and approved by the mayor of said city, on the 24th day of April, 1880: Now, in consideration of the provisions of the said ordinance, and especially the execution of the bond provided for in the third section of said ordinance, as also for the consideration of one dollar, the city of Louisville this day, and by this writing, bargains, sells, and conveys unto the Louisville, Cincinnati & Lexington Railway Company the right of way, so far as it owns the same, from a point near the roundhouse of said company east of Southall street, thence along the route set out and described on the several maps filed in cases in the Jefferson court of common pleas, to wit, *City of Louisville vs. E. D. Gilligan et al.* (No. 10,377), *Same vs. James Burkhart* (No. 10,658), *Same vs. Wm. Jarvis et al.* (No. 10,445), *Same vs. Hall* (No. 11,207), and the several verdicts and judgments in the several cases mentioned, to all of which reference is here made for greater certainty, together with the roadbed, bridges, and right to operate a double-track railway, with steam locomotive power, along and over same, between the points aforesaid, in full accordance with the terms and provisions of the ordinance aforesaid; also such claim or title as the city of Louisville has to the parcels of land between Brook and First streets and the south line of the wharf and the south line of Water street; also such claim or title as the city of Louisville has to the land between the south line of the wharf and the north line of Water street and First and Second streets, with the right to cross First street by tracks as near as may be as shown on the map on file in the city engineer's office, and operate the same. A copy of the maps, showing the right of way and parcels of land herein intended to be conveyed, is annexed to this deed, and signed by the mayor, for the purpose of identification. To have and to hold the property, right of way, and right to use and operate the same in accordance with the provisions of the ordinance aforesaid, forever, with covenant of special warranty. In testimony whereof the city of Louisville, by its mayor, has here signed this deed, under the corporate seal of said city, this 6th day

of May, 1880. The City of Louisville, by John G. Baxter, Mayor."

By this deed the city plainly conveyed to the railroad company the right of way, so far as it owned the same, along the route described on the several maps filed in the condemnation cases, and set out and described in the verdicts and judgments in those cases, and, to remove all possible doubt, a copy of the map, showing the right of way and parcel of land intended to be conveyed, is annexed to the deed, and signed by the mayor, for the purpose of identification. A copy of this is filed with the transcript, identified by the mayor's signature, and is the same map with the red line filed in the condemnation suits. Taking this map, with the judgments in condemnation cases, identifying the land condemned as that within these red lines, no one can read the deed, referring to these verdicts and judgments for greater certainty as to what was condemned, without understanding that the whole 110 feet was conveyed that had previously been condemned by the city. The map filed with the deed defines accurately the right of way by two heavy red lines, 110 feet apart at the points in controversy. At First street the map locates the right of way $445\frac{2}{12}$ feet from Washington street to the blue line, and at Brook street the same distance; at Preston street, 480 feet; at Jackson street, $556\frac{4}{10}$ feet. It also shows that the blue line is 50 feet from the south red line, and 60 feet from the north red line; thus locating beyond doubt precisely the north and south lines of the right of way.

It is earnestly insisted by appellant that in the case of *Long v. Railroad Co.*, 89 Ky. 544, 13 S. W. 3, and *Long v. City of Louisville*, 98 Ky. 67, 32 S. W. 271, this court reached a contrary conclusion, and the question is now *res judicata*. But the property involved in those cases was not the same as that in question now, and was held under a different title. Those judgments were not pleaded in bar for this reason by appellant. The second case was a suit by the city of Louisville for a strip owned at the time of the condemnation suits by Dennis Long himself, and that suit having been dismissed by the city as to him without prejudice, before the judgment was entered in the case, it was held that the city acquired thereby no rights in the property as against him. The rights of the parties as to the land then belonging to the Prestons were in no way before the court in that case or considered by it. In the other case the controversy was between Dennis Long & Co. and appellee about the same piece of land in litigation in the case just referred to, and the court might have rested its judgment on the same ground, but it seems not to have so done. It determined from the evidence in that case that the deed from the city to the railroad company conveyed a strip only 60 feet wide through the property there in contest. As that was different property from the piece in

litigation here, derived under a different title, the conclusion of the court does not estop appellee from showing the truth. The evidence in that case appears to have been materially different from that now presented. The map, which defines the property beyond question, appears not to have been before the court in that case, and the court would seem to have had before it some written contract between the railroad and the city which is not in evidence in this case, from which a different effect was given to the conveyance by the city than can be done on the evidence before us. It may be that the parties did not prepare that case with sufficient thoroughness to manifest to the court what property was conveyed. We dislike to depart from a former ruling of the court, but we cannot shut our eyes to the truth. The learned chancellor to whom this case was submitted after that case was decided refused to follow it because the judgment did not operate as an estoppel, and because it was in conflict with the undeniable facts clearly shown in the record. After a very careful consideration of the whole case, we have reached the same conclusion. Judgment affirmed.

PAYNTER, J., dissents.

FT. JEFFERSON IMP. CO. v. DUPOYSTER.¹

(Court of Appeals of Kentucky. June 15, 1890.)

CHAMPERTY—CONSTRUCTION OF DEED—VESTED REMAINDER—POWER OF APPOINTMENT.

1. A deed conveying land in the adverse possession of another is not void, but voidable merely, at the instance of the parties in adverse possession; and, therefore, if the grantee buys in the adverse titles, a purchaser from him cannot complain of his title.

2. A deed to B. which recites that "it is expressly agreed and understood that said second party is to deed or will said lands to the bodily heirs of J. C. Dupoyster,—in other words, the title and possession of said lands is only invested in said second party during his natural lifetime, then to said heirs of J. C. Dupoyster; and second party has the discretion of allotting said lands between said heirs as he may see proper,"—vests in B. only a life estate, remainder to the children of J., which vests in the firstborn child, and opens up to let in the afterborn children.

3. The discretion to B. of allotting the lands "as he may see proper" contemplates an equal division, and gives B. merely the discretion to designate the location of each child's share.

Appeal from circuit court, Ballard county.
"To be officially reported."

Action by Joe C. Dupoyster, in his own right and as administrator of Ben S. Dupoyster, against the Ft. Jefferson Improvement Company, to recover the balance of the purchase price of land. Judgment rescinding the contract of sale, but refusing to give de-

fendant a lien on the land for the purchase money paid, and defendant appeals. Reversed.

George M. Jackson, J. M. Nichols & Son, Thomas P. Bashaw, and L. P. Palmer, for appellant. D. G. Park and W. G. Bullitt, for appellee.

HAZELRIGG, C. J. It is the contention of appellee that, claiming under paper title from one Langdon and others, Thomas Dupoyster and his son Joe C., settled in 1848 upon the tract of land in controversy, containing some 3,600 acres, in Ballard and Carlisle counties; that they occupied a small portion of the land that was cleared, made some little improvements, cut timber, and cleared a few more acres of land, and asserted their ownership to the entire tract. Appellee further contends that on March 16, 1869, Thomas Dupoyster, who had three children living at that time (Joe C., Ben S., and Thomas Dupoyster), by deed duly signed, acknowledged, and recorded in the proper office, conveyed this land to his son Ben S. for life, and then to the children of Joe C. Dupoyster, under conditions to be considered presently. In September, 1890, Joe C. Dupoyster, his wife, and his brother Ben S. Dupoyster, claiming to own this land, conveyed the same to appellant, the Ft. Jefferson Improvement Company, for the consideration of \$50,000, part to be paid in stock, \$10,000 to be paid in cash when deed was made, and \$25,000 six months thereafter. The company had paid something over \$8,000 on the trade, when Joe C. Dupoyster, in his own right and as the administrator of his brother Ben S., who had died in March, 1891, filed in the Ballard circuit court, December, 1891, the present action to recover of the appellant company the balance of the purchase money. To this action, Harkless, Trimble, and others, claiming liens on the land, were made parties; but there is no appeal from any judgment on their behalf, and it is not necessary to discuss their interests. To this action the Ft. Jefferson Improvement Company set up several defenses, but we will discuss the only material one, in which they charged fraud upon the part of their vendors in making the sale. It is charged that liens of Harkless and others were on the lands when sold, and that since the purchase the company had discovered that Joe C. had theretofore sold a large portion of the land to one McCombs, all of which Joe C. Dupoyster had fraudulently concealed from the company, representing that the latter was getting a clear title. The company therefore asked for rescission of the contract of sale, and for a lien on the land to secure to it the money already paid. An amended answer of the company charged that in November, 1883, Ben S. Dupoyster had conveyed the entire tract to Joe B., son of Joe C. Dupoyster, and assigned this as addi-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

tional ground for rescission. It appears that this deed of 1883 conveys about 1,000 acres of the 3,600 acres in controversy, and that, though it was of record, it was not indexed. In 1893 Joe B. Dupoyster, infant, and Dalva D. Edwards, the only living children of Joe C. Dupoyster, came into this suit by cross action, and set up the deed of March 16, 1859, from old man Thomas Dupoyster to his son Ben S., alleging that by the terms of the deed a life estate in the land in controversy was given to Ben S. Dupoyster, and at his death the remainder vested in the then living children of Joe C. Dupoyster, and that they were the only living children of Joe C. Dupoyster at the time of the death of Ben Dupoyster; and they prayed for judgment awarding them the complete title and possession of the whole tract of land in controversy. The company made defense to this cross action, denying that Thomas Dupoyster executed the deed of 1859 to Ben Dupoyster, and alleging that the latter never accepted it; denied that the deed was ever acknowledged or recorded until 1893, while this suit was pending. Indeed, they attacked the deed and certificate as a forgery, and assailed it as not genuine in many other respects. After a great volume of proof was taken on the issues joined, the court made an order rescinding the contract of sale, and awarding judgment to the company against Joe C. Dupoyster in his own right, and against him as administrator of Ben S. Dupoyster, for the sum of about \$10,000, purchase money the company had paid, but declined to adjudge the company a lien on the land in controversy to secure payment of judgment. The court further adjudged the whole tract of land to Joe B. Dupoyster and Dalva D. Edwards, as prayed for in their cross action, and from this judgment the Ft. Jefferson Improvement Company has appealed.

The first and most important question that presents itself to us for decision is as to the genuineness of the deed of March 16, 1859. The old gentleman, Thomas Dupoyster, at the time of the alleged execution of this deed had three sons; and we cannot discern what reasonable motive he could have had in deeding all this land to one child for life, with remainder to the unborn children of one of his other sons, making no provision for two of his children. This alleged original deed is before us for examination. The writing in the body of the deed is singularly similar to the certificate written on the back of the deed. Joe C. Dupoyster admits that he wrote the body of the deed, but it is claimed that the clerk, J. Corbett, wrote the certificate. Comparing the body of the deed of March 16, 1859, with the Lauderdale deeds, we are not entirely satisfied that the same person wrote them. At least, it hardly seems possible that they could have been written by the same man at the times they are dated, and they are dated only a little over a year apart. Joe C. Dupoyster says that he wrote them all.

If this is true, the evidence of Chowning and Asthorpe would lead us to believe that the deed dated 1859 was written many years after the deeds to Lauderdale. These witnesses say that this 1859 deed is written in a more mature hand. Indeed, the testimony of Asthorpe, Ort, L. W. Corbett, Keith, Chowning, and an examination of the several original admittedly genuine handwritings of Corbett, and the fact that the alleged deed was recorded, if at all, out of its regular place, conduce strongly to support the contention that the deed of 1859 is not genuine. Yet to dispel this conclusion there is the testimony of Hogancamp, Powell, Overly, Stovall, Shelton Thomas, Sprouse, and others, tending strongly to establish its genuineness. Judge White testifies that he saw of record a deed from Thomas Dupoyster to his son Ben S., but does not remember the contents. Mr. Bugg does not remember that the deed filed here is the original deed, but a long time prior to this suit Joe C. Dupoyster stated to him that Thomas Dupoyster had deeded the land to his son Ben, and offered it to Bugg for examination; but the latter failed to examine same, and cannot testify that the deed filed here is the original deed. The deed of Ben S. to his nephew Joe B., of 1893, refers to the fact that Thomas Dupoyster had deeded these lands to his son Ben. The county records having been destroyed by fire, we cannot give any light on the subject. Taking the evidence as a whole, and lending some weight to the finding of the chancellor below, we conclude that the deed filed here is the original and genuine deed of Thomas Dupoyster to his son Ben.

It is insisted by counsel for appellant that, even if this deed of 1859 is genuine, it must be declared void under the champerty statute. This question is thoroughly and ably discussed by counsel, and we have given it much consideration. It may well be conceded, as contended by counsel, that there was a superior title to that of the Langdons and others, and that at the time Thomas Dupoyster settled upon a portion of the land in controversy there were several parties in actual possession of the greater portion of this land, claiming it under the superior title. We think the evidence clearly establishes the fact that these parties were holding a great portion of this land under the superior title adversely to Thomas Dupoyster at the time he made the deed of March 16, 1859, to his son Ben. Taking this view of the case, counsel contends that the deed is therefore absolutely void, as being within the champerty statute, and respectable authority is cited sustaining counsel's position; but, construing the statute as a whole, and in view of the decision of this court in the case of Luen v. Wilson, 85 Ky. 503, 8 S. W. 911, we are of opinion that the deed is not void, but only voidable at the instance of the parties in adverse possession. The evidence clearly shows that Ben S. Dupoyster and his brother Joe, claiming under this deed of 1859,

purchased all these adverse claims for Ben, and took the actual possession of the whole tract, and were so holding it under this deed at the time it was sold to the appellants. If A. should sell to B. lands at the time in the adverse possession of others, and B., claiming under his deed, should purchase in the adverse titles, and would thereafter sell it to C., we do not understand upon what grounds C. could complain of his title, so far as to have the deed from A. to B. declared void. A different rule would apply if the parties in adverse possession were complaining. And so, in this case, as Ben Dupoyster had acquired the fee to this land under the deed of 1859, we do not think that appellants can be heard to complain, the outstanding titles having been theretofore bought in by Ben.

Having held this deed of 1859 to be genuine, and not void as within the champerty statutes, we now find it necessary to construe this writing, in order to determine who are the owners of the land in controversy. The deed reads as follows: "This indenture, made and entered into by and between Thos. Dupoyster, party of the first part, and Ben S. Dupoyster, party of the second part, all of Ballard county, Kentucky, this, the 16th day of March, 1859, to wit, said party of the first part, for the following consideration, to wit, that said second party has certain lands in Mississippi county, Mo., which the second party is to convey to the first party, or such parties as the first party may direct to be conveyed to, and also one dollar in hand paid by second party to first party, the receipt whereof is hereby acknowledged, said first party does bargain, sell, and convey unto second party the following described lands, to wit: All of section three, township five, range four west, not in Mississippi river; also, all of section ten in same township and range, not in said river; also, all section of section two and section one in same township and range; also, all of sections eleven and twelve in same township and range, not covered by the Wm. Clark and Walter Scott surveys; also, all of section seven and the south half of section six in township five, range three west; also, the south half of section thirty-four and the southwest quarter of section thirty-five, township six, range four west. All of said land are on the waters of Mayfield creek, on the Mississippi river, in Ballard county, of Kentucky. It is expressly agreed and understood that said second party is to deed or will said lands to the bodily heirs of J. C. Dupoyster,—in other words, the title and possession of said lands is only invested in said second party during his natural lifetime, then to said heirs of J. C. Dupoyster; and second party has the discretion of allotting said lands between said heirs as he may see proper; said second party to have and to hold said lands during his natural lifetime, and said heirs, and their heirs and assigns, together with all the appurtenances thereunto belonging, forever, with covenant of general

warranty." The lower court construed this deed to mean that Ben S. Dupoyster took a life estate, with a contingent remainder to the bodily heirs of J. C. Dupoyster, with power of appointment in the life tenant. We think it quite plain that the grantor intended that Ben Dupoyster should take only a life estate in the land conveyed. We are also of the opinion that the word "heirs" and "bodily heirs," as used in this deed, mean "children," and the lower court properly so held; but we are of the opinion that the court erred in deciding that the intention of the grantor was to invest the children of J. C. Dupoyster with a mere contingent remainder. The intention, we think, was to vest a life estate in Ben, with remainder to the children of Joe C.; his firstborn taking the entire remainder, which, however, opened up to let in the afterborn children. No power of appointment proper is created by this deed in the life tenant. At any rate, the power was an extremely limited one, and was directed to be exercised for the benefit of the bodily heirs of Joe C.; and, to make the meaning plainer, the grantor adds: "In other words, the title and possession of said lands is only vested in said second party during his natural lifetime, then to the heirs of J. C. Dupoyster." Then follows a provision merely giving to Ben the "discretion" of allotting, of dividing out or partitioning, "as he may see proper," these lands among the children of Joe C. The language does not suggest an unequal allotment or partition, nor create the power of cutting off or lessening the right or interest of any one of these heirs or children. We must suppose the allotment or division was intended to be an equal one, but that the discretion was vested in Ben to designate the location of each child's interest or share. And this designation or allotment he might make by will or deed. It follows that the children of J. C., as they were born, took vested remainders. It appears from the record that during the married life of J. C. Dupoyster there has been born to him four children, two of whom are dead. Hence, under our construction of this deed, the interest of the dead children passed by the law of descent to their lawful heir or heirs. If it should appear that the child of Joe B. Dupoyster has received by the deed of 1883 more than his proportion of the land in controversy, as fixed under our construction of the deed of 1859, then that deed should be held void to that extent.

At the time of the conveyance of the land in controversy by J. C. Dupoyster and Ben S. Dupoyster to the appellant company, it is quite certain that the Dupoysters knew of the existence of this deed of 1859, and knew that they could not convey to the company the fee-simple title,—all of which, from the evidence, was unknown to the company. This fact, in connection with other evidence here tending to show fraud and misrepresentation upon the part of the Dupoysters, justified the lower court in ordering a rescission

of the contract. On whatever of the land J. C. may be the owner by inheritance from his dead children there will be a lien in favor of appellant for the purchase money wrongfully received by him.

A brief has been filed on behalf of the Langdon heirs, but there are no pleadings filed or issues made in this action from which we can intelligently discuss their interests, if any. The judgment is reversed, and cause remanded for proceedings consistent herewith.

KERR v. HOUGH et al.¹

(Court of Appeals of Kentucky. June 14, 1899.)

PRINCIPAL AND SURETY—DELIVERY OF PROPERTY BY PRINCIPAL TO ANOTHER TO INDEMNIFY SURETY.

Where the principal in a note delivered property to defendant to indemnify defendant's wife and her brother against loss by reason of the suretyship of their deceased mother for him, defendant did not thereby become liable for the debt.

Appeal from circuit court, Bourbon county.
"Not to be officially reported."

Action by C. L. Hough, for the benefit of J. T. Cook, against W. H. Kerr and others. Judgment for plaintiff, and defendant Kerr appeals. Reversed.

McMillan & Talbot, for appellant.

GUFFY, J. It is substantially alleged in the petition of appellee C. L. Hough that he borrowed from appellee J. T. Cook \$450, and gave his note therefor, with Lucy J. Skinner as his surety, and that only \$75 of the same had been paid. It is further alleged that said Skinner departed this life testate, and that the principal part of her estate was devised to defendant James W. Skinner and Fannie Kerr, wife of defendant W. H. Kerr. It is also alleged that afterwards defendant agreed with said Hough that, if he would deliver to them two certain horses, they would pay the said Cook debt, and that he did so deliver said horses, and judgment was prayed for the benefit of said Cook for the amount of the note. The answer of Kerr admitted the delivery of the horses, but denied that they were delivered for the purpose claimed, but averred, in substance, that they were delivered to indemnify defendant on account of anticipated losses to accrue to defendant on account of suretyship of said defendant for said Hough. A demurrer was sustained to the answer, and defendant amended. The amended answer, besides being a traverse of the allegations of the petition, also averred that the horses were turned over to the defendant, to be sold, and the proceeds to be applied in making good the loss which would thereafter be sustained by J. W. Skinner and Fannie L. Kerr, because of the liability of their mother's estate on several notes of said Hough, aggregating about \$600, being not only the note to said Cook, but other notes upon

which she was surety for said Hough; that it was not proposed to the defendant to become liable for the note to Cook; that the horses were not worth \$400, but were simply accepted at that price, because it was the best defendant could get as indemnity as aforesaid; that appellee Cook did not release the estate of said decedent Lucy J. Skinner from the payment of said debt, but had filed his claim therefor, and the same was allowed; that it never was contemplated that defendant should become bound for the debt to Cook. A demurrer was sustained to the answer as amended, and, defendant failing to plead further, judgment was rendered against him for the balance due upon the Cook debt, and from that judgment this appeal is prosecuted. The allegations of the answer were taken as true upon the demurrer, and, taking the answer as true, the appellant was not bound to pay any part of the debt due Cook. The judgment is therefore reversed, and cause remanded, with directions to overrule the demurrer and for proceedings consistent herewith.

SINGER MFG. CO. v. CHENEY.¹

(Court of Appeals of Kentucky. June 17, 1899.)

SALES—PASSING OF TITLE—MEASURE OF DAMAGES.

Where the buyer of logs had the right to inspect them when tendered, and to reject such as did not meet the requirements of the contract, the title did not pass until the logs were accepted, and therefore the measure of damages for the buyer's refusal to take and pay for the logs is not the contract price, but the difference between the price agreed to be paid for the logs at the time and place of delivery and the sum for which the seller could, by reasonable effort, have sold the logs after the buyer failed to take them.

Appeal from circuit court, Hickman county.
"Not to be officially reported."

Action by W. R. Cheney against the Singer Manufacturing Company to recover damages for breach of contract. Judgment for plaintiff, and defendant appeals. Reversed.

J. M. Nichols & Son, for appellant. J. M. Brummal & Son, for appellee.

GUFFY, J. The appellant, Singer Manufacturing Company, prosecutes this appeal from a judgment of the Hickman circuit court rendered in favor of the appellee, W. R. Cheney, against it for the sum of \$140. It is alleged, in substance, in the petition, that appellant had entered into a contract with Moss & Jackson for 200,000 feet, more or less, of green timber, of the price of \$4 per 1,000, to be delivered at a landing in Hickman county on the bank of the Mississippi river in barge-load lots; that 117,000 feet was so delivered; that with the consent of appellant the contract was turned over to appellee; that appellant agreed to let appellee deliver 35,000 feet, more or less, at Hoskin landing, on the bank of said river,

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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upon the same conditions as named in the contract with Moss & Jackson. It is further alleged that appellee did so deliver 35,000 feet of gum timber, and notified appellant thereof, but that it negligently failed to take said logs or timber, or pay for the same. It seems that a demurrer was sustained to the petition, and afterwards an amended petition was filed, which corrected an alleged mistake in the original, and contained some other averments, not necessary to recite. The answer is denial of any contract or agreement with appellee, and also contained other averments tending to show that appellee had no cause of action. After the issues were made up, a jury trial resulted in the judgment aforesaid.

The appellant complains of the instructions given; also insists that the verdict is not sustained by the evidence, and that the court ought to have sustained appellant's motion for judgment notwithstanding the verdict. It appears from plaintiff's own evidence that appellant had the right to inspect the logs, and was not bound to take such as were not according to contract, or such as were worthless. No such agreement appears to have been made, nor does the petition show what kind of logs, as to size or quality, were sold to appellant. It is nowhere alleged that appellant ever received the logs. Taking the pleadings and evidence altogether, we are of opinion that the title to the timber never vested in appellant, and that the criterion of recovery, if any could be had, was the difference in the price agreed to be paid for the logs at the time and place of delivery and the sum that plaintiff could have sold them for by reasonable effort after appellant failed to receive them according to contract, if he did so fail. The instructions of the court do not correctly lay down the law as to the criterion of recovery, nor do they properly present the question of fact as to the reception of the timber by appellant. Upon the return of the cause the parties may be allowed to plead further. For the reasons indicated, the judgment is reversed, and cause remanded for a new trial upon principles consistent with this opinion.

HALL v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. June 15, 1899.)

GRAND LARCENY—INSTRUCTIONS TO JURY— FORMER CONVICTION—FAILURE OF JURY TO FIX PUNISHMENT.

1. Accused was not entitled to have the jury specially instructed as to the defense that she had found the money alleged to have been stolen; it being sufficient to instruct them that they must believe, in order to convict, that she did feloniously "take, steal, and carry away" the money.

2. Under Ky. St. § 1130, providing that every person convicted a third time for felony shall be confined in the penitentiary for life, evidence

of former convictions alleged in the indictment is admissible before the jury has found accused guilty of the offense charged; there being no provision for a separate trial of the fact of former convictions.

3. Though that section requires the jury to find merely the fact of former convictions in order to authorize a judgment for the increased penalty, yet, as section 1136 provides that "the jury by whom an offender is tried shall fix by their verdict the punishment to be inflicted within the periods or amount prescribed by law," it was error to render a judgment for the increased penalty where the jury was not instructed with reference thereto, and did not fix such increased penalty by their verdict, but found merely the fact of former convictions after fixing the penalty for the offense charged.

Appeal from circuit court, Franklin county.
"To be officially reported."

Lucy Hall was convicted of the crime of grand larceny, and she appeals. Reversed.

John W. Ray, for appellant. W. S. Taylor and M. H. Thatcher, for the Commonwealth.

DU RELLE, J. Appellant was found guilty of grand larceny, under an indictment which, in addition to the charge of grand larceny, alleged that she had been twice theretofore convicted of felonies, the punishment of which was confinement in the penitentiary; setting forth the terms and courts at which the former convictions had been had. The evidence of her guilt was circumstantial. It was shown that the prosecuting witness, having divided his money, put \$32 of it in a sock, which he concealed in a tub in the yard of the house where he was staying; that he slept in the same room with appellant, another woman, and two children; that appellant went out into the yard about 4 o'clock in the morning; and that she made purchases of furniture and other things, and paid her rent, on that day. Evidence was also introduced as to two former convictions, which were both for grand larceny. Objection was made both to the admission of this testimony, and to the unofficial character of the person by whom the records of the former conviction were produced; he being a son of the clerk of the penitentiary, and acting as clerk during the clerk's sickness. Appellant testified to the fact that she found the money, not in a sock, but lying in the path leading through the back yard; that she did not know it was the property of defendant, and, from his statement made the night before, thought he had no money. The court gave the ordinary instruction as for grand larceny; directing the jury that, if they found her guilty, they should fix her punishment at confinement in the penitentiary for not less than one nor more than five years, and gave in addition an instruction that if they found her guilty under the first instruction, and should further believe that she had been twice theretofore convicted of felony, as charged in the indictment, they should so find and state in their verdict.

The court refused to charge the jury specially as to what they must believe in order to find appellant guilty of grand larceny, if

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

they believed that she found the money. This also is urged as ground for reversal. This question has been already ruled upon by this court, through Judge Paynter, in *Hester v. Com.* (Ky.) 29 S. W. 875, where it was held that the instruction requiring the jury to believe that she did feloniously "take, steal, and carry away" the money was more favorable to the accused than if the court had instructed specially upon the defense that she had found the money, because, "if the jury believed that she did find the money, they could not find her guilty, under the instructions of the court."

It is earnestly urged that it was error to permit the introduction of evidence of former convictions at all until the jury should have first found her guilty under the charge for which she was then being tried; that it amounted to the admission of testimony to impeach her general character, which she had not put in issue, and enabled the commonwealth to show her to the jury in the light of a common thief, and rebut the presumption of innocence which the law gives her by evidence in chief upon a trial for grand larceny. It is painfully apparent that, with the circumstances shown as to the loss of the money, and evidence of two former convictions for grand larceny, the accused, who is an ignorant negro woman, had not the slightest chance that an average jury would entertain a reasonable doubt of her guilt, while, without the evidence of former convictions, there was a possibility that they might do so. There is a considerable force, therefore, in the proposition urged, that this procedure denied the accused a fair trial of the offense whereof she was accused. But the statute as to habitual criminals (Ky. St. § 1130) seems to have created an additional and higher degree of offense, viz. the commission of a felony, having been theretofore twice convicted of a felony, etc. To show the accused guilty of this degree of the offense charged, it is necessary to show the former convictions; and this, of course, is bound to prejudice the accused,—just as evidence showing malice is bound to prejudice the defendant in a murder case,—but it may be shown to make out a higher degree of the offense, which authorizes the severer punishment. The statute has been held constitutional, and it has been held essential to allege the former conviction or convictions in the indictment. *Stewart v. Com.*, 2 Ky. Law Rep. 386; *Mount v. Com.*, 2 Duv. 93; *Taylor v. Com.*, 3 Ky. Law Rep. 783; *Boggs v. Com.* (Ky.) 5 S. W. 307. The statute requires the jury to find the fact of the former convictions. There is no provision for a separate trial of the fact of former conviction, nor do we think the statute intended there should be one. The law seems to work a hardship, but it is a hardship the legislature alone can remedy. In *Combs v. Com.*, 20 S. W. 268, this court, through Judge Lewis, recognized the legality of this procedure, saying: "It was distinctly and sufficiently charged in the indictment, and fully proved on the trial, and

also found by the jury, that appellant had been twice before the present offense convicted of a felony, the punishment of which is confinement in the penitentiary; and therefore the penalty of confinement in the penitentiary for life became, according to section 12, art. 1, c. 29, Gen. St. [now section 1130, supra], inevitable, and the court could do no less than so instruct, and the jury, after finding the present offense a felony, was bound to render the verdict in pursuance thereof. The validity of that statute has heretofore been sanctioned by this court and it is now needless to discuss the question."

The jury rendered a verdict as follows:

"We, the jury, find the defendant guilty of grand larceny, and fix the punishment at one year confinement in the Kentucky penitentiary. E. M. Wallace, Foreman."

"We, the jury, further find that the defendant was at the April term, 1883, of the Ballard circuit court, convicted of a felony, and that said defendant was again at the January term, 1893, of the Franklin circuit court, convicted of a felony. E. M. Wallace, Foreman."

It is urged that it was error for the court to sentence the defendant to confinement in the penitentiary for life under this finding; that section 1136 specifically requires the jury by whom the offender is tried to fix by their verdict the punishment to be inflicted, within the periods or amount prescribed by law. Upon the other hand, it is insisted for the commonwealth that by section 1130 it is mandatory that, if convicted a third time of felony, the accused shall be confined in the penitentiary during his life, under the provision, "Judgment in such cases shall not be given for the increased penalty, unless the jury shall find from record and other competent evidence the fact of former convictions for felony committed by the prisoner in or out of this state." It is argued, therefore, that, as said in the *Combs Case*, supra, the life penalty became inevitable, and that it was the duty of the court, in rendering judgment, to so fix it. Differing from the English system, and from that which obtains in the courts of the United States and in many of the states, our system requires the jury to fix the punishment of the offender, within the limitations prescribed by the statute, and as to such limitations they are instructed by the court. The other system requires the jury only to find the fact of guilt, and the degree of the offense, if it is an offense having different degrees. Upon this verdict ascertaining the fact of guilt, the court proceeds to render judgment within the limitations fixed by the law. Under the old system, the jury have nothing whatever to do with adjusting the punishment to fit the crime. Under our system, it was intended that they should have everything to do with it, so they did not transgress the bounds prescribed. And it may be argued with some plausibility that our system contemplates a consideration by

the jury of the punishment to be inflicted under the law, in fixing the degree of the offense of which they find the defendant guilty. It is not our duty to discuss the relative merits or demerits of the two systems. That question is not under discussion. But it is our duty to consider what our own system was intended to effect, and whether a failure to carry out its general design in any particular is prejudicial to any substantial right of the accused whose case is brought before us. On the trial of a criminal case in the federal court, counsel for defense is not permitted to tell the jury what penalty will be imposed if they render a verdict of guilty. In our courts a considerable portion of the argument of counsel for the defendant is frequently devoted to discussing the severity of the punishment, as contrasted with the trivial nature of the offense. Under our system, whether by direct design as to this point, or as necessary to effect another purpose, it is contemplated, at all events, that the jury should know and say what punishment is to be imposed for the offense of which they find the accused guilty. The statute (section 1136) requires them to fix by their verdict the punishment to be inflicted, within the periods or amount prescribed by law. It will not do to say that, the fact of two former convictions being ascertained and found by the jury, it is inevitable that punishment by confinement in the penitentiary for life should follow, and therefore that the court is authorized to so adjudge. If a defendant is found guilty of murder, it is inevitable that he should be hung or confined in the penitentiary for life; but no commonwealth's attorney would be hardy enough to come to this court expecting to affirm a judgment of confinement for life upon a verdict running, "We, the jury, find the defendant guilty of murder as charged in this indictment." And yet that punishment would be as inevitable from that verdict as it is in this. Nor is there anything incompatible or conflicting in the two statutes,—sections 1130 and 1136. By the one it is mandatory that, if convicted a third time of felony, the accused shall be confined in the penitentiary during his life. By the other section it is equally mandatory that the jury shall fix the punishment,—just as mandatory that the jury shall fix the punishment of murder at confinement in the penitentiary for life, at the lowest. This is in strict accord with the theory under which the increase of punishment inflicted upon habitual criminals is reconciled to the constitution. That theory is, as we have said, that a higher grade of offense is created by the statute. The accused is not sent to the penitentiary for life for committing grand larceny, but for the offense of grand larceny after having been twice convicted of felony, the punishment whereof is confinement in the penitentiary. And so the proper procedure, in order to inflict this seemingly oppressive

punishment, is that the jury should find that the accused is guilty of grand larceny; that she has twice theretofore been convicted of a felony, the punishment whereof is confinement in the penitentiary; and that the jury fixes her punishment at confinement in the penitentiary for life. The contrary view is bound to work hardship and oppression. A jury, in a criminal case, like this, is not presumed to know any law as to that case, except that which they are told by the court; for the court is required to give to the jury, in its instructions, all the law of the case. They are properly instructed as to the law of grand larceny. They are also required to find certain facts. As a matter of course, it is their duty to find those facts accurately; but they are not told the effect of their finding, nor can they, under such circumstances, be expected to realize the importance of it. Under the instructions as to grand larceny, they find the accused guilty, and fix her punishment at a year's confinement in the penitentiary,—one would think, an ample punishment for stealing \$32, under the circumstances as they appear in this case. But they find, in addition,—without dreaming, so far as this record shows, of the effect of that finding,—a fact upon which, according to the commonwealth's contention, the court inevitably sentences the accused to confinement in the penitentiary for life. It may be urged that, for securing unprejudiced action by the jury in their finding of such facts, it is better that they should not know the effect of their finding. But our system requires them to know it. The case of *Chenoweth v. Com.* (Ky.) 12 S. W. 585, is not incompatible with this view, for there the jury were evidently instructed as to the effect of finding the existence of former convictions. Their verdict showed it. By an error in computation, the jury fixed the punishment at more than this court thought it should have been. The trial court rendered judgment in accordance with the verdict, and this court reversed the case, with directions to render what was considered the proper sentence. Nor is there any conflict whatever with this doctrine in the recent case of *Herndon v. Com.* (decided by Judge Hobson) 48 S. W. 989. There the jury were instructed that if they found the defendant guilty, and also found that he had been twice previously convicted, as required by the statute, they should fix his punishment at confinement in the penitentiary for life. Their verdict found him guilty as charged, and fixed his punishment at confinement in the penitentiary for life. It was accordingly held that a substantial compliance with the requirements of the statute as to finding the fact of former convictions had been had, because, under the instructions, the jury could not have fixed his punishment as they did, except by finding the fact of the former convictions. For the reasons given, the judgment is reversed, with directions to render

sentence on the verdict, fixing the punishment at one year's confinement in the penitentiary.

HILBERT v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. June 17, 1899.)

HOMICIDE—PROOF OF DYING DECLARATION BY WIFE OF DECEASED—FORMER JEOPARDY—DISCHARGE OF JURY.

1. The wife of deceased is a competent witness for the commonwealth to prove the dying declaration of her husband.

2. Where the sheriff, after the jury were placed in his charge at night to be kept together until next day, permitted a sick juror to go to his home, and the court on the next day discharged the panel because the attendance of the sick juror could not be secured,—accused being unwilling to fill the panel,—there was no ground for a plea of former jeopardy on a subsequent trial.

Appeal from circuit court, Jefferson county, criminal division.

"Not to be officially reported."

John Hilbert, Jr., was convicted of manslaughter under an indictment for murder, and he appeals. Affirmed.

A. A. Haggan, for appellant. W. S. Taylor, for the Commonwealth.

HOBSON, J. Hilbert was convicted of voluntary manslaughter in the Jefferson circuit court, on an indictment charging him and Henry Seabalt with the murder of John Brecker. His punishment was fixed at three years in the penitentiary. The instructions fairly submitted the law of the case, and there is no serious complaint made of their correctness, except that those relating to Seabalt should not have been given, and that as to him the case should not have been submitted to the jury. But there was no error in this regard. The proof showed: That appellant and Henry Seabalt gave a dance, on the night of the homicide, at Schlich's saloon, near the almshouse. That Brecker was there, drunk and disorderly, and inclined to fuss with appellant. Seabalt tried to get him home, and he agreed to go if Seabalt would treat. This Seabalt did twice, but he then refused to go, and was noisy. Seabalt told him to be quiet, but he continued noisy, and perhaps cursed Hilbert. Thereupon Seabalt said to him, "When I say keep quiet, I mean it," and struck him with a beer glass. According to the testimony for the commonwealth, as Brecker dodged or staggered from the blow struck by Seabalt appellant ran up, striking him with one hand, and immediately stabbing him in the abdomen with the other. Brecker sank down from the blow, and died a few days later. The evidence for appellant was to the effect that Brecker had threatened his life, and was attacking him at the time of the cutting. These questions were aptly submitted to the jury by the court's instructions,

and the testimony amply sustains their finding. There was no error in the admission of the testimony.

The court admitted proof by the wife of the deceased as to a dying declaration made to her by him, but afterwards, on reflection, excluded it. This was, in any view of the law, not prejudicial to the substantial rights of appellant, as the facts were so fully shown by the testimony of a large number of eyewitnesses. The reason for the exclusion of the testimony seems to have been that the wife cannot, by section 606 of the Civil Code of Practice, testify as to any communication with her husband. Section 151 of the Criminal Code of Practice adopts the provisions of the Civil Code as to securing the attendance of witnesses, but section 606 of the Civil Code is not adopted as part of the Criminal Code. *Com. v. Minor*, 89 Ky. 560, 13 S. W. 5. On the contrary, the latter contains, in section 223, independent provisions on this subject. On grounds of public policy, the wife cannot testify against the husband as to what came to her from him confidentially or by reason of the marriage relation, but this rule does not apply to a dying communication made by the husband to the wife on a trial of the one who killed him. The declaration of deceased made in extremis in such cases is the thing to be proved, and this proof may be made by any competent witness who heard the statement. The wife may testify for the state, in cases of this character, as to any other fact known to her. The tendency now is to admit all testimony obtainable, and leave its credibility to the jury, and no reason appears for making dying declarations an exception to the rule. We think the evidence was competent, and there was no error in its admission. Its subsequent exclusion by the court was favorable to appellant, and he has no cause of complaint in this regard.

There was a plea of former jeopardy, which the court properly disregarded. The trial of the case was begun in October, 1897; and, after some of the evidence was heard, the jury were placed in charge of the sheriff, to be kept together until the next morning. During the night one of the jury was taken sick, and, being in a dangerous condition, was sent home by the sheriff, on the advice of a physician. The court then, after hearing testimony, discharged the other 11 jurors, and continued the case; being satisfied that it would not be practicable to continue the trial in a reasonable time. The evidence in the record before us abundantly sustains this conclusion of the court. Under the circumstances, the course he followed was all that could be done; appellant being unwilling to fill the panel and go on with the trial. *Cooley*, *Const. Lim.* side page 327. The act of the sheriff in letting the sick juror separate from the others did not discharge the jury. The trial might have proceeded, if the attendance of the juror could have been secured; and, when it could not be secured, the court prop-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

erly discharged the panel. On the whole, we see no error in the record, and the judgment is therefore affirmed.

PENNINGTON v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. June 17, 1899.)

HOMICIDE—KILLING OF OFFICER MAKING ARREST—EVIDENCE AS TO OTHER OFFENSES.

1. Where an officer and his posse broke open the door of a house at night, and, with guns presented, attempted to arrest accused, whereupon shots were fired, resulting in the killing of one of the posse, the court should have instructed the jury that it was the duty of the attacking party to make known their intention, and to use no more force than was necessary to make the arrest.

2. It was error to compel accused to testify on cross-examination as to his conviction of various misdemeanors, and to give the details of his escape from jail some months before the killing charged, and how, after his escape by force, he had by force taken a gun from the possession of another.

Appeal from circuit court, Leslie county.

"Not to be officially reported."

Henry Pennington was convicted of murder, and he appeals. Reversed.

T. G. Lewis, Rader & Hanford, and Tinsley & Faulkner, for appellant. W. S. Taylor, for the Commonwealth.

HAZELRIGG, C. J. The appellant was indicted and convicted of the murder of Henty Coots in Leslie county, and from the verdict and the judgment sentencing him to the penitentiary for life has appealed to this court.

It appears that the accused had been confined in the Leslie county jail some months prior to the homicide on a felony charge,—obtaining a gun under false pretenses, it appears,—and had escaped jail. No warrant issued for his rearrest, so far as appears from any competent evidence; but a deputy constable and the deceased, with others, appear to have undertaken his rearrest, and had been looking for the accused in the neighborhood where he had been living for several weeks before the night of the killing. On the night of the killing, accused was at the house of two women, which he seems to have frequented, and was unaware of the proximity of the officer or his posse, as he was sitting by the fireside with a child in his lap, but with his gun in easy reach. Suddenly Turner, Coots, and some four others charged upon the house, guns and pistols in hand, and broke open the door, without warning or notice, and with their guns presented. Two shots were fired almost simultaneously, and Coots fell mortally wounded. One of the shots was fired by accused, and the other by some one of the attacking party. The accused escaped, but was shortly afterwards arrested in Perry county. Turner had been an officer only a short while, having been appointed deputy constable by an order of the county court, as is now per-

mitted by the statute; but there is no evidence conducing to show that the accused knew he was such a deputy. He did know, however, that Turner and Coots had been looking for him, and it is probable he knew that the attack was made by them or others for the purpose of accomplishing his arrest. The question of such knowledge on his part was substantially submitted to the jury in the instructions, although in an involved and indirect way. But, if we assume that he had such knowledge, still there is no instruction whatever limiting the force, or defining the manner in which the arrest might lawfully be made. The court instructed the jury that the officer and his force might break the door and use all necessary force to make the arrest, but there was no instruction that the attacking party were to give notice of their intention in making this sudden assault on the house, or that they were to use no more force than was necessary to make the arrest. In view of the manner of this attempted arrest, made in the nighttime, and without warning or notice, this limitation of the force to be used should have been defined in the instructions.

On the trial the following extract of the cross-examination of appellant is taken from the bill of evidence, to all of which evidence appellant objected: "Q. Were you indicted for anything since then? A. Yes, sir. Q. What was it? A. I was charged with killing a hog. Q. Were you convicted on that charge? A. Yes, sir. Q. Well, go on. Were you indicted for anything else? A. I was indicted here for taking a gun under false pretenses. Q. Were you indicted for anything in any other county? A. I was indicted once at Salyersville, Ky., for carrying concealed a pistol. I was tried and fined. Q. Were you ever convicted and sent to the penitentiary in any other state? A. No, sir." Then follow a number of questions as to whether the accused had ever been indicted in the counties of Knott, Pike, Martin, Breathitt, Perry, and Bell; the witness answering in the negative to each question. Our statute provides (section 597, Civ. Code Prac.) that a witness may not be impeached by "evidence of particular wrongful acts, except that it may be shown by the examination of a witness or record of a judgment, that he has been convicted of felony." It follows that the evidence quoted was incompetent, and from its nature it was presumably prejudicial. Such have been the repeated rulings of this and other courts. *Baker v. Com. (Ky.)* 60 S. W. 54; *Martin v. Com.*, 93 Ky. 193, 19 S. W. 590; *Leslie v. Com. (Ky.)* 42 S. W. 1005; *Saylor v. Com. (Ky.)* 30 S. W. 390. See, also, 2 *Roberson's Cr. Law & Proc. Ky.* 979; *Commander v. State*, 60 Ala. 1; *Pinckord v. State*, 13 Tex. App. 478. The witness was also compelled to give, over his objections, the minute details of how he escaped from the jail of the county some months before the killing, and how, after his escape by force, he had by force taken a gun

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from the possession of the wife of one Wilson Baker, in Perry county. There is other objectionable evidence of the same character, but the foregoing will serve to prevent its introduction on any future trial. For the reasons given, the judgment is reversed, with directions to award the accused a new trial, and for proceedings consistent with this opinion.

BRISTOW v. BRISTOW.¹

(Court of Appeals of Kentucky. June 15, 1890.)
DIVORCE AND ALIMONY—VACATION OF JUDGMENT—REASONABLENESS OF ALLOWANCE.

1. A judgment of divorce cannot be annulled, except upon a petition, verified by the parties in person, requesting it, as provided by Civ. Code Prac. § 426.

2. Though the husband's estate consists of only a small tract of land, which is incumbered, and which yields little or no returns, yet, as he receives a salary of \$125 per month, an allowance of \$25 per month for the support of the wife and her infant daughter is not excessive.

3. It is always in the power of the chancellor, if the conditions change, to change the amount of alimony to conform to the necessities of the case.

Appeal from circuit court, Kenton county.
"Not to be officially reported."

Action by Emily B. Bristow against Frank L. Bristow for divorce and alimony. Judgment for plaintiff, and defendant appeals. Affirmed.

B. F. Graziani, Y. F. Boughner, and J. W. Rodman, for appellant. Courtland Chenault and H. D. Gregory, for appellee.

BURNAM, J. On the 22d day of September, 1896, appellee filed her petition seeking a divorce from appellant upon the ground of cruelty and settled aversion, and asking the custody of her child, and for alimony and counsel fees, which was resisted by appellant. With consent of appellant, appellee withdrew her original petition from the record, and filed an amended petition in lieu thereof on November 28, 1896, in which she sought the same relief prayed for in her original petition, on the ground of abandonment of her by appellant for more than one year before the institution of the action. Appellee entered his appearance to this amended petition, and filed no answer thereto. Subsequently, on November 29, 1896, the chancellor entered a judgment for divorce, and directed that appellant should pay the cost of the suit, \$100 counsel fees, and \$25 per month alimony for the support of appellee and her infant daughter, the custody of whom was awarded to her. On the 17th day of December thereafter, the defendant filed grounds and motion for a new trial, and asked the

court to vacate the judgment of divorce and alimony, and filed in support thereof his affidavit in which he says that it was agreed between appellee and himself that she was to withdraw her original petition for divorce, and he was to withdraw his answer, and that plaintiff should file her supplemental petition changing the ground of divorce to abandonment, and that the proof should be taken establishing this ground of divorce, and he further agreed to make no defense thereto, to pay the costs, attorney's fees, and alimony provided by the judgment, under an agreement that he was to have the privilege of seeing his infant daughter on Monday, Wednesday, and Saturday afternoons of each week, and on Saturday afternoon, at 2 o'clock, he was to have the privilege of taking her out riding or walking, as he might desire, returning her on the afternoon of the same day, and that this was the chief consideration for his agreement. He charges that appellee had violated her agreement, and refused to permit him to see the child on the days mentioned. This motion was heard by the chancellor on November 30th, and overruled, from which judgment this appeal is prosecuted.

Under the statute this court has no revisory power over a judgment for divorce. Section 426 of the Civil Code of Practice provides that "a judgment of divorce from the bond of matrimony may be annulled by the court which rendered it upon petition verified by the parties in person so requesting it"; and this is the only method provided by law for the vacation of such judgments. But, in determining whether alimony has been properly allowed, it will consider the testimony in the case. The testimony here shows that appellant has but little property; that it consists of a tract of 15 acres of land in Jessamine county, which cost \$2,500, and which is covered by a mortgage of \$1,700, and which yields little or no returns; but that he is a music teacher by profession, and enjoys a salary of \$125 per month. The judgment fixing the alimony in this case was confessedly agreed to by appellant, and it does not appear to us to be excessive, so long as appellant continues to receive the salary of \$125 per month. It is always in the power of the chancellor, if the conditions change, to change the amount of alimony to conform to the necessities of the case, and it is therefore unnecessary for us to make any orders in this direction. It appears from the testimony in the case that the claim of the appellant that he is deprived of the pleasure of enjoying the society of his infant daughter is wholly unsupported by the proof. For reasons indicated, the judgment overruling the motion to set aside the judgment allowing alimony is affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

HEYKER v. HERBST, President.

SAME v. McLAUGHLIN.

(Court of Appeals of Kentucky. June 15, 1899.)

"Not to be officially reported."

Petition for rehearing. Denied.

For former report, see 50 S. W. 859.

BURNAM, J. It is insisted by appellee in his petition for rehearing (50 S. W. 859) in this case that he was elected to fill the office of clerk of the board of education for four years from January, 1896, and that there was, therefore, no vacancy in the office in January, 1898. While this suggestion was made in the original brief, it was not seriously insisted upon, and, in our opinion, is wholly unsupported by the agreed facts filed in the case, which show that appellee was elected clerk of the school board for the city of Covington for one year in January, 1893, and that in the December following he was again elected to this office for the term of four years, which term did not expire until December, 1898. It is true that in April, 1896, by action of the board, the term of the office of clerk was changed from four to two years, and it was expressly provided that this rule should apply to appellee, and that his term should begin January 1, 1896; and both under his original election and under the change made in April, 1896, it was provided that his term should expire on the 1st day of January, 1899. It seems to us that these facts are conclusive of appellee's contention on this point.

GARDNER v. PADUCAH BLDG. TRUST CO.

(Court of Appeals of Kentucky. June 15, 1899.)

"Not to be officially reported."

Petition for rehearing. Granted.

For former report, see 50 S. W. 52.

HAZELRIGG, C. J. In a number of cases recently decided, the principles controlling the operation of building and loan associations were fully reviewed, and substantially the same conclusion reached in them as was in all the older cases. When the present case was considered, it was found that counsel had fully and ably argued again the whole question involved in the operation of such associations. Having so recently considered the questions involved, we merely referred to one of the cases we supposed to be conclusive of the general principles, but we affirmed the case on the ground that it did not fully or clearly appear from the pleadings that any usury had in fact been paid by the borrower. We could not believe this would be misleading, or could confuse the association in the management of its business. However, counsel for appellant has, by petition for rehearing, attempted to make it clear, by a calculation, that usury is embraced in the judgment we affirmed; and counsel for the association

has, in his response, conceded, in express terms, that such usury is so embraced. There is nothing left save to withdraw the former opinion, and grant a rehearing, which is now done. The judgment below is reversed, with directions to enter judgment for the plaintiff below for the amount sued for, less the sum of \$57.92, being the amount of the usury confessed by the appellee.

LOUISVILLE RY. CO. v. BLAYDES.¹

(Court of Appeals of Kentucky. June 15, 1899.)

STREET RAILROADS—INJURY TO WHEELMAN—CONTRIBUTORY NEGLIGENCE.

1. One who was unaccustomed to riding a bicycle was not guilty of contributory negligence in riding in a public street, so as to preclude her from recovering for an injury resulting from a collision with a street car, where she lost control of the wheel, and ran into the street in which the car was moving.

2. It was the duty of the motorman to use the highest degree of care to avoid injury to a wheelman in a public street.

Appeal from circuit court, Jefferson county; law and equity division.

"Not to be officially reported."

Action by Grace Blaydes against the Louisville Railway Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Fairleigh, Straus & Eagles, for appellant. L. C. Willis and Carroll & Carroll, for appellee.

HAZELRIGG, C. J. Appellee instituted this action for damages for personal injury. The defense was a denial and contributory negligence. A trial resulted in a verdict and judgment for appellee for \$2,500; hence this appeal.

The reasons assigned for a new trial, and relied on here for a reversal, are error in refusing a peremptory instruction to find for appellant, and that the verdict is flagrantly against the evidence. The evidence for appellee shows that she was on Rubel avenue, in the city of Louisville, trying to ride a wheel, and, being unaccustomed to riding, and by reason of a grade in the street, she lost control of the wheel, and ran into Broadway street, and, in trying to turn, the wheels of her vehicle were caught in the track of appellant between the rails and rocks. While in this condition, and without warning of any kind, a car of appellant ran over and seriously injured her. It is insisted that appellee is shown by her own testimony to have been guilty of such contributory negligence as precludes a recovery, and that the court should have given a peremptory instruction. It cannot, however, be held as a matter of law that appellee was so guilty in being on the street of Louisville trying to ride a wheel. But, if it may be said she was guilty of negligence on this occasion, it was still the duty of the

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appellant to keep a lookout for persons on the track, and to avoid injury to them. The proof conduces to show that the motorman could have seen appellee in ample time, after she was caught on the track, to have avoided the injury. At least there was sufficient proof to that effect to go to the jury. As the place of injury was a public street, it was the duty of the operator to use the highest degree of care in avoiding injury. If her testimony as to how the accident occurred be true, the appellant is liable. For the defense the testimony of the motorman showed he saw appellee for half a square before the car came to where she was injured, but he contradicted her entirely as to how the injury occurred. Other witnesses corroborated the motorman to some extent, but we are not prepared to say that the verdict of the jury is flagrantly against the evidence. We do not feel authorized to disturb the verdict. Judgment affirmed.

CLIFT v. WILLIAMS et al.¹

(Court of Appeals of Kentucky. June 17, 1899.)

LIMITATION OF ACTIONS—OPERATION OF PAYMENT TO EXTEND PERIOD OF LIMITATION.

Payments made on a note secured by a mortgage operate to extend the period of limitation, not only as to the debtor, but as to a subsequent purchaser of the mortgaged land, and as to the wife of the mortgagor, who united in the mortgage, relinquishing her dower.

"Not to be officially reported."

Petition for rehearing. Denied.

For former report, see 49 S. W. 328.

John P. McCartney and E. L. Worthington, for appellant Clift. Joseph H. Power and E. P. Humphrey, for Glover & Durrett. Joseph H. Power and Edward W. Hines, for appellees.

WHITE, J. It is insisted on petition for rehearing that the opinion herein is in conflict with the opinion of this court in *Tate v. Hawkins*, 81 Ky. 577, and *Kendall v. Clarke*, 90 Ky. 178, 13 S. W. 593. We do not so deem it. In the *Tate-Hawkins* Case; the facts show that Hawkins sold by deed the land in 1864, and the vendor's lien then had some 14 years to run. The action was brought in 1881, more than 15 years afterwards. The payments made on the note by Hawkins in 1873 and 1878 could only operate to elongate the statute of limitations as to the note, and bind Hawkins. When these payments were made by Hawkins, he had long since ceased to have power to bind the land for anything. The land was sold by Hawkins to Basket in 1864, and was subject to the vendor's lien as it then existed, i. e. for 14 years, or the length of time to complete the bar, and no subsequent act of Hawkins after he parted with title could change this time as to the

land, however long he might protract the time as to the debt itself. As long as Hawkins owned the land, he might have extended the lien by extending the note, but when he ceased to own the land his power to further bind it ceased. The purchaser took it with all its then burdens, but they could not be increased. Applying that rule to this case, it is manifest the opinion rendered herein is the law. The decedent, Williams, had by payments elongated the statute as to his debt and as to his land. When a part was sold to the son, W. Y. Williams, in 1888, the note and lien were by payments, on foot, and the time necessary to elapse to bar by limitation extended far beyond the filing of the petition, by Clift. There is nothing in the record showing the date of the deed by J. W. Williams for the 5 acres, afterwards acquired by W. Y. Williams, and we are unable to say whether it would come within the same rule as the 87 acres or not, as to limitation. However, that could be subjected, if at all, only after the residue had failed to satisfy appellant's (Clift's) mortgage. Payments made by decedent, Williams, after the sale to his son, could not affect the part sold to the son, but that has no application here.

It is also insisted that, as to the widow, Lucy B. Williams, and her right of dower, the mortgage of Clift is barred by limitation, and that no payments by her husband can operate to extend the mortgage as to her right of dower. In this contention counsel must conclude that the wife, Lucy B. Williams, in signing the mortgage releasing and waiving her right of dower and homestead, became the surety of her husband. This has never been held to be the effect of such release and waiver. The wife could not become the surety of her husband, and, if she could, the bar as to a surety is seven years. While the right of dower existed at common law, in this state it is governed by statute. The right to a homestead is the creature of the statute. The statute relating to dower provides (section 2132) that the widow shall have dower in lands owned by her husband, "unless the right to such dower or interest shall have been barred, forfeited or relinquished"; and (section 2135) that "the wife shall not be endowed of land sold, but not conveyed by the husband before marriage, nor of land sold in good faith, after marriage, to satisfy a lien or incumbrance created before marriage, or created by deed in which she joined, or to satisfy a lien for the purchase money" (italics ours). St. 1894, §§ 2132, 2135. It is clear that the wife, having signed and acknowledged the mortgage and released and waived her dower and homestead right, cannot claim dower in such lands by reason of the statute above, as well as by reason of the fact that the mortgage itself is not barred by limitation. The widow's claim can only come through her husband, and her right dates from his death, and in no case, where she signs the mortgage, can she be in a bet-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ter position than a purchaser with constructive notice. In the case of *Cook v. Trust Co.* (decided June 10, 1899) 51 S. W. 600, we held that a purchaser took the land with its burden at that date, and any payment on the debt made before the date of the purchase would operate to extend the statute of limitation as to the purchaser the same as to the original mortgage. Petition overruled.

McREYNOLDS et al. v. GRUBB.

(Supreme Court of Missouri, Division No. 2.
June 8, 1899.)

**DEED — EXECUTION — DELIVERY — PLEADING —
DEFECTIVE CONVEYANCE BY WIFE
— REFORMATION.**

1. A petition averring that grantors made a warranty deed which was recorded, and that thereafter the grantee conveyed a part of the land therein described, sufficiently avers a delivery of the deed.

2. From the execution and record of a deed delivery is presumed.

3. Where land intended to be conveyed by a husband and wife was not her separate property, and she could only convey her interest in the manner prescribed by statute, a deed defectively executed by her, or which does not describe the land, cannot be corrected by a proceeding in equity, though she received and retains the consideration therefor; she having been incompetent to contract in relation to a conveyance of the land when the deed was executed.

Appeal from circuit court, Jasper county;
E. C. Crow, Judge.

Suit by America McReynolds and others against Rhoda C. Grubb. Judgment and decree in favor of plaintiffs, and defendant appeals. Reversed.

Harrison & Harrison, for appellant. McReynolds & Halliburton, for respondents.

BURGESS, J. This suit was instituted in the circuit court of Jasper county by plaintiffs against the defendant for the purpose of having corrected a deed executed by defendant and her husband, Joel Grubb, in his lifetime, to Jacob Grubb, by which they attempted to convey to him a certain tract of land in said county, to wit, 26½ acres, a part of the N. E. ¼ of the S. E. ¼ of section 9, in township 27, and the N. W. ¼ of the S. E. ¼ of section 17, in township 27 of range 13, except three-fourths of an acre in the southwest corner; but by the mistake of the scrivener, as alleged, who wrote the deed, the land in section 17 was described as the N. E. ¼ of the S. E. ¼, when it should have been described as the N. W. ¼ of the S. E. ¼ of said section 17, township and range, except three-fourths of an acre in the southwest corner of said 40-acre tract. The deed was executed on the 9th day of March, 1877. Joel Grubb died in October, 1889. Plaintiffs claim title under Jacob Grubb. The trial resulted in a judgment and decree in favor of plaintiffs, correcting the mistake in the deed. After unsuccessful motions for new trial and in arrest, defendant appeals.

Joel Grubb was married three times. By his first wife he had five children, viz. America McReynolds, Sarah A. Montague, John Grubb, and V. H. Grubb, and one by his last wife, the defendant, all of whom were living in March, 1877. At that time he was the owner in fee of the N. W. ¼ of the S. W. ¼ of section 10, township 27, range 31, except 2½ acres thereof. This was the homestead. He also owned 26½ acres, a part of the N. W. ¼ of the S. E. ¼ of section 9, in township 27 of range 31. Joel Grubb and the defendant were the owners of, and had the legal title to, the N. W. ¼ of the S. E. ¼ of section 17, township 27 of range 31, except three-fourths of an acre in the southwest corner thereof, as tenants in common; Joel Grubb owning three-fourths thereof, and the defendant one-fourth. In March, 1877, Joel Grubb made an arrangement with defendant by which it was agreed that they would deed all the land he owned and the land he and she owned to Jacob Grubb, and that said Jacob Grubb should immediately deed to the defendant for her and her child the home place, to wit: N. W. ¼ of the S. W. ¼ of said section 10, and it was further agreed that Jacob Grubb was to hold the title to the N. W. ¼ of the S. E. ¼ of section 17, and 26 acres in section 9, township 27, range 31, until the death of said Joel Grubb, when these tracts were to be divided between the five children of Joel Grubb's first wife; and, for the purpose of binding Jacob Grubb to make said conveyances, Jacob Grubb executed his note to Joel Grubb for \$500, with the agreement and understanding that with the making of said conveyances to his brothers and sisters said note was to be given up and canceled, the only consideration therefor being to bind Jacob Grubb to make the conveyances. In the deed from Joel Grubb and his wife to Jacob Grubb, made in pursuance of this arrangement, there was a mistake in the description of the land in this: that where they attempted to convey the N. W. ¼ of the S. E. ¼ of section 17, except three-fourths of an acre in the southwest corner of said quarter, it was described as the N. E. ¼ of the S. E. ¼—a 40 to which Joel and Rhoda C. Grubb never at any time had any title. Rhoda C. Grubb acquired her interest in the 40 acres in section 17 as an heir at law of her father, Matthew Payne, and Joel Grubb acquired his interest therein by the purchase of the interest of other heirs in said estate, and in partition of said estate this land was set off to them with other land, which made them respectively own, the defendant one-fourth, and Joel Grubb three-fourths, of said 40. After the death of Joel Grubb, in October, 1889, the five children of the first wife of Joel Grubb went to his residence, where the defendant lived, and there talked over the property of the estate and the manner of dividing the same. At that time John Grubb had a chattel mortgage on all the personal property of Joel Grubb. There was also a note for \$100, signed by the defendant in favor of Joel Grubb. These five heirs and the

defendant at that time mutually agreed that John Grubb should deliver up and cancel his chattel mortgage, and the defendant should have all the personal property belonging to the estate of Joel Grubb, and retain the home place, 37½ acres, for herself and minor child; that Jacob Grubb's note for \$500 should be delivered to him and defendant, and Rhoda C. Grubb's note for \$100 should be delivered to her, all of which was done at that time; that the N. W. ¼ of the S. E. ¼ of section 17, township 27, range 31, should be deeded to America McReynolds, Sarah A. Montague, and V. H. Grubb; that 26 acres in section 9 should go to John Grubb and Jacob Grubb; and immediately thereafter, on October 21, 1889, Jacob Grubb made a deed to America McReynolds and Sarah A. Montague and V. H. Grubb, conveying the N. W. ¼ of the S. E. ¼ of section 17, township 27, range 31. On the same day America McReynolds and Sarah A. Montague bought of V. H. Grubb his interest in said 40, and received a deed therefor, and afterwards, by agreement, divided said land between themselves, each taking 20 acres, and made deeds March 14, 1891, in accordance therewith. All these deeds conveyed said land by the correct description. America McReynolds and Sarah A. Montague immediately took possession of their respective parts of this 40 acres, and commenced improving the same, and put thereon lasting and valuable improvements at a considerable expense, with the full knowledge of the defendant, Rhoda C. Grubb. Matters ran along in that shape until the fall or winter of 1895, when the defendant commenced making some claims to this 40 acres of land, and this suit was commenced to correct said deed. At the close of the evidence, the court, at the request of plaintiffs, found the facts to be as follows: "(1) That defendant, Rhoda Grubb, owned an interest in the tract of land in controversy as her separate property; (2) that it was in the intention of Joel Grubb and Rhoda Grubb to convey the N. W. ¼ of the S. E. ¼, except three-fourths of an acre in the southwest corner, instead of the N. E. ¼ of the S. E. ¼, except as described in the deed; (3) that defendant, Rhoda Grubb, after the death of Joel Grubb, ratified the deed, as intended to have been made by the said Joel Grubb, by her acts and transactions with the children of Joel Grubb by his first wife, and is bound by such ratification." At the request of defendant, the court found the facts to be as follows: "(1) That, at the time the deed in controversy was made, Joel Grubb and Rhoda C. Grubb (this defendant) were husband and wife; that Joel Grubb died in October, 1889." And refused to find: "(2) That Joel Grubb and Rhoda C. Grubb were the owners of the W. ½ of the S. E. ¼ by judgment in partition. (3) That the 80 acres was partitioned by parol between Rhoda C. Grubb and Joel Grubb; that afterwards Joel Grubb traded the south 40 (his share) with John Warden for the N. E. ¼ of the S. E. ¼, and had Warden deed it direct to Jacob Grubb, and also made Jacob

Grubb a deed for the N. E. ¼ of the S. E. ¼, including 20 acres of other land, said Jacob Grubb paying him the difference in value in the two 40 acres of land; and that there is no evidence showing a mistake made by the parties to the deed. (4) That this 40 acres was not her separate estate, and there was no agreement made with her to convey this 40 acres of land, nor any interest she had in it whatsoever. (5) That said deed was a gratuitous grant, and was never delivered to, nor accepted by, said Jacob Grubb, under whom plaintiffs claim. (6) That the land claimed was not her separate property, under Rev. St. 1879, § 3296, which was the law governing the rights of the parties in this case. (7) The defendant occupied said N. W. ¼ of the S. E. ¼ until 19 days after his death, October 2, 1889, to October 21, 1889, at which time (October 21, 1889) plaintiffs took possession of said land against the wish and protest of the defendant. (8) The court finds from the evidence that Rhoda C. Grubb (the defendant) was one of the daughters of Matthew Payne; that Matthew Payne departed this life, intestate, at some time prior to 1872; that the defendant was one of 10 heirs of said Payne; that this defendant at that time inherited her interest in the 40 acres in controversy; that by the partition papers offered in evidence the defendant's said interest and her husband's interest, which he had purchased, to wit, two shares and two-thirds of one share in said estate, was set off in one tract, it being 80 acres, the W. ½ of the S. E. ¼ of section 17, township 27, range 31, Jasper county, Mo.; and said interest of the said Rhoda C. Grubb was not her separate estate, but was her legal estate, inherited as aforesaid."

It is first insisted by defendant that the petition fails to state a cause of action, in that it does not aver that the deed in question was delivered to Jacob Grubb, and is bad for the further reason that it shows upon its face that plaintiff was a married woman at the time the deed was made, in March, 1877. The petition alleges "that on the 9th day of March, 1887, the said Joel Grubb and his wife, the defendant herein, made a warranty deed which is recorded; * * * that on the 21st day of October, 1889, said Jacob Grubb, the grantee therein named, conveyed a part of the land therein described to two of his sisters and one brother." So that the only reasonable construction that can be put upon these allegations is that the deed was delivered to, and accepted by, the grantee therein named. Moreover, the allegation that the deed was executed and recorded was equivalent to an allegation that it was delivered. No formal delivery was necessary, as the law will presume a delivery under such circumstances. *Kane v. McCown*, 55 Mo. 181.

The next question presented is the vital one in this case, and upon its solution depends the result. Defendant having acquired her interest in the land which it is claimed

by plaintiffs was intended to be conveyed by the deed in question by inheritance after her marriage with Joel Grubb, which was prior to the adoption of section 6864, Rev. St. 1869, it was not her separate property, and could only have been conveyed by her and her husband jointly, and then only by deed signed and acknowledged by them as provided by section 2, p. 273, Rev. St. 1872. Therefore, as the deed does not describe the land intended to be conveyed, as to Mrs. Grubb it passed no title, either legal or equitable. But plaintiffs insist that, as defendant received in consideration for the land which was intended to be conveyed to Jacob Grubb for the benefit of Joel Grubb's five children by his first wife a deed to the home place of her and her husband, Joel Grubb, and still retains the same, in equity and good conscience the deed in question should be corrected so as to conform to the intent of the grantors. As the land intended to be conveyed by defendant and her husband by the deed in question was not her separate property, and she could only have conveyed her interest therein in the manner prescribed by statute, it seems to follow that a deed defectively executed by her, or which does not describe the land intended to be conveyed, cannot be corrected by proceeding in a court of equity. Such proceeding can only be maintained against a party competent to contract, and the defendant herein possessed no such power at the time of the execution of the deed. In *Shroyer v. Nickell*, 55 Mo. 264, *Sherwood, J.*, speaking for the court, said: "The reformation of deeds and of contracts, whether sealed or otherwise, executed or merely executory, is one of the most familiar doctrines pertaining to equity jurisprudence. But it is to be observed of this power of reforming instruments that it always has for its basis the fact that the parties thereto are capable of making a valid contract. This capability cannot be, in general, affirmed of a married woman. The only exception to this rule of incapacity, so far, at least, as it concerns her individual rights, is where a feme covert contracts with regard to her separate estate; for, in respect to that, she is held a feme sole by courts of equity. But, beyond this, the original inability to make a binding contract still exists in all its ancient vigor, save where modified by statute. It was one of the fundamentals of common law that the contract of a feme covert was absolutely void, except where she made a conveyance of her estate by deed duly acknowledged, or by some matter of record, and this could only be done after private examination as to whether such conveyance was voluntarily made; and our statutory mode, whereby the deed of a married woman is executed and acknowledged, is but substitutionary of the common-law method in this regard. This is the only change that our statute has wrought." *Whitely v. Stewart*, 63 Mo. 360; *Pearl v. Hervey*, 70 Mo. 107; *Dameron v.*

Jameson, 71 Mo. 97; *Rush v. Brown*, 101 Mo. 596, 14 S. W. 735; *Brown v. Dressler*, 125 Mo. 589, 29 S. W. 13. It is true, as argued by plaintiffs, that a void deed executed by a married woman with regard to her land, the title to which she holds in fee, may be affirmed by her after she becomes discovert, but it must be done in writing and in the form prescribed by law. Her subsequent assent to it, even after coverture, or her parol adoption of it, or expressions of willingness by her to make it valid, or a new deed, do not make it so. *Stew. Husb. & Wife*, § 366; *Adams v. Buford*, 6 Dana, 406. To have such an effect, it must be reacknowledged and delivered. In *Price v. Hart*, 29 Mo. 171, it was, in effect, said: If such a deed can be adopted or set up by a mere parol declaration, made by a married woman after the removal of her disability of coverture, it would seem to let in all the evils which the statute was designed to guard against. While these observations and the authorities cited are more particularly with respect to the defective acknowledgment of deeds executed by married women, than the misdescription of lands intended to be conveyed by them, the same rule applies with equal, if not greater, force to the latter class; that is, that a court of equity has no power to correct the mistake. In *Martin v. Hargardine*, 46 Ill. 322, it was said: "Even if the certificate of acknowledgment had been correct in point of form, the court had power to apply it to any other lands than those described in the deed. The difference between correcting a deed as to the husband, or, if he is dead, as to the heirs, and to the wife or widow, is this: As to the husband, the deed is made in execution of a contract between the grantor and grantee, and if it does not properly express the contract as really made, either as to the description of the lands or otherwise, it can be corrected by a court of chancery on the making of satisfactory proof. So, if the contract is executed on the part of the purchaser, by the payment or tender of the purchase money in compliance with its terms, and the vendor refuses to convey, the court will compel a conveyance. But the wife is incapable of making a contract which will bind her as to her dower. She can relinquish it to the grantee of her husband, but only in the manner pointed out by the statute. The execution of a deed, by signing, sealing, and delivering it, is not sufficient; much less an agreement to execute a deed. The deed must not only be signed and sealed, but it must be acknowledged in a special manner, before an officer designated by the law, and a certificate must be placed by such officer upon the deed, showing such acknowledgment to have been made in the mode required by the statute. The character and effect of this transaction cannot be changed by subsequent proof. If the deed describes the northeast quarter, instead of the south-

east, as was intended, and the wife executes and acknowledges the deed before the mistake is corrected, all that can be said is that she has relinquished her dower in the lands described in the deed, and in none other; and although she may have agreed to relinquish it in another tract, and may have supposed she was doing so, yet, if she has not done so, the court has no power of compelling her. Her agreement does not bind her, and the court cannot take her relinquishment of dower in one tract, and apply it to another, in which she never has relinquished. This would make for her a new deed." It follows that the court was without authority to make the decree which it rendered. It may be that in an action of ejectment by defendant for the possession of the land (which, if she does not bring voluntarily, she may be compelled to do under the statute, or be debarred from ever setting up or claiming title thereto) that by reason of the fact that she received from her husband the agreed consideration for her interest in the land, and having settled with the Grubb heirs upon that theory, and then stood by and saw them making lasting and valuable improvements thereon, that she would be estopped in ejectment from a recovery. She is certainly not, however, entitled to recover possession of the land in this suit. For these considerations, we reverse the judgment.

GANTT, P. J., and SHERWOOD, J., concur.

RICKETTS v. HART et al.

(Supreme Court of Missouri. May 30, 1899.)

APPEAL—RECORD—VENDOR AND PURCHASER.

1. While the record proper must show the filing of the bill of exceptions, the record entries need not be set out in full in the abstract. A narrative of the several steps taken is sufficient.

2. Failure of a petition for damages for non-performance of a land contract to allege performance on plaintiff's part is cured by denial of such performance in the answer.

In banc. Appeal from circuit court, Knox county; E. R. McKee, Judge.

Action by Samuel L. Ricketts against H. W. Hart and others. There was a judgment for plaintiff, and from an order granting a new trial he appeals. Reversed.

O. D. Jones, for appellant. C. D. Stewart, H. T. Botts, and L. F. Cottey, for respondents.

PER GURIAM. This cause was heard at the October term, 1898, of this court, and an opinion, prepared by Judge WILLIAMS, was concurred in by all the members of this court as then constituted. A rehearing was granted, and the cause has been reargued.

An amended abstract of the record has been filed, since the former opinion, to meet

the objection of respondent that the abstract failed to show the filing of the bill of exceptions. As amended, it shows that at the June term, 1897, of the Knox circuit court, plaintiff procured leave of the court to file a bill of exceptions in vacation on or before 90 days after June 16, 1897; that afterwards, on the 19th day of July, 1897, he presented to Judge E. R. McKee, the judge of the Knox circuit court, said bill of exceptions, and it was duly signed by said judge, and ordered filed and made part of the record, and was filed and indorsed "Filed" on July 20, 1897, in the office of the clerk of the circuit court of Knox county. This abstract, as amended, obviates the objection which respondent urged so strenuously on the first hearing. No counter abstract has been filed by respondent, and no order requiring the clerk to certify the record in dispute. It has been uniformly ruled by this court that the record proper must, if in term time, show the filing of the bill of exceptions, and if the time be extended in term time the record proper must show it, and the minute of the clerk in vacation must show the filing within the time allowed; that the recital in the bill cannot supply that defect, as in the very nature of the case the bill of exceptions is no part of the record until signed and filed by leave of the court. *State v. Harris*, 121 Mo. 445, 26 S. W. 558; *Walser v. Wear*, 128 Mo. 652, 31 S. W. 37. Where there is a conflict between the recital of the filing in the bill and the recital in the record proper, the latter must, and does, control. But while the record proper must show the filing, it has never been ruled, under our statute, permitting the bringing of appeals to this court by certificates and abstracts, that the record entries must be set out in full. A narrative of the several steps is held sufficient, as the statute contains within itself the means of protecting this court against imposition by false statements of the record. *McDonald v. Hoover* (Mo. Sup.) 44 S. W., loc. cit. 336; *Kincaid v. Griffith*, 64 Mo. App. 673; *Stewart v. Sparkman*, 69 Mo. App. 456. As already said, the amended abstract shows the leave to file, and the filing by the clerk within the time allowed. Accordingly, the motion to dismiss the appeal must be, and is, overruled.

2. As to the sufficiency of the pleadings to support the verdict, we approve and adopt the opinion of Judge WILLIAMS on that branch of the case, and his statement of the case, in the following words:

"This case was certified to this court by the St. Louis court of appeals. One of the judges of that court dissented from the opinion of the majority, holding that said opinion was in conflict with prior decisions of said court, and also of this court. 73 Mo. App. 647. Hence the case comes here for final determination, in accordance with constitutional requirements to that effect. The sufficiency of the petition is questioned, and it is

necessary therefore to set it out in full in this statement. It is as follows: 'Plaintiff states: That on the 29th day of July, A. D. 1896, the defendants, by their bond for deed herewith filed, signed by each of them by their initials, as in the caption stated, sealed, and acknowledged, and thereby acknowledged themselves to owe and be indebted to him (the plaintiff) in the sum of fourteen hundred dollars, on the sole condition that the defendant H. W. Hart, and mentioned in the body of the bond as H. Walter Hart, upon the payment to him by the plaintiff of the sum of forty-six hundred dollars at times and on terms as follows, namely: Thirteen hundred dollars to be paid November 1, 1896, and twenty-six hundred dollars, in the form of an incumbrance then on the land, to be assumed by plaintiff,—all interest to be paid up to November 1, 1896, on said incumbrance by defendant Hart,—should then convey to plaintiff, by good and sufficient warranty deed in common form, the following lands, namely: All of the southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter, and forty-four acres where residence is located,—all in section 10, township 60, range 12 west, in Knox county, Missouri, being 124 acres, more or less. That the balance of the purchase money was to be due and payable when deed was delivered. That plaintiff, on the faith of said contract and bond for a deed, made by the defendants as aforesaid, on August 13, 1896, paid defendant Hart the sum of seven hundred dollars, and on November 9, 1896, the sum of one hundred dollars, and on November 12, 1896, the sum of one hundred dollars; making, in all, the sum of nine hundred dollars. That defendant Hart has failed and refused, and still fails and refuses, to comply with his part of said contract and bond for a deed, in this: that he has failed and refused to execute and deliver to plaintiff a good and sufficient warranty deed in common form, conveying the title to said lands to plaintiff, subject, only, to an incumbrance of twenty-six hundred dollars, as stipulated in said contract and bond for a deed. That on the 12th day of January, 1897, the plaintiff notified the defendants that, since the terms of the contract remained unperformed, the plaintiff elected to, and did, rescind the contract in said bond for a deed referred to, and that he redelivered possession of said premises, and demanded his money back, and he now sues herein therefor. Plaintiff says that he is damaged by the defendants, by reason of the breach of the terms of said contract and bond for a deed, in the sum of nine hundred dollars, paid to defendant Hart as aforesaid, with interest thereon at the rate of six per cent. from the date when paid. And plaintiff says that, relying on the contracts and promises of the defendants in said bond contained, he removed from the state of Illinois, where he then resided, to this state, to take possession of said lands, to pay for them

and comply with the terms thereof on his part, and in so doing he has been compelled to pay, in cost and expenditures, and in labor and trouble in so doing, the full sum, and is actually damaged in the sum, of one hundred and fifty dollars, and that he was and is compelled, by reason of the failure and breach of the conditions of said bond by the defendants, to redeliver the possession of said lands to defendant Hart, and to return to the state of Illinois, at an actual cost of trouble, labor, and expense, one hundred dollars, and that he is damaged thereby in the actual sum of two hundred and fifty dollars, for which he asks judgment. He therefore asks that he have judgment on said bond for the penalty thereof against the defendants in the sum of fourteen hundred dollars, and that his damages because of the breaches of the terms and conditions thereof, as aforesaid, be assessed at the sum of eleven hundred and fifty dollars, together with the interest thereon and cost of suit.' The defendants filed separate answers. The execution of the bond sued on was admitted, and the other averments of the petition denied. The sureties pleaded an alteration of the contract after the execution of the bond by them; but it is unnecessary to notice that further, as no point is made upon it in this court. The answer also contains these allegations: 'Defendants deny that defendant Hart failed and refused to comply with his part of the contract and bond for a deed, by failing and refusing to execute and deliver to plaintiff a good and sufficient warranty deed to said land according to the condition of said bond; but they aver that said Hart was at all times ready and willing to comply with all the conditions of said bond requisite to be performed by him, and that he did, as a matter of fact, tender to plaintiff a good and sufficient warranty deed to said land, but plaintiff refused to accept the same, and to comply with the condition of said bond to be performed by him; and defendants further aver that on November 1, 1896, and at all times since then, the said Hart has been able, willing, and ready to execute and deliver to plaintiff a good and sufficient warranty deed to said land, according to the conditions of said bond, but that plaintiff has failed and refused to comply with his part of said contract, and the conditions of said bond imposed upon him to be performed by him, in this: that plaintiff has failed and refused to pay the balance of the purchase money, as stipulated and required of him to do in said bond; and defendants aver that said Hart has performed all of the conditions required of him to be performed by said bond.' The reply denied the affirmative allegations in the answers, and stated that plaintiff learned for the first time on January 12, 1897, that defendant Hart could not make him a good title to the land, and that he then gave notice to all of the defendants that for said reason he rescinded the sale and demanded the

money he had paid on the contract and damages. It is further alleged therein that on January 28, 1897, Hart presented a deed for about 116 acres of land, upon which there was due \$40 in taxes and an incumbrance of \$5,000, and refused to submit the deed for examination to plaintiff's attorney. The case was tried upon these pleadings, and the result was a verdict and judgment for plaintiff. Defendants filed a motion for a new trial, which was sustained by the court, and this appeal is by the plaintiff from that order. The ground stated in the record for granting the new trial is that the court erred in admitting any evidence on the part of plaintiff, because the petition fails to state a cause of action, in this: 'It is alleged in the petition that plaintiff should pay defendant Hart \$1,300, on the 1st day of November, 1896, and on that day assumed an incumbrance of \$2,600 on the land described in the petition, and that defendant Hart should then convey to plaintiff said land by good and sufficient warranty deed, etc. It is then alleged that the balance of the purchase money was to be due and payable when the deed was delivered. It is not alleged in said petition that plaintiff paid, or offered to pay, or tendered, said sum of \$1,300 on November 1, 1896, or that he ever paid it, or offered it. The court therefore finds that it erred in admitting any testimony offered by plaintiff under said petition.' A full transcript of the proceedings was not brought up by the appellant, but the case was taken up by what is called the 'short form,' under section 2253, Rev. St. 1889. The printed abstract contains the pleadings and judgment, and then follows the bill of exceptions. It sets out the motion for a new trial, and shows that an exception was duly saved by plaintiff to the action of the court in granting the same. Plaintiff asked and obtained leave to file bill of exceptions herein 90 days after June 16, 1897, and plaintiff presented in turn his affidavit for an appeal from the order and judgment of this court setting aside the verdict in the cause, and asked an order granting an appeal to the St. Louis court of appeals, and the appeal was granted. Plaintiff in vacation presented his bill of exceptions made and taken in the cause, and asks that it be allowed, signed, and ordered filed and made a part of the record in the cause, which was done on the 19th of July, A. D. 1897, and filed by the clerk on that day.

* * * * *

"2. The circuit court sustained the motion for a new trial upon the sole ground that error was committed in overruling the objection made by the defendant to the introduction of any evidence, for the reason that the petition failed to state a cause of action. No other ground for granting the new trial has been suggested here. The petition is set out in full in the statement accompanying this opinion. The action is upon a bond guarantying performance by defendant Hart of a contract

to convey certain lands to plaintiff by a good and sufficient warranty deed upon the payment of the purchase money by the latter. The specific objection to the petition is that it fails to allege performance, or an offer to perform the contract, upon plaintiff's part. The answer, however, presented that issue directly and plainly. Defendant did not stand content with a denial of such of the averments of the petition as they desired to contest, but alleged that Hart was at all times ready and willing to comply with the conditions of the bond, and that he tendered plaintiff a good and sufficient warranty deed to the land, but plaintiff refused to accept the same, and to comply with the conditions to be performed by him. They further alleged that said Hart was at the date fixed for the conveyance, and had ever since been, able, ready, and willing to execute a good and sufficient warranty deed, but that plaintiff refused to comply with his part of the agreement, and the conditions thereof to be performed by him. This tendered directly the issue of Hart's ability and willingness to carry out the contract, and also the nonperformance of the conditions thereof by plaintiff, and supplied any omission in that regard in the petition. The reply denied these allegations, and the questions thus raised were properly presented by the pleadings. This court, in *Stivers v. Horne*, 62 Mo., loc. cit. 475, speaking through *Sherwood, J.*, held: 'Another objection, equally futile, is that the petition is faulty in not charging notice of the fraud, etc., on *Lewis*. The petition was not framed with the view of making him a party, but an issue as to notice was raised expressly by the answer and denied by the reply, and this accomplished all that could have been done by an amendment of the complaint.' And in *Garth v. Caldwell*, 72 Mo. 629, the same learned judge declared: 'These allegations of the answer, by putting in issue that fact, which the petition should have alleged, cure such lack of allegations. * * * Even at common law it was a rule of pleading that an omission to state a material fact, either in the declaration or special plea, would be obviated if the pleading of the opposite party put that matter in issue.' In *Wagner v. Railway Co.*, 97 Mo. 512, 10 S. W. 486, the petition did not show that the husband of plaintiff, for whose death the suit was brought, was a passenger on defendant's train, and *Brace, J.*, said: 'But, as defendant did not see fit to raise the objection before the trial, but in its answer tendered the issue "that he was not a passenger on its train, and that it did not owe him the duty of a passenger," which issue the plaintiff accepted and joined, and both parties went to trial upon it, that objection was waived, and afforded no ground for a new trial, and cannot be considered on writ of error.' The circuit court improperly granted a new trial, and the cause will be remanded to the court of appeals, with directions to reverse the judgment of the circuit court and remand the case with instruc-

tions to proceed in accordance with this opinion."

GANTT, C. J., and SHERWOOD, BURGESS, ROBINSON, BRACE, MARSHALL, and VALLIANT, JJ., concur.

SULLIVAN v. STATE.

(Supreme Court of Arkansas. June 3, 1899.)
CONFESSIONS.

The owner of property stolen, and who is really the prosecutor, is a person in authority, within the principle that a confession obtained by an inducement held out by such a one is not admissible.

Appeal from circuit court, Greene county; Felix G. Taylor, Judge.

William Sullivan was convicted of larceny, and appeals. Reversed.

At the September term, 1895, of the Greene circuit court, the appellant, William Sullivan, was indicted for grand larceny. At the spring term, 1899, the cause came on for trial. Appellant, waiving formal arraignment, entered his plea of not guilty, was tried, convicted, and sentenced to one year in the penitentiary, and appealed to this court. The evidence upon which appellant was convicted, in part, is as follows: B. A. Johnson, for the state: "Was acquainted with the appellant in May, 1895. About that time witness had fourteen or fifteen dollars' worth of meat stolen from him. Don't know of my own knowledge who took it. Other parties found the meat. I identified it by a wire that it was hung up by. This was in Greene county, Arkansas." O. M. Batey, for the state: "Was a justice of the peace in Greene county in 1895. At that time two men named Allen were tried before me for the larceny of some meat. William Sullivan testified before me that time. I made no promise to him to get him to make a statement. Sullivan testified that he and one of the Allen boys went to Col. Johnson's smoke house, and pried the hinges off the door, went in, and carried off a certain amount of meat; took it off a piece; met the other Allen boy there with a sack to help them carry it off. He said they took three (3) middlings and four (4) hams. I committed William Sullivan to jail. This was some time after. I made no promise of leniency to get him to testify. I was using him as a witness against the Allen boys. I did not bind him over for stealing the meat, but for stealing the clothes." The evidence of the witness as to Sullivan's testimony before him was objected to by appellant, and proper exceptions saved, and was excluded by the court, and the jury told not to consider it at all. B. A. Johnson, for the defense: "I had a talk with Sullivan about stealing the meat before he went on the stand at Esquire Batey's. He came to my house not a great while after the meat was taken, and I got after him, for I suspected that he knew about

the parties. I thought he was young, and I could get him to tell about it. He told me finally, after working with him for some time, that he would let me know the next day. He said that he thought that the meat could be found. My recollection is that he went and had a conversation with his aunt, and he agreed to tell the story if we would agree to make it easy with him. I told him that I would make a state's witness of him, to help convict the others. At the examining court it was my understanding that he was not to be bound over; that, if we bound him over, the whole thing was gone. I think I told his aunt to go and see him, and we would try and make it as light on him as possible. It was our understanding that he would not be prosecuted if he would testify against the Allen boys. I was not holding any office in the county at that time, nor acting in any official capacity whatsoever. Sullivan confessed being with the Allen boys at the time they stole the meat. I simply told appellant that I would do all I could to make a state's witness of him against the Allen boys, if he would testify; that, if he would tell all he knew about it, that I would do what I could to make him a state's witness; that I would use my efforts to have that done." Defendant moved the court to exclude the testimony of B. A. Johnson in regard to the confession made to him. Motion overruled, and exceptions saved.

Crowley & Huddleston, for appellant. Jeff Davis, Atty. Gen., and Chas. Jacobson, for the State.

HUGHES, J. (after stating the facts). After much other testimony had been given, the court instructed the jury "that the confession made by the defendant to Col. B. A. Johnson, together with the fact that the meat was stolen, will justify you in finding the defendant guilty." Defendant excepted. The testimony of Col. B. A. Johnson as to the confessions of the defendant was not admissible. The proof shows that they were made by the defendant in the hope that, if he would confess, he would be made a state's witness against others, and that he would not be bound over or prosecuted "if he would testify against the Allen boys." This was promised him by Col. B. A. Johnson before he went on the stand as a witness. Col. Johnson, at the time he induced the defendant to make the confessions, was not in official position of any kind; but he was the owner of the stolen meat, the party injured, and really the prosecutor in the case, and as such was a person in authority, within the meaning of the law. In *Warickshall's Case*, 1 Leach, 263, Eyre, C. B., said: "A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the

flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected." "The material inquiry, therefore, is whether the confession has been obtained by the influence of hope or fear applied by a third person to the prisoner's mind." 1 Greenl. Ev. § 219. Lord Campbell stated the rule to be that "if there be any worldly advantage held out, or any harm threatened, the confession must be excluded." Reg. v. Baldry, 16 Jur. 599, 12 Eng. Law & Eq. 590. If the threat or inducement is held out actually or constructively by a person in authority, it cannot be received, however slight the threat or inducement; and the prosecutor, magistrate, or constable is such a person. 1 Greenl. Ev. § 222; Com. v. Sego, 125 Mass. 210; Knapp's Case, 10 Pick. 489; Charles v. State, 11 Ark. 408; Corley v. State, 50 Ark. 305, 7 S. W. 255; Reg. v. Moore, 16 Jur. 622, 12 Eng. Law & Eq. 583. It is true that, the principle of law that the confession must be voluntary being strictly adhered to, the question whether it is voluntary must be decided primarily by the presiding judge.

The instruction given by the court was clearly erroneous. It invaded the province of the jury, in assuming as a fact that the meat was stolen, and in telling them to give full credence to the testimony of Johnson, and to the confession of the defendant alleged to have been made to him, which we have shown was inadmissible. It is error for the court, in charging a jury, to assume facts to have been proven, when they are disputed, or to charge the jury upon the weight of evidence. This is elementary. The constitution forbids it. For the errors indicated, let the judgment be reversed, and the cause remanded for a new trial.

BUNN, C. J., and BATTLE, J., did not participate.

STATE v. WELBORN.

(Supreme Court of Arkansas. June 3, 1899.)

INDICTMENTS—SUBSTITUTION.

An indictment charging defendant with violating the law in regard to the comfort of railway passengers, by failing and refusing to keep open a separate waiting room for the African race, and one charging him with violating said law, by neglecting to assign certain passengers of the African race to the room provided and used for said race, and permitting said passengers to occupy the room provided for the white race, charge different offenses, and the prosecuting attorney cannot substitute one for the other.

Appeal from circuit court, Lawrence county, Eastern district; Frederick D. Fulkerson, Judge.

The state moved to substitute one indictment against C. M. Welborn for another. Motion denied, and the state appeals. Affirmed.

This appeal is taken from an order of the circuit court of Lawrence county overruling a motion of the state to substitute one indictment for another. The appellee was indicted first on the 10th day of March, 1898, by the grand jury of Lawrence county, charged with violating the law in regard to the comfort of railway passengers, by unlawfully and willfully failing and refusing to keep open a separate waiting room for the African race, and the said crime was charged to have been committed on the 1st day of February, 1898. At the March term of said court, 1899, on the 10th day of March, the grand jury of said county returned an additional indictment against the same appellee, charging him with violating the law in regard to the comfort of railway passengers, by neglecting to assign certain passengers of the African race to the room provided and used for said race, and permitting the said passengers to occupy the room provided for the white race, and the second count in the same indictment charged him with failing to eject said persons of the African race from such room. The latter indictment the state, through the prosecuting attorney, on the 17th day of March, asked to substitute for the former indictment by motion to quash indictment No. 29, and proceed on indictment No. 116. This motion was by the court overruled. Section 2099, Sand. & H. Dig., reads as follows: "If there shall be, at any time, pending against the same defendant, two indictments for the same offense, or two indictments for the same matter, although charged as different offenses, the indictment first found shall be deemed to be suspended by such indictment, and shall be quashed." This section has received the construction of this court in a former case, as follows: "Where two indictments against the same defendant are so diverse as to preclude the same evidence from sustaining both, and where each sets out an offense differing in all its elements from that in the other, they are not for the same offense, within the meaning of this section." State v. Hall, 50 Ark. 28, 6 S. W. 20. The two indictments must, therefore, be for the same offense; and what constitutes the same offense, or the test for determining whether they are the same offense, is there laid down and defined to be the same evidence sustaining both, and, further, that out of the same facts a series of charges shall not be preferred. Omitting the formal parts, and giving the charging parts of the indictments side by side, the indictments are as follows: The first charges that the said agent did then and there unlawfully and willfully fail and refuse to keep open a separate waiting room for the African race, as provided by law. The second charges that, certain persons of the African race occupying the waiting rooms set aside and provided for the white race, the said C. M. Welborn did then and there willfully neglect to assign said passengers and persons of the African race to the rooms provided and used for the African race, to which

said passengers and persons belonged; and the second count charges that he did then and there unlawfully neglect to eject said persons of the African race from said room so provided for the white race. The sections of the statute under which these indictments were found are as follows: Section 2 of the act approved February 23, 1891, entitled "An act to promote the comfort of passengers on railway trains and for other purposes," which provides: "That the officers of such passenger trains and the agents at such depots shall have power and are hereby required to assign each passenger or person to the coach or compartment or room used for the race to which such passenger or person belongs. * * * Any officer of any railroad company assigning a passenger or person to a coach or compartment or room other than the one set aside for the race to which said passenger or person belongs, shall be liable to a fine of twenty-five dollars. * * * Should any passenger or any other person not a passenger for the purpose of occupying or waiting in such sitting or waiting room not assigned to his or her race, enter said room, said agent shall have the power and it is hereby made his duty to eject such person from such room. * * *" Section 3 of this act provides: "* * * Any agent at such depot who shall refuse or neglect to carry out the provisions of this act, shall, on conviction, be fined not less than twenty-five dollars nor more than fifty dollars for each offense. * * *" Acts 1891, pp. 16, 17. The act approved April 1, 1893, amends only section 1 of the foregoing act, and leaves sections 2 and 3 unmodified. Acts 1893, p. 200.

Jeff Davis, Atty. Gen., and Chas. Jacobson, for the State. J. E. Williams and Dodge & Johnson, for appellee.

HUGHES, J. (after stating the facts). If the first indictment charges any violation of the statute by the agent of the railroad company, the second one charges a different and distinct offense. The prosecuting attorney might have dismissed the first indictment, and the grand jury might have thereupon found the second, and thus saved the case from the operation of the statute of limitations. But we do not think he could substitute one for the other. The judgment of the circuit court is affirmed.

BUNN, C. J., and BATTLE, J., not participating.

BANKS et al. v. DIRECTORS OF ST. FRANCIS LEVEE DIST.

(Supreme Court of Arkansas. June 3, 1899.)

LEVEE TAXES—SALE FOR NONPAYMENT.

In case of sale of land for nonpayment of levee district taxes assessed under Act Feb. 15, 1893, creating the district, and amendatory acts, it is error, where there was no irregularity in

the sale, to allow redemption thereafter, the provision of the act for redemption being repealed by the amendatory acts, without other provision therefor; the act providing that the enforcement of the taxes shall be in the chancery courts proceeding according to the usual course of chancery courts, and the decree which condemned the lands for sale permitting sale only up to the day of sale.

Appeal from circuit court, Crittenden county; Felix G. Taylor, Judge.

Lem Banks and others, to whom lands were sold for taxes assessed for the St. Francis levee district, moved to have deeds made to them. Motion denied, and they appeal. Reversed.

Norton & Prewett, for appellants. R. C. Brown and Thomas M. Scruggs, for appellee.

BUNN, C. J. This is a motion in the chancery court of Crittenden county, to compel the commissioner of said court to make deeds in pursuance of sale made by him, under the decretal order of said court, to the petitioners, as purchasers at said sale. The motion was overruled, and the movers appealed to this court.

On November 28, 1895, said court decreed the sale of the lands in controversy for the nonpayment of the levee-district taxes assessed against them, under the provisions of the act entitled "An act creating the St. Francis levee district," approved February 15, 1893, and the amendatory act approved March 21, 1893, and a further amendatory act approved April 2, 1895, and appointed J. L. Holloway as commissioner to sell the same, and the sale was made accordingly by him, and the appellants became the purchasers, on the 21st and 22d of July, 1896, the dates of said sale, and paid in cash the amount by each to said commissioner, and demanded of him their deeds accordingly, which he declined then and there to give. Said commissioner filed his report of sale at the following term, to wit, on the 19th day of November, 1896, in which it appeared that various parties whose land had been sold by him at said sale had, before the completion of his report, come forward and paid him the taxes, penalty, and costs, and he had given them certificates of redemption. Thereupon the appellants, Lem Banks, F. A. Cordes, and Minor Merriwether, purchasers at said sales, to wit, on the 3d December, 1896, filed their separate and several motions, which are as follows: "Comes Lem Banks, and moves the court for an order directing J. L. Holloway, commissioner in this cause, to execute and deliver to him a deed for lands by him bought at the sale under the decree herein rendered, and for cause says: That, as directed by the decree of this court, the commissioner, on the 21st and 22d days of July, 1896, offered at public outcry, to the highest and best bidder, for cash, and after giving the notice required by said decree, and otherwise complying with its provisions, sundry lands, situated in Crittenden county, Ark., among them

the following tracts, which were condemned and sold in the names of the parties hereafter appearing in the lines with the tracts, respectively, and were struck off to him at the sums opposite the tracts, respectively; the names of the parties being first on each line, followed by a description of the land, and the amount bid and paid for the same." The list of the lands purchased by him is then given, with the names of the owners, and also the taxes assessed against each tract. Similar motions were made and filed by the other two purchasers, and all three were overruled by the court, to which exceptions were duly made and saved, and the ruling of the chancellor raises the issue in this case; that is to say, whether the said owners had a right to redeem at the time and in the manner they did.

The amendatory section had the effect of repealing the original clause allowing redemption, and the amendatory act fails to provide for redemption elsewhere. It follows that there is no statutory right of redemption from sales under these condemnation proceedings, except as in favor of infants and insane persons, which is provided for. The act provides that the enforcement of the payment of the taxes, penalties, and costs assessed and levied against the lands in the district shall be in the chancery courts in the counties where the lands are respectively situated, and, in condemning the lands and making sales thereof, these courts are to proceed according to the usual course of chancery courts. The usual method of chancery courts, when enforcing liens on lands to pay money demands, is to condemn the lands to be sold, and to direct the sale to be made on a certain day in the future, unless the lands are sooner redeemed by the payment of the debt, interest, and costs; and, if not so redeemed, the sale is made, and thereby the rights of purchaser attach, and will not be disturbed by the court on passing upon the report of sale and exceptions thereto, where the sale has been fair, and in substantial compliance with the law, and the orders of the court directing the same to be made. Of course, a suggestion of jurisdictional defects will be the subject of inquiry at every stage of the proceedings.

The original decree condemning these lands for sale contained the following as to the privilege of redemption: "And it is further ordered and decreed that any of said defendants, or any persons for them, or any person claiming any of said lands or interest therein, may, before sale, pay to the clerk of this court the amount of taxes, interest, penalty, and costs, set opposite each tract severally, both in foregoing statement and the costs hereinafter provided for, that may have accrued at the time of payment, and said clerk shall give a receipt therefor, and note the fact of payment, and by whom paid, on the margin of this decree, and against the tract so paid on." This decree, in effect, permits redemption up to the sale, but not afterwards, and under it

the commissioner permitted many tracts to be redeemed before the day of sale, and no controversy over this fact is made here. Another provision in the original decree reads as follows, to wit: "And it is further ordered, adjudged, and decreed that said commissioner shall execute deeds of conveyance to purchaser of land so sold, and shall include all the lands sold to a purchaser in one deed unless otherwise directed by the purchaser, and for each deed the commissioner shall receive a fee of one dollar, to be paid by the purchaser." The time for making the deed or deeds is after confirmation of sale; for, until the sale is confirmed, it can never be known what changes there may be made in the report of sale in order to its confirmation. In this respect the sale may be said to be incomplete until confirmation. But where the sale has been fairly conducted, according to law, under the decretal orders of the court, the rights of the purchasers cannot be disturbed by matters occurring after the sale brought in by the commissioner, although approved by the court on final hearing and confirmation of his report of the sale. The following lands were sold, but afterwards permitted to be redeemed before the commissioner's report of sale was confirmed, and released to their respective owners, on payment of the taxes, penalty, interest, and costs assessed against them, namely: "N. E. $\frac{1}{4}$ and W. $\frac{1}{2}$ Sec. 21, T. 7 N., R. 7, taxed to Jonas Carr; S. E. $\frac{1}{4}$ W. $\frac{1}{2}$ Sec. 21, T. 7, R. 7, taxed to C. W. Willets, receiver; S. W. $\frac{1}{4}$ Sec. 21, T. 7, R. 7, taxed to Charles Morgan; S. E. $\frac{1}{4}$ Sec. 6, T. 4, R. 8, taxed to estate J. N. Williford; W. $\frac{1}{2}$ Sec. 7, T. 4, R. 8, taxed to estate J. N. Williford; N. E. $\frac{1}{4}$ Sec. 6, T. 4, R. 8, taxed to estate J. N. Williford; N. E. $\frac{1}{4}$ Sec. 7, T. 4, R. 8, taxed to estate J. N. Williford;" and perhaps other tracts,—at all events, all lands belonging to the estate of J. N. Williford and the North American Trust Company, S. M. Jarvis, trustee, and C. N. Willets, receiver. Before final decree of confirmation, it was shown, by proper affidavits in regard to these lands, that, while the owners of them were residing in other states, yet in each case, respectively, these owners had an agent or tenant in actual occupancy during the whole period of assessment, levy, and suit to foreclose; and that, as the only notice of the bill to foreclose was constructive notice, actual notice should have been given on these agents and tenants, and, as this was not done, the foreclosure and sale were void as to these lands; but as the owners had voluntarily appeared, and paid the taxes, interest, penalty, and costs, without controversy, there was no error in the chancellor in releasing these lands, and his decree as to them is affirmed, but as to the other lands involved in this controversy, saving the rights of minors and insane persons named in the act, the decree of confirmation is reversed, and the cause remanded, with directions to the chancellor to have the report

corrected on the facts and under the rule here laid down, and order deeds to be made accordingly.

GRIFFITH v. MAXFIELD et al.

(Supreme Court of Arkansas. June 3, 1890.)

ADMINISTRATOR'S SALE—DECLARATION OF TRUST—POWERS.

1. An administrator is not interested in the purchase of the land which he sells at administrator's sale, though the firm of which he is a member has a claim against the estate.

2. An instrument, without consideration, by which one declares that he holds in trust for certain persons certain lands, does not convey any title or interest.

3. T. reserves to himself a power coupled with an interest, which is not revoked by the death of those for whom he declares a trust, and makes a deed of the property by him alone sufficient, where, after declaring that he holds land, an undivided half in his own right, and an undivided half in trust for others, he proceeds, "Hereby reserving and retaining to myself the right and power to sell and convey to any person any and all of the above-described lands at such prices and on such terms as I may deem proper and advantageous to myself and co-owners, the beneficiaries."

Appeal from circuit court, Independence county; R. H. Powell, Judge.

Action by W. R. Griffith against Theodore Maxfield and another. Judgment for defendants. Plaintiff appeals. Affirmed.

J. W. Butler and J. C. Yancey (F. D. Fulkerson, of counsel), for appellant. W. S. Coleman and Robert Neill, for appellees.

WOOD, J. Appellant bought of the firm of Theodore Maxfield & Bros., composed of Theodore, Edward, Charles, and John Fred Maxfield, a certain tract of land, for which he executed his promissory note for \$600, with interest at the rate of 10 per cent. per annum, took the bond for title of Theodore Maxfield & Bros., and went into possession under his purchase. Appellant paid the note, and was tendered a warranty deed, duly signed and acknowledged by Theodore Maxfield and his wife, which, after examination, he refused to accept. Appellant offered to surrender the possession of the land to Theodore Maxfield, which was refused; and thereupon appellant brought this suit against Theodore and Charles Maxfield, as survivors of the firm of Theodore Maxfield & Bros., to recover the sum of \$650, as damages for the alleged breach of the bond for title.

The principal question in the case is, was the deed of Theodore Maxfield and wife a compliance with the stipulations of the bond for title? The bond was in the usual form, and contained the following clause: "Now, if the said Theo. Maxfield and Bros. shall make a good and sufficient title in fee simple to said W. R. Griffith, his heirs and legal representatives, to the above-described lots of land, upon the payment of the above promissory note and the interest that shall accrue thereon, then this obligation shall be

void; otherwise, to remain in full force and effect." If the deed of Theodore Maxfield and wife conveyed to Griffith "a good and sufficient title in fee simple," it fulfilled the express stipulation of the bond. Was it a good title?

Omitting unnecessary details, we will state only such facts as are required to make clear the rulings upon the objections urged in appellant's brief to the title. In 1881 Theodore Maxfield, who up to that time had acquired considerable real and personal property, gave to his three brothers, Edward, Charles W., and J. Fred, an interest in his mercantile and woolen-mill business, and entered into a partnership with them. Edward owned "a sort of working interest" at the time of the organization of the firm; but the other brothers, Charles W. and J. Fred, had no interest whatever, and the gift of Theodore to them was purely voluntary,—in consideration of love and affection. The firm dealt only in personal property, and their business continued unchanged until the 10th of January, 1888. During these years Theodore became the owner, in his own name and right, of a large amount of real estate, consisting of 4,000 acres of farming land and 500 town lots, which Theodore says they estimated to be worth \$100,000 at the time the declaration of trust was made, on the 10th of January, 1888; that the firm had no title to or interest in any of the land, except a few unimportant tracts. A separate account, under the head "Real Estate," was kept on the books of the firm, in which was entered all the purchases and sales of real estate made by Theodore. All the money which was received from either the firm's business or Theodore's real-estate business was kept in one common depository; and when Theodore took out money to pay for land it was charged to him on his real-estate account, and when he turned in any on the sale of land it was credited to him on his real-estate account. On January 10, 1888, Theodore, on his own motion, and without any consideration, had a declaration of trust prepared by his attorney, and it was signed by him and the other members of the firm. The provisions of this instrument, after describing the land and naming the parties, are as follows: "And whereas, said parcels of land, although held in severalty by the said Theodore Maxfield as in fee simple, are in equity the property and estate of all the said above-named parties hereto, as tenants in common, in the shares and proportions as follows, to wit: Theodore Maxfield, an undivided four-eighths ($\frac{4}{8}$); Edward Maxfield, an undivided two-eighths ($\frac{2}{8}$); Charles W. Maxfield, an undivided one-eighth ($\frac{1}{8}$); and John Fred Maxfield, an undivided one-eighth ($\frac{1}{8}$),—the said lands having been acquired by the said labor and investment of all of the said several parties hereto: Now, therefore, I, the said Theodore Maxfield, in consideration of the above recitals, and the sum of one dollar to me in hand paid by the said Edward

Maxfield, Chas. W. Maxfield, and John Fred Maxfield, the receipt whereof I do hereby acknowledge, do hereby declare and make known that I hold the above-described lands as follows, to wit: An undivided four-eighths ($\frac{4}{8}$) in my own right, in fee; an undivided two-eighths ($\frac{2}{8}$) in trust for the above-named Edward Maxfield; in trust for the above-named Charles W. Maxfield, an undivided one-eighth ($\frac{1}{8}$); in trust for the above-named John Fred Maxfield, an undivided one-eighth ($\frac{1}{8}$),—hereby reserving and retaining to myself the right and power to sell and convey to any person or persons any and all of the above-described lands at such price or prices, and upon such terms, as I may deem proper and advantageous to myself and co-owners, the beneficiaries. In consideration of the provisions herein above recited, and of divers other good and valuable considerations us hereunto moving, we, the said Edward Maxfield, Charles W. Maxfield, and John Fred Maxfield, beneficiaries in this instrument, hereby accede to and accept the provisions and terms of this declaration of trust, and acknowledge our separate beneficial and equitable interests in the lands above described to be as above stated and set out." The instrument is signed by all of the parties, —Theodore, Edward, Charles W., and John Fred Maxfield,—and bears date January 10, 1888. In 1872 Theodore Maxfield and his brother George R. Maxfield purchased a tract of land, of which the lot in controversy was a part, and held possession of the same as tenants in common until March 4, 1887, when George Maxfield died intestate, leaving a widow and four minor children; but they did not reside upon the lot in controversy,—same was not the homestead. The firm of Theodore Maxfield & Bro., supra, was the principal creditor of the estate of George R. Maxfield, deceased. Charles W. Maxfield was appointed and duly qualified as administrator of the estate of George R. The interest of George R. Maxfield in the lands, including the lot in controversy, was sold by the administrator on the 30th of September, 1887, under an order of the probate court, to pay debts. The half interest of George R. in the lands owned by him and Theodore was appraised at \$1,750, and was bought by Theodore for the sum of \$2,100; and on the 9th day of January, 1888, under an order from the probate court, the administrator made him a deed to the land.

1. The first objection made by appellant to the deed of Theodore Maxfield and wife is as follows: "Because the evidence shows that Charles W. Maxfield, the administrator, was interested in the purchase of the land which he sold at his administrator's sale." There is no such proof in the record. The fact that Charles W., the administrator, was a member of the firm of Theodore Maxfield & Bros., that held the claim against the estate of George R., which claim, among others, the land was sold to satisfy; that Theodore and John Fred were his bondsmen; that Charles

W., the administrator, allowed a claim of \$1,686.33 in favor of the firm, which, without proof, was probated against the estate; that the administrator procured an order, and sold the lands in controversy, with other lands; that Theodore Maxfield purchased the land at said sale, and obtained deed to same, January 9, 1888, and the next day executed the deed of trust to Charles W. and the other brothers of this same land, declaring it "had been acquired by the said labor and investment of all the said several parties" thereto,—none of these facts, in our opinion, prove that Charles W. was interested in the purchase of the land at the sale by him as administrator. The land was purchased by Theodore Maxfield, not by Charles W. The evidence on this point by Theodore Maxfield is as follows: "Q. When this half interest in what was known as the 'McGruder Place' was to be sold by the administrator, I will ask if you and the administrator had any understanding between you that you were to buy the land? A. There was not. Q. Was there any understanding that you were to buy in the land for the firm of Theodore Maxfield & Bros.? A. There was not. On the other hand, I expected to sell my interest. Q. State if at the sale you made any public declaration to the bystanders about this land. A. I stated at the court-house door, when the property was sold, that my half interest in the property would be for sale at the same price that my brother George's interest brought,—that any one wanting to purchase it could have my interest in it for the same price as the half interest that was being offered for sale. * * * Q. State why you bid more than the appraised value of the land. A. I wanted to sell, and in the first place offered my interest for sale. I wanted to sell my interest, and not to buy. * * * I was interested, not only for myself, but for my brother's widow, to have the property bring as much as it would. I did not calculate to take it. I bid \$2,100, and there were no further bids, and it dropped on me. Q. State if the firm of Theodore Maxfield & Bros. was interested in any way in the purchase of that land. A. No, sir; they were not. I had owned one-half interest for twelve or fifteen years, and when this was sold I bought it for my own use and benefit, and the firm had no interest in it whatever." The testimony of Charles Maxfield was to the same effect, and, without setting it out in *hæc verba*, it shows that, of the proceeds of the sale by him as administrator, he had "close to the sum of \$1,000" after paying the debts, which sum he paid to the widow and heirs of George R. Maxfield. This witness shows how the amounts were paid, and explains the entries made on the book of Theodore Maxfield & Bros., which would too greatly incumber this record to set out at length; but we think, in the light of his evidence, it is clear that there is no inconsistency in his testimony, with the book entries, as to how

the amount was paid for which George R. Maxfield's half interest was sold. But, if there were, the cogent fact remains, and it is undisputed, that the land was sold, purchased by Theodore Maxfield, paid for by him, and the money paid over by the administrator to the proper parties. Charles Maxfield says: "When I made the deed, he (Theodore) settled up and paid me. It was charged to Theodore's account. By charging it to Theodore's account, that authorized me to settle with the widow. The amount was going to the firm after it was charged to Theodore. After paying the account, the balance was paid to the widow in cash. The children were paid a hundred dollars each, and the widow got the other five hundred. The widow really was paid all of it. After paying the debts, the balance in my hands was \$890, which I paid to the widow, and took her receipt for it." It is not pretended that the account of the firm of Theodore Maxfield & Bros. against the estate of George R. was simulated or fraudulent. The allowance of the account by the administrator and probate court without proof was merely error which might have been corrected by appeal from such allowance. It did not in any manner affect the regularity and validity of the sale made by the administrator to pay debts under the order of the probate court. Nor do any or all of the above facts tend in the remotest to show that the administrator was interested in the purchase. The most that it could be said to show would be that the administrator, being a member of the firm holding the account against the estate, was therefore interested in the proceeds for which the lands sold, to the extent of his interest in the debt due the firm; but that would in no way make him a party to the purchase of the land, in the sense condemned by the law. Had the proof showed that the land was paid for by the firm, and that the amount withdrawn from the firm had not been charged up to Theodore Maxfield, then there would be something in the contention that Charles W. Maxfield was interested in the purchase at his own sale as administrator. As we gather from the record, the proof is the other way. There is no defect in the title of Theodore Maxfield, growing out of any fatal defect or irregularity connected with the administrator's sale, at which he purchased.

2. It is next contended that, "by the deed styled 'A Declaration of Trust,' the three brothers became seised of the equitable estate of a one-half undivided interest in said land." This contention, of course, concedes (we suppose, for the sake of argument) the correctness of the conclusion we have just reached supra,—that Theodore Maxfield acquired title to a half interest of the land in controversy through the sale of and deed by the administrator of the estate of George R. Maxfield under the order of the probate court. Did Charles W., Edward, and John Fred acquire an equitable title in the property, which Theo-

dore could not convey by the deed? The instrument itself furnishes an irrefutable negative answer. The error into which counsel for appellants falls is in calling the declaration of trust a "deed," and in supposing that it has the force and legal effect of a deed in conveying title to real estate. Neither the words "bargain and sell," in the present tense, nor any words of similar import, indicating a present purpose to convey any interest or title in the land itself, are used. There are no grantor and grantee. In *Holland v. Rogers*, 33 Ark., at page 255, the court uses this language: "A simple bargain and sale of land in writing, in words of the present, and without any more, is a conveyance, operating under and by virtue of the statute of uses, always upon sufficient consideration. It was devised in England as a common assurance soon after the passage of the statute, and has become the most common mode of conveyance in the United States. It is more than a quitclaim or a release. It actively effects a divestiture of title from the grantor, and transmits it to the grantee, with or without words of covenant of warranty." We do not think the language of the instrument, under the statute of uses, could be construed as operating to convey any title or interest in the land itself to the brothers of Theodore Maxfield. It is merely the declaration of a purpose to hold the land himself, or to convey it and hold the proceeds in trust for them. It simply means that any use to which it may be subjected by him, in the way of rental or otherwise, or by sale, they shall share with him in the proceeds thereof, in the proportion designated in the declaration. See *McCulloch v. Chatfield*, 15 C. O. A. 48, 87 Fed. 877. This view is strengthened by the extraneous, uncontradicted proof that there was no consideration for the instrument except love and affection. The recital that the lands "had been acquired by the said labor and investments of all the said several parties" pertained to the consideration for the instrument, and oral proof on this point was proper. A declaration of trust or use is "an act by which a person acknowledges that a property, the title to which he holds, is held by him for the use of another." 5 Am. & Eng. Enc. Law, 368; And. Law Dict. 320. But if we concede that the instrument, under the statute of uses, was sufficient to convey from Theodore Maxfield an equitable interest in the land to the brothers named, in the proportion designated, then, by the terms of the same instrument, has not Theodore Maxfield reserved to himself "the right and power to sell and convey to any person or persons any and all of the above-described lands at such price or prices, and upon such terms, as I [he may deem proper and advantageous to myself [himself] and co-owners, the beneficiaries"? And do not the beneficiaries accede to and accept the terms and provisions of the declaration of trust, and acknowledge their separate beneficial and equitable interests in the

lands described to be as therein stated and set out? The power which Theodore Maxfield reserved to himself was a power coupled with an interest in the land, and it was not revoked by the death of Edward or John Fred Maxfield. Nor did the failure of Charles W. to join in the deed make it any the less effectual to convey a perfect title. Mr. Wharton defines a power as an authority retained by or conferred upon a person to deal with property so as to affect, more or less, estates or interests therein possessed either by himself or by others, albeit underived therefrom. 18 Am. & Eng. Enc. Law, 878. "Where the right or authority to do the act is connected with or flows from an interest in the subject on which the power is to be exercised, the power is said to be coupled with an interest; but, where it is disconnected from any interest of the donee in the subject-matter, it is a naked power." 18 Am. & Eng. Enc. Law, 887. If a power be coupled with an interest, it survives the person giving it, and may be executed after his death. *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 174. It follows from what we have said that the deed of Theodore Maxfield and wife, tendered to appellant, conveyed a perfect title, and was a full compliance with the condition of the bond for title.

3. The court did not err in postponing the case and allowing testimony to be taken. This was a matter purely in the discretion of the court, and the testimony was relevant and proper.

4. The appellant has no cause of action. The questions raised, the evidence being uncontradicted, were those of law. It would be folly to remand the cause for trial at law, even if the court erred in transferring it to the equity docket, for the error was not prejudicial. The judgment could not have been otherwise. Let the judgment be affirmed.

TEXAS & P. RY. CO. v. ARMSTRONG.

(Supreme Court of Texas. June 22, 1890.)

RAILROAD PASSENGERS—SELLING WRONG TICKET—DAMAGES—MENTAL ANGUISH.

A railroad company selling the wrong ticket to a woman unaccustomed to traveling is liable for mental anguish suffered by her while waiting in a city in which she was a stranger, and where she was compelled to ask a hotel man to keep her until she could get money to pay her bill.

Certified questions from court of civil appeals of Third supreme judicial district.

Action by H. W. Armstrong against the Texas & Pacific Railway Company. Judgment for plaintiff was reversed by the court of civil appeals (41 S. W. 833), and question certified.

T. J. Freeman, F. B. Dillard, and Head, Dillard & Muse, for appellant. Dudley & Moore, for appellee.

BROWN, J. The court of civil appeals for the Third supreme judicial district has certified the question hereinafter stated for our consideration. The court sets out in full the evidence of the plaintiff and his wife, from which we make the following statement as being sufficient upon which to predicate our answer: H. W. Armstrong resided, with his wife and family, in the city of Paris, Tex., prior to and on July 3, 1895, and on that day he applied to the agent of the appellant at Paris for a ticket for his wife to visit her mother, who lived in Oklahoma territory, her post office being Curtis. Neither Armstrong nor his wife knew whether Curtis was in Texas or near the line, but they knew that the mother lived in Oklahoma territory, and that the nearest railroad station was called "Tucker," but did not know on what road it was. The evidence showed that Tucker and Curtis were both stations in Oklahoma territory on the Atchison, Topeka & Santa Fé Railroad. The evidence of the plaintiff and his wife tended to prove the following facts, which, however, were in some material points disputed by the testimony of the defendant: When Armstrong called upon the agent of the Texas & Pacific Railroad Company, he stated to him, in substance, that his wife desired to visit her mother, who lived in Oklahoma territory; that her post office was Curtis, and the nearest railroad station was called "Tucker," but that he (Armstrong) did not know whether Curtis or Tucker was in Texas or in Oklahoma. He stated that his wife was not accustomed to traveling, that she would have her children with her, and he desired to get a ticket over the best and quickest route to the point nearest to where her mother lived. The agent of the railway company examined his maps, and stated to Armstrong that there was no such station as Tucker, or it was a flag station, and not marked on the map; but that Newlin, in Hall county, Tex., was the nearest station to Curtis. Newlin was a station on the Ft. Worth & Denver City Railroad, and was a considerable distance from where Mrs. Armstrong's mother resided. Some days after this, Armstrong, with his wife and children, went to the depot of the Texas & Pacific Railroad at Paris, Tex., and told the agent that he wanted a ticket for his wife, as he had before notified him, to visit her mother in Oklahoma territory, and the agent of the railway company issued and delivered to Armstrong, for his wife, a ticket over the Texas & Pacific Railroad to Whitesboro, Tex., thence over the Missouri, Kansas & Texas Railroad to Henrietta, Tex., thence over the Ft. Worth & Denver City Railroad to Newlin, Tex. The ticket should have been issued for a route over the same roads to Gainesville, Tex., thence north over the Gulf, Colorado & Santa Fé and the Atchison, Topeka & Santa Fé to Winfield, Kan., and thence westward over the Atchison,

Topeka & Santa Fé to the station known as "Tucker." Mrs. Armstrong, with her children, took the train at Paris, on the appellant's road, provided with lunch and money enough to carry her to the place of her destination, if she had been provided with a proper ticket, which place she would have reached on the next afternoon at 3 p. m. After passing Gainesville, and just before she reached the town of Henrietta, Mrs. Armstrong learned that her ticket was improperly issued to Newlin, and she stopped at Henrietta, where she remained from Tuesday afternoon until Sunday, during which time she succeeded in getting the rebate on the ticket not used over the Ft. Worth & Denver City Railroad, and some money from her husband. When she stopped at Henrietta, she had no money with which to pay her hotel bill, and was a stranger in the town, without any experience in traveling, and was compelled to ask a hotel man to keep her and her children until she could get money with which to pay her bill. She was greatly harassed, mortified, and annoyed by the situation, and did not know what to do to relieve herself of the embarrassment. Mrs. Armstrong finally resumed her trip, and made her visit. H. W. Armstrong brought suit in Lamar county against the Texas & Pacific Railway Company for damages occasioned to his wife by reason of the delay and vexation caused to her by the negligence of the agent of the railroad company in selling her the ticket by the wrong route. Among other things, the trial court charged the jury as follows: "If you find a verdict for the plaintiff, you will, in assessing his damages, consider any additional expenses necessarily incurred by plaintiff, and any mental pain, anxiety, or distress suffered by his wife which you may find from the evidence to have been the direct result of negligence on the part of the defendant in selling plaintiff a ticket to the wrong station, and only assess as actual damages such amount as will, in your judgment, reasonably compensate plaintiff therefor." The court of civil appeals has certified the following question: "Among other questions presented for decision, appellant has assigned as error that portion of the court's charge which allows the plaintiff to recover compensation for mental pain, anxiety, or distress suffered by his wife; and whether or not it was error to give this charge the court of civil appeals for the Third district certifies to the supreme court for decision. The pleadings presented this question."

The district court did not err in giving the charge set out above. If the mental pain, anxiety, and distress were caused proximately by the negligent act of the agent of the railway company, for which that company was liable, then the mental suffering, anxiety, and distress were proper elements of actual damages to be considered by the jury in arriving at the amount of their verdict. *Railway Co. v. Gilbert*, 64 Tex. 541; *Railway Co. v. Crispi*,

73 Tex. 236, 11 S. W. 187; *Railway Co. v. Terry*, 62 Tex. 380; *Railway Co. v. Kaiser*, 82 Tex. 144, 18 S. W. 305. We are not able to distinguish this case, upon principle, from the numerous cases decided by this court in which it has held mental anguish to be a proper subject of consideration in the assessment of damages under circumstances similar to those disclosed in the present case. The case of *Railway Co. v. Kaiser*, cited above, is especially similar to this case in its facts. We are not prepared to overrule these decisions.

LEARY et ux. v. PEOPLE'S BUILDING, LOAN & SAVING ASS'N.

(Supreme Court of Texas. June 12, 1899.)

BUILDING AND LOAN ASSOCIATIONS—LOANS TO MEMBERS—FORECLOSURE—CREDIT FOR VALUE OF STOCK—APPEAL—ISSUES OF FACT—JUDGMENT IN SUPREME COURT.

1. Where a trust deed given to a building and loan association to secure a loan on stock is not due by its terms, but the association, under a provision therein contained, elects to declare it due for default in payment of installments on the stock and interest and premiums, the debtor is entitled to credit for the actual value of his stock, regardless of whether the contract was usurious.

2. Evidence that a borrowing member of a building and loan association had paid \$480 as installments on his stock, but that the directors had declared that the stock was worth 23 per cent. less than its face value, raises an issue of fact as to the value of his stock, which will prevent the supreme court from entering judgment on reversal of a judgment of the court of appeals.

3. The supreme court cannot enter judgment upon a controverted issue of fact.

Error to court of civil appeals of Third supreme judicial district.

Suit by the People's Building, Loan & Saving Association against Dan T. Leary and wife. From a judgment of the court of civil appeals affirming a judgment for plaintiff (49 S. W. 632), defendants bring error. Reversed.

Hudgins & Estes, R. W. Rogers, Todd & Glass, and Dan T. Leary, for plaintiffs in error. Smelser & Mahaffey, for defendant in error.

BROWN, J. Daniel T. Leary borrowed from the loan association \$1,800, for which he executed his bond, joined by his wife, for \$4,000, dated February 28, 1894, payable to the said association, and subscribed for 20 shares of stock in that corporation, of the face value of \$100 per share. The bond recited that Leary, as a member and stockholder of the association, had received from it, under the articles of incorporation, an advance of \$100 per share on the value of 20 shares of stock, in anticipation of their par value at the time when they should mature, stating the terms as follows: "Now, the condition of this obligation is such that if the said above-bounden Daniel T. Leary, his heirs, executors, administrators, or assigns, shall well and truly pay or cause to be paid unto

the said People's Building, Loan & Saving Association, or its certain attorney, successors, or assigns, the just and full sum of \$2,000 on or before the maturity of the said shares, payable in the manner following,—that is to say, twenty dollars and no cents, monthly, as an installment on the said shares of stock, and eight dollars and thirty-three cents interest, and eight dollars and thirty-three cents premium on said advance of \$2,000 each and every month from the date thereof, for such term as will secure the said People's Building, Loan & Saving Association the payment of the full sum of \$100 on each and every one of the said twenty shares hereby secured to be paid, * * * this obligation shall be void." The contract stipulated that payments should commence on a certain date, and be paid monthly on the last Saturday of each month. Leary bound himself to pay the taxes on the property, and to insure the buildings thereon upon which the deed of trust was given to secure the payment of the money borrowed; and it was expressed that, in case Leary should be in default of payment of any of the sums mentioned in the bond for a period of three months, "the whole principal sum hereby secured to be paid, together with interest and premium hereon, shall become due and payable immediately thereafter, although the period above limited for payment thereof may not have expired, anything therein contained to the contrary notwithstanding." It also provided for a reasonable attorney's fee in case suit was brought to enforce its collection. The 20 shares of stock subscribed for by Leary were never delivered to him, but he at the same time transferred them to the loan company as collateral to secure the loan. Leary and wife executed and delivered to E. A. Walton, treasurer of the association, as trustee, a deed of trust upon certain lots in the city of Texarkana, Tex., to secure the sum advanced. The deed of trust contained the same provisions as those copied above from the contract, and it was agreed that, in case Leary should be in default of payment of any of the sums named for the period of three months, the trustee should be empowered to sell the property under the terms specified therein, and that the proceeds of such sale should be applied as follows: (1) To the payment of the costs and expenses of executing the trust; (2) to the payment to the association of \$100 per share for each of the shares of stock, all unpaid interest and premiums accrued thereon, and all moneys that Leary might owe the association on the shares of stock, all taxes and assessments and any sum of money that the association might have paid for Leary on account of his failure to keep the buildings insured, less "the actual value of said shares of stock at the time of sale." Leary paid up all dues and assessments against him, and on the 1st day of February, 1896, wrote a letter to the officers of the association, in which he expressed a desire to withdraw from it. In that letter

he used the following language: "I want to pay so much cash, and have you take my stock, and cancel the mortgage on my property. In other words, what will you accept in cash as a complete settlement now between us? I subscribed for the stock and borrowed the money with the full understanding that the amount I paid each month would pay me out at the end of five years." To this letter the association replied, offering to allow him a deduction of \$343.75 as the value of his stock. No objection was made to his withdrawing stock, but the controversy was over the sum to be allowed as a credit for the payments made on the stock. There was no proof of the value of the stock made by either party, except that Leary had paid in \$480 as installments on the stock, \$30 for expense fund, and \$10 fee for examination of title; and the association proved by one of its officers that it was a solvent concern, and had a surplus of \$201,000, but that the board of directors in 1895 had declared that the stock was worth 23 per cent. less than par, but there was no proof that they had taken any action upon the application of Leary in deciding what value should be placed upon his stock. Leary tendered to the agent and attorney of the association at Texarkana \$908.75 in full settlement of the debt. If, however, he is allowed \$480, the tender was not sufficient. He had paid as interest and premium upon the debt the sum of \$371.54, and, the contract being usurious, it is not denied that he was entitled to a credit for that sum. The contest is upon his right to be credited with the value of his stock in the association. In September, 1896, the association proceeded under the deed of trust to sell the property for the payment of the debt. Leary sued out a writ of injunction to prevent the sale, and the association pleaded in reconvention upon its bond, and asked for a foreclosure of its lien upon the lot. Upon a trial before the court the contract was held to be usurious. Leary was allowed a deduction of \$200, reserved in the making of the loan, and \$371.54 on account of interest and premiums paid, and judgment entered for \$1,428.46, foreclosing the lien of the deed of trust, denying to him a credit for amount paid on stock. The court of civil appeals for the Third supreme judicial district affirmed the judgment of the district court. The shares of stock subscribed for by Leary not having matured when the plea of reconvention was filed, the building and loan association was not entitled to enforce the collection of the whole amount of the debt, except by the terms of the deed of trust, by which Leary's failure for three months to make payment of installments upon the stock, interest, and premiums, and other charges which might accrue against him under the by-laws matured the whole debt, and the trustee was empowered to sell the land, paying to the association out of the proceeds its debt and other charges, less the actual value of the stock at the time of the sale. The as-

sociation could not avail itself of the terms that matured the debt, and enforce its collection, without giving credit for the actual value of the stock. *Association v. Griffin*, 90 Tex. 486, 39 S. W. 656; *Bringinghurst v. Association* (Tex. Civ. App.) 47 S. W. 831. Leary's right to have the value of the stock credited upon the debt did not depend upon the intent to evade the usury laws of the state, but rested upon the contract itself. It was admitted that Leary paid on the stock the sum of \$480, but he was entitled to profits and liable to deductions for losses, and the stock might have been worth more or less than that sum at the time the land was to be sold. The amount paid was evidence of the value of the shares, and, if there had been no other proof of value, would be sufficient to establish the fact that the stock was worth the amount of the payments made upon it; but it was proved by the defendant below, without objection, that in 1895 the directors of the building association had determined that the stock was worth 23 per cent. less than its face value. That evidence is sufficient to make an issue of fact as to the value of the stock at the time the building association sought to make sale of it, which issue was not decided by the trial court nor by the court of civil appeals, and this court cannot enter judgment upon a controverted issue of fact. The district court erred in denying to Leary a credit for the actual value of his stock, for which error the judgments of the district court and of the court of civil appeals are reversed, and the cause is remanded.

COTTON et al. v. RAND.

(Supreme Court of Texas. June 19, 1899.)

AGENCY—TERMINATION—CONSPIRACY—COMPENSATION—LIMITATIONS—NEW CAUSE OF ACTION.

1. Where an agent, acting for the several owners of a suburban addition, conspired with some of them to sue the others for an alleged indebtedness to him, agreeing to divide with them all recovered over a certain amount, this was a termination of the agency, though nothing was done pursuant to the conspiracy.

2. It being provided that an agent should receive his compensation from sales of lots as made from time to time, and not at the termination of the agency, he was entitled to recover the compensation earned when the agency was forfeited.

3. An agent was employed for one year at a stated salary, to sell lots in a suburban addition. The agency was continued thereafter, but the agent was to be paid his salary out of the property when sold, or as sales should be made from time to time. *Held*, that the salary was payable annually, and limitation began to run against each year's salary at the end of that year.

4. An agent, acting in two distinct enterprises in which his principals were not the same, sued for his salary as agent for both, but afterwards, in an amendment, averred that it was understood "there was no * * * need for an agent for" one of the enterprises. *Held*, that this stated a different cause of action, so that limitations continued to run until the amendment was filed.

Error to court of civil appeals of Fourth supreme judicial district.

Action by Noyes Rand against Frank B. Cotton and others. From a judgment of the court of civil appeals affirming a judgment for plaintiff (51 S. W. 55), defendants bring error. Reversed.

Millard Patterson and W. B. Merchant, for plaintiffs in error. Leigh Clark, W. M. Coldwell, and W. B. Brack, for defendant in error.

GAINES, C. J. The defendant in error, Noyes Rand, brought this suit against plaintiffs in error, Frank B. Cotton and others, on the 12th day of September, 1893. He obtained a judgment, which was reversed by the court of civil appeals. *Cotton v. Rand*, 29 S. W. 682. The cause was again tried upon a fourth amended original petition, filed May 4, 1898, and again resulted in a judgment for the plaintiff. That judgment having been affirmed by the court of civil appeals (51 S. W. 55), this writ of error has been sued out to reverse it.

The suit was brought to recover a salary alleged to have been earned by the plaintiff as agent under a contract made by F. B. Cotton, for himself and others, and also for certain expenditures claimed to have been made by plaintiff as such agent. The alleged agency grew out of certain joint ventures of the parties to this suit and others in certain mineral and suburban lands. The first venture had its origin in a written agreement entered into in April, 1880, by the plaintiff, Noyes Rand, Francis W. Abney, Richard W. Dorphley, P. B. Delaney, and Clarence P. Ehrman, as parties of the first part, and by defendant Cotton, for himself and others (whose names are not disclosed in the writing), as parties of the second part. The stipulations of that agreement were as follows: "First. That all options now held by said parties of the first part, or any of them, for the purchase of mineral lands in the state of Texas, as well as all options for such purchases as they may hereafter secure, and any and all such purchases as they may hereafter make, and all mineral lands already located, or that may hereafter be located, by them in the state of Texas, shall be for the joint benefit of the parties to this agreement. In the proportion of one-half interest to the parties of the second part. Second. That said parties of the second part will furnish the necessary amount of money, not exceeding thirty thousand (\$30,000) dollars, to pay the cost of such lands as may be selected by the parties of the first part out of any such as are now controlled, or as may be secured hereafter, and that they will send a representative to such point as may be designated by parties of the first part to examine said lands, as soon as so required to do, such representative to be authorized to pay for same as soon as he shall examine and approve of them and the proper deeds and titles shall be furnished; said deeds to be made in the name of Frank B. Cotton and Edwin B. Buckingham, as trustees for the respective parties to

this agreement. Third. That parties of the second part hereto will pay to the parties of the first part the sum of seventeen hundred and twenty-three (\$1,723) dollars, to reimburse outlays already incurred by them, including the cost of about six tons ore now in transit from St. Louis, Mo., to Philadelphia, Pa., which ore shall thereupon become the property of the parties hereto for their joint benefit, such payment to be made upon the execution of this agreement and the delivery of said ore at such point as may be indicated by the parties of the second part hereto. Fourth. That the parties of the second part will advance the sum of not exceeding thirty-five hundred (\$3,500) dollars to meet the cost of outfit and the necessary expenses of their aforesaid representative, and of such of the parties of the first part as may go to Texas to attend to this business, and to pay them for their service in such employment, which advance shall be reimbursed out of the future earnings of this enterprise. Fifth. That parties of the second part will furnish such further amount of money as the parties hereto may decide as needed for developing the lands under this agreement, and for carrying out the plans to be hereafter agreed upon by said parties hereto, the entire amount so furnished to be reimbursed out of the net earnings of the enterprise before any dividends shall be declared on the capital stock of the company to be formed as hereinafter provided. Sixth. That said parties of the first part agree that Noyes Rand and Francis W. Abney will personally go to Texas at once, and attend to the purchase of the land as aforesaid, and to carry out the plans of the parties hereto, for the space of three months from date of this agreement, if necessary, receiving, as compensation for their service while so employed, two hundred (\$200) dollars each per month, besides the cost of their outfit and necessary traveling and other expenses, and will also secure the services of Clarence P. Ehrman, at the rate of one hundred (\$100) dollars per month and expenses, to assist them, such payments to be met out of the advance hereinbefore provided to be made by the parties of the second part. Seventh. That as soon as the parties of the first part shall have secured such lands as they may decide upon, and the deeds therefor shall have been executed and received, a meeting of all the parties hereto, in person or by proxy, shall be held, in such place as may be mutually agreed upon, and a company organized under a charter to be obtained under the laws of Texas, or of such other state as may be decided upon, with such an amount of capital stock and of such par value per share as the parties hereto may determine, and directors and officers shall be elected to manage the business of said company, each of the respective parties hereto having an equal representation in the board of directors, but the officers to be of the party of the second part, or such as may be acceptable to them of

the parties of the first part. Thereupon the titles to all lands that may have been purchased shall be properly vested in said company in due legal form, and full-paid stock of the company shall thereupon be issued to the respective parties hereto in the proportion of one-half of the entire capital stock to the parties of the first part, or in such other divisions as the respective parties may agree among themselves. Eighth. That all lands that may be located or patented under this agreement shall be assigned to the hereinbefore named trustees by the individual in whose name they are to be located, under a written agreement to be executed at the time of authorization of such location in his name. Ninth. It is further agreed that none of the individual members of the respective parties hereto shall directly or indirectly operate in mineral lands or mineral products of the state of Texas, within the district which this agreement is intended to cover, unless by consent of the other party hereto."

The second contract was entered into December, 1880, by F. B. Cotton of the first part, and Rand and Dorphley of the second part. Its stipulations are as follows: "That all purchases of land, leases, mining rights, and interests or real estate, in general, west of the Mississippi river (not embraced in a certain contract between the parties hereto and their associates, bearing date April 17, 1880), which may be made after November 19, 1880, by either or any of the parties of the second part hereto or their associates, shall be for the joint account and interest of the parties hereto and their associates, and no others, during the continuation of this agreement, or any contract that may be executed in accordance with it, said interest to be apportioned as follows: Two-thirds of all profits arising from such purchases to accrue to Frank B. Cotton and his associates; one-third, to Noyes Rand, R. W. Dorphley, and their associates. It is agreed and understood, as the conditions upon which this agreement is based, that the necessary funds for making the aforesaid purchases, for meeting the necessary expenses, and for such improvement or developments as may be agreed upon between the parties hereto, are to be furnished or secured by said Frank B. Cotton and his associates; that said Noyes Rand and R. W. Dorphley will attend themselves, or through competent representatives, to securing, purchasing, and getting in proper condition for development, improvement, or sale, as may be agreed upon, any purchase that may be made under this agreement; that the party of the first part and his associates shall not be held to any purchases of leases unless approved by him and his associates, or for a greater sum than \$2,000, for expenses, unless expressly authorized by him or them; and that the titles to estates, leases, mining rights, and interests shall be vested in Frank B. Cotton, as trustee, for the purposes hereof." This contract

is signed by Cotton, for self and associates, and by Rand and Dorphley.

Under the first contract, more than 87 sections of mineral lands were acquired, and were conveyed, as provided therein, to F. B. Cotton and Edwin B. Buckingham, as trustees. Under the second contract, there was acquired for the parties thereto a tract of 550 acres of land lying adjacent to the city of El Paso, which is known as the "Cotton Addition" to that city. The title to this tract seems to have been taken in the name of Cotton, as trustee. Most of the parties to the venture in the mineral lands were also interested in the purchase and sale of the Cotton addition, but there were some parties interested in each who had no interest in the other enterprise.

About the month of August, 1881, Cotton, through a correspondence by mail and telegraph, entered into a contract with Rand, by which he engaged Rand to take the management, as agent, of the mineral lands and the Cotton addition for the term of one year, and, in consideration of his services, agreed, among other things, to pay him the sum of \$2,000. The plaintiff, Rand, claims that, before the expiration of the year, the contract, with some modifications, was renewed by a verbal agreement between himself and Cotton. In his original petition filed in this case, September 12, 1893, the terms of this latter agreement are alleged as follows: "That about August, 1882, F. B. Cotton notified him that he was financially embarrassed, and would not be able to furnish the necessary means to carry on the operations at El Paso, and would not be able to advance money, etc.; and requested plaintiff that he (plaintiff) should continue as agent at the aforesaid salary, and that plaintiff should raise the necessary funds to carry on the business by sales of property out of the Cotton addition, and, if necessary, by borrowing money."

On July 10, 1896, the plaintiff filed an amended petition, in which the averments as to the agreement are as follows: "That Frank B. Cotton, acting as trustee as aforesaid, and as agent for all persons interested in said two contracts of April and December, 1880, represented to plaintiff that he was financially embarrassed, and notified plaintiff that he would not be able to furnish the necessary means to carry on the operations at El Paso, and would not be able for a time to advance the sums of money that he had promised to advance, and requested plaintiff that he (plaintiff) should continue to act as agent at the aforesaid salary, and that plaintiff should raise the necessary funds, and agreed that the necessary funds should be raised, to carry on the business, by sales of property out of the Cotton addition, and, if necessary, by borrowing money, and agreed that plaintiff should be paid his salary out of said property when sold, or as sales of the same should be made from time to time."

The plaintiff filed a second amended petition on the 23d day of December, 1897, in which the terms of the verbal contract are alleged as follows: "That about August, 1882, the said Frank B. Cotton, acting as trustee as aforesaid, and as agent for all persons interested in said two contracts, represented to plaintiff that he (Cotton) was financially embarrassed, and notified this plaintiff that he would not be able to furnish the necessary means to carry on the operations at El Paso, as he had theretofore done, and would not be able for a time to advance the sums of money that he had promised to advance by the terms of said contract, and then and there requested of plaintiff that he (plaintiff) should continue to act as agent at the aforesaid salary, but that plaintiff should raise the necessary funds, and agreed that plaintiff should be paid his salary out of said property when sold, or as sales of the same should be made from time to time; and further says that in August, 1882, it was understood and agreed, by and between plaintiff and said Cotton, as trustee, that his claim for salary which had then accrued, or which might afterwards accrue, should be payable out of the funds derived from the disposition of lots and blocks or property belonging to, or connected with, said Cotton addition."

In an amendment filed April 9, 1898, the terms of the agreement are stated in the following language: "That about August, 1882, the said Frank B. Cotton, acting as trustee as aforesaid, and as agent for all parties interested in said two contracts, represented to plaintiff that he (Frank B. Cotton) was financially embarrassed; that he could obtain no money from his associates at that time, and would not be able to do so until the patents were obtained for said mineral lands, and notified this plaintiff that he would not be able to furnish the necessary means to carry on the operations at El Paso as he had theretofore done, and would not be able for a time to advance the sums of money that he had promised to advance by the terms of said contract, and then and there requested of plaintiff, as trustee and agent for all the parties thereto, that plaintiff should continue to act as agent at the aforesaid salary, and that plaintiff should raise the necessary funds, and agreed that the necessary funds should be raised to carry on the business by sales of property out of said Cotton addition, and, if necessary, by borrowing money, and agreed that plaintiff should be paid his salary out of said property when sold or as sales of the same should be made from time to time."

In the amended petition, upon which the case was tried, the terms of the contract are alleged as follows: "Plaintiff further says that about August, 1882, the said Frank B. Cotton, acting as trustee and agent as aforesaid for all the parties interested in said two contracts of April 17, 1880, and December 21,

1880, and so represented himself to be such trustee and agent, except for plaintiff, represented to plaintiff that he (Frank B. Cotton) was financially embarrassed, that he could obtain no money from his associates at that time, and informed and notified plaintiff that he would not be able to furnish the necessary means to carry on the operations at El Paso, as he had theretofore done, and would not be able, for a time at least, to advance the sums of money he had promised to advance by the terms of said contract, and then and there requested of plaintiff, as trustee and agent for his said associates, as well as for all the parties as aforesaid, that he (plaintiff) should continue to act as agent at the aforesaid salary, but that plaintiff should raise the necessary funds, and agreed that the necessary funds should be raised to carry on the business by sales of property out of said Cotton addition, and, if necessary, by borrowing money, and agreed that plaintiff should be paid his salary, then accrued or which might thereafter accrue, out of said property when sold, or as sales thereof should be made from time to time, it being understood that there was no, or but nominal, need for an agent for said mineral lands after the first year as aforesaid, to all of which plaintiff assented."

The defendants Cotton, Hunt, and Millard Patterson, as administrator of the estate of Samuel Colt, answering, denied the making of the verbal contract, as alleged; pleaded the statutes of limitation; alleged that, if the contract was ever made, the plaintiff had by his misconduct precluded himself from recovering anything under it; and also pleaded, in effect, in reconviction for advances made to Rand, and for money received by him as agent from the proceeds of the enterprise.

The contract between Cotton, as trustee, and Rand, for the latter's services as agent for the mineral lands and the Cotton addition for one year, was proved. It was also proved that Rand continued to act as agent from the expiration of that year until September, 1893. As to the terms of the contract under which Rand served, there was a sharp conflict in the testimony. Rand testified to the contract as alleged in his last petition, while Cotton deposed that, about the time of the expiration of the first contract, he engaged Rand to continue as agent for certain considerations not necessary to mention in this connection, but notified him that he would pay no salary.

It was also shown by the evidence that in the month of March, 1892, the plaintiff, Rand, entered into two contracts with reference to the mineral lands and the Cotton addition, of which the following are copies:

"Memorandum of an agreement made and entered into this eighth day of March, A. D. 1892, by and between Noyes Rand, of El Paso, Texas, as party of the first part, and Francis W. Abney, of Charleston, West Virginia, and Samuel Colt, of Washington, D. C., for themselves and as assignees of Edwin B.

Buckingham, George H. Cotton, and Walter G. Cotton, parties of the second part, witnesseth: Whereas, all the parties hereto, being interested in certain properties in the state of Texas, acquired and held under the provisions of two certain contracts, one dated April 17, 1880, and signed by Noyes Rand, Francis W. Abney, Richard W. Dorphley, P. B. Delaney, by Richard W. Dorphley, Clarence P. Ehrman, by Noyes Rand, on the one part, and by Frank B. Cotton, for self and associates, on the other part, and the other dated December 21, 1880, and signed by Frank B. Cotton, for self and associates, on the one part, and Richard W. Dorphley, for self and Noyes Rand, on the other part: Now, therefore, the parties hereto hereby agree to pool their interests, each party to have an equal share of all the interests they now hold, or may hereafter obtain, in the properties now held under the two contracts hereinbefore mentioned, and all the parties hereto join together for mutual benefit and protection, and for this purpose each party hereto binds himself to the other to adopt such course of action in regard to the properties in question as may be mutually agreed upon, and such as will be for the best interests of all as well as the properties. For this purpose, it is agreed that said Noyes Rand, party of the first part, shall act as the resident partner and agent for all the parties in interest to the extent of the conditions to be hereafter agreed upon, and he, the said Rand, shall receive as compensation therefor the sum of twelve hundred dollars per annum, payable in monthly installments of one hundred dollars each, together with house rent free of charge; and the parties of the second part hereto hereby agree and bind themselves to pay the same, or to see that the same is paid, until such time as the revenue from the properties shall of itself provide for payment of same, and this provision to remain in force until otherwise arranged by mutual consent or agreement. It is further agreed, by and between the parties hereto, that, as soon as it can be possibly arranged, the possessory control of all the properties held under the two contracts hereinbefore mentioned shall be placed in Francis W. Abney and Noyes Rand, as trustees for the parties hereto, who shall pass title to same to all vendees of any portion or all of same, as the case may be; that the property shall be divided off into blocks and lots, and prices fixed upon same from time to time, a schedule of such to be given each party in interest, and, in case of sales, it shall require the signature of both trustees in order to pass title, and in case of any sale at figures at less than the schedule price the consent of all parties hereto shall be necessary; monthly statements of all receipts and disbursements to be made by the trustees. For the purpose of this agreement, Francis W. Abney shall act as treasurer or custodian of all moneys arising from this venture, and disburse the same according to the interests of

the parties hereto, as may be agreed upon from time to time. It is understood and agreed to, between the parties hereto, that all moneys necessary for legitimate expenses and taxes, accrued and to accrue, over and above actual receipts from the properties, shall be furnished by the party of the second part hereto, but that the same shall be considered in the nature of an advance, and shall be returned to the parties of the second part out of the first proceeds from the properties. It is further understood that, in case this agreement is fully carried out, the said Rand agrees to waive his homestead right to his present place of residence in El Paso, Texas, except in so far as the same may be necessary to protect his two daughters, Ellie Rand Thomas and Florrie Rand Dowley, in and to the three lots he has heretofore given to each, within the boundary of said homestead."

"An agreement made and entered into this twenty-first day of March, 1892, between Noyes Rand, of the city of El Paso, Texas, of the first part, and Francis W. Abney, of Charleston, W. Va., and Samuel Colt, of Washington, D. C., parties of the second part: Whereas, said Abney and Colt have agreed between themselves to purchase on their joint account the interests of Edwin B. Buckingham, George H. Cotton, and Walter G. Cotton, of Boston, Mass., in and to certain city, mineral, and other lands situate and in the city of El Paso and in other parts of El Paso county, Texas, acquired under two certain contracts between Frank B. Cotton and others, one dated April 17, 1880, the other December 21, 1880, and in pursuance of said agreement the interests of said Buckingham, Walter G. Cotton, and George H. Cotton have been purchased by said Colt for himself and said Abney; and whereas, the interests held by said Buckingham and said Cottons have been so managed or mismanaged as to be prejudicial to the interests of said Noyes Rand; and whereas, said Abney and Colt purpose furnishing sufficient money to put said lands in a marketable condition, and to protect the same from loss by forfeiture for nonpayment of taxes, and in this way advance the interests of said Rand therein; and whereas, said Rand claims that said properties are liable to him to the extent of about \$30,000, including interest to date, for personal services rendered and money advanced concerning same: Now, therefore, if the said Abney and Colt, or either of them, shall advance money sufficient for the objects hereinbefore stated, and the further consideration of the benefits to be derived by the said Rand from this course of action on the part of said Abney and Colt, the said Rand hereby agrees and binds himself not to claim, as against the interests of said Abney and Colt heretofore owned by them, or those which they may acquire from said Buckingham and Cottons, a greater sum than fifteen thousand (\$15,000) dollars. And said Rand further agrees and binds himself, his heirs and personal representatives, upon re-

quest of said Abney and Colt, their representatives, executors, or assigns, to institute such legal proceedings in the courts of Texas as may be deemed necessary and proper to recover said claim of about \$30,000; and that if said proceedings are successful, and a greater amount than \$15,000 is recovered by said Rand, he hereby agrees, in consideration of said benefits to him accruing by the course pursued by said Abney and Colt, to divide equally, between himself and said Abney and Colt, one-third each, any excess that may be so recovered above the sum of \$15,000, as of the date of said recovery. And it is further agreed that if said Rand recovers a judgment or decree against said properties, or any of them, in such proceedings, that he will assign and transfer the same to said Abney and Colt, to be used by them in the purchase of said property ordered to be sold to satisfy the same, if they become the purchasers thereof. And it is understood and agreed by the parties hereto that any judgment or decree obtained by said Rand on said claim against any of said lands shall be satisfied after the sales of or from said properties, and, if said Abney and Colt use the same in any purchase they may make of said lands, that said Rand will wait until any advance payments of said Abney and Colt on such purchase are satisfied out of the resale of said lands before he shall be paid his said judgment or decree, and from said resales, but said judgment or decree to the amount of \$15,000, or whatever less sum it may be, shall bear legal interest from date of said judgment or decree until the same is fully satisfied. It is further agreed that the expense of the legal proceedings that may be had under the provisions of this agreement shall be advanced by the said Abney and Colt, and such advance shall come out of the first revenues in any manner derived from said properties."

These contracts speak for themselves. By them, Rand not only contracted for and accepted an agency inconsistent with his former employment, but also bound himself to a course of conduct antagonistic to the interests of all the shareholders in the two enterprises, save the parties to these last contracts themselves. We are clearly of the opinion that such a breach of duty on part of an agent, unless condoned by the principal with a full knowledge of the facts, puts an end *ipso facto* to the agency. The law requires fidelity of agents, and holds them no longer capable of representing their principals, when, without the knowledge of the latter, they acquire an interest in the matter of the agency adverse to that of their employers. It will not do to say, as has been insisted in this case, that the plaintiff did nothing under the contract. A clerk who had conspired to rob his master's till might as well urge, in order to defeat the consequences of his misconduct, that for the lack of opportunity he had been unable to execute his design. Besides, this suit itself seems the initial step in the prosecution of the

scheme evidenced by the contracts in question.

The result being, as we think, that the agreements between Rand, Colt, and Abney terminated Rand's agency, it becomes important to determine what its effect is upon the rights of the parties to this suit. The plaintiffs in error claim that, because the agency was terminated by Rand's unfaithfulness and gross misconduct, he lost all right whatever to any compensation as agent. There is a class of cases where such is the result. For example, an agent employed to sell, who makes a sale to a company in which he has an interest, his principal not knowing of that interest, cannot claim commissions for the sale, although the sale be in other respects fair and for an adequate price. *Salomons v. Pender*, 3 Hurl. & C. 639. But there is another class of cases in which it is held that, although the agent be discharged for good cause, he may recover for his past services either a proportionate part of his stipulated salary, or a compensation for a quantum meruit not exceeding that sum. *Massey v. Taylor*, 5 Cold. 447; *Lawrence v. Gullifer*, 38 Me. 532; *Kessee v. Mayfield*, 14 La. Ann. 90. The rule is a just one, and should apply whenever the service is of a uniform character, and the salary may be fairly proportioned by the time of actual service. There may be other cases in which, for example, the parties contemplate that the agent shall perform his entire work before receiving any compensation, and in which he forfeits his agency before the work is completed. In such, probably, a different rule would apply, and the agent, especially in case of fraud or bad faith, would be allowed to recover nothing. *Murray v. Beard*, 102 N. Y. 505, 7 N. E. 553; *Sumner v. Reicheniker*, 9 Kan. 320.

It seems to be the theory of the plaintiff's case that, as long as the agency continued, the salary did not fall due until sales of the property were made sufficient to pay it, after deducting necessary expenses. This contention seems to be necessary in order to meet the plea of the statute of limitations. If it was contemplated by the contract that the agency would not be fully accomplished until the lands were sold, or, in other words, that the sale of the lands was the ultimate end of the agency, we would have difficulty in holding that Rand did not forfeit all right to compensation by entering into the contracts with Colt and Abney. But we hardly think that the agreement between him and Cotton, as alleged by him in his petition and as sworn to in his testimony, should receive that construction. It would seem to call for a continuation of the former salary without any condition, save that Rand himself was to raise the money for its payment, either by sales of the property or by borrowing money upon the credit of the enterprise, and that Cotton should not be looked to to advance it. Our conclusion upon this question is that Rand, by his contracts with Colt and Abney,

did not forfeit his right to compensation for his previous services.

This brings us to the question whether the plaintiff's action or any part thereof was barred by the statute of limitations. If the salary became due unconditionally at the end of each year, then so much of it as accrued more than two years before the filing of the petition was, in any event, barred by the statute. The first contract was for an employment for one year, and contained no stipulation for its continuation beyond that period. If, by the verbal agreement, it had been continued for an indefinite period without any modification of the original, then, as we think, the salary would have been payable annually. *Rex v. Macclesfield*, 3 Term R. 76; *Davis v. Gorton*, 16 N. Y. 255; *In Re Gardner*, 103 N. Y. 533, 9 N. E. 306. The terms of the contract, however, were, according to the allegations of the petition and the testimony of the plaintiff, in some respect modified. But the question is, were they modified with respect to the stipulation that the salary was an annual salary, and was payable at the end of the year of service? We think not. Neither in his original petition nor in either of his amendments is it alleged that the payment was not to be made at the end of each year. A stipulation for an annual salary, nothing being said as to the time of its payment, implies that it is to become due at the end of the term of service. The theory of the plaintiff seems to be that his salary was not to fall due until a sufficiency of the lands of the Cotton addition were sold to pay that and other necessary expenses. We are of opinion that the allegations as to the terms of the contract in the amended petition upon which the case was tried do not sustain that construction. Very clearly, according to those allegations, Rand was not entitled to look to Cotton for the payment for his services; but it was agreed that the salary should be paid from the sales of the property or by borrowing money, and that, when sales were made, the plaintiff should be paid from their proceeds as they should accrue from time to time. There is nothing in this from which it is to be implied that the salary was not to fall due at the end of each year. It is certain that it is not distinctly averred that in any case the plaintiff's right to demand his salary for the year was to be postponed until the Cotton addition should be sold, though the language employed may possibly admit of that construction. If it were a fact that, upon the happening of any event, the payment of the salary was not to fall due until the entire sale of the property or of a sufficiency of it to pay the salary and other expenses, no reason is seen why it was not expressly alleged. In such a case, any doubt arising upon the language of the pleading should be resolved against the pleader. The terms of the contract, as specified in the allegations in question, stipulate as to the manner or source of

payment, but not as to time when the compensation for services should mature. We recognize the difficulty of the question, but our conclusion upon the point is that, according to the allegations of his petition, the plaintiff, at the end of each year, was entitled to sue for and recover his salary. It results that, in our opinion, the plaintiff could, in no event, recover, except for the salary for the two years next before his suit was brought. The question then arises, could he, under the circumstances of this case, recover even for that period? The solution of this question depends upon the further inquiry whether the amended petition upon which the cause was tried sets up the same cause of action as the original petition. According to the rule which was applied in the case of *Railway Co. v. Scott*, 75 Tex. 84, 12 S. W. 995, if the contract alleged in either of the amended petitions is different in its material terms from that averred in the original, such amendment states a new cause of action, as to which the operation of the statute is not suspended until such amended petition was filed. The contract sued upon is stated in each of the amendments in somewhat different language from that employed in the original, but it may be doubted whether either of them, except the last, states a contract different in any essential particular from that first alleged. As to the last, however, we are clearly of opinion that it contains an averment of a stipulation not inserted in the allegations of the terms of the contract as they appear in any of the former petitions, and that the stipulation so averred changes the contract in a most important particular. The additional averment referred to is as follows: "It being understood that there was no, or but nominal, need for an agent for said mineral lands after the first year as aforesaid, to all of which plaintiff assented." Now, it is to be remembered that Cotton was trustee both of the mineral lands and of the Cotton addition, and, under the first contract entered into between him and Rand, the latter was employed for the term of one year to act as agent of both enterprises. It is to be presumed that the language just quoted was inserted in the last amended petition for a purpose, and we think that purpose was to aver, in effect, that while, under the original contract, the agency extended to both enterprises, under the new contract the real substantial agency was to extend to the Cotton addition only, and such, we think, is the effect of the stipulation as averred. The two enterprises were distinct, and the parties at interest in the one were not all interested in the other, and vice versa. Therefore a contract to act as agent of both is quite different from one to act as agent for but one, which the stipulation, as averred, means, if it means anything. We conclude that the amended petition upon which the case was tried averred quite a different contract from that averred in the original petition, or in any one of the

previous amendments thereto, and that, therefore, the statute of limitations, which was set in operation by the contracts entered into by the plaintiff with Colt and Abney in March, 1892, continued to run until the filing of that last amendment, in May, 1898. For the error of the trial court in refusing to instruct the jury that the action was barred, the judgments of that court and of the court of civil appeals are reversed, and the cause remanded.

RICE et al. v. WARD et al.

(Supreme Court of Texas. June 22, 1899.)

LIMITATION OF ACTIONS—IGNORANCE OF CAUSE OF ACTION—WHEN IMPUTABLE TO HEIRS.

The knowledge of the ancestor that a deed executed by him, absolute in form, was in fact a mortgage, is not imputable to his heirs or devisees, so as to set limitations running against them before actual knowledge on their part of the true nature of the deed.

Certified questions from court of civil appeals of Third supreme judicial district.

Action by John Ward and others against William Rice and others. From a decree for complainants, defendants appealed to the court of civil appeals, which certified questions to the supreme court. Decided in favor of complainants.

Finks & Gordon and L. W. Goodrich, for appellants. Geo. Clark, Z. I. Harlan, Rice & Bartlett, and Sam R. Scott, for appellees.

BROWN, J. The court of civil appeals for the Third supreme judicial district has certified to this court the following statement and question: "This is a suit on appeal now pending in the court of civil appeals of the Third supreme judicial district of Texas. The action is one by the appellees, as the heirs at law and as legatees and devisees under the will of S. S. Ward, deceased, against the appellants, for a decree declaring a general warranty deed absolute in form, executed by S. S. Ward to William Rice, of date March 19, 1868, to be in fact a mortgage, and to recover from the appellants the land described in that instrument. In order to a correct understanding of the question hereinafter certified, the court of civil appeals finds the following facts: That on the 19th of March, 1868, S. S. Ward executed and delivered to appellant William Rice the deed in question, which, upon its face, conveys the land in controversy,—1,280 acres located in Falls county, Texas. At the time of the execution of the deed, S. S. Ward was indebted to William M. Rice & Co., and the deed was in fact, as between the parties thereto, intended as a mortgage to secure a debt of \$600 due the appellants. There are no words of defeasance upon the face of the deed, nor anything recited therein indicating that it was intended as a mortgage; but there is evidence in the record which warrants the

conclusion that it was in reality a mortgage to secure the \$600 indebtedness. S. S. Ward died on the 5th day of May, 1873, and at the time of his death the debt secured by the instrument in question had not been paid off or discharged, and up to the time of his death there was no conduct of the appellants which amounted to a repudiation of their relationship as mortgagees. This suit was instituted on the 19th of June, 1895, and the appellees did not, before January of that year, become aware of the fact that the deed in question was a mortgage. They had no knowledge or information, before January of 1895, that the deed in question was other than its terms imported. Ward, before his death, had not informed them that the deed was a mortgage, nor did the appellants furnish them any information upon that subject; but there was conduct of the appellants, after the death of Ward, of a character which had a tendency to lead the appellees to believe that the instrument was in reality an absolute deed and conveyance of the land, and the facts in the record warrant the conclusion that from the time of the death of S. S. Ward to January, 1895, nothing occurred of a nature calculated to excite any inquiry upon the part of the appellees in order to ascertain that the deed was a mortgage. The trial court, in effect, submitted to the jury the question of fact whether the plaintiffs became aware of their rights, or might, by the exercise of diligence, have discovered such rights. And, further, in order that the repudiation of the trust on the part of William Rice, if any existed, should affect the plaintiffs, it would be necessary for the plaintiffs to be aware of the trust relation, or be chargeable with such notice. With this statement and findings, the court of civil appeals of the Third supreme judicial district of Texas certifies to the supreme court of Texas the following question, which arises from the record in this case: Was the knowledge possessed by S. S. Ward that the deed was really intended as a mortgage imputed to the appellees, who hold under him as his heirs or as legatees and devisees under his will? This question is important because the appellants have pleaded limitation and stale demand, and assert the proposition that the knowledge possessed by Ward is imputable to the plaintiffs. And, in this connection, it is well to state that there is evidence of conduct upon the part of the appellants, shortly after the death of Ward, of a nature tending to show a repudiation of their relationship as mortgagees." We answer the question in the negative. If, after the death of S. S. Ward, Rice did acts which would have amounted to a repudiation of the trust relation, if the heirs, devisees, or legatees had known of its existence, the fact that Ward, the ancestor, knew that the deed, which was absolute in form, was in fact a mortgage, would not put the statute of limitations in operation against the heirs, who were in fact ignorant of the trust which had been re-

posed in Rice by their father. *Chalmer v. Bradley*, 1 Jac. & W. 51; *Bennett v. Colley*, 2 Mylne & K. 225. In the case of *Chalmer v. Bradley*, above cited, the testator, by his will, created in his executors a trust in favor of his heirs. The executors repudiated the trust, and applied the property to a different use, by which one of them became the owner of it. Forty-five years after the act of repudiation, some of the heirs of the testator brought suit to enforce the trust, and to recover the property, alleging that they were ignorant of its existence. The question was whether the plaintiffs were barred of their action by the lapse of time, and the chancellor caused inquiry to be made as to whether or not they knew of the provisions of the will which created the trust in their favor. The question certified in this case was involved in the decision of that, although it was not discussed. In that case the trust was created by the ancestor by will, of which the heirs were ignorant. In this case the trust was created by parol agreement, of which the heirs were ignorant. In both cases the acts of the trustees were consistent with the rights of the heirs as known to them; but in both cases the acts were inconsistent with the rights of the heirs, as known to the ancestor in his lifetime. If the knowledge of the ancestor that the trust was created is imputable to heirs, then, in the case of *Chalmer v. Bradley*, the court did a useless thing when it ordered inquiry into the fact of actual knowledge on the part of the heirs. Before the court would have made such an order, it must have decided that the knowledge of the testator did affect the heir. That case is directly in point, and supports our conclusion.

The reason that the statute of limitations begins to run against a cestui que trust when the trustee repudiates the trust, and the act of repudiation is known to the beneficiary, is that the latter is thereby notified that the trustee no longer holds the property for him, and, if he claims the existence of the trust relation, it becomes his duty to assert his right with reasonable diligence; that is, within the time prescribed by law for prosecuting such suits, otherwise his claim would be barred by the statute of limitations. If, however, the act of the trustee is not inconsistent with any right of the beneficiary which is known to the latter, then there is no cause for his bringing his suit, there being no violation of any known right. If the heirs of Ward knew that Rice held the property as mortgagee, and Rice so used it as to show to them that he claimed it as his own, then it became their duty to assert their right within the time prescribed by the statute. If, however, the heirs did not know of the existence of the trust, how could it be possible that they would sue Rice for using property as his own which appeared to them to belong to him? The knowledge of their father could furnish no reason why they should sue. Acquiescence in the acts of the trustee cannot be

predicated upon the knowledge of one who is dead at the time the acts are done, and which knowledge was not communicated to those who inherited his rights. It is the duty of one who holds property in trust for another to execute the trust, and not to conceal either its existence or any material fact connected with it. It comes with bad grace from such a one to say to the heir, "Your father trusted me, which confidence I have concealed from you and violated so long that the trust fund has become mine,—the reward of my fraudulent concealment." If the doctrine contended for by the appellant be maintained, then every minor whose parent creates such a trust, and dies without communicating the fact to his heir, can be defrauded of the right by the trustee using the property as his own, and thus setting the statute of limitations in motion against his cestui que trust, who was ignorant of the relation and of his rights. If Ward, in his lifetime, had created a nuisance upon the land in question for which he was liable to pay damages, and had died, the heirs who inherited the land in ignorance of the existence of the nuisance would not be liable for damages until knowledge of the fact was brought home to them. The knowledge of the ancestor would not be imputed to the heir in such case. *Abern v. Steele*, 115 N. Y. 203, 22 N. E. 193; *Sloggy v. Dilworth*, 38 Minn. 179, 36 N. W. 451. One who knows of the existence of a nuisance upon his land must, with reasonable diligence, remove it, and, failing to do so, is liable for damages which may result therefrom; but a nuisance not known to the owner can create no liability against him. Knowledge of a fact demands action in both classes of cases, and the absence of it must alike excuse the want of action in each case. We think that this rule of law, which is well established, is in line with, and fairly supports our conclusion upon, the question certified.

GRACEY v. HENDRIX.

(Supreme Court of Texas. June 19, 1899.)

PUBLIC LANDS—SALE—CLASSIFICATION.

1. Where school land was classified as dry agricultural land, and put on the market at \$2 per acre, the valuation was not affected by Gen. Laws 1897, p. 184, c. 129, prohibiting the sale of agricultural land at less than \$1.50 per acre; and hence a deposit and obligation to buy at the rate of \$1.50 was not a compliance with the law, and gave the applicant no right to the land.

2. The fact that three days after his deposit and obligation the land was reclassified at \$1.50 per acre made no difference; the statute (Rev. Civ. St. art. 4218j) providing that the sale should be effective from the date the obligation was filed in the land office.

Error to court of civil appeals of Second supreme judicial district.

Action by A. W. Hendrix against J. R. Gracey. From a judgment of the court of civil appeals reversing a judgment for de-

fendant (50 S. W. 137), defendant brings error. Reversed.

H. E. Deaver, J. R. Duke, and Plemons & Veale, for plaintiff in error. W. M. Pardue and Huff & Hall, for defendant in error.

BROWN, J. Under the act of 1887, survey No. 104 of school land in Hall county was classified as dry agricultural land, and valued at \$2 per acre, at which price it was put upon the market, and remained on the market under that classification and price until the 23d day of August, 1897, except during the time that A. W. Hendrix claimed it under a purchase from the state, which was forfeited for nonpayment of the interest of 1893. On the 20th day of August, 1897, A. W. Hendrix was, and had been for several years, an actual settler upon the section of land, and on that day made an application to the commissioner of the general land office to purchase it at the price of \$1.50 per acre, which was filed in the general land office the next day. He remitted to the treasurer of the state \$24, the one-fortieth part of the whole purchase price; and he sent his obligation to the commissioner of the general land office for \$936, the remainder of the purchase price. If, however, he was entitled to purchase it at \$1.50 per acre, his application, remittance, and obligation were in conformity with the statute. If the valuation of \$2 per acre was then in force, he did not comply with the law. J. R. Gracey filed in the general land office his application to purchase the east half of section 104 at \$1.50 per acre, and complied with the statute, if the price of \$1.50 per acre had been the valuation placed upon the land at the time. Gracey was not an actual settler at the time he made the application, but subsequently moved upon the east half of the land, and became an actual settler before the land was awarded to him by the commissioner of the general land office. On the 23d day of August, 1897, the section of land was reclassified as dry grazing land, and valued at \$1.50 per acre. On September 10, 1897, the commissioner of the general land office sold the east half to Gracey at \$1.50 per acre, and refused the application of A. W. Hendrix. Hendrix brought suit against Gracey for the entire section of land, who disclaimed as to the west half, but claimed the east half for himself. The trial was had before the judge without a jury, who gave judgment in favor of Gracey, which judgment the court of civil appeals reversed, and rendered it in favor of A. W. Hendrix for the east half of the land.

The question in the case is, did Hendrix, by his application, remittance of a part of the price, and execution of his obligation for the balance, acquire a right to purchase section 104? If he did, the judgment of the court of civil appeals is right, because in that event Gracey could not have subsequent-

ly acquired any right to the east half of the survey. If, however, Hendrix did not acquire a right to purchase the land by his application and proceedings connected therewith, then the judgment of the district court was correct, although Gracey may not have acquired any right himself. Hendrix must recover in this suit upon the strength of his own title, and not because Gracey has none.

Article 4218j, Rev. Civ. St., prescribes the mode of procedure by which an actual settler upon the public free school land may acquire a right thereto as follows: "Any person desiring to purchase land in accordance with the provisions of this chapter shall forward his application to the commissioner, describing the land sought to be purchased, which application shall be accompanied with the affidavit of the applicant, in effect that he desires to purchase the land for a home and has in good faith settled thereon, except where otherwise provided herein, and he shall also swear that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof. * * * The purchaser shall transmit to the treasurer of the state one-fortieth of the aggregate purchase money for the particular tract of land and send to the commissioner his obligation to the state, duly executed, binding the purchaser to pay the state on the first day of November of each year thereafter, until the whole purchase money is paid, one-fortieth of the aggregate price, with interest at the rate of three per cent. per annum on the whole unpaid purchase money, which interest shall also be payable on the first day of November of each year; and upon receipt of one-fortieth of the purchase money by the treasurer and the affidavit and obligation aforesaid by the commissioner, the sale shall be deemed and held effective from the date the affidavit and obligation are filed in the general land office." To comply with the requirements of the law, Hendrix must have made the affidavit and presented the application required by the statute, and must have forwarded one-fortieth part of the purchase money for the whole section, and his obligation for the remaining portion of the purchase price, as above stated. The land was valued, at the time the application, affidavit, and obligation were filed and the money paid in, at the price of \$2 per acre, which would make an aggregate of \$1,280 for the section, the one-fortieth part of which would be \$32, which he was required to have remitted to the treasurer of the state; but he sent only \$24, being \$8 less than the amount required by law. The remainder of the price to be secured by the obligation would have amounted to \$1,248, but Hendrix gave his obligation only for \$936, which was \$312 less than was required by law. He did not comply with the law, and the sale did not become effect-

ive and confer a right upon him at the time that the papers were received by the commissioner of the general land office.

It is claimed that the act of 1897, "relating to leasing and selling the free school and asylum lands" (chapter 129, Gen. Laws 1897, p. 184), had the effect to repeal or annul the former classification and valuation placed upon the land, and to put it on the market for sale at \$1.50 per acre. After empowering the commissioner to classify any lands not before classified, the act provides: "He may also reclassify any lands heretofore erroneously classified, upon the official certificate of the commissioners' court of the county in which said land is situated or the county to which said land is attached for judicial purposes certifying what the proper classification should be. * * * When any portion of said land has been classified to the satisfaction of the commissioner of the general land office under the provisions of this chapter or former laws, said land shall be subject to sale. * * * All agricultural lands belonging to the public free school and the several asylum funds shall be sold at not less than \$1.50 per acre; and all grazing lands shall be sold at not less than \$1 per acre." This land having been previously classified and valued, the commissioner could not have reclassified it except upon the certificate of the commissioners' court of that county; and it was upon the market for sale upon the original classification, and at the price previously fixed, when Hendrix's application was filed in the general land office, unless that act had the effect to reduce the price of lands previously classified to the minimum stated therein. The law does not say that the lands of the given class shall not be sold for a price exceeding that named in the act, but prescribes that it shall not be sold for less than the sum stated per acre. It did not affect the valuations previously made for more than \$1.50 per acre. The payment and obligation of Hendrix were not a compliance with the law at the time they were filed and presented to the officials of the state, and did not secure to him the right to purchase the land.

The honorable court of civil appeals rests its judgment upon the proposition that the application, being on file, became effective when the classification and valuation were changed so as to make it a compliance with the conditions as thus changed. In this we think that honorable court committed error. The statute had prescribed the terms upon which the settler might acquire a right without the concurrence of any official, and had prescribed the standard of compliance to be the requirements of the law on the day that the papers were filed in the general land office. The language of the law is so explicit as to preclude construction, and courts have no authority to change its terms. The obligation of Hendrix, not being in compliance with the law, did not bind him, and

he might have abandoned his application at any time. The right to the land did not, by the law, attach upon any day subsequent to that on which the papers were filed with the commissioner of the general land office, because the law is not so written; and, if compliance was not had on that day, what was done subsequently would not inure to the benefit of a previously filed void application. *Busk v. Lowrie*, 86 Tex. 128, 23 S. W. 963; *McKinney v. Grassmeyer*, 51 Tex. 376; *Wright v. Hawkins*, 28 Tex. 470.

Hendrix, the plaintiff in the court below, acquired no right to the section of land, and was therefore not entitled to recover, although the defendant, Gracey, may not have acquired any legal right himself,—upon which it is not necessary for us to pass. It is therefore ordered that the judgment of the court of civil appeals be reversed, and that the judgment of the district court be affirmed.

HUTCHESON et al. v. STORRIE.

(Supreme Court of Texas. June 19, 1899.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—DUE PROCESS OF LAW—ESTOPPEL—INJUNCTION.

1. Under Const. art. 1, § 19, and Const. U. S. Amend. 14, § 1, providing that no person shall be deprived of his property without due process of law, the legislature cannot empower a municipal corporation to assess the cost of a public improvement on abutting property in a sum materially exceeding the benefits derived therefrom by such property.

2. A special assessment to pay for the cost of a public improvement, on property abutting on the improvement, in excess of the benefit derived therefrom by the property, is a taking of private property for a public use without adequate compensation, and repugnant to Const. art. 1, § 17, prohibiting such taking of private property.

3. The legislature has no power to confer on a municipality authority to assess property for a local improvement without giving the property owner an opportunity to be heard on the question whether the improvement for which the assessment was levied was a benefit to his property.

4. A municipal charter authorized the construction of public improvements at the cost of abutting property, against which the cost was to be assessed according to the cost of the improvement in front of the particular property. Property owners were to be notified of the assessment, and, if wronged thereby, were to have the opportunity, by petition to the city council, to object to the assessment, and to ask for a revision or correction, and for that purpose to appear before the city council. A petitioning property owner injured by the action of the city council, on his petition, was authorized to apply to the court for an injunction to restrain the levying of the assessment only on grounds alleged in the petition to the city council, and a failure to do so was to estop him from questioning the validity of the assessment. *Held*, that the owner of property assessed for a local improvement on the basis of the cost of the improvement without regard to benefits is not, by failing to petition the city council for a correction of the assessment, estopped from asserting its invalidity, because of its not having been levied on the basis of benefits derived by the property from the improvement, against a person who constructed the improve-

ment and took improvement certificates issued by the city against such property for the price, as the owner had no opportunity to object that the city council had no authority to make the levy on the basis of benefits in the first instance, or to readjust it on that basis afterwards on the petition of the property owner.

5. Nor does the fact that the charter gives the property owner the right to enjoin the levying of such assessment estop the owner from afterwards so attacking its validity, as, being confined in his application for an injunction to the matters alleged in the petition to the city council, the objection that the levy was not made on the basis of benefits could not be raised by an application for injunction.

6. A city charter required special assessments for local improvements to be made on abutting property on the basis of the cost of the improvement opposite the respective property, and gave a property owner aggrieved by any special assessment the right to petition the city council for its correction, and, if unsuccessful, to apply to the court for injunction to restrain the levy only on grounds set up in his petition to the city council, and provided that, on the trial of an issue as to validity of such assessment, a recovery should be had for such sum as ought to have been assessed according to the mode of apportionment provided in the law of the city applicable to such improvement, and, if such recovery could not be had, then a recovery should be had quantum valebat, not exceeding the price of the improvement in front of the lot in question according to the front-foot rule, and, if no recovery could be had in either of such modes, a recovery should be allowed to the extent of benefits derived by the land in question from the improvement. *Held*, that a property owner contesting the validity of such assessment, which was invalid, because not made on the basis of benefits to the property, is not required to show the amount of benefits derived from the improvement by his property, so as to authorize the enforcement of the assessment to that extent, but that the assessment would be adjudged invalid as a whole.

Error to court of civil appeals of First supreme judicial district.

Action by Robert C. Storrie against Bettie M. Hutcheson and another. A judgment for plaintiff was affirmed by the court of civil appeals (48 S. W. 785), and defendants bring error. Reversed.

Hutcheson, Campbell & Myer, for plaintiffs in error. Ewing & Ring, for defendant in error.

BROWN, J. We omit many of the facts of this case which are immaterial in considering the questions presented to this court. The following are the material facts: Bettie M. Hutcheson, wife of J. C. Hutcheson, owned in her separate right a block of land containing about 20 acres, fronting 647 feet on the north side of the Harrisburg road, and some other lots upon the said road, all lying within the limits of the city of Houston between the International & Great Northern Railroad and the corporate line of the city. At a meeting of the city council of the city of Houston, held on August 13, 1894, the council adopted a resolution declaring that the improvement of the Harrisburg road from the International & Great Northern Railroad tracks to the city limits was a public necessity. The resolution stated the different

kinds of material of which the improvement might be made, and directed that bids for the work be solicited. The third section of the resolution is in the following language: "The cost of constructing said improvements, except as to street intersections, together with the cost of collecting thereof, shall, as provided in section 24 of the charter of said city, be wholly defrayed by the owner of the lot or lots, block or blocks, or tracts of land when not divided into lots or blocks abutting on said portion of said streets or avenues to be so improved, and said improvements shall be paid for in five equal annual installments." The resolution was published as required by the provisions of the charter, and the city engineer made specifications for the work, which were approved by the city council, and, after due advertisement, the city council entered into a contract with R. C. Storrie to make the improvement ordered. The city engineer, in accordance with the terms of the charter, made and filed a roll of ownership upon which the property of Mrs. Hutcheson was placed, and the cost of the improvement, according to the contract, was apportioned to the said property by the front foot thereof, as required by the charter to be done. The roll of ownership thus made out was filed with the secretary of the city, who gave notice of its filing, as required by the charter, and, there being no objection presented on the part of Mrs. Hutcheson, it was approved by the council, and improvement certificates were ordered to be issued to R. C. Storrie for the cost of the work, when approved by the board of public works. R. C. Storrie did the work according to the contract, and the improvement certificates were issued and delivered to him. Mrs. Hutcheson having failed to pay the installments, this suit was filed to enforce their collection, and the district court entered judgment foreclosing a lien upon the property for the amount assessed, except the correction of some errors. Mrs. Hutcheson's property was situated in a part of the city of Houston where there were very few houses of any kind, and most of them small and of little value. Much of the property in that vicinity was used for pasturage, and there were no water mains or pipes, electric lights, or sewerage in that portion of the city. As to whether the value of the property was equal to the amount assessed upon it for the improvement, the testimony was conflicting and the issue not determined by the court of civil appeals. Mrs. Hutcheson offered evidence to show that there were no special benefits derived by her property from the improvements made, which was excluded by the court, and there was no evidence that such benefits did exist. The court of civil appeals affirmed the judgment of the district court, from which Mrs. Hutcheson and her husband have sued out this writ of error.

Plaintiffs in error present a number of objections to the judgment, all based upon the proposition that the charter of the city of

Houston, in so far as it authorizes the city council to improve the streets at the cost of abutting property, without regard to special benefits to the property, is violative of sections 17 and 19 of article 1 of the constitution of this state, which read as follows:

"Sec. 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person. * * *

"Sec. 19. No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

Also that it is in conflict with the following provision of section 1 of the fourteenth amendment to the constitution of the United States: "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The court of civil appeals followed strictly the case of *Adams v. Fisher*, 75 Tex. 657, 6 S. W. 772, in which Judge Stayton said: "The charter of the city of Galveston gives to its council the legislative power to determine whether such an improvement will be for the public interest, and also to determine whether it will be of such benefit to property fronting on that particular street to be improved as will justify the imposition of a part of the costs of the improvement on the owners of such property, and its determination of this question must be deemed conclusive," and, in support of the opinion, Judge Stayton quoted from *City of Ludlow v. Trustees of Cincinnati Southern Ry. Co.*, 78 Ky. 360, as follows: "While assessments of this character, as distinguished from general taxation, rest upon the basis of benefits or presumed benefits to the property assessed, it is not essential to their validity that an actual enhancement in value or other benefit to the owner be shown. The passage of the ordinance by the city council, under the power granted in the charter, is conclusive of the propriety of the improvement and of the question of benefit to the owners of abutting property." In that opinion this court followed the great weight of authority by which this extraordinary power has been sustained with remarkable unanimity. But in the case of *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, recently decided by the supreme court of the United States, the rule announced in *Adams v. Fisher* has been completely overturned, and all precedents establishing it have been set aside. We recognize the binding force of the decision of the supreme court of the United States upon this question, but we the more readily apply it because we indorse it as a timely and just announcement of the superiority of a constitutional guaranty over a rule of law established by the courts. We feel some satisfaction, also, in the fact that

the constitution of this state provides with equal fullness for the protection of the rights of property under such circumstances as does the constitution of the United States, and, if the action now undergoing investigation is violative of the constitution of the United States, it is more palpably a violation of the plainer provisions of the constitution of the state of Texas.

The first question is, what scope are we to give to the case of *Village of Norwood v. Baker* as authority in the decision of this case? Counsel for Storrie have presented an able and ingenious argument in which they endeavor to limit *Village of Norwood v. Baker* by contrasting it with previous decisions of the same court, and, by ascribing to the former decisions superiority, they seek to eliminate from the latter case every point which contradicts a former decision. It is claimed that because the court says *Village of Norwood v. Baker* is not in conflict with the former decisions that court did not intend to decide that which is in fact in conflict. The more reasonable conclusion is that the court did not understand the former cases to embrace the grounds upon which the later case rests. The case mainly relied upon for this purpose is *Parsons v. District of Columbia*, 170 U. S. 45, 18 Sup. Ct. 521, in which the assessment was made by an act of congress, while in the case of *Village of Norwood v. Baker* it was made by a municipal corporation under an act of the legislature. In the former case the court distinguishes the two classes in the following language: "There is a wide difference between a tax or assessment prescribed by a legislative body having full authority over the subject and one imposed by a municipal corporation acting under a limited and delegated authority. And the difference is still wider between a legislative act making an assessment and the action of mere functionaries whose authority is derived from municipal ordinances." The distinction drawn may not be sound, but the statement shows that the question decided in *Village of Norwood v. Baker* was not determined in the case relied upon.

Village of Norwood v. Baker establishes the following propositions, which are applicable to the case at bar:

1. The legislature of a state cannot authorize a municipal corporation to assess upon abutting property the cost of a public improvement in a sum materially exceeding the special benefits which that property may derive from the work. The court said: "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation." It has been uniformly held that such assessments rest upon the ground that the benefits conferred are equal to the demands made upon the property; but

the courts, in applying the law to the particular cases, have heretofore ignored the principle upon which the authority rests, and have held that the exercise of the power will be upheld, although the facts out of which it arises do not exist, and that benefits will be presumed to equal the assessment.

2. The legislature of a state cannot confer upon a municipal corporation the authority to make such assessment conclusive upon the owner without giving an opportunity to contest the question of benefits. Upon that point the court said: "As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not in fact pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of public improvement, irrespective of any peculiar benefit accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received." If the law under which the assessment in controversy in this suit was made did not afford to the property owner a fair opportunity to contest the correctness of the assessment made upon her property, she was not estopped to deny its validity.

3. In *Village of Norwood v. Baker* the supreme court of the United States laid down the rule that, because the assessment was made under a law that did not afford property owners the opportunity to be heard nor empower the city authorities to consider the question of benefits, the assessment in that case was a nullity. Upon this proposition that honorable court said: "It is said that a court of equity ought not to interpose to prevent the enforcement of the assessment in question, because the plaintiff did not show nor offer to show proof that the amount assessed upon her property was in excess of the special benefits accruing to it by reason of the opening of the street. This suggestion implies that, if the proof had shown an excess of cost incurred in opening the street over the special

benefits accruing to the abutting property, a decree might properly have been made enjoining the assessment to the extent simply that such cost exceeded the benefits. We do not concur in this view. As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of special benefits. The assessment was by the front foot and for a specified sum representing such cost, and that sum could not have been reduced under the ordinance of the village, even if proof had been made that the cost and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one." From the record it appears that, in determining the amount to be assessed against the property of Mrs. Hutcheson, neither the city council nor the municipal officers considered the question of special benefits which might accrue to the land from the work, but proceeded upon the basis of the cost of the improvement to determine the amount. It follows that the assessment is void, unless Mrs. Hutcheson is estopped to set up the defense by a failure to enter a protest against the proceeding and to sue out an injunction against the council.

The charter of the city of Houston confers upon the city council full authority and control over its streets and alleys, and empowers the council to determine what street or portion of any street shall be improved, and whether the cost of such improvement shall be paid by the city in whole or in part, or by the owners of the abutting property either in whole or in part. If the city council should determine to charge the cost or any portion of it upon the abutting property, then, by a two-thirds vote of all of the aldermen, it must determine whether the improvement is necessary to the public interest. When these questions have been settled by the council, if it be decided that the cost of the improvement shall be paid by the owners of the abutting property, the charter provides that "the cost . . . shall be defrayed, in case of . . . street improvements, by the owner or owners of the lot or lots, block or blocks, tracts of land, when not laid out into lots and blocks, abutting on such street or portion of street improved, according to the cost of work in front of the particular lot or block or tracts of land." Sp. Laws 1893, p. 21, § 24. The city council is also empowered to determine whether the work shall be paid for in money, bonds of the city, or improvement certificates, and to make a contract for it. After the contract has been made, it is the duty of the city engineer to make out a

roll of property abutting on the street to be improved, and to specify upon such roll, among other things, "the total cost, as ascertained and calculated by the city engineer, of such improvements necessary to be borne by each and to be paid by each owner of such property as described in such roll." Id. p. 24. There is no discretion lodged with the city council in determining the assessment to be made upon the abutting property, but the charter absolutely fixes the rule by which the assessment is to be governed, and devolves upon the engineer the mere ministerial duty to ascertain by calculation what the work in front of the particular lot will cost, under the contract, according to the specifications. The law prescribed the standard to be the cost of work done in front of the lot, the specifications showed the work to be performed, and the contract fixed the price. A calculation alone was necessary to ascertain the sum to be expressed on the roll. Neither the council nor the engineer could proceed upon any other basis than that expressed in that statute, for we must look alone to the charter for the powers to be exercised by these officials. If, however, there were room for doubt as to the rule by which the assessment is to be made, the charter would set that at rest, for in the next succeeding phrase of the same sentence is to be found the following provision: "And in case of sewerage or drainage improvements [the cost] shall be defrayed by the owner or owners of such lot or lots, block or blocks, or tracts of land, when not laid out into lots or blocks, according to the proportionate benefits of the lots," etc. Id. p. 21, § 24. It is apparent that, in the enactment of these provisions in the same section and in the same sentence, the distinction between the assessment of the cost and the assessment of the value of benefits was present in the legislative mind, and that the rule of assessing for street improvements according to the cost of the work, without regard to benefits, was intentionally and distinctly applied to that class of work with the intention to exclude benefits. Up to this point in the procedure there certainly could have been no departure from the rule expressed in the charter by the city council or any officer engaged in the execution of the powers conferred. Special benefits could not have been considered. But it is claimed that the charter provides for a hearing before the council at which the rights of the parties might have been adjusted upon the basis of benefits, and that the plaintiffs in error are estopped to deny the validity of the assessment, because they failed to call upon the council by petition to revise and correct the proceedings and remedy the wrong. The question arises, did the charter afford to Mrs. Hutcheson an opportunity to contest the mode of making the levy? After the roll of ownership has been prepared by the city engineer and approved by the board of public works and by

the city council, it must be filed with the secretary of the city, who is required to publish the following notice: "Persons owning property on [here insert the name of street or streets, or description of portions of the same referred to in said roll, or a description of the territory or district to which the roll relates] are hereby notified that the roll of ownership showing the amount of the special assessment tax levied against the owners of property above referred to, to cover the cost of improvement made in accordance with the resolution of the city council relating to the same, adopted [here insert the date of the resolution], has been placed in the office of the city secretary for inspection, in order that all persons interested therein, or to be affected thereby, may have an opportunity of calling the attention of the city council to any errors or mistakes connected with such assessments levied against property owned by them, as shown in said rolls." Id. p. 25, § 27. The secretary is required to mail a copy of a notice to the post-office address of the property owner. At any time within 10 days after the first publication of the notice, the property owner may, "by petition to the city council, filed with the city secretary, object to any such acts and proceedings and show wherein they have been or may be wronged or injured thereby, and to ask for a revision or correction of the same; and they shall be permitted, and it shall be their duty, before the final approval of such roll, to appear in person, or by agent or attorney, before said city council, and not thereafter at any time before any other tribunal, fraud and collusion, which was then unknown and could not by reasonable diligence have been ascertained, excepted, and apply for redress for such wrong or injury, and for the correction of such errors as they may point out and establish to the satisfaction of said council; nor shall any such roll be finally approved by the city council after filing of such petition by any person so affected or liable to be affected by said proceedings, until such petition shall have been heard and acted upon by the city council, although it shall not be necessary to incorporate in the minutes of said city council its action thereon; and it shall be the duty of any person who may deem himself injured by the action or non-action of the city council in reference to the matters contained in such petition, within five days after the approval of such roll of ownership, to apply to the proper court for an injunction, based on the facts alleged in such petition, restraining further action on the part of the city officials, or any of them, in reference to the matter complained of in such petition, and to the extent of the petitioner's interest in the same; and neglect or failure so to do shall forever estop such petitioner and all parties claiming under him from denying the correctness of said roll or the regularity of all proceedings previously had in

reference thereto, or the validity of the special tax therein assessed against the land owned by him." Id. p. 26, § 27. The foregoing provision of the charter authorizes the property owner to call upon the city council to revise and correct errors committed in the proceedings had in assessing the cost of improvement against his property, but it does not empower the council to do anything that it or its officers could not have done in the first instance. The words "revision" and "correction" mean that the council may be called upon to review that which had been done, and to make the proceedings conform to the law. *Vinsant v. Knox*, 27 Ark. 272. The city council and the officers acting under the authority of the charter of the city of Houston having no power in the first instance to consider the question of benefits in fixing the amount to be charged against Mrs. Hutcheson's property, a revision and correction of the acts done could not give relief against the wrong complained of. In support of this conclusion, we call attention to the potent fact that the city had entered into a contract with Storrie for the performance of the work at a stipulated price and with the agreement that he should be paid in improvement certificates, which would hold a lien upon the property, before the amount of the assessment was ascertained. If the engineer, for instance, committed an error in estimating the cost of the work in front of Mrs. Hutcheson's property, then a revision and correction of that act by the council could be had and the wrong could be corrected, because the contract itself furnishes the data, and the correction would accord with the contract. If, however, the council had changed the basis of the assessment against Mrs. Hutcheson's property from the costs of the work to that of benefits received by the property, whereby the amount assessed would be lessened, the contract would have been annulled. A construction should not be placed upon the language that would empower the city to destroy the contract without the consent of Storrie. The claim that, upon petition of Mrs. Hutcheson, the council could have afforded relief from the unlawful exaction, is wholly unsupported by the terms of the law, and is in direct conflict with many of its provisions. The wrong did not consist in a failure to follow the directions of the law, but in obeying its unconstitutional requirements. The authority conferred upon the court to issue an injunction restraining the council from proceeding further is limited to "the facts alleged in the protest," and is no broader than that vested in the council. The court is simply empowered, by writ of injunction, to restrain the council from doing acts contrary to the charter, and to correct any errors which that body might have corrected. It is claimed that the jurisdiction of the court must be held to be broad enough to embrace the subject of estoppel provided for in the law.

Therefore the court, by injunction, could inquire into and correct anything done which affected the validity of the levy. But we think that the estoppel, to question the "validity" of the tax, must be construed to forbid the owner to set up such invalidity as might arise from a want of compliance with the terms of the charter, and not such as might grow out of want of authority in the city to make the assessment. The right to apply to a court for injunction is, as above stated, expressly limited to the facts alleged in the petition to the council. The authority of the district court is revisory and confined to correcting the acts done by the council and city officers. If the legislature had enacted in plain words that a failure to apply for injunction against a levy of the cost of improvement upon the property should estop the owner to deny the validity of such assessment, the law would be void, because the legislature could not validate by estoppel an act that it is forbidden by the constitution to authorize. It is asserted that Mrs. Hutcheson might have had the question of benefits investigated in this suit and the assessment reduced so as not to exceed the special benefits received. The charter provides: "And at all times and in all proceedings in any court in which the validity of any special tax assessment that might have been laid under the charter of the city of Houston or amendments thereto, as shown by any roll of ownership, purporting to have been prepared by the city engineer in accordance with the provisions thereof, may be called in question, a recovery shall nevertheless be had in such suit for such sum as ought to have been assessed against the tract of land involved, according to the mode of apportionment, provided in the law of said city applicable to such improvement, and if for any reason, in law or fact, such recovery cannot be had, then a recovery shall be allowed, quantum valebat, not exceeding the contract price for the improvement in front of the lot or lots, block or blocks, or tracts of land involved, according to the front-foot rule or standard; and if for any reason, in law or fact, recovery cannot be had in either of the above modes, then recovery shall be allowed not exceeding the contract price, to the extent and according to the standard of benefits from the improvements in question to the lot or lots, block or blocks, or tracts of land involved." Sp. Laws 1893, p. 26, § 27. The legislature attempted to secure contractors for this class of work against all contingencies, and to authorize them, in case their contracts and the proceedings by virtue of which their claims arose were unenforceable, to recover nevertheless from the property owners upon one of the grounds named. It is unnecessary for us to determine whether the legislature could effect such a purpose or not. The language does not purport to authorize the defendant in such proceeding to inaugurate the inquiry,

and the construction would conflict with that part of the charter which declares that the property owner shall not do that thing. Substantially the same proposition was presented in the case of *Village of Norwood v. Baker*, where it was contended that the party who sought the injunction in that case should have shown that the assessment was in excess of the benefits received, and that the court should have rendered judgment for the amount that the property was benefited by the improvement. In answer to this proposition, that court said: "This suggestion implies that, if the proof had showed an excess of cost incurred in opening the street over the special benefits accruing to the abutting property, a decree might properly have been made enjoining the assessment to the extent simply that such cost exceeded the benefits. We do not concur in this view. As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of special benefit. The assessment was by the front foot and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the village, even if proof had been made that the cost and expense assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one." The quotation thoroughly refutes the contention made in this case, and needs no argument to support it. It would be quite unusual to require the defendant in a suit, upon a demand wholly invalid, to furnish the plaintiff a valid cause of action as a condition precedent to defending himself against the unlawful claim. If the charter of the city of Houston, under which the assessment in this case was made, could, by any fair and reasonable construction, be held to secure the property owner the right, at a time when it could be made effective, to contest the validity of the levy, because not made upon the basis of benefits, it would be the duty of this court to so construe it. But, in order to justify such a construction, it should be so obvious that the property owner, upon a fair consideration of its provisions, would have known at the time of the proceeding that the remedy was afforded by the charter. If this court should force a construction of the charter which could not reasonably have been understood to be the meaning of the law at the time the acts were being performed, it would be not only judicial legislation, but retroactive as well, which would be as unreasonable and arbitrary as the rule by which courts are required to conclusively presume that the city council has found the

special benefits to be equal to the cost, when in fact there were no benefits and the council had no power to consider the question.

It is to be regretted that contractors and others may have been involved in financial loss by reason of an unconstitutional enactment of the legislative department, and courts will always preserve the rights of those who act in compliance with the law of the land, as far as it can be done lawfully; but the guaranties of the federal and state constitutions must not be subordinated to questions of finance nor sentiments of justice. Justice will be best preserved by upholding the limitations against the exercise of arbitrary power. When a law comes in conflict with the constitution of the United States or of the state of Texas, then the law must yield, and the constitution be upheld and sustained. We conclude that the assessment made in this case was void, and that it gave no right against Mrs. Hutcheson, either of a personal nature or a lien upon her property, and that the pleadings and evidence conclusively show that no right of action can be shown. It is therefore ordered that the judgments of the district court and court of civil appeals be reversed, and that judgment be here rendered for defendants, B. M. and J. C. Hutcheson.

BISHOP v. LUCY et al.

(Court of Civil Appeals of Texas. June 21, 1899.)

FALSE IMPRISONMENT—ADMISSION—DENIAL.

An admission by defendants of the allegations of plaintiff's petition is not an admission of an allegation that defendants were responsible for the condition of the cell in which plaintiff was confined, and the injuries sustained by him thereby, where it is coupled with a denial of defendants' abuse and harsh treatment of plaintiff; the defective condition of the cell being the treatment complained of.

On rehearing. Denied.

For former opinion, see 50 S. W. 1029.

FISHER, C. J. In the original opinion we stated that there was evidence tending to show that the cell in which the plaintiff was confined was, by reason of noxious gases arising from cesspools, an improper place to confine a prisoner, and for the damages that the plaintiff might have sustained therefrom he would have a cause of action against the guilty party who was responsible. We held, in this connection, that the evidence did not show that the appellees (the defendants below) were responsible for the condition of the cell, or of the confinement of the appellant therein, and, in effect, stated that this was a matter that would have to be proven, in order to hold the appellees responsible. Appellant, in his motion for a rehearing, states that the appellee Lucy was responsible for the condition of the cell, and the confinement of the appellant therein. This statement is bas-

ed upon an allegation in the petition to the effect that, "from the time of the arrest of the appellant, City Marshal Lucy assumed and maintained absolute control of, and exercised absolute authority over, the person of the plaintiff." It is insisted by the appellant that this statement in the petition was admitted to be true, and, as evidence of this fact, he calls our attention to the following agreement: "After the court had overruled the defendants' general demurrer and special exceptions, defendants, through their counsel, in open court, admitted all of the allegations set forth in plaintiff's petition, save and except they denied that plaintiff had been restrained of his liberty (as alleged) by defendants without his consent, denied the charges of malice, and also denied the charges made as to their abuse and harsh treatment of plaintiff as alleged by him." And the agreement goes on to state other matters, which it is not necessary for us to set out. The contention of appellant cannot be maintained. The agreement does not confess or admit the allegations that Marshal Lucy or the other appellees were responsible for the condition of the cell, and the injuries sustained by the plaintiff while therein. The agreement expressly denies the charges of abuse and harsh treatment of the plaintiff. The treatment inflicted upon him while in the cell, arising from its defective condition, clearly is in the nature of abuse and harsh treatment received by him, and the defendants deny their connection with any abuse or harsh treatment he sustained. This is all of the motion that we desire to notice. Motion overruled.

SWEET v. SLOUGH.

(Court of Civil Appeals of Texas. June 21, 1899.)

SCHOOL LANDS—PURCHASE—EMPLOYMENT AGENT—VALIDITY.

The law regulating the purchase of school lands, which requires the purchaser to make an affidavit, and execute notes for the price, does not prohibit him from employing an agent to present his application, where he himself makes the affidavit and executes the notes.

Appeal from district court, Brown county; J. O. Woodward, Judge.

Action by John W. Slough against B. G. Sweet. From a judgment entered on a verdict for plaintiff, defendant appeals. Affirmed.

Goodwin & Grinnan, for appellant.

FISHER, C. J. This is an action by appellee to recover from appellant section 12 of state school land, located in Brown county. The first count in the petition is one of trespass to try title. The second count, in effect, alleges that the appellant holds the legal title to the land in trust for appellee, by reason of the fact that the appellant, at the time of his pretended purchase of the school section from the state, was the agent of the appellee for

the purpose of purchasing the land in question; that he violated his duty in this respect, and purchased the land in his own name, and withholds possession thereof from the plaintiff, and refuses to convey to him the legal title. Appellee recovered a judgment in the court below. The issue submitted by the trial court and the question raised by the evidence was whether, at the time of the application and the purchase of the land by the appellant from the state, he was the agent of appellee for the purpose of purchasing the land; and in this connection our conclusion is that there is abundant evidence in the record justifying the verdict of the jury against the appellant on this issue. As this is the only controverted question in the case, it is unnecessary to find as to any other fact.

The first assignment of error complains of the ruling of the court in refusing to sustain a demurrer addressed to the plaintiff's petition, on the ground that the contract out of which the trust arose was against public policy. The appellant contends that the law will not permit one to act as agent of another in the purchase and acquisition of school land. We do not agree with appellant in this broad view of the question. There are certain features of the law regulating the purchase of school land which require certain things to be done by the purchaser, and which impliedly negative the right to delegate a performance of these duties to an agent; such as, for instance, making the affidavit required by the statute, and executing the notes and contract for the purchase money. But in this case the pleadings and evidence show that in these particulars the plaintiff acted in person, after the agreement was made by which the appellant was to act as the agent of the appellee. The appellee, in person, made the affidavit, and executed the notes required by the statute. As to the matter of presenting the application to the commissioner of the land office, this could be performed by an agent. That part of the petition to which the demurrer is addressed substantially alleged the facts as just stated. It appears from these averments that those duties which the law imposes personally upon the appellee were performed by him, and that the duty of appellant, by virtue of his agency, was to present the application to the commissioner of the land office, and to effect the purchase of the land for the appellee. We do not think there was any error in overruling the demurrer. What has been said disposes of the second, third, and fourth assignments of error.

We do not think there was any error in the charge, as complained of in the fifth assignment of error. The evidence clearly shows that the agency had not terminated upon the rejection of the application made by the appellee; and there is abundant evidence establishing the proposition that the appellant was really the agent of the appellee at the time he purchased the land. In response to those assignments of errors complaining of the re-

fusal of the court to give certain charges requested by appellant, it is sufficient to say that, in our opinion, the charge of the court pointedly presented the issues arising in the case, and all that were necessary to be given.

There are assignments which complain that the verdict of the jury is not supported by the evidence. These assignments are not supported by the record. There is evidence to sustain the verdict.

Under the facts there was no error in the court's giving the charge complained of in the thirteenth assignment of error. It announced, we think, a correct principle of law, applicable to certain phases of the case.

There was no pleading of appellant upon which the relief could be accorded as claimed in the fourteenth and fifteenth assignments of errors. But, however, as to these items, if error, we think it was more a matter of omission than commission, and, if the appellant had desired relief as to the items here claimed, he should have asked the court to grant it. Such does not appear to have been the case. We find no error in the record, and the judgment is affirmed. Affirmed.

FT. WORTH & R. G. RY. CO. v. WHITE.¹

(Court of Civil Appeals of Texas. June 21, 1899.)

CARRIERS—INJURIES TO PASSENGERS—EVIDENCE—PHYSICAL EXAMINATION—DAMAGES.

1. In an action against a carrier for injuries received by a passenger while standing in the aisle, and caused by a sudden jerk of the train, it was competent for plaintiff to explain, as a reason for placing his hand on the arm of a seat at the time he was injured, that he did it as a precaution to keep himself from falling.

2. Where a petition alleged injury to plaintiff's chest, evidence of his spitting blood was not incompetent as being an injury not pleaded; it not being relied on as a distinct injury, but simply to show the condition of plaintiff's chest, and the testimony showing it might have resulted from the injuries to the chest.

3. In an action for personal injuries, admission of proof of injury to plaintiff's arm, though not pleaded, was not cause for reversal; the finding stating that plaintiff was injured "as alleged in his petition," and awarding the sum found as compensation for those injuries.

4. Refusal to require a physical examination of plaintiff in a personal injury case *held* not error, where plaintiff expressed a willingness to be examined, but his counsel opposed it.

Appeal from district court, Brown county; J. O. Woodward, Judge.

Action by P. M. White against Ft. Worth & Rio Grande Railway Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Newton H. Lassiter, for appellant. Sims & Snodgrass and J. K. Baker, for appellee.

FISHER, C. J. This is an action by the appellee against the railway company for damages arising from injuries sustained while a passenger on board of the cars of one of the appellant's trains. The act of negli-

¹Application for writ of error pending.

gence, and part of the injuries sustained, as pleaded, are as follows: "That the defendant, while transporting plaintiff by and through its agents and employes managing and operating said train and cars in which plaintiff was transported, negligently and carelessly managed and operated its locomotive and said train and cars, and negligently, carelessly, and recklessly jerked and jolted said car in which plaintiff was being transported, as aforesaid, back and forth, jerking and jolting said car violently and with great force and in a violent and unusual manner, and with such force and violence that plaintiff was violently thrown on and against the arm rest and the seats of said car aforesaid, being a hard substance, the plaintiff being then and there thrown on same and struck by same on the stomach, chest, sides, back, and ribs, by reason whereof he had two ribs broken, his chest, stomach, sides, and back bruised and injured, and was knocked senseless, and remained partly unconscious for a long time, and was caused to suffer great physical pain and mental anguish." The case was tried before the court without a jury, and judgment rendered in appellee's favor for \$3,000. The facts show that the appellee was a passenger on appellant's train from Brownwood to Comanche; that while just in the act of arising from his seat, or while standing up in the aisle, handing a paper to a passenger in a seat opposite, the train gave an unusual, sudden, and violent jerk, which threw the appellee upon the iron arm of a seat, and caused the injuries sustained. There is evidence which shows that the jar or jerk of the train which caused the appellee to fall was sudden and unusual, and of a character from which we might conclude that there was negligence in the operation of the train. There is no evidence tending to show, other than the mere fact that the appellee had arisen from his seat and was standing in the aisle, any negligence or want of care upon the part of appellee. At the time of the shock, the appellee placed his hand on the arm of a seat. The question was asked him why he placed his hand on that seat. Objection was raised to the question on the ground that it was argumentative. The court permitted the witness to answer, "I put my hand there as a precaution to keep myself from falling." The evidence was admissible. The physical fact of putting his hand there occurred at the time he was injured, and was a part, we might say, of the act. His explanation given as the reason why he placed his hand there was clearly admissible. It was an explanation of the physical act. The fifth assignment is very general, and it is doubtful if we ought to consider it; but we have no hesitancy in ruling upon the question presented. The objection to this evidence was first called to the attention of the court after the opening argument had been made for the plaintiff, then the request was made to exclude the evidence of the witnesses tending

to show that the plaintiff had been spitting up blood, and that his left arm was disabled and partially paralyzed; the contention being that these facts were not alleged as a part of the injuries sustained by the plaintiff. So far as the spitting of blood is concerned, it is clear from the testimony that that may have resulted from the injuries to the chest, and it was simply evidence of the condition of the chest, and was not relied upon as a distinct injury sustained by the plaintiff. As to the injuries to the arm, it is clear from the findings of the trial court that he did not take this evidence into consideration. The court, in the third finding of fact, states that the plaintiff was injured as alleged in his petition, and awards the sum found as compensation for those injuries. This shows that the court did not consider injuries, although proven, which were not alleged. There was no error in the refusal of the court to require a physical examination of the plaintiff, in order to ascertain the extent of his injuries. The question was asked the plaintiff whether or not he was willing to permit a Dr. Brown to make a physical examination of him. He replied that he was willing if his counsel were willing. His counsel expressed their unwillingness. In our opinion, this ended the matter. It is unnecessary for us to further discuss this question, as, in our opinion, the appellee fully answered it in his brief. There was no error in the ruling of the court as complained of in the seventh, eighth, and ninth assignments of error. In our opinion, the motion for a new trial was properly overruled; and we adopt for our reasons those given by the appellee in his brief upon this subject. In response to the tenth assignment of error, it is only sufficient to say, in our opinion, the testimony justified the amount of the judgment. Our findings of fact dispose of the eleventh assignment of error. The evidence, viewing it from the plaintiff's standpoint, does not sustain the appellant's twelfth assignment of error. Therefore there was no error in the judgment of the court in this respect. In response to the remaining assignments, it is only sufficient to say that, in our opinion, all the conclusions of fact and law, as found by the trial court, are sustained by the evidence. We find no error in the record, and the judgment is affirmed. Affirmed.

**CITY NAT. BANK OF GATESVILLE et al.
v. COLGIN.¹**

(Court of Civil Appeals of Texas. June 21, 1899.)

REPLEVIN—ATTACHMENT—RELEASE OF OFFICER—JOINT TORT FEASORS.

Rev. St. art. 5311, providing that a claim made to property under the provisions of the chapter relating to the trial of the rights of property levied upon by an officer shall operate as a release of all damages by the claimant against the officer who levied on the property, does not apply to the parties who order an officer to make a levy.

¹Application for writ of error pending.

Appeal from district court, Coryell county; J. S. Straughan, Judge.

Action by W. M. Colgin against the City National Bank of Gatesville and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

McDowell & Sadler and H. N. Atkinson, for appellants. White & Mings and John L. Dyer, Sr., for appellee.

FISHER, C. J. Appellee, W. M. Colgin, the owner of a stock of goods and merchandise, transferred the same to W. B. Woodward, by a chattel mortgage, for the benefit of his creditors. Woodward, who was named therein as trustee, took possession of the goods. The creditors accepted. While the goods were in possession of the trustee, Woodward, they were attached by the appellant the City National Bank of Gatesville, in a suit by the bank against Colgin. Woodward, under the statute regulating the trial of right of property, filed claimant's affidavit and bond for possession of the goods. They were delivered to him by the officer (who was the sheriff of Coryell county) levying the attachment writ, and, in the controversy of the trial of right of property, Woodward was successful in recovering possession of the goods. In that action no damages were claimed against the officer, or any of the parties levying the writ. The appellee, Colgin, was not a party to that controversy. Afterwards the appellee, Colgin, filed this suit against the appellants to recover damages occasioned for injuries to the goods while in the possession of the officer under the attachment process. There were a verdict and a judgment in favor of Colgin against the appellants for \$250.

The question to be decided is whether the action by the trustee, Woodward, and the judgment in his favor against the sheriff, to recover the possession of the goods, under the statute regulating the trial of the right of property, operated as a release or satisfaction of the damages sustained by Colgin, the owner of the property, while the same was in possession of the sheriff. Article 5311 of the Revised Statutes, relating to the trial of rights of property, provides that "a claim made to property under the provisions of this chapter shall operate as a release of all damages by the claimant against the officer who levied upon said property." It is contended by appellants that by reason of the privity existing between the trustee, Woodward, and appellee, as the maker of the instrument upon which Woodward based his right to possession of the property, the action by the latter to recover possession inured to the benefit of appellee, and that he would be bound by that action, and the judgment rendered therein, and therefore the statute quoted would apply to him, as well as to the claimant, and operate as a bar to an action for damages against the officer,

and as the statute released the latter, and, in law, operated as a satisfaction of all damages to the goods when in possession of the officer, he being a joint trespasser or tortfeasor with the appellants, they were likewise released. In other words, the proposition is that although there has been no actual or real satisfaction of the damages sustained by the owner of the goods, from any of the joint trespassers, when the election was made to proceed against one—who in this instance was the officer—under the claimant's statute, the article that has been quoted, in law, operated as a satisfaction of damages, and that a complete satisfaction from one joint tortfeasor released the others. The general rule is (to which there are some exceptions) that there exists no right of contribution between joint trespassers or tortfeasors, and that a release of one, without a complete satisfaction, does not release the others. The plaintiff may proceed against one or more, and obtain successive judgments against all, but is only entitled to satisfaction once of his damages. Cooley, Torts (2d Ed.) 159; Moore v. King (Tex. Civ. App.) 23 S. W. 496; McGehee v. Shafer, 15 Tex. 198; Lovejoy v. Murray, 3 Wall. 16. If it can be held that the statute in question is not violative of fundamental principles of the constitution, which protect the vested interest in property, which includes, not only the thing itself, but the right to its enjoyment, in its full value, from the illegal appropriation by another, we are of the opinion that, in its operation, it is not the design and purpose of the statute to release any of the joint tortfeasors, except the officer seizing the property. There is no real satisfaction of the damages actually sustained to the property, and it is not believed that it is the intention and purpose of the article quoted, in releasing one tortfeasor, based upon an unsubstantial satisfaction, arising solely from a legal fiction, that the real and active originators and promoters of the wrong should go unwhipped of justice, and be released from liability for the damages which were sustained to the property of the plaintiff by reason of their wrongful conduct. The general principle that has been stated, that only a complete satisfaction will operate as a discharge of the joint tortfeasors, should be applied in this case, and the action to recover possession of the property from the officer ought not to be held as a satisfaction of the damages actually occasioned by those who caused the property to be seized. An officer seizing property under process legal and regular upon its face, while liable to the injured party, is, as to those who instituted the wrong and caused the seizure, a technical or nominal trespasser, who may compel contribution or satisfaction from the active wrongdoers. Cooley, Torts (2d Ed.) 169. This right is further recognized by article 199 of the Revised Statutes, regulating the execution of attachment process, which,

in effect, gives a cause of action in favor of the officer against those directing the seizure, for the damages the injured party may recover from him. The legislature, in passing the statute quoted, which is relied upon by appellants, evidently had in view this principle; and with the contemplation that the officer, as between him and the wrongdoers, was a nominal trespasser, it is not believed that it was the purpose of the statute, which, *eo nomine*, released him only, should operate as a release of the actual promoters of the wrong for the damages sustained by reason of the levy. Judgment affirmed.

SMITH v. DYE.

(Court of Civil Appeals of Texas. June 21, 1899.)

DAMAGES—ACTUAL AND EXEMPLARY DAMAGES—ATTACHMENT—AFFIDAVIT.

1. The remission of actual damages before entry of judgment by one who has recovered a verdict for actual and exemplary damages for the wrongful and malicious levy of an attachment deprives the court of power to render judgment for the exemplary damages.

2. An affidavit of attachment stating "that defendant is about to convert crops raised by him on plaintiff's place into money, or a part thereof into money, for the purpose of placing it beyond the reach of affiant," who is a creditor, substantially complies with Rev. St. art. 186, subd. 11, relating to attachment.

Appeal from Travis county court; A. S. Walker, Judge.

Attachment by J. W. Smith against A. D. Dye. There was judgment for defendant, and plaintiff appeals. Reversed.

Victor C. Moore and Jas. W. Cloud, for appellant. John Dowell, for appellee.

FISHER, C. J. Smith sued Dye for the value of certain cotton alleged to be due on lease contract, and on a promissory note covering a lien on lands rented by Dye from Smith, and for the foreclosure of a landlord's lien on property raised on the premises, and for a writ of attachment directing levy upon the crop raised upon the premises. The defendant (appellee) pleaded certain offsets against the demands of the plaintiff, and also alleged that he sustained actual and exemplary damages by reason of the levy of the attachment on the property in controversy. On motion of the appellee, the attachment was quashed. The case was submitted to a jury by the court, which returned a verdict to the effect that the appellee was liable to the plaintiff for \$153.97, and, as against the same, the appellee was entitled to a credit of \$114.47, and, in addition, found in favor of appellee against the appellant, by reason of the wrongful and malicious levy of the attachment, \$43 actual damages, and \$25, which the verdict named as attorney's fees, and \$100 exemplary damages. The appellee here (de-

fendant below), before judgment was entered by the court, remitted, among other items, the amount found by the jury for actual damages; and the court thereupon rendered judgment in favor of appellee against appellant for the sum stated as exemplary damages, and for other items mentioned in the judgment.

We find no error in the charge of the court, nor in the manner in which the judgment adjusted the differences between the parties. The judgment, in this respect, we think is in accord with the verdict; but it will have to be reversed because of a fundamental error, apparent upon the record, which is not assigned.

It is well settled by numerous cases in this state upon the subject that there must be some finding of actual damages, in order to support a judgment for exemplary damages. It is true, in this case the jury did return a verdict for actual damages, which, if it had not been remitted, would have supported the judgment for exemplary damages; but before the judgment was entered the appellee remitted his actual damages, the effect of which was to deprive the court of the power to render judgment for the exemplary damages. For the reasons stated, the judgment of the court below will be reversed, and the cause remanded.

We think that the third ground stated in the affidavit for attachment substantially complies with the statute. It states "that the defendant is about to convert crops raised by him on plaintiff's place into money, or a part thereof into money, for the purpose of placing it beyond the reach of this affiant." This part of the affidavit does not state that he is about to convert all of his property into money, but it does state that he is about to convert the crops, which is a part of his property, into money; and it does not state that it is done for the purpose of placing it beyond the reach of his creditors, but states that it is done for the purpose of placing it beyond the reach of affiant, who the affidavit shows to be one of the creditors of the defendant. We think this part of the affidavit is in substantial compliance with subdivision 11 of article 186 of the Revised Statutes, and we do not think that the grounds for attachment here stated are inconsistent or in conflict with the two other grounds stated in the affidavit; and, as to the first two grounds stated, we think there was no error in the court holding them to be insufficient. As the case is to be reversed upon the fundamental error noticed, we call the court's attention to this feature of the affidavit for attachment. We have examined the other questions raised in the briefs, and we find no error, except the one noticed, for which the judgment of the court below is reversed, and the cause remanded. Reversed and remanded.

MALLETTTE et al. v. FT. WORTH PHARMACY CO. et al.

(Court of Civil Appeals of Texas. May 27, 1899.)

INSOLVENT CORPORATIONS—PREFERRING CREDITORS—ATTACHMENT—VACATION—FALSE AFFIDAVIT—COSTS—RECEIVERS—COMPENSATION.

1. A creditor of an insolvent corporation may, by attachment, acquire a lien on its property prior to other creditors, where it has not ceased to carry on its business in the usual course of trade.

2. An affidavit for attachment is not traversable for the purpose of abating the writ and vacating the lien.

3. An attachment creditor cannot assail a prior attachment as having been obtained by a false affidavit, in the absence of fraud or collusion between the prior attaching creditor and the debtor.

4. A lien creditor is not entitled to the vacation of a prior attachment lien on the sole ground that the attaching creditor had no reasonable grounds for believing the affidavit for attachment to be true when the attachment was sued out.

5. Creditors who are defeated in a suit to have attachment liens on their debtor's property vacated, after they have caused the property to be placed in the hands of a receiver, cannot complain that the costs, except the expenses incident to the care and sale of the attached property, are taxed against them, including the compensation allowed the receiver, which is within the court's discretion.

Appeal from district court, Tarrant county; Irby Dunklin, Judge.

Suit by J. G. Mallette and others against the Ft. Worth Pharmacy Company and others. Decree for defendants, and plaintiffs appeal. Affirmed.

Capps & Canty and McCormick & Spence, for appellants. S. T. Camp and Greene & Stewart, for appellees.

Conclusions of Fact.

STEPHENS, J. On the 9th day of January, 1897, and for some time prior thereto, the Ft. Worth Pharmacy Company, a private corporation, was carrying on a retail drug business in the city of Ft. Worth. On that day, and while it was yet a going concern, though insolvent, its stock of drugs was seized under attachments levied at or about the same time, which prevented it from further prosecuting its business. The State National Bank of Ft. Worth, E. W. Childress, A. O. Walker, the Carter-Battle Grocery Company, and N. N. True were the several plaintiffs in these attachment suits, and their attachments were levied in the order named. Each of these attachments was sued out upon the ground that the pharmacy company was about to dispose of its property with intent to defraud its creditors. On January 14, 1897, J. G. Mallette and other creditors of the pharmacy company brought this suit, in behalf of themselves and all others similarly situated, against the company, its officers, stockholders, and the attaching creditors, causing its assets to be placed in the hands of a receiver, and seeking to have the attach-

ment liens vacated upon the ground of fraud and collusion, in order that the assets might be distributed among all the creditors alike. When the case came on for trial, by agreement of the parties, the issue of fraud was submitted to a jury, and the other issues of fact to the presiding judge, and upon the findings of the judge and the verdict of the jury judgment was entered against plaintiffs below. Hence this appeal. We adopt, as amply sustained by the evidence, what was found by his honor, the substance of which is sufficiently given in the foregoing statement. We are also of opinion that the verdict must be accepted as establishing, there being sufficient evidence to sustain it, (1) that there was no collusion between the Ft. Worth Pharmacy Company and the attaching plaintiffs, or any of them, and (2) that, if the several affidavits for attachment were false, the parties making them did not know them to be false. We further find that the evidence tended very strongly, and without conflict, to show that the alleged ground for the attachment did not exist; and whether the attaching plaintiffs or any of them had or had not reasonable grounds for believing it to exist was a controverted question of fact raised by the evidence, the preponderance of which tended to show that they had not.

Conclusions of Law.

1. That one or more creditors of an insolvent corporation may fix a lien upon its property by attachment, and thus obtain a preference over other creditors, provided it has not ceased to carry on its business in the usual course of trade, must now be accepted as the law in this state, whatever may be the rule elsewhere. *American Nat. Bank v. Dallas Tinware Mfg. Co.*, 39 S. W. 953, and cases there cited and reviewed by Judge Fly, a writ of error having been denied in that case. The facts above stated bring this case clearly within that rule.

2. That the affidavit for attachment is not traversable for the purpose of abating the writ and vacating the lien has been the recognized rule in this state since the decision in *Cloud v. Smith*, 1 Tex. 611. In the latest case reaffirming it, that of *Gimbel v. Gomprecht* (Tex. Civ. App.) 35 S. W. 470, Justice Brown says: "The validity of the writ of attachment does not depend upon the truthfulness of the allegations made in the affidavit or the petition, but upon the compliance with the statute in making the affidavit." In many jurisdictions a different and possibly better rule prevails; but we must follow the rule so early adopted and long followed in Texas. Subsequent lien creditors, in the absence of fraud and collusion between the prior attachor and the debtor, have no rights in this respect superior to those of the debtor himself. They are, however, permitted to intervene and show that the older attachment is based upon a fictitious or fraudulent demand, or that the attachment is otherwise collusive, and thus

vacate it. *Nenney v. Schultzer*, 62 Tex. 327; *Johnson v. Heidenheimer*, 65 Tex. 263. It seems also to have been held in this state that a subsequent lien creditor may intervene and have the prior attachment vacated, where the creditor suing it out knew his affidavit to be false when he made it. *Bateman v. Ramsey*, 74 Tex. 589, 12 S. W. 235; *Shoe Co. v. Harris*, 82 Tex. 274, 18 S. W. 308; *Kollette v. Selbel* (Tex. Civ. App.) 26 S. W. 863. Whether this holding is not at variance with the rule that the affidavit is not traversable as to the grounds upon which the attachment is sued out may be doubted. But the case was submitted to the jury in accordance with this holding, and we need not discuss that question. We know of no case going so far as to hold that a subsequent lien creditor may vacate the prior attachment upon the sole ground that it was sued out without reasonable grounds for believing the affidavit for attachment to be true. Yet the sixth error is assigned to the refusal of the following requested instruction embodying that proposition: "You are instructed that, if you believe from the evidence that the defendant Ft. Worth Pharmacy Company at the time the several attachment writs were run by the defendants was not in fact about to dispose of its property for the purpose of defrauding its creditors, and that said defendants (other than defendant company) or their agents who made the affidavits for the attachment writs in question did so without reasonable grounds for believing that the said defendant pharmacy company was about to dispose of its property with the intent to defraud its creditors, then you will find for the plaintiffs against such of said defendants as you may believe from the evidence had not such information as would lead a reasonably prudent person, under the same circumstances, to believe that the grounds mentioned in said affidavits for attachment did in truth exist." While a jury might infer from the want of probable cause the existence of guilty knowledge or a fraudulent purpose in suing out the writ, the law does not require them to do so. That would be an inference or presumption of fact, and not a conclusion of law. *Willis v. McNeill*, 57 Tex. 465; *Biering v. Bank*, 69 Tex. 599, 7 S. W. 90; *Kaufman v. Wicks*, 62 Tex. 234. The charge was, therefore, under the well-established practice in this state, properly refused, unless it be the law that a defendant or subsequent lien creditor may have the attachment vacated where the attachor (to quote from the refused charge) "had not such information as would lead a reasonably prudent person, under the same circumstances, to believe that the grounds mentioned in said affidavits for attachment did in truth exist"; that is to say, unless it be the law that a creditor may be thus deprived of his prior lien because he made a mistake in suing out the attachment, which he might have avoided by acting with reasonable prudence. We know of no authority for such a

proposition. True, a false statement made without knowing it to be so is treated as fraudulent, where it is made to influence the conduct of one who is misled thereby to his prejudice. *Mitchell v. Zimmerman*, 4 Tex. 79; *Henderson v. Railroad Co.*, 17 Tex. 576. But it has never been held, so far as we know, that the mere doing of a lawful thing—such as suing out an attachment—in a negligent manner is fraudulent. Negligence is not fraud, nor is it one of the grounds of equity jurisdiction. A suit for damages has too long been held to be an adequate legal remedy for the consequences of a negligent or merely wrongful act, not producing irreparable injury, to admit of a discussion of equitable remedies in that connection. The pharmacy company, or its directors or receiver, or possibly its general creditors, might have maintained such an action for any injury done in this case by the wrongful attachments, whether negligently sued out or not. But such is not this suit, the purpose of which was to vacate the attachment liens and distribute the assets covered by the liens ratably among all the creditors. There were no such allegations of damage or the extent thereof as to warrant any recovery upon that theory. Indeed, the petition was not drawn to present such an issue; nor is any ruling complained of on appeal involving that phase of recovery. These conclusions, together with our conclusions of fact, cover the main questions raised.

3. The errors assigned to the rulings in the admission and exclusion of evidence are overruled without discussion, as they are obviously without merit.

4. The remaining assignments complain in different forms of the court's action in adjudging the costs. There was certainly no error in imposing upon appellants the costs of the suit they lost. The costs incident to the receivership were divided, and we are not prepared to hold that this was not equitably done. Whatever would have been a charge upon the assets seized under attachment without the appointment of a receiver, including the expense of taking care of and selling the property, was not taxed against appellants, but the compensation allowed the receiver was, which was within the court's sound discretion. *Cattle Co. v. Bindle* (Tex. Civ. App.) 32 S. W. 582. Judgment affirmed.

WEAVER et al. v. GOODMAN.

(Court of Civil Appeals of Texas. April 1, 1899.)

TRUST DEEDS FOR BENEFIT OF CREDITORS—FICTITIOUS CLAIMS—COLLUSION—EVIDENCE—ATTACHMENT—INSTRUCTIONS—MEASURE OF DAMAGES—INTEREST.

1. In an action by a trustee under a deed for the benefit of certain creditors against a creditor not mentioned in the deed, for making a wrongful attachment of the property conveyed by the deed, an instruction that a preferred creditor would not be affected by his knowledge that the

claim of one of the creditors was fictitious is erroneous, as authorizing a verdict for plaintiff, though the creditor having the knowledge of the fictitious claim accepted the deed for the purpose of giving the claim a false standing, with the intention of aiding in its payment, in which case he would be a party to the fraud, and his claim would not take precedence over that of the attaching creditor.

2. In such an action, a question whether a creditor had notice that the claims of other creditors were fictitious should be submitted to the jury though the evidence of notice is unsatisfactory and inconclusive.

3. A creditor is entitled to avail himself of a trust deed executed in his behalf and that of another creditor, though he could have discovered by the use of ordinary diligence that the claim of the latter was fictitious, if he had no actual knowledge of the fact.

4. The measure of damages for a wrongful attachment by a creditor of a stock of goods that had been previously conveyed by the debtor in trust for the benefit of other creditors is the market value of the goods, with interest thereon at the rate of 6 per cent. from the time of the levy.

Appeal from district court, Navarro county; L. B. Cobb, Judge.

Action by J. R. Goodman against J. M. Weaver and other for damages for a wrongful attachment. From a judgment for plaintiff, defendants appeal. Reversed.

Frost, Neblett & Blanding, for appellants. Simkins & Mays and C. W. Croft, for appellee.

BOOKHOUT, J. We adopt the following statement of the case, taken from appellants' brief: On the 24th day of October, 1896, N. Cahn executed a deed of trust on a certain lot of goods, wares, and merchandise, notes and accounts, in Corsicana, Navarro county, Tex., to J. R. Goodman, to secure certain persons and corporations named therein. The deed of trust recites that N. Cahn is indebted to I. Baum in the sum of \$2,600 for rents, and directs the trustee to pay this first. The deed then prefers Croft & Croft, attorneys, Goodman, the trustee, the First National Bank, and the Corsicana National Bank. The trustee, Croft & Croft, and the two banks accepted the provisions of the deed. Sanger Bros. were also preferred, but they declined to accept the deed; and on the same day it was executed they instituted suit against N. and A. Cahn, composing the firm of N. Cahn, and caused an attachment to be levied on the goods. This suit was brought on January 9, 1897, by the trustee against Weaver, the sheriff who attached the goods, and Sanger Bros., to recover as damages the value of the goods attached. Sanger Bros. answered that the deed of trust was fraudulent and void for the reason that the debts of Baum, the First National Bank, and Croft & Croft were fictitious, and the other creditors knew that such debts were fraudulent when they accepted the trust deed, and they participated in the fraud of Cahn in preferring such fraudulent debts. In March, 1898, the case was tried before a jury, and resulted in finding that the First National Bank debt was fraud-

ulent; that Baum's debt was fraudulent, and that one-half of Croft's debt was fraudulent. Judgment was rendered in favor of the trustee, Goodman, for the fair and reasonable value of the goods taken under the attachment, against Weaver, the sheriff, with 6 per cent. interest from date of levy, and in favor of Weaver against Sanger Bros. for the same amount, with attorney's fees and costs. After motion for new trial made and overruled, Sanger Bros. and Barry and Schneider, sureties on the indemnity bond, bring their cause to this court by appeal.

We will not discuss in detail the many assignments of error presented by appellants, but will select only such as we deem important for a decision of the case upon this appeal.

The tenth assignment complains of the action of the court in giving a special charge at the request of appellee, reading as follows: "You are charged, at the request of plaintiff, that, though you should believe that there was a combination between Baum and the First National Bank and Cahn to defraud some of Cahn's creditors, in order for the Corsicana National Bank to be affected thereby you must believe from the evidence not only that the Corsicana National Bank knew of such combination, but also that it was a party to and participated in such combination; and the fact that it was a creditor of Cahn, and was preferred in the same deed of trust with said parties, and accepted under said trust deed with them, would not alone be sufficient to make it a participant in such combination, should you believe there was a combination." The objection made to this charge is that it is upon the weight of the evidence. The acceptance by a creditor with notice of the fact that there was a fictitious debt among the number secured by the deed of trust, if done in good faith, and with the sole intention of securing his own claim, it is believed, would not make him a party to the fraud; but if his purpose and intention was, in accepting, to give color and character to such fictitious claim, and aid in its collection, over the just claims of the debtor, then he would become a party to the fraud. *Shoe Co. v. Mars*, 82 Tex. 498, 17 S. W. 370; *Sugar-Refining Co. v. Harrison* (Tex. Civ. App.) 29 S. W. 500; *Rider v. Hunt* (Tex. Civ. App.) 25 S. W. 314; *Frost v. Mason* (Tex. Civ. App.) 44 S. W. 53; *Haas v. Kraus*, 86 Tex. 689, 27 S. W. 256. Such seems to have been the holding of the supreme court in the case of *Haas v. Kraus*, supra. In that case Chief Justice Stayton, speaking for the court, uses the following language: "To have made the mortgage in question fraudulent, the secured creditor must have some purpose other than the security and payment of the sum due. He may have known that the debtor would not have given him the security, but for a desire, even, to defeat some other creditor in the collection of the sum due him. But this would not render it unlawful for him

to take security for payment of the sum due. If the real purpose of the creditor was not such lawful purpose, but was to tie up the property by a mortgage in form, to the injury of other creditors, or some like purpose on his part, then the mortgage would be fraudulent as to the other creditors." The special charge, in effect, told the jury that, although there may have been a combination on the part of certain parties named in the deed of trust to defraud, yet, in order to affect the bank, it must have been a party to and participated in such combination, and the fact that it was a creditor of Cahn, and was preferred in the same deed of trust with said parties, and knew of such combination, and accepted under said deed of trust with them, would not be sufficient to make it a participant in such combination. The jury, under this charge, were authorized to find for plaintiff, although they may have believed there was a fictitious claim or claims embraced in the deed of trust, and that the bank had knowledge of it, and with such knowledge accepted its terms, for the purpose of giving such claims a false standing, and with the intention of aiding in their payment. We cannot agree to such a proposition. If the deed of trust made to Goodman, as trustee, was executed to secure a fictitious debt or debts, and the Corsicana National Bank knew of the fact that the schedule of claims secured contained one or more fictitious claims, which by the deed of trust were to be paid prior to the claim of the bank, and the purpose and intention of the bank in accepting the terms of the deed of trust was to give color and standing to such claim or claims, and to aid or assist in its or their collection, the bank thereby became a party to the fraud, and its claim would not take precedence over the claim of the attaching creditor. The appellants were entitled to have this phase of the case submitted to the jury without comment upon the evidence.

It is insisted by appellee that there is no evidence in the record that the Corsicana National Bank had notice that any of the claims secured by the deed of trust were fictitious, and, hence, if there was error in the charge it was harmless. While the evidence of notice is unsatisfactory, and not of a conclusive nature, yet we cannot say that there is no evidence on this issue. It was a matter that should have been passed upon by the jury.

The appellants requested a special charge to the effect that if any of the claims were fictitious, and at or before the Corsicana National Bank accepted such deed of trust said bank could have discovered, or those who acted for it in accepting said deed of trust by the use of ordinary diligence could have learned, that any one of the claims secured by said deed of trust was fictitious, then the plaintiff could not recover. This charge does not announce a correct proposition. The question of constructive notice is not applicable to this case. If the bank had notice that the deed

of trust embraced a fictitious claim, and accepted its terms with the purpose and intention of assisting in its payment, then, as before stated, it became a party to the fraud.

Appellants complain of the charge of the court upon the measure of damages. The court instructed the jury that, if they found for the plaintiff, the amount of their recovery would be the fair and reasonable value of the goods, etc., that passed by the deed of trust, with interest at 6 per cent. per annum from the date of the levy. It is contended that the defendants were only liable, if liable at all, for the market value of the goods. The true measure is the market value, and the jury should have been so instructed.

It is further contended by appellants that the charge is erroneous in that it invades the province of the jury, by leaving them no discretion, but directs them, as a matter of law, to find interest on the value of the goods from the time of the levy at the rate of 6 per cent. per annum. It is contended that it is within the discretion of the jury to find interest, or not, as they may deem proper. The supreme court has settled this question adversely to the contention of appellants. *Watkins v. Junker*, 90 Tex. 588, 40 S. W. 11. For the error in giving the special charge of appellee above pointed out, the judgment is reversed, and the cause remanded.

On Rehearing.

(May 27, 1899.)

Appellee, in his motion for a rehearing, complains of the statement of the case set out in the beginning of our opinion as not being supported by the record. This statement was taken from the brief of the appellants. Such a statement is not a finding of facts by this court. Its only purpose is to show the general nature and result of the suit. The statement that the jury found the debts of the First National Bank, the Baum debt, and the debt of Croft & Croft, fraudulent, is not fairly borne out by the record. The jury made no express finding on the claims of I. Baum and the First National Bank. They found the claim of Croft & Croft excessive; resulting, as it would appear, from a mistaken value of the goods conveyed by N. Cahn to the trustee, Goodman. We make the above correction in the statement of the case. We see no reason for changing our opinion upon the law of the case. The motion for rehearing is overruled.

HULSE v. POWELL et al.

(Court of Civil Appeals of Texas. June 21, 1899.)

PARK—DESTRUCTION OF TREES—RIGHT OF LOT OWNER TO RESTRAIN.

Where land has been dedicated as a public park, an owner of lots which are not situated contiguous thereto, or in the vicinity thereof, and which will not be depreciated in value by the de-

struction of trees thereon, is not entitled to restrain such destruction merely because he and the public in general are thereby deprived of the use of such park.

Error from district court, Runnels county; J. O. Woodward, Judge.

Action by J. W. Powell against Adam Hulse and others. From a judgment for plaintiff, defendant Hulse brings error. Reversed.

R. B. Truly and W. R. Spencer, for plaintiff in error. C. O. Harris, M. C. Smith, and J. W. Terry, for defendants in error.

KEY, J. J. W. Powell brought this suit against Adam Hulse and others to enjoin them from cutting down and destroying the trees on a tract of land alleged to have been dedicated to the public as a park, said tract of land being adjacent to the town of Ballinger. The plaintiff's petition, after alleging that the Gulf, Colorado & Santa Fé Railway Company laid out, mapped, and plotted the town of Ballinger, and dedicated the tract of land referred to as a public park for the use and benefit of the public, alleges "that the plaintiff purchased certain lots and blocks in the town of Ballinger, as did divers other inhabitants of said town; that he purchased the same because of, and with reference to, the fact that the tract of land referred to had been dedicated as a public park, and thereby acquired a vested right in said park." The petition alleges further: "That the groves of shade and ornamental trees growing on said open space as aforesaid are of the value, for said public purposes, and especially to plaintiff, of the sum of \$600; that the plaintiff, as well as many other inhabitants of said town, having likewise a vested right in said shade and ornamental trees, have besought said defendants to desist from their said unlawful acts in the destruction of said shade trees, but they have refused to do so, and are now still unlawfully cutting and destroying said shade trees, and have threatened to continue said unlawful acts in the destruction of said shade trees to the great and irreparable injury and damage of said inhabitants of said town, and especially to plaintiff, in the sum of \$600." The petition does not allege that the plaintiff's property is situated contiguous to or in the vicinity of the alleged park, and does not aver that the destruction of the trees growing in the park will depreciate the value of, or otherwise injuriously affect, the plaintiff's blocks or lots. The defendants' answer, among other things, contains a general demurrer, and what they denominate "special exceptions," the latter reading as follows: "(1) Plaintiff failed to allege such facts as would authorize him to prosecute this suit in his own behalf. (2) Plaintiff failed to allege such facts as to his interest in the property alleged to be trespassed upon as will entitle him to recover for any damages thereto. (3) No such authority or right is alleged in plaintiff as will entitle

him to any equitable relief, or to any restraining order of this court, on account of the grounds alleged by him." The trial court overruled all of these exceptions, and upon the trial of the case rendered judgment restraining the defendants from cutting down or removing the timber and trees from the park referred to.

We sustain the assignment of error which complains of the action of the court in overruling the exceptions to the plaintiff's petition. The petition fails to allege any injury to the plaintiff other than such as would result to the public by interference with the park referred to. For aught that appears in the petition, the plaintiff's blocks and lots may be situated on the opposite side of the town, and their value may in no wise be affected by the destruction of the park; and while it appears from the petition that, if the defendants are not restrained, the plaintiff and the other inhabitants of the town of Ballinger will be deprived of a suitable place for picnics, May fests, etc., still this would not be such special injury to the plaintiff as would authorize him to maintain the action. Obstructing a street or other public highway in such manner as to prevent its use by the public may result in inconvenience to any person who desires to travel such highway, but such person cannot maintain an action on account of or to prevent such obstruction unless he shows that such obstruction will injuriously affect him, other than depriving him, as well as the public, of the use of the highway. *City of San Antonio v. Strumberg*, 70 Tex. 366, 7 S. W. 754. The same principle applies as to public parks. In the case cited the plaintiffs sought to restrain the erection of a public building upon the open space in the city of San Antonio known as the "Military Plaza," and in deciding the case the supreme court used this language: "We think it a principle established by the overwhelming weight of authority in the courts of all countries subject to the common law that no action lies to restrain the interference with a mere public right at the suit of an individual who has not suffered or is not threatened with some damage peculiar to himself. As applied to public measures, the doctrine is elementary. 2 Cooley, Bl. 219. For a special damage, resulting from the invasion of a right enjoyed by a party in common with the public, the law affords him a remedy by private action; but, if the damages be only such as are common to all, the action must be brought by the lawfully constituted guardian or guardians of the public interest." *Oswald v. Grenet*, 22 Tex. 94, and *Shepherd v. Barnett*, 52 Tex. 638, cited in support of the petition in this case, are not analogous. In the first case the plaintiff alleged that he bought lots contiguous to the open space alleged to have been dedicated to the public, and it does not appear that he did not allege, and does appear that he proved, that the construction of a building on the open space re-

ferred to would obstruct the view from the plaintiff's lots, and materially depreciate their value. In the other case the petition shows that the plaintiff's property was bounded on the south by a street, which, it was alleged, the defendant had erected a fence across; and it was charged that the obstruction referred to not only interfered with the plaintiff's use of the street, but had depreciated the value of his lot to the extent of \$1,000. The petition in this case is obnoxious to a general demurrer, and the court erred in overruling the exceptions referred to. On the other questions presented we sustain the rulings of the trial court, but for the error pointed out the judgment will be reversed, and the cause remanded. Reversed and remanded.

GULF, C. & S. F. RY. CO. v. HARRIS.
(Court of Civil Appeals of Texas. June 21, 1899.)

MASTER AND SERVANT—NEGLIGENCE—PROVINCE OF JURY.

1. In an action for personal injuries alleged to have been caused by a collision resulting from the failure of defendant's foreman to place a red flag on a car on which plaintiff worked, where the duty of the foreman to place such flag was fixed by rule or custom, it was error to charge, as a matter of law, that the foreman's failure to place the flag constituted negligence on defendant's part, since negligence was a question of fact for the jury.

2. Where there was evidence that it was the custom of men in plaintiff's place to put out the flag, it was error to charge, as a matter of law, that plaintiff's failure to put out the flag constituted contributory negligence on his part, as it was a question of fact for the jury.

Appeal from district court, Brown county; J. O. Woodward, Judge.

Action by Aud Harris against the Gulf, Colorado & Santa Fé Railway Company. *Judgment for plaintiff, and defendant appeals. Reversed.

J. W. Terry, for appellant. I. J. Rice and Chas. Rogan, for appellee.

FISHER, C. J. This is an action by the appellee, Harris, against the railway company, to recover damages for injuries sustained while in the employ of the appellant, working upon a car, in placing timbers, under the direction of a foreman, by reason of a switch engine colliding with the car and throwing him from it. He recovered a verdict and judgment in the court below for \$6,000. The pleadings and evidence raised the following issues: The plaintiff was a member of a bridge gang, which was under the control of a foreman. At the time of his injuries he was working upon a car, in placing timbers, under the direction of the foreman. A switch engine collided with the car, and the shock threw the plaintiff from it, thereby causing the injuries sustained. It was a question in the case whether it was the duty of the foreman, either by the rules of the company, or

his habit and custom so to do, to give notice, by placing a red flag upon the car upon which the men were working, or by other notice to those operating the switch engine, that men were working upon the car; and it was a question whether or not such notice was given. The plaintiff himself did not give any notice, by putting out a flag, or any other character of notice, to the switch crew, that he was engaged in work upon the car; and there is also evidence to the effect that it was the custom of the men working on the car to give notice by putting out the flag. The plaintiff went upon the car without ascertaining whether any flag was placed, notifying the switch crew that they were engaged in work upon it.

The first assignment of error is as follows: "The court erred in the tenth subdivision of its charge, which is as follows: 'Should you find from the evidence that it was the duty imposed by the defendant company upon said Klever, the foreman of said bridge gang, to give notice to the said switch crew that he was about to send hands upon said car, and that said Klever failed to give such notice, his said omission to do so would be an act of negligence upon the part of defendant company; and if you find that plaintiff was injured as a direct result of such negligence, and if you further find that it was not made the duty of plaintiff, by the rules of defendant company, or by the custom prevailing in said service, to have given the said notice himself, and that there was no apparent danger in going upon said car, and that plaintiff was not guilty of any other act of contributory negligence in failing to exercise due care while on said car, you will find for plaintiff such damages as you find he has sustained under instruction hereinafter given you.'" Appellant, in its brief, submits three propositions under this assignment, which are as follows: "(1) While it is proper for the court, in its charge, to call the attention of the jury to the issues made by the evidence, yet in cases of this character the final question of whether negligence or contributory negligence is shown by the facts should be left to the jury. When there is no statute fixing the duty, it is the province of the jury to say whether the facts show that the defendant failed to exercise such care in the particulars charged as would have been exercised by a person of ordinary care and prudence under the circumstances, or whether the plaintiff, under the facts shown, failed to exercise such care and prudence as would have been observed by a person of ordinary care and prudence under similar circumstances; and it was error for the court to charge the jury that any particular state of facts constituted negligence on the part of the defendant, or contributory negligence on the part of plaintiff. (2) It was a question of fact, under all the circumstances of the case, whether the foreman, Klever, was guilty of negligence in not giving the notice; and the court there-

fore erred in instructing the jury, as a matter of law, that his failure to give notice was negligence. It was a question of fact, under all the circumstances of the case, whether plaintiff was guilty of contributory negligence in going on the car without himself notifying the switch crew, or without putting out a flag, or seeing that one was put out. This issue should have been submitted to the jury, and the court therefore erred in withdrawing this issue from the jury, and instructing them that merely because it may not have been made the specific duty of the plaintiff, by the rules or custom, to give notice, and if there was no apparent danger in going on the car, plaintiff was not guilty of contributory negligence. (3) Rules or customs are mere evidence of negligence, *vel non*; and it was error for the court to give such rules and customs the effect of a statute, but he should have left it to the jury to say, under all the circumstances of the case, whether following the rule or custom was or was not negligence." We think the charge quoted is justly subject to the objections urged in these propositions, and for the reasons there stated the judgment of the court will be reversed. In the main, what is here stated applies to the charges complained of in the remaining assignments of error. The court should leave questions of negligence and want of care to the jury. For the errors stated, the judgment is reversed and the cause remanded. Reversed and remanded.

HERRING v. HERRING et al.

(Court of Civil Appeals of Texas. May 13, 1899.)

ACTIONS — CONSOLIDATION — PARTNERSHIP — AUDITOR'S REPORT — CONCLUSIVENESS — INSTRUCTIONS — PREJUDICE — APPEAL — ASSIGNMENTS OF ERROR — SUFFICIENCY.

1. Plaintiff instituted suit against defendant to recover a penalty for usury, and another against defendant and others for a partnership settlement, which suits were consolidated. *Held*, that the consolidation was not erroneous, it appearing that the payments charged to be usurious were sums credited to plaintiff by sales of firm property, and that the causes were intimately connected.

2. In an action for the settlement of a partnership an auditor was appointed, who reported the firm transactions, some of the items of which were excepted to. *Held* not error to instruct that the report was conclusive as to all items not excepted to, but as to those excepted to it should not be considered, where the general charge left the issues as to the disputed items to be determined by evidence irrespective of the report.

3. Plaintiff and defendant were cattle dealers, and divided certain partnership cattle between them. Defendant lost a portion of his, and went on the range and branded others to supply their places. *Held*, that in an action for a partnership settlement it was not prejudicial to plaintiff to instruct that he was not authorized to brand cattle out of partnership cattle to supply those lost, where the evidence was that those branded were part of those lost.

4. An assignment of error as to the court's charge will be overruled where the statement of facts in appellant's brief following the assignment is not sufficiently full to enable the court

to determine whether the error, if any, resulted in appellant's injury.

5. An assignment of error complaining of the insufficiency of the evidence to support the verdict will not be considered where the attention of the trial court was not, in the motion for a new trial, called to the deficiency in the proof.

6. A refusal of a new trial because the jury found against plaintiff as to certain cattle alleged to have been converted by defendant was proper where plaintiff knew nothing of the matter, and defendant sent plaintiff a check in settlement of the matter, though he knew nothing about the cattle.

Appeal from district court, Wilbarger county; G. A. Brown, Judge.

Consolidated actions by F. E. Herring against C. T. Herring and by same plaintiff against same defendant and others. From a judgment, plaintiff appeals. *Affirmed*.

F. P. McGhee, J. A. Lucky, and J. M. Basham, for appellant. Huff & Hall and L. P. Bonner, for appellees.

CONNER, C. J. On the 11th day of July, 1896, the appellant sued C. T. Herring alone to recover the statutory penalty for charging, collecting, and receiving usurious interest, and alleged that on or about the 1st day of November, 1891, appellee C. T. Herring loaned appellant the sum of \$11,505, for which he charged interest at the rate of 12 per cent. per annum. Appellant alleged that he paid interest on the above sum of money at said rate from time to time, aggregating in all the sum of \$4,371.87, and he prayed judgment against C. T. Herring for double the amount of said usurious interest. Afterwards, on the 15th day of July, 1896, appellant instituted another suit against C. T. Herring for a partnership settlement, and by amendment afterwards made John R. Stinson and P. L. Herring defendants, alleging that in the fall of 1891 appellant, C. T. Herring, P. L. Herring, and John R. Stinson entered into and were engaged in partnership together in the cattle business in the Indian and Oklahoma Territories, alleging that appellant and C. T. Herring owned and were equally interested in a certain stock of cattle, describing the brand, and that appellant, C. T. Herring, and P. L. Herring owned together a stock of cattle in another given brand, C. T. Herring's interest therein being one-half, and appellant's and P. L. Herring's interests therein being one-fourth each; that said Stinson was only interested in ranching on the ranges on which said brand were ranged. Appellant then set out the sums of money by him and by C. T. Herring and by P. L. Herring, respectively, brought into the partnership, and alleged that the said partnership business continued until in 1896, when the same was dissolved by mutual consent, and that no final partnership settlement had ever been had; that C. T. Herring had possessed himself of all the partnership property remaining on hand at the date of the dissolution of said partnership, which he alleged amounted to the sum of about \$50,-

000, and which it was alleged C. T. Herring had appropriated to his own use and benefit. It was also alleged that C. T. Herring had appropriated certain individual cattle belonging to appellant, and, among other things, set up a promise by C. T. Herring to pay a certain note appellant held against P. L. Herring for the sum of \$1,249.28, and that Herring had only paid thereon the sum of \$1,000; and he prayed for an accounting of the partnership business, etc. The court, on motion, consolidated the two suits, and afterwards, on the 7th day of September, 1898, the consolidated cause was tried before a jury, and resulted in a verdict in appellant's favor against C. T. Herring for the sum of \$1,215.10 and all costs of suit, but against appellant as to his plea of usury, and for loss of individual cattle alleged, and upon the alleged assumption of the note against P. L. Herring, and the alleged conversion of the partnership property.

The first error assigned is to the action of the court in consolidating said two causes. It would seem that these causes of action are not such as should ordinarily be joined, but, under the peculiar facts of this case, we have been unable to say that in so doing the court below erred to appellant's prejudice. The payments charged to be usurious appeared to have been sums credited to appellant by sales of partnership cattle and of cattle owned and held by him individually, less expenses from time to time made during partnership transactions extending from August, 1891, to some time in 1895, the details of which are too numerous to here enumerate; but a careful consideration of the same has led us to the conclusion that the two causes were intimately connected, and that it has not been shown that in fact usury was paid as alleged, and we think, therefore, that this assignment should be overruled.

In the second assignment of error it is charged that the court below erred in its charge to the jury with respect to the use and purpose of the auditor's report. Upon a former day the court had appointed an auditor, who it appears heard evidence, and reported to the court the partnership transactions, some of the items of which were severally excepted to by appellant and appellee C. T. Herring. The charge of the court complained of is not set out in the assignments or in the proposition or statement thereunder. From an examination of the charge, however, we find that the court charged the jury, in effect, that the auditor's report was conclusive as to all items not excepted to, but that as to items excepted to said report should not be considered. It is asserted in aid of this assignment that the auditor's report was prima facie proof, even as to the items excepted to. This appears to be true, as a proposition of law, in cases where no proof is offered to establish or contradict such items. *Manufacturing Co. v. Hanaway*, 90 Tex. 581, 40 S. W. 13. But the

court in its general charge left the issues of fact as to disputed items in the account as reported by the auditor to be determined by the evidence adduced upon the trial, without respect to the auditor's report. In the statement under this assignment of error the evidence, if any, as to the disputed items, is not set out, nor is it stated that there was no evidence. As presented, and as the result of an effort to search through a voluminous record for the purpose of collecting the facts which relate to the several items in question, we are unable to say either that the charge given was incorrect, or that, if so, appellant suffered any injury; and said assignment is accordingly overruled.

In the fourth assignment of error it is complained that there was error in the court's charge on the question of the 23 head of cattle branded out of the partnership brand into C. T. Herring's individual brand during 1896. The court, among other things, charged the jury, in effect, that C. T. Herring would not be authorized to brand cattle out of partnership cattle on the range to supply the place of those lost by him out of those that had been partitioned between him and appellant. It appears from the evidence that in 1895 appellant and C. T. Herring divided certain cattle; that C. T. Herring drove his towards Vernon; and that in Waggoner's pasture he lost 27 head, and some time thereafter branded 23 head of cattle in the partnership brand, to supply the place of the 27 lost. Appellant, however, knew nothing of this transaction, except what had been told him; and one of the appellee C. T. Herring's witnesses testified that the 23 head so branded were part of the 27 lost. Another witness testified that the 23 head so branded were found and branded in the pasture in which the loss occurred, and we see nothing in the charge or the evidence on this point to appellant's injury.

The court may have charged as imputed in the fifth and sixth assignments of error, but, if so, the facts called to our attention in the statements following these assignments are not sufficiently full to enable us to determine whether the error, if any, probably resulted in injury to the appellant. No error being apparent to us, the fifth and sixth assignments of error are overruled.

The effect of the seventh assignment of error is to question the verdict of the jury on the ground of insufficiency of testimony to support their finding that C. T. Herring was not liable upon appellant's note by P. L. Herring. The attention of the trial court was not, in appellant's motion for new trial, called to this deficiency of proof, if any. It is a well-settled rule that this should have been done before appellant can here have the matter corrected. In addition to this, no such evidence has been called to our attention as to make it apparent to us that the verdict is unsupported by the evidence in this particular.

The seventh (a) and the eighth and the ninth assignments of error are each and all overruled, on the ground that no such statement has been made in connection therewith as points out to us any injury to appellant, and from an examination of the record in the particulars complained of in these assignments we have been unable to see error to appellant's prejudice.

The tenth and last assignment of error is overruled, the complaint therein made being that the court erred in overruling plaintiff's motion for new trial, because the jury found against plaintiff on his claim for \$60 for three cattle taken by the hands of C. T. Herring in 1895. The only evidence called to our attention, or that we have been able to find, relating to this item, is that of the plaintiff, who testified that of his own knowledge he knew nothing of the conversion of these three head; that the foreman of C. T. Herring had told him so; and the further testimony that C. T. Herring sent a check for \$30 on this account. But C. T. Herring, in his testimony, explains that he sent this check as a matter of compromise, and that he knew nothing whatever about the three cattle in question. Judgment affirmed.

HEARNE v. STRAHORN-HUTTON- EVANS COMMISSION CO.

(Court of Civil Appeals of Texas. May 27, 1899.)

TRIAL—DIRECTION OF VERDICT—PEREMPTORY INSTRUCTIONS.

In an action to recover the value of cattle alleged to have been purchased at a trustee's sale, it is not error to peremptorily instruct for defendant, where no evidence is submitted, either as to their value, or as to the damages sustained by plaintiff in failing to get them.

Appeal from district court, Callahan county; T. H. Conner, Judge.

Action by L. Hearne against the Strahorn-Hutton-Evans Commission Company. From a judgment for defendant, plaintiff appeals. Affirmed.

F. W. James and John Bowyer, for appellant. Capps & Cantey and Otis Bowyer, for appellee.

HUNTER, J. This suit was brought by appellant, in the district court of Callahan county, to recover against appellee \$14,500 damages, the alleged value of 725 head of three and four year old steer cattle which he claims to have purchased at a trustee's sale made at Balrd, Tex., on December 7, 1896, by William Hunter, trustee in a certain mortgage or deed of trust made by Sam Cutbirth in 1895 to the appellee to secure notes due it amounting to about \$12,000. The defendant company pleaded a general denial, and a special plea, which it is not now necessary to notice. The case was tried by a jury, and, after all the evidence was in, the district judge instructed the jury to find a

verdict for defendant, which they did, and from the judgment of the court rendered thereon in favor of the defendant this appeal is taken.

The evidence, as contained in the record, discloses that the sheriff of Callahan county, at the instance of William Hunter, the trustee, cried the sale of the cattle as described in the mortgage, and that appellant bid \$900, when the same were knocked off to him. He demanded from Hunter a bill of sale of the cattle under the seal of the appellee company, upon receipt of which, only, he proposed to pay the bid. Hunter refused to make such a bill of sale, or any other, it seems. Appellant never paid the bid, and never received any cattle or bill of sale thereof. Indeed, it appears that some time before the sale all the cattle so mortgaged had been delivered to the appellee company in part payment of the debt, except one crippled steer, worth about \$15, and that had been sold by Cutbirth by consent of Hearne; so that there were no such cattle in the pasture as were named in the mortgage and notice of sale. It does not appear why this sale, or form of sale, was gone through with; but there is no evidence whatever in the record tending to prove the value of the cattle bid for by appellant, or in any way tending to establish any damages.

There is but one assignment of error, which complains of the peremptory charge to find for defendant company; and under that one proposition, to wit, "When a party plaintiff in a petition sets up a good cause of action, and sustains every allegation by proof, he is entitled to judgment." This proposition appellee's counsel, in their brief, seem rather to concede as correct, abstractly speaking,—indeed, they say they "hesitate to assail it"; but they point out that there was no evidence whatever to sustain one of the important allegations of the petition, to wit, the one alleging the value of the cattle, and the damages sustained by the plaintiff in failing to get them, and this is the weak spot in appellant's case. We are compelled to overrule the assignment of error, and order that the judgment be affirmed.

CONNER, C. J., not sitting.

RENNER v. PETERSON et al.

(Court of Civil Appeals of Texas. June 3, 1899.)

PUBLIC LANDS—PURCHASE AS ACTUAL SETTLER—TRESPASS TO TRY TITLE—EVIDENCE—BURDEN OF PROOF.

1. Where it appears that plaintiff, the day before she made application to purchase the land in controversy as an actual settler on state school lands, merely drove over the land, and picked out a place for a house and tank, but did not get out of the buggy, and that no one was occupying the land, and there were no improvements, the evidence fails to show that she was an actual settler at the time she made her application.

2. Where plaintiff claims as an actual settler

on state school lands, she must rely upon the strength of her own title, and the burden of proof is on her to show that she was an actual settler at the time she made her application.

Appeal from district court, Baylor county; S. I. Newton, Judge.

Trespass to try title brought by Mrs. E. J. Peterson and others against George H. Renner. There was a judgment for plaintiffs, and defendant appeals. Reversed.

D. A. Holman and D. L. Kenan, for appellant. C. C. Cummings, for appellees.

CONNER, C. J. This is a simple suit in trespass to try title, to which the defendant pleaded general denial and not guilty. Appellant had made application to purchase the land in controversy as an actual settler on state school land, and it was awarded to him. Appellee subsequently made application to purchase the same section as an actual settler, which was rejected, and brought this suit to recover the land. The court, among other things, instructed the jury as follows: "(3) The burden of proof was upon the plaintiff Mrs. E. J. Peterson to establish her right and title to the land in controversy by a preponderance of evidence before she would be entitled to recover. (4) The term 'actual settler,' as used in this charge, is one who has gone upon state school land, and is residing upon it as his home, in good faith, at the time he makes his application to purchase same." "(7) I now submit to you the following issues of fact, and you will render your verdict upon each issue separately in writing: First issue of fact: (8) Mrs. E. J. Peterson claims that she was an 'actual settler' upon the land in question at the time of her application to purchase same. You will find from the evidence before you whether she was or was not an actual settler, as hereinbefore defined in subdivision fourth of this charge, upon the land in controversy, at the time of her application to purchase same, and as you find so state in your verdict. (9) Should you find, in passing upon the first special issue of fact above submitted, that she was not an actual settler upon said land at the time she applied to purchase same, then you need not proceed any further with your investigation." The court also submitted the second issue of fact, to find whether G. H. Renner was an actual settler upon said land at the time he made his application, and, if they found that Mrs. Peterson was and that Renner was not, then to find for plaintiff. The jury returned the following verdict: "We, the jury, find from the evidence that Mrs. E. J. Peterson was an actual settler on the land at the time she made her application, and we also find from the evidence that G. H. Renner was not an actual settler at the time he made application." Judgment for appellee was accordingly entered, and hence this appeal.

The assignments of error raise but one

question, to wit, does the evidence show Mrs. Peterson entitled to the land in controversy as an actual settler? The evidence on this issue was, in substance, as follows: Plaintiff Mrs. E. J. Peterson testified as follows: "The day before I made my application I met Mr. A. L. Chesher in Seymour, and asked him if he knew where George H. Renner lived. He told me he did, and I told him I wanted to see Renner, and asked him if he would go in a buggy with me out to Renner's house. We went out to Renner's, and, finding him absent from home, I left a note at his house, asking him to come to town, that I wanted to see him. We then drove to the land in controversy, and drove over it twice, and I picked out a place for a house and tank. I did not get out of the buggy. We found no one on the land, and no improvements of any kind upon it, nor evidence of any kind that any one was occupying it. We then drove down to Shawver's, but did not find Renner, and I told Mr. Chesher that I was going back to town, and file on the land. We then came on back to Seymour. The next morning I went to the county clerk's office, and made my application to buy the land as an actual settler, and sent my application to the general land office, and at the same time I sent the money to make the first payment on the land to the state treasurer." Lem Chesher testified, corroborating her statement as to their going to Renner's, driving over the land in a buggy. "She did not get out of the buggy; picking out a place for house and tank. Said she was going to town and file on the land, and returned to Seymour." This was all the testimony as to being an actual settler at the time she made her application. Plaintiff also testified that on the night of the day, and after she made her application, as follows: "That night I went out on the land alone, and stayed all night on the land, sleeping in the buggy. I carried a lot of wraps, and the next morning I built a fire, and made some coffee, and cooked some eggs, and ate breakfast on the land, and came back to town after sunup. I carried nothing with me except the buggy and team and a lot of wraps, and brought them all back to town with me. I left nothing out there on the land. I hired the buggy from Dickson's livery stable. I had a shawl and a slicker, and also some wraps that were furnished with the buggy by the livery stable. When I came back to town that morning I took the train and went to Childress, Tex., to get the money to buy the lumber to build a house on the land. * * * I did not get back to Seymour until November 26th, eleven days after I went to Childress." It was also shown that on her way to Childress she wrote directing the purchase of lumber, and upon her return, on November 26th, proceeded to erect a small room or house covered with plank; remaining on the land, cooking for the workmen, during its erection. After the completion of the building, she returned to Childress to

superintend the education of her daughters there attending school, returning to the land in the spring of 1898 with one daughter, and resuming the occupancy of the premises in controversy. It also appeared that during all times herein named appellee was the wife of Charlie Peterson, who was a section foreman on the Ft. Worth & Denver City Railroad; appellee and her husband, however, being without other homestead than the one herein claimed.

We are clearly of opinion that this evidence does not support the finding of the jury nor authorize the submission of such issue. The appellant was, at the institution of the suit, in actual possession under an award by the commissioner of the general land office, and the burden of proof was upon appellee to show that she was an actual settler at the time she made her application. She must rely upon the strength of her own title, and not upon a defect, if any, in appellant's title. Because the evidence fails to establish the necessary fact of actual settlement, the judgment below is reversed, and here rendered for appellant.

PIERSON v. SANGER et al.

(Court of Civil Appeals of Texas. May 20, 1899.)

DEEDS — DESCRIPTION — EXTRANEOUS EVIDENCE—NEW DEED—ATTACHMENT LIEN.

1. Where a deed describes the land it purports to convey as "one hundred acres out of the W. survey, * * * four hundred and twenty acres out of the M. survey, * * * one hundred and sixty acres out of the T. survey, * * * particularly described in deeds to me of record, * * * and which are made a part hereof," and the deeds referred to do not describe the parcels mentioned, but convey the W. survey, containing 640 acres, the M. survey, containing 480 acres, and the T. survey, containing 640 acres, the description is not sufficient to convey the grantor's interest in such surveys.

2. Extraneous evidence is not admissible to show that the grantor had conveyed a part of each survey, and retained title to the number of acres mentioned in the deed.

3. Where the description in a deed is insufficient, it cannot be aided by a more perfect description in a second deed, as against parties acquiring an attachment lien on the lands.

Appeal from district court, Bosque county; J. M. Hall, Judge.

Suit by Sanger Bros. against Peter J. Pierson for the foreclosure of an attachment lien. Judgment for plaintiffs, and defendant appeals. Affirmed.

A. C. Prendergast and Gillett & Hale, for appellant. S. H. Lumpkin and Boynton & Boynton, for appellees.

CONNER, C. J. This is an appeal from a judgment in appellees' favor, establishing the validity of an asserted attachment lien upon certain lands claimed by appellant adversely to said lien. The disposition of this appeal and of the several assignments of error, in

our judgment, is to be determined by the proper construction of the trust deed that constitutes the primary source of appellant's title from the common source under whom all parties claim. So far as necessary to an understanding of the question here presented, the pleading and evidence presented substantially the following facts: On and prior to December 17, 1894, P. Pierson, father of appellant, was a member of the firm of Pierson, Peterson & Co., engaged in a mercantile business in Bosque county. Said firm then being largely indebted, on said date duly executed and filed for record a trust deed, signed by all the partners, conveying to Frank Kell, as trustee, all of the property of said firm for the payment of the creditors therein named, in the order of the classes given. Said trust deed also conveyed or purported to convey, among other things, the individual property of P. Pierson, the language used therefor being as follows: "Also the separate property of P. Pierson, as follows: One hundred acres of land out of the William Winkler survey, on the waters of Nell's creek. Four hundred and twenty acres out of the W. B. Morris survey, situated adjoining the above 100 acres. * * * 160 acres out of the Thomas Toby survey. * * * All of said property is situated in Bosque county, and particularly described in deeds to me of record on the deed records of said county, and which are made a part hereof." There were no deeds to P. Pierson of record or otherwise describing the parcels enumerated, but there were deeds of record to him conveying the William Winkler survey, which contained 640 acres, the W. B. Morris, containing 480 acres, and the Thomas Toby, containing 640 acres. The deeds to P. Pierson, as recorded in Bosque county, evidenced the fact that each of the above-named surveys had been severally acquired by deeds conveying to him the whole survey. On the trial below, appellant offered certain deeds from P. Pierson to others conveying parts of the surveys named for the purpose of showing that at the time of said trust deed P. Pierson had left in him the title to only the number of acres specified in said trust deed, to wit, 100 acres of the William Winkler, 420 of the W. B. Morris, and 160 acres of the Thomas Toby, each of which parcels was described by metes and bounds in appellant's answer, the same being the particular lands involved in the present controversy. Afterwards, on December 19, 1894, said firm and the individual members thereof executed a second trust deed of like form and effect as the first, save that in this second deed of trust the individual property of P. Pierson in the surveys hereinbefore named was described particularly, giving the metes and bounds of the 100 acres of the William Winkler 640, the 420 of the W. B. Morris 480, and the 160 of the Thomas Toby 640, as described in said answer. Each of these deeds of trust was duly acknowledged, delivered, and recorded. In the interim, however,—that

is, between the time of the execution and delivery of the first trust deed and of the execution and delivery of the second trust deed,—appellees herein duly instituted suit upon a subsisting valid indebtedness against said firm, and duly sued out and caused to be duly levied a writ of attachment upon, among other things, the whole of each of the Winkler, Morris, and Toby surveys as the property of said P. Pierson. Appellant claims title by mesne conveyances from and under said two trust deeds. The question presented is whether the description of the individual lands of P. Pierson, as given in the trust deed first executed, is sufficient to convey the lands or interest of P. Pierson in said surveys as in fact owned by him at the time, or whether the description given is such as may be aided by extraneous evidence. We are of opinion that both questions must be answered in the negative. The rule has been thus stated: "A deed, to be valid, must describe the land by its terms, or give data from which the description may be found and made certain." *Coker v. Roberts*, 71 Tex. 602, 9 S. W. 665, and authorities there cited. It is clear that the description here given of a specified number of acres out of the named surveys is made dependent upon the data given, to wit, "in deeds to" P. Pierson "of record on the deed records of Bosque county." In effect, this was as if the description given in the deeds to P. Pierson had been added to, and stood together with, the description given in the trust deed. The description given in the deeds to P. Pierson was in each instance of the whole survey, and it appeared that such whole surveys contained a greater number of acres than was conveyed or attempted to be conveyed by said first trust deed. Thus is presented a patent ambiguity in description which, by all the authorities, cannot be aided by extraneous evidence. See *Norris v. Hunt*, 51 Tex. 609; *Coker v. Roberts*, supra; *Lumber Co. v. Hancock*, 70 Tex. 312, 7 S. W. 724; *Knowles v. Torbitt*, 53 Tex. 557; *Planagan v. Boggess*, 46 Tex. 330. The deed in question did not purport to convey the entire survey, nor "all the right, title, and interest" of P. Pierson in the surveys named, as in the cases of *Smith v. Crosby*, 86 Tex. 15, 23 S. W. 10, and *Macmanus v. Orkney*, 91 Tex. 27, 40 S. W. 715, and that class of cases cited by appellant. Nor was it the case of a deed referring to data whose production made certain the description given. The production of the data here given rendered absolutely uncertain the description and deed in question. See authorities before cited. This uncertainty of description cannot be aided by the more perfect description in the second trust deed, by reason of the fact that appellee had before its execution acquired a valid lien on the lands in controversy. These conclusions render immaterial the court's rulings on the demurrers and in the admission and rejection of evidence, and we see nothing in the other assign-

ments of error requiring special notice. All the assignments are therefore overruled, and the judgment below is in all things affirmed.

PATTERSON et al. v. CRABB.¹

(Court of Civil Appeals of Texas. April 8, 1899.)

AGREEMENT IN RESTRAINT OF COMPETITION—TEACHING MUSIC—INJUNCTION.

Defendant was employed by plaintiff to teach music in his school at H. Defendant was unacquainted in H., and one of the conditions of the contract was that, in case he ceased to teach in plaintiff's school, he would not teach in H. Held, that such contract was not void, as being a violation of Rev. St. art. 5313, prohibiting any combination of capital, skill, or acts to create or carry out restrictions in the full and free pursuit of any lawful business; hence injunction would lie to prevent defendant from teaching music in H. on his own account.

Appeal from district court, Hill county; J. M. Hall, Judge.

Bill by W. A. Patterson and another against W. J. Crabb. From a decree in favor of defendant, plaintiffs appeal. Reversed.

Smith & Phillips and McKinnon & Carlton, for appellants. Wear & Parr, for appellee.

RAINEY, J. This is a suit brought by appellants to restrain appellee from teaching music in the city of Hillsboro, Tex. A temporary writ of injunction was granted, which was dissolved in vacation upon the appellee's answer and motion, to which the appellants excepted. Upon the trial a demurrer was sustained to appellants' petition, and cause dismissed, from which this appeal is taken.

The petition stated a good cause of action at common law, and the demurrer should have been overruled, unless the contract, which is the basis of the action, contravenes the provisions of article 5313, Rev. St., prohibiting trusts. Said contract is as follows: "State of Texas, County of Hill. This article of agreement, entered into by and between W. A. Patterson, of the first part, and W. J. Crabb, of the second part, shall remain in full force and effect for a period of one term of ten months of school, dating from the 31st day of August, 1897, and covering in full the following conditions and terms of agreement, namely: I, W. A. Patterson, president of the Patterson Institute, for and in consideration of the services of W. J. Crabb as teacher of piano, organ, violin, mandolin, banjo, and zither, also theory, harmony, and thorough bass, piano and musical history, to be taught in the above institution as the demand may require, I hereby obligate myself to pay to the said W. J. Crabb two-thirds of the price of tuition at the end of each month, as collected, the fixed basis of tuition on all instruments to be five

¹ Application for writ of error dismissed for want of jurisdiction.

dollars (\$5.00) per month of eight lessons; theory, harmony, and thorough bass, two and $\frac{50}{100}$ (\$2.50) dollars in classes only twice a week, and eight lessons per month; all music pupils on all musical instruments be required to study theory and harmony, class lessons, once a week, free to all pupils studying music in the institution. The said two-thirds commission applies to such pupils as may be directly or indirectly under the management of the said W. J. Crabb. (In case said musical department assumes such proportions that necessitates one or two extra assistant teachers, then the said W. J. Crabb shall have it in his power to select such assistance, pay same out of his proceeds, he receiving the above mentioned and specified two-thirds tuition money for all such pupils; therefore the above expression of 'directly and indirectly.') In case any pupil shall pay one term or one session in advance, said money shall be set apart in some bank, and drawn monthly; the said W. A. Patterson, of the first part, drawing one-third of said month's tuition, and W. J. Crabb, of the second part, drawing two-thirds of said month's tuition, and so on until the whole term or session which shall have been paid is drawn out in full. Be it further agreed and understood that the said W. A. Patterson shall furnish all pianos, and keep same in tune, necessary for the successful operation of said music department, and further furnish such practice and instruction rooms as said musical department may require. Be it further agreed and understood that, in case the said W. A. Patterson, for the patrons of the Patterson Institute, or in case the said W. A. Crabb becomes dissatisfied himself, he hereby agrees that he will not establish a school of any kind in the city of Hillsboro, but, at the close of one year, quietly withdraw. It is further understood that all recitals shall be under control of said W. A. Patterson, and that the said W. J. Crabb and Miss M. Rice shall work conjointly in such recitals. It is further agreed that no part of this contract shall in any way interfere with the contract already made with Miss M. Rice, but that said W. J. Crabb is to have control of the string and orchestral department, also theory and harmony, and is to be assistant piano teacher. In case W. J. Crabb brings any pupils from Temple or any surrounding country, they are to be considered his own, and he is to receive two-thirds of all music tuition received from them. All other pupils secured will be subject to the contract with Miss M. Rice, namely, she is to have the first twenty-five for her department, namely, piano and vocal. Witness our hands in the city of Hillsboro, county of Hill, this 23rd day of July, A. D. 1897." On June 13, 1898, said parties had this agreement: "This article of agreement, entered into between W. A. Patterson, of the first part, and W. J. Crabb, of the second part, shall remain in

full force and effect for a period of ten school months, dating from August 30, 1898, and covering in full the following agreement, viz.: I, W. A. Patterson, president of Patterson Institute, for and in consideration of the services of W. J. Crabb as teacher of music in the said institute, hereby obligate myself to pay to the said W. J. Crabb two-thirds of tuition entered by said W. J. Crabb, said amount to be paid monthly as collected. Fixed rates of tuition are to be stated in catalogue of said school. In case assistants are necessary, said division of one-third and two-thirds will apply as above stated. Said assistants may be employed (over) by said Crabb, subject to the approval of said Patterson. Be it further agreed that said Patterson furnish and keep in tune and repair all pianos necessary for Crabb and assistants, and also such practice pianos as may be necessary. Said Patterson agrees to furnish all rooms, with janitor and fuel, for above department. Be it further agreed and understood that, in case said Crabb does not remain as teacher in said institute, that he agrees not to teach in Hillsboro."

A short time after the second contract was entered into, appellee canceled his connection as a teacher with the Patterson Institute under said contract, and opened a school of music on his own account in said city of Hillsboro. We are of opinion that said contract was not in violation of said provision of the statute, as there was no such combination of capital, skill, or acts "to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state." By the contract, appellee was employed to teach in the Patterson Institute, and he was to receive as pay a certain per cent. of the tuition charged by said institute for instructions in music. This part of the contract can in no sense be construed as obnoxious to the provisions of the statute under consideration. Nor do we think that the other portion of the contract, wherein appellee agreed, upon withdrawal from the institute, not to teach music on his own account in the city of Hillsboro, can be considered as a united co-operation between the parties to defeat the objects of the statute. The petition alleges that Crabb was a stranger in the city of Hillsboro, and that he would not have been employed to teach in the institute on other conditions, as his employment in the institute would be the means of bringing him in contact with the patrons of said institute, and enable him to more successfully compete with said institute if he opened an independent school. Under this state of case it would be inequitable for him to teach an independent school in said city, and, as there was no such union or association as prohibited by the statute, the plaintiff was entitled to his writ of injunction. *Gates v. Hooper* (Tex. Sup.) 39 S. W. 1079. The principle announced in that case is applicable here, and decisive of this

case. Therefore the judgment of the court below is reversed, the order granting the temporary writ of injunction is reinstated, and the cause remanded for trial on its merits.

LEDGERWOOD v. ELLIOTT.

(Court of Civil Appeals of Texas. May 20, 1899.)

WORDS ACTIONABLE PER SE—INTENT OF UTTERANCE—RUMOR CONCERNING PLAINTIFF—PROVOCATION AS MITIGATION OF DAMAGES.

1. The words, "You stole a hundred dollars of his money," uttered in the presence of plaintiff and others, are actionable per se, and plaintiff's right to recover does not depend upon the intent or purpose with which they were uttered.

2. In an action for slander, it is not incumbent on plaintiff to prove the falsity of the slanderous charge; the law raises the presumption of falsity and malice, and the truth of the charge is a matter of defense.

3. The fact that defendant believed a current rumor concerning plaintiff, of the same tenor as the slander which he spoke concerning him, is properly submitted in mitigation of damages.

4. The fact that the alleged slander was spoken under provocation by misconduct of the plaintiff may be shown in mitigation of damages.

Appeal from district court, Collin county; J. E. Dillard, Judge.

Action for slander by N. B. Ledgerwood against Alexander Elliott. From a judgment awarding plaintiff nominal damages only, he appealed. Reversed.

This suit was instituted by appellant for damages against appellee on account of alleged slanderous words uttered and published. In one count in the petition the alleged slanderous words were: "Culwell (meaning Bud Culwell) can talk to you (meaning plaintiff), for Culwell said you (meaning plaintiff) stole a hundred dollars of his money." The other count in the petition alleged these words: "Bud Culwell can talk to you (meaning plaintiff), for he (meaning Bud Culwell) said you (meaning plaintiff) got (meaning stole) a hundred dollars of his money." The import of these last-quoted words are alleged to charge that Bud Culwell had said that plaintiff was guilty of the crime of theft, and that appellee intended to insinuate that appellant was guilty of the crime of theft of \$100. The defendant answered with general denial, special plea of mitigating circumstances, and justification, upon the ground that the charge of theft was true in fact. Upon the trial it was shown without contradiction that the alleged slanderous words were spoken by appellee in the presence of a number of persons. Some of the testimony showed the words to be as first recited, while other testimony showed them to be as last recited. There was no proof of special damages, and no proof tending to show that appellant had been guilty of theft. The jury returned a verdict in favor of the plaintiff for one cent, and from the judgment entered upon this verdict the plaintiff has appealed.

G. R. Smith and A. W. Walker, for appellant. De Armond & Church and Garnett & Merritt, for appellee.

FINLEY, C. J. (after stating the facts). 1. It is claimed that the court erred in charging the jury that the words must have been uttered "with the intent to injure the reputation of the person spoken of." The words as alleged are actionable per se (Newell, Defam. [2d Ed.] pp. 97, 98; Belo's Case, 84 Tex. 453, 19 S. W. 616); and the intent or purpose with which they were uttered does not determine the question of the right to recover (Newell, Defam. [2d Ed.] p. 301, § 22). The charge was error.

2. The charge is complained of in requiring the plaintiff to prove the charge involved in the alleged slanderous words to have been false. The charge required the plaintiff to prove, by a preponderance of the evidence, the falsity of the words, and malice prompting their utterance. The reverse is the rule. The law raises the presumption of falsity and malice, and they must be disproved by the evidence. It is a matter of defense, and the burden was upon the defendant. Id. p. 39, § 4; Id. p. 770, § 19; Id. p. 323, § 22.

3. The court charged that if it was currently reported in the neighborhood, and generally believed, that plaintiff had stolen a hundred dollars from Bud Culwell, and that the defendant believed said current rumor, then the jury might take those facts into consideration in the mitigation of damages. The charge was proper, if the evidence justified it. Id. pp. 882, 883, §§ 62, 63, and notes. The objection urged is that the evidence did not justify the submission to the jury. We have carefully examined the evidence contained in the statement of facts, and have reached the conclusion that there was evidence to support the charge, although there was much to the contrary.

4. The following part of the charge is assigned as error: "The jury are further instructed, if they believe from the evidence before them that defendant uttered the words of and concerning the plaintiff, in the presence and hearing of plaintiff and others, which are set up in plaintiff's petition, and if the jury further find and believe that defendant intended by the use of such words to insinuate and charge plaintiff with the theft of one hundred dollars from Bud Culwell, and if the jury further believe from the evidence that such charge is false, yet, if the jury further find and believe from the evidence that just prior to the time the defendant spoke and uttered such words (if he did) that plaintiff had wrongfully and falsely accused defendant of tampering with the witnesses in a criminal case then on trial before Justice Luck, in which plaintiff was defendant, and that such accusation was made in said court in the presence and hearing of defendant and others, and if the jury believe that such conduct on the part of

plaintiff (if he was guilty of such) was reasonably calculated to incense a man of ordinary temper, and if the jury further believe that the defendant became and was incensed against plaintiff on account of such charge, and that he (defendant) then spoke and uttered the words set up in plaintiff's petition of and concerning plaintiff, and that he (defendant) was prompted to do so by anger or sudden resentment, produced by the conduct of plaintiff, and was not actuated by malice towards plaintiff, then plaintiff would be entitled to recover nominal damages only, and the jury should so find." It was error to give this charge, for two reasons: First, provocation by misconduct of the plaintiff may be considered in mitigation of damages, but should not be presented as a defense to the claim for a substantial recovery of damages (Newell, Defam. [2d Ed.] p. 519, § 120; Maynard v. Beardsley, 7 Wend. 561); second, the evidence did not justify the submission of the issues of fact whether the plaintiff had charged the defendant with attempting to tamper with witnesses. The errors pointed out in the charge were manifestly calculated to affect the verdict of the jury as to the amount of damages awarded, and on account of such errors the judgment must be reversed. *Belo v. Fuller*, 84 Tex. 453, 19 S. W. 616. Judgment reversed, and cause remanded.

SPARKS v. McHUGH et al.

(Court of Civil Appeals of Texas. May 27, 1899.)

TROVER AND CONVERSION—PREMATURE DISMISSAL—EXECUTION SALES—OFFICER'S RETURN—COLLATERAL ATTACK.

1. In an action in a county court for the value of property converted, defendant, by answer, deraigned title through sale under execution from a justice court. Plaintiff, by supplemental petition, attacked the sale, alleging it to have been made on a defective levy. The court dismissed the suit on demurrer, holding that it had no jurisdiction to set aside the execution sale. *Held*, that such action was premature, since the original petition stated a good cause of action, and the court could not determine whether defendant's allegations would be proved, and, if not, the supplemental petition would be superfluous.

2. In a subsequent suit between the same parties, plaintiff cannot defeat defendant's title to property acquired at a sale under execution on a judgment in the prior suit by claiming that the levy was defective, since that would be a collateral attack on the officer's return, which could only be set aside by direct proceeding in the prior suit.

Appeal from Motley county court; A. R. Anderson, Judge.

Action by W. T. Sparks against Pat McHugh and another. From a judgment for defendants, plaintiff appeals. Reversed.

Snodgrass & Britt, for appellant. W. M. Smith and L. S. Kinder, for appellees.

STEPHENS, J. Again this case comes before us on appeal, and again must the judg-

ment be reversed. For the former appeal, see 43 S. W. 1045.

Upon the last trial the county judge sustained a general demurrer to the plaintiff's second amended petition, and dismissed the suit, because he was of opinion that the court over which he presided had no jurisdiction to set aside execution sales out of a justice court. The amended petition to which the demurrer was thus sustained stated in unmistakable terms a good cause of action, in that, as in the original and first amended petitions, for which it became the substitute, it alleged that plaintiff, Sparks, was on and before the 2d day of April, 1897, the legal and equitable owner of "about 500 head of stock cattle branded thus, SWTS on left side, and X on right side," ranging in Floyd, Motley, and Dickens counties, and that at the date named the defendants "wrongfully and unlawfully took possession of 31 head of said 500 head of cattle branded as aforesaid, and barred out said brands," and put fresh brands upon them (describing the same), and alleging the value of the cattle so converted at the sum of \$658.78, and further alleging that the defendants had replevied the cattle under the sequestration process. Other facts showing special damage were alleged, which need not be noticed. In answering this petition, the defendants deraigned title through execution sales made by virtue of range levies in which the cattle were described as "running at large on the range in Motley county, Texas." Twenty-five of the cattle were thus levied on and sold to Pat McHugh, one of the defendants below, under an execution issued out of the justice court upon a judgment in his favor against appellant, Sparks. The remaining six were sold to the other defendant, Mackay, under an execution issued out of this court for costs in a suit between the same parties. 38 S. W. 537. The replication of Sparks to these answers, as set forth in his supplemental petition, was to the effect that the officer failed to comply with the law, in several particulars, in making the range levies, and particularly that the range levies, and consequently the sales by virtue thereof, were void because the range of the cattle was not confined to Motley county, but also extended into Floyd and Dickens counties. On this account the court seems to have treated the entire suit as a collateral attack upon the proceedings in the suit previously disposed of in the justice court, and therefore refused to entertain jurisdiction of the case.

It seems to be well settled that it is inadmissible, in a subsequent suit between the same parties, to attack the return of the officer upon process executed in the prior suit; the remedy of the party aggrieved by an incorrect or false return being confined to a direct proceeding in the original suit to have it amended, or to a separate action against the officer for a false return. *Schneider v. Ferguson*, 77 Tex. 572, 14 S. W. 154; *Coal Co.*

v. Lawson (Tex. Civ. App.) 31 S. W. 843, and cases there cited. This principle might, and, as we shall see, probably would, have defeated any recovery in this case, had it gone to trial on the facts, but the action of the court was premature and erroneous in deciding the case on demurrer. Because the supplemental petition was insufficient as a replication to the answers of the defendants did not deprive the plaintiff of a hearing upon his amended petition, which, as before seen, stated a good cause of action. We have no means of determining that the facts stated in the answers would have been proven on the trial, and, if not proven, the supplemental petition would have been superfluous, and the plaintiff entitled to recover upon proof of the facts alleged in his amended petition.

In view of another trial, we deem it proper to say that, in our opinion, the contention of appellant that the range of his cattle when levied on was in the three counties named, and not merely in Motley county, is not available in this suit to defeat titles acquired at execution sales under such levies, because we construe it to be a collateral attack upon the officer's returns in the original suit to which appellant was a party. Those returns showed, as was held on the former appeal, that the levies were presumptively sufficient. If, for defects not appearing on the face of the returns, the levies were bad, they should have been set aside by a direct proceeding in the original suit. If the facts be as alleged by appellant in his supplemental petition, the returns were not in strict conformity to the facts, and, if not literally false, were at least defective. In *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848, the levies were not attacked collaterally. Cobb, as appears from the original record on file in the trial court, though not from the case as reported, was the purchaser at execution sales under judgments in favor of other parties against the Stone Pasture & Cattle Company and others,—not including, however, the appellants in that case, who attacked the range levies relied on by Cobb as the foundation of his title. Judgment reversed, and the cause remanded for a new trial.

ANDERSON v. SESSIONS.

(Court of Civil Appeals of Texas. May 20, 1899.)

HOMESTEAD—CITY LOTS—CHANGE OF USE—EFFECT—ABANDONMENT.

1. Under Const. 1876, art. 16, § 51, providing that the homestead in a city shall consist of a lot or lots, not exceeding \$5,000 in value, provided the same are used for purposes of a home, a lot used by the owner for raising garden vegetables and fruits, for the exclusive use of his family, is part of the homestead, though located in a different part of the city from the owner's residence lot.

2. The fact that one purchases a city lot with the intention of building his residence thereon when able to do so, but thereafter uses it to raise vegetables for the use of his family, does not

constitute an abandonment, or deprive the lot of its homestead character.

Stephens, J., dissenting.

Appeal from district court, Montague county; D. E. Barrett, Judge.

Action by S. A. Sessions against A. J. Anderson and another. From a judgment for plaintiff, defendant Anderson appeals. Affirmed.

F. M. Brantly, for appellant. Jas. A. Graham and Thos. F. Turner, for appellee.

HUNTER, J. This was a suit instituted in the district court of Montague county, on the 28th day of June, 1898, by appellee against W. R. Pierson, constable of precinct No. 4, Montague county, and A. J. Anderson, appellant, to enjoin the sale by said constable of a tract of land situated in the town of Bowie, in said Montague county, under an execution issued out of the justice court of precinct No. 1, Tarrant county, from a judgment rendered therein in favor of A. J. Anderson against S. A. Sessions. The ground on which the sale was sought to be enjoined was that the property, consisting of about two acres, constituted part of the residence homestead of appellee and his family, and as such was exempt from such sale; that, while it was detached from the dwelling of appellee, yet, by reason of its cultivation, use, etc., it constituted part of the residence homestead of appellee. Appellant, Anderson, and the constable answered by general demurrer and special exception, admitting the existence of the judgment in the justice court mentioned as well as the issuance and levy of the execution mentioned therefrom on the property in question, but denying that the property levied upon was exempt, or constituted any part of the homestead of appellee or his family. They further averred that appellee acquired the property in question simply for purposes of speculation, and so held the same at the time of the levy in question, and not for the purpose of a homestead at all, and that the claim of appellee that the same constituted any part of his homestead was a mere pretense, a fraud, and a sham, sought to be asserted with the fraudulent intent of preventing the just seizure and subjecting of the property towards the satisfaction of his just debts. The case was tried by the court without a jury, and judgment was rendered perpetuating the injunction, the court below finding that the lot in question was part of the residence homestead of appellee, and from this judgment this appeal is taken.

The following are the facts as found by the district judge, and which we adopt: "As to matters of fact, I find that the defendant Anderson, in the justice court of Tarrant county, recovered judgment against the plaintiff, and that the execution sought to be enjoined was issued upon said judgment, and levied upon the premises in controversy as the property of plaintiff, as alleged in the plaintiff's petition. I also find that plaintiff is, and was

at the time of such levy, a married man, and the head of a family consisting of himself, his wife, and three children. That with his family he has continuously resided in Bowie, Montague county, Tex., on lot 8, block 48, of Stalling's addition to Bowie, which is 70x140 feet, owned by him for many years last past. The premises in controversy are also situated within the corporate limits of said city of Bowie, from 800 to 1,000 yards from the lot on which plaintiff resides. He purchased the premises in controversy in January, 1895, intending, when he got able to do so, to build upon it, and move onto it with his family, and very soon after his purchase inclosed the same with a fence, and planted a portion thereof in fruit trees and grape and blackberry vines, and the next season planted the greater portion of the remainder in such trees and vines. That during the year 1895, and for each year since, including the present year, he has cultivated said premises in garden vegetables, exclusively for the use of himself and his family, carrying the vegetables and fruits raised thereon to the place of his residence, to be eaten by his family. He has never sold any of the products raised on such premises, and no part of said premises has been used, since plaintiff purchased the same, for raising products for market, but solely for the table use of plaintiff and family, and no part of said premises has been rented out to any person. That, since acquiring said premises, plaintiff has not used any other piece of ground as a garden, and on said lot 8, where he resides, he has no garden and no room for any. The premises in controversy consist of about two acres of ground, worth about \$150, and these premises, together with said lot 8, on which plaintiff resides, are worth, and have always been worth, less than \$5,000." To this we add another point from the statement of facts: That the appellee's business or occupation was that of a drummer or traveling salesman, and had been for eight years previous to the levy, and the lot in question was not claimed as his business homestead, but as part of his residence homestead, and that the two lots were situated in different parts of the city altogether, the one in controversy having been acquired several years after the establishment of his home on the other. Upon the facts found by him, the learned district judge filed the following conclusion of law: "From the foregoing findings of fact I conclude, as a matter of law, that the premises in controversy at the time of the levy of said execution thereon constituted a part of the homestead of plaintiff and his family, being used for the purposes of a home, and hence that the same was exempt from such levy."

The contention of appellant is (1) that the lot was not being used for the purposes of a home, and that the products thereof, though used only by the family for their maintenance and pleasure, were not necessary to the use of the mansion or home, as a home, nor did

they or the lot contribute to the proper use or enjoyment of such mansion or home, though they may have contributed to the support of the family; and (2) that the lot was not connected with, or appurtenant to, the residence lot, but was about half a mile distant therefrom, and that its use was in no way essential to the proper occupancy, use, or enjoyment of the home by appellee or his family.

We cannot agree with appellant in his contentions. Our constitution provides: "The homestead in a city, town or village, shall consist of lot or lots, not to exceed in value five thousand dollars at the time of their designation as the homestead, without reference to the value of any improvements thereon: provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family." Const. 1876, art. 16, § 51. This provision does not require that the lots shall be connected with each other, or even that they shall be near to each other, but only that they must be within the city, town, or village limits. Nor does it require that they should be necessary or essential to the occupancy, use, or enjoyment of the mansion house, but only that they be used for the purposes of a home.

The case of *Iken v. Olenick*, 42 Tex. 196, is relied on by appellant to show that the lot must be contiguous to the residence lot. But that decision was rendered in 1875, under the constitution of 1869, which contained no such provision relating to the use of the lots for the purposes of a home as are contained in our present constitution of 1876. The constitution under which that decision was rendered provided for the exemption from forced sale as the homestead of "any city, town or village lot or lots not to exceed \$5,000 in value"; but that decision was made to turn on Worcester's definition of the word "homestead,"—"the place of the house; a mansion house, with the adjoining land;" and, following this definition, our supreme court, as then constituted, overruled a line of decisions running back for nearly 20 years, which were more liberal to the family, as they allowed as part of the homestead the lot upon which the husband carried on his business to support his family, as well as all others occupied by the family, not exceeding \$2,000 in value, although disconnected and remote from the residence lot. *Pryor v. Stone*, 19 Tex. 373. In the case last cited, Chief Justice Hemphill, construing our constitution of 1845 (article 7, § 22), which exempted "any town or city lot or lots, in value not to exceed \$2,000," said: "It allows any number of lots, not to exceed \$2,000, and it cannot be material how many or how far or how near or remote from each other may be the lots occupied for the convenience of the family and for the prosecution of the business or employment of its head or members." Thus the people of Texas understood their homestead laws for two

decades, and seem to have been contented and happy, when the decision in *Iken v. Olenick* suddenly made its appearance in their Reports, and in less than 12 months from the rendition thereof a convention of delegates from the people had met in Austin, and had framed the present constitution, in which, in our opinion, they in unmistakable terms framed a homestead law exactly in accord with Chief Justice Hemphill's decision; overruling, as it were, the decision in *Iken v. Olenick*, and confirming that in *Pryor v. Stone*. So that now, whatever may have been Mr. Worcester's definition of the word "homestead," the people of Texas have made a definition of their own, and have declared that the homestead in a city, town, or village shall consist of lot or lots, in whatever portion of the town situated, whether near to each other or remote, not to exceed in value \$5,000, provided they be used either for the purposes of a home or as a place to exercise the calling or business of the head of a family.

Following the adoption of that constitution, came, in 1881, the decision in *Arto v. Maydole*, 54 Tex. 247, where our supreme court, in construing the clause defining a suburban homestead, said: "The question is not whether any portion of this adjoining block may have been a necessity or a mere convenience to the enjoyment of the homestead, but whether in fact it was a part of the homestead. If it was, the fact that it may have been used as an approach to the mansion, or for the purpose of ornamentation or pleasure grounds only, would not defeat it of the homestead protection."

In 1882 the case of *Brooks v. Chatham*, 57 Tex. 33, was decided, where the clause of the constitution (article 16, § 51) defining the rural homestead was construed. That clause provides that the country homestead "shall consist of not more than 200 acres of land, which may be in one or more parcels, with the improvements thereon"; and the court held that the clause immediately following the definition of an urban homestead, to wit, "provided the same shall be used for the purposes of a home," applied to the parcels of land claimed as a rural homestead, the same as it did to the lot or lots claimed as a city homestead; and it was further said by the distinguished jurist who wrote that opinion that the parcel claimed might be situated eight or ten miles from the home place, if its use was such as to designate it as part of the home.

In 1883 the same court held, in *Medlenka v. Downing*, 59 Tex. 40, that the use of a town or city lot for a garden "fixed upon it the homestead character"; and this, too, in a case where the lot was separated by a fence, and the homestead had been designated in writing, for the purpose of securing a loan, excluding the garden, upon which, with other property, the mortgage was given.

In 1884 the same court, in the case of *Jacobs v. Hawkins*, 63 Tex. 4, said: "If there

be an actual use of property as for a homestead purpose, although it be detached from the lot on which the residence or mansion house stands, then it is not necessary that some open assertion or claim to it as part of the homestead be made, otherwise than as such claim is evidenced by the use."

Following this decision, in the year 1885 the case of *Axer v. Bassett*, Id. 548, was decided, where the two-acre lot claimed as part of the urban homestead was 100 yards from the residence lot, but was used for a rye and barley patch, and to pasture cows and horses on, and it was held to be part of the homestead, because used for the purposes of the home.

We think that the use of a lot for the purpose of raising garden vegetables, berries, and fruits for the family table is one of the uses to which home lots are usually devoted. It is a "garden," as the term is understood among Texans, and a garden in a Texas town or village is considered as much a part of the home as the front yard or the back yard or the stables and horse lot, and the writers of our constitution must have so understood it and intended it. *Waggener v. Haskell* (Tex. Sup.) 35 S. W. 1. If the lot adjoined the residence lot, used as it is, though divided from it by a high wall or fence, would any one contend that it was not a part of the homestead? Certainly not. And why would it be? Simply because it was used for the purposes of a home, and not because it was contiguous. Then, if a garden is a home use,—one that would protect it if adjoining the residence lot, as held in the *Medlenka Case*,—we can see no reason why the same use will not protect it though situated across the street, as in the *Jacobs-Hawkins Case*, or across ten streets, or anywhere else in the town, city, or village. It might not be as convenient a homestead, thus scattered from suburb to suburb, but probably the best the poor drummer would be able to own. He might not be able to own the lot adjoining his residence to use for a garden, because of its great value for building purposes, but could buy one in the suburbs of the town, larger and perhaps better adapted for a garden, and thus add a few comforts to his home. If playgrounds, and shady parks with graveled walks, used only for pleasure or ornamentation, are protected, because used for the purposes of a home, we think that a little garden spot, although in a distant suburb of the town, would not be an improper or an unreasonable addition to the homestead, where it is used for the purpose of supplying the home table with the necessaries and comforts of life; for the children of the poor must eat, though they may not have much time to play.

It is contended also that because, when he bought the lot, he intended to build a residence on it when he got able, and has since only used it as a garden, this would render it liable to execution. But we are also con-

strained to differ from this view. Both are homestead purposes, and shifting the uses of the lot from one homestead purpose to another does not constitute an abandonment, nor deprive the lot of its homestead character. See *Axer v. Bassett*, *supra*. Finding no error in the judgment, it is affirmed.

STEPHENS, J. (dissenting). It is not pretended that the lot in controversy, consisting of about two acres and used as a garden for appellee's family, was exempt as a place to exercise his calling or business, which was "that of a traveling man," but the exemption is claimed upon the sole ground that the same was "used for purposes of a home." The case made by the undisputed evidence is this: About eight years before the trial appellee acquired a homestead in the southeastern part of the town of Bowie, upon a lot 70 by 140 feet, where he has ever since resided with his family, the improvements on this lot consisting of a dwelling house, barn, cow lot, etc. About five years later he purchased the two-acre lot in controversy, in the northern part of the town, and distant a half mile or more from his residence, with the intention of building and moving on it "when he got able to do so," or when he could sell the place where he lived, in the southeast part of the town. With this in view, he had it fenced, and planted in fruit trees, grape vines, and blackberries. He also caused it to be cultivated in vegetables of various kinds each year thereafter, which were used by his family "in home consumption." Both lots are situated within the corporate limits of Bowie, a town of 3,500 or 4,000 people, but in different parts of the town altogether. "The territory intervening is cut up into streets and lots and blocks, and is pretty well built up with residences and settled up." The constitution of this state exempts the homestead of the family from execution, and provides (article 16, § 51) that an urban homestead "shall consist of lot or lots, not to exceed in value \$5,000 at the time of their designation as a homestead, without reference to the value of any improvements thereon: provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family." In *Waggener v. Haskell* (Tex. Sup.) 35 S. W. 1, it was held that this constitutional definition of the homestead was intended to settle the previous conflict of judicial construction upon that question, it having first been decided, as expressed in the opinion of Chief Justice Hemphill in *Pryor v. Stone*, 19 Tex. 371, that the homestead might include, besides the place of residence, "a place where the head or members may pursue such business or avocation as may be necessary for the support and comfort of the family," though remote from the place of residence; but in the opinion of Justice Moore in *Iken v. Olenick*, 42 Tex. 195, the exemption beyond the "mansion house" was restricted to "the land which,

from its use as well as its contiguity, it is to be supposed was intended to be exempted from the demands of creditors, as part and parcel of the land connected with, and necessary for the use and enjoyment of, the mansion house," thus excluding the place of business, if not otherwise a part of the homestead. In this connection it may not be amiss to quote from *Thomp. Homest. & Exemp. p. 105, § 120*, the following characteristic comment: "We shall also see that the doctrine of the early Texas cases—that a man can have a homestead scattered all over a town, regardless of intervening streets, alleys, lots, or blocks—has been exploded in that state, denied in Kansas, and cannot be regarded as sound law anywhere." Says Justice Denman, in *Waggener v. Haskell*, *supra*, referring to the above quotation from the constitution: "It will be observed that the first proviso includes (1) land used for the purposes of a home, as indicated in the opinion of Justice Moore; and (2) land used as a place to exercise the calling or business of the head of a family, as contended by Chief Justice Hemphill." The plain meaning of the constitutional definition, then, is that the lot or lots claimed to be exempt must, first of all, be designated as the homestead, either residence or business, or both, and if, as in this case, only a residence homestead is claimed, the definition given by Judge Moore, and not that of Chief Justice Hemphill, should apply. It therefore seems to me that the lot in question, besides being acquired and designated for a different purpose, was not so situated and used in connection with the "mansion house" as to make it "appendant to and part thereof"; it being entirely too remote from the residence for "it to be supposed" that it "was intended to be exempted from the demands of creditors," as part and parcel of the land connected with, and necessary for the use and enjoyment of, the mansion house." It cannot fairly be said in such case to have been used for the purposes of a home, however beneficial its use may have been to the family, and whatever might be the effect of such use were the lot in the vicinity of the "mansion house," so as to be appurtenant thereto. In my opinion, the separated lots in a town or city exempted by the constitution as the place and for the purposes of the home should be situated at least approximately together, and not, as in this instance, a half mile apart, and on opposite sides of the town, in totally different neighborhoods. It was this anomalous idea of a home "scattered far and wide" which our supreme court repudiated in *Iken v. Olenick*, *supra*, the governing principle being thus further stated in that case: "The visible occupation of the homestead or mansion house, or lands adjoining or in actual use, as appendant to and part thereof, is notice to creditors and purchasers dealing with the husband." The correctness of that decision has never since been questioned, as it is undoubtedly sound and in line with the authorities

everywhere, but the latest expression of our supreme court is to the effect that it has received constitutional sanction, though the constitution went further, and exempted, in addition, as the place of business, what was held not to be exempt in *Iken v. Olenick* as a part of the home premises. *Waggener v. Haskell*, supra; *Thomp. Homest. & Exemp.* p. 109, § 127. What was said by Judge Stayton in *Brooks v. Chatham*, 57 Tex. 31, was with reference to a rural homestead; and it will be observed that the proviso above quoted from section 51, art. 16, Const., applies as well to the parcels of land in the country as to the lots of land in a town or city; that is, one or more parcels of the land constituting the homestead in the country, if not used for the purposes of a home, may still be exempt as the place to exercise the calling of the head of the family, that of farming and the like. Hence it is immaterial that such parcel or parcels may be remote from that upon which is situated the dwelling house and home of the family. The homesteader still gets the substantial benefit, it is true, of the doctrine of the early Texas cases, which was repudiated in *Iken v. Olenick*; but it is under the constitutional provision exempting the place to exercise the calling or business of the head of the family, and not that exempting what is designated and used merely for the purposes of a home. As the business of the "traveling man" or "drummer" is of such nature as not to admit of a place for its exercise, he is without the pale of the provision exempting a place of business. His homestead exemption is not broader, therefore, than that covered by the definition in *Iken v. Olenick*; for he can only have what, for the sake of convenience, is termed the residence homestead. Nor does the law allow him two such homesteads, though in reality that seems to be what is claimed in this case; for the effect of the findings of fact, in my opinion, is that the lot in question, situated in the northern part of Bowie, was acquired and improved, not as a part of the existing homestead in the southeast part of the town, but to become a new and different homestead, at an indefinite time in future, it being used in the meantime for just such purposes as a farm, orchard, or garden in the country would be used; that is, it was never designated by concurrent intention and use as a part of the already established homestead, but the use made of it in connection therewith was temporary merely. Upon both of these grounds I am constrained to dissent from the conclusion of the majority, and that, too, notwithstanding the pathetic appeal made in their opinion in behalf of the "poor drummer." "The children of the poor must eat," say they; to which, without dissenting from a proposition so humane and benevolent, I answer, let them be fed by him who is responsible for their existence in the world, and upon whom, therefore, naturally and justly, devolves the duty rather than by judicial

construction at the expense of the creditor, who may, perchance, be also poor, with children of his own to feed. If he is not equal to the task, and the "poor man's burden" must be borne by strangers, then open wide the door of charity, and let others besides the creditor in. But until the law provides for the "poor drummer" some exemption in lieu of a place to exercise the business or calling of the head of the family, it is not within the province of the courts to make any such provision merely because his children "must eat."

PENNSYLVANIA FIRE INS. CO. v. MOORE.

(Court of Civil Appeals of Texas. June 10, 1899.)

FIRE INSURANCE—CO-INSURANCE CLAUSE—VALIDITY.

The co-insurance clause in a policy, limiting the risk of the insurer to such proportion of the loss as the sum insured bears to the value of the whole property covered, is reasonable and valid.

Appeal from Grayson county court; J. D. Woods, Judge.

Action by B. F. Moore against the Pennsylvania Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Modified.

This suit was instituted in the county court of Grayson county, Tex., by B. F. Moore, the appellee, against the Pennsylvania Fire Insurance Company, the appellant, to recover the contents of a certain insurance policy, insuring the appellee against loss or damage by fire on certain grain in a sum not exceeding \$500. On a trial before the court without a jury, judgment was rendered on March 23, 1899, for the sum of \$500, with interest from February 15, 1899, at the rate of 6 per cent. per annum, which was the full amount of the policy sued on. The insurance company has appealed.

Harris, Etheridge & Knight, for appellant. Maxey & Vowell, for appellee.

FINLEY, C. J. The only issue involved in this case is whether what is known as the "co-insurance clause," as contained in the policy of insurance sued on, is a valid stipulation. It is agreed in the statement of facts that, if the said clause is invalid, the judgment of the court below should be affirmed, and that, if it is valid, the judgment should be reversed and reformed in favor of the appellee for the sum of \$449.06, with interest at the rate of 6 per cent. per annum from February 15, 1899. The clause in question is as follows: "It is understood and agreed to be a part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that the assured shall maintain insurance on each division of property as per division of this policy, to the extent of the actual cash value thereof, and, failing so to do, shall

be an insurer to the extent of such deficit, and in that event shall bear his, her, or their proper proportion of any loss." In *Ostr. Ins.* § 208, the principle involved in the restriction of liability here in question is recognized as valid. That author says: "It is competent for the insurance company to limit its liability in respect to any particular risk to such proportion of the loss as the sum insured bears to the value of the whole property covered; it being the obvious intention of such stipulation to cause the insured to become mutually interested with the insurer in partial losses, and thereby to secure greater care and watchfulness in the protection of the property." The text is supported by citing *Christian v. Insurance Co.*, 101 Ala. 634, 14 South. 374. The case cited fully sustains the proposition announced by the text writer. Discussing such clause, that court said: "We do not concur in the proposition that the clause is unreasonable and unjust, and for this reason ought not to be sustained. True, the amount of property which an open policy, or 'blanket policy,' as it is sometimes called, of this character, could be made to cover, under some circumstances, might be so valuable that a recovery for loss by fire would not be commensurate with the premium paid, but this condition cannot occur except by the voluntary action of the insured. The amount of the insurance is \$900. By not permitting the value of the property insured to exceed the amount of the insurance, the entire loss is recoverable. If the whole property insured had not exceeded \$900, the entire loss would be recoverable, under the provisions of the policy. The risk the insured carries, under the provisions of this policy, is increased in proportion as he increases the value of the property covered by the policy beyond the amount of the insurance, and the extent of the liability of the insurer is proportionately diminished. We know of no rule of law or public policy which prohibits an insurance company from limiting the risk it will carry. Its premiums, in great part, are regulated by the amount of risk. If the insured had taken out a policy for \$1,800,—an amount equal in value to the whole property covered by the policy at the time of the fire,—the company would have been liable for the whole of the loss." Such limitation of indemnity has long been applied to marine insurance, and we see no sound reason why it should not be applied to fire policies, when the contract expressly so provides. In *Richards, Ins.* § 23, treating of this restriction in marine insurance, it is said: "Sometimes, by the attachment of a co-insurance clause, the fire policy is made to resemble the marine contract in that respect. Otherwise, in fire insurance, where the property is only partially covered by insurance, the insured recovers in case of partial loss under the policy as much as though he had been paying premiums for full insurance, whereas in reality he has only been paying premiums for part insurance." The authority just quoted recog-

nizes the principle involved here to same as that pertaining to average insurance, which is universally sustained. Contention of appellee that the restriction is unreasonable and contrary to public policy is not sustained by authority, and in our opinion there is no good reason upon which to base a decision to that effect, and we therefore hold the clause valid. The judgment is reformed and affirmed, at appellee's request. Judgment according to the terms of the agreement. Judgment reformed and affirmed.

CAIN et al. v. TEXAS BUILDING & LOAN ASS'N.¹

(Court of Civil Appeals of Texas. March 1899.)

USURY—WHAT CONSTITUTES—BUILDING ASSOCIATION—MECHANICS' LIENS—FIRST SUBJECT—SUBSEQUENT IMPROVEMENTS—ESTOPPEL TO DENY PRIORITY.

1. A contract between a landowner and a building association, by which the latter to erect a building for the former on his lot, in consideration of the payment of a certain cash and a further sum in installments, contract for a loan, subject to the usury laws.

2. Under Rev. St. art. 3294, giving priority to a mechanic's lien, in the erection of any building or improvement on lands, the building and the land on which it was erected, a mechanic's lien, once attached to the lot, attaches to a house thereafter erected on the lot, on the destruction of the house, the lien of which the lien accrued, and to the priority over a lien for the erection of the house.

3. An agreement by the holder of a mechanic's lien, with a person claiming a mechanic's lien on the same property, that, in consideration of the latter forbearing to bring suit to foreclose the lien, it shall be prior to that of the former, does not affect the validity of the latter lien, and does not estop the holder of the former from thereafter enforcing it.

4. Insurance on property subject to a lien was payable to one of the lienholders, and a loss under the policy the other lienholder agreed with the lienholder to whom the insurance was payable that in consideration of the latter forbearing to sue to foreclose the lien, which was in default, it should be prior to the former, and that it might be enforced from time to time. Thereafter the owner of the property and the holder of the lien secured the insurance compromised the amount of the policies, and, of the money received from the insurance companies, the lienholder retained the amount then due on the lien, and paid the balance to the owner. Held, that the lienholder's agreement permitting the other lienholder to receive the insurance was not a bar to the time for the payment of his lien estopped from asserting that his lien was entitled to priority because of the failure to apply the entire proceeds of the insurance policies on the other lien.

Appeal from district court, Navarro County. L. B. Cobb, Judge.

Action by the Texas Building & Loan Association against T. M. Cain and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

B. M. McMahan and Perkins, Gilbert and Perkins, for appellants. Frost, Neblett & Ing, for appellee.

¹ Writ of error denied by supreme court.

BOOKHOUT, J. This is a suit upon a note and contract executed by T. M. Cain and J. W. Ballew to and with appellee. The note is for the sum of \$3,000, dated Corsicana, Tex., September 19, 1892, payable in 60 monthly installments of \$50 each; the first installment to be paid on the 19th day of October, 1892, and the others monthly thereafter. Installments not paid at maturity bear interest, and provide for 10 per cent. attorney's fees. It recites that it is given for labor and material advanced by appellee for the improvement of the homestead of appellants,—their place of business,—and was signed by said Cain & Ballew and their wives; that the contract signed by said Cain & Ballew is in form a builder's or material man's contract, and is a lien upon lot 1, and parts of lots 2 and 3, in block No. 3, in the town of Emory, Rains county, Tex., as described in appellee's petition. The other defendants, besides McMahan, are made parties as heirs of the wife of T. M. Cain, who died after the execution of said papers. B. M. McMahan is a junior mortgagee. Prayer is for judgment for balance on the note, with attorney's fees, for costs, and for foreclosure of its lien. All the defendants except McMahan filed a general denial, and a special answer under oath, alleging that T. M. Cain and J. W. Ballew was each a married man and the head of a family, and the necessary allegations showing the property in controversy to have been their business homestead at the time said note and contract were executed and was so being used; that appellee never erected any house for any of the defendants, but in truth and fact loaned T. M. Cain and J. W. Ballew \$2,000 for the purpose of erecting a house on their lot; that the transaction was a loan of money, which was received by them, and partly used in the erection of a house upon said lot, and that less than \$2,000 was used for said purpose; that \$1,000 of the said note was in fact for interest on the \$2,000 loaned, and for no other consideration; that prior to the institution of this suit said Cain & Ballew had paid on said note the sum of \$2,102, as shown by exhibit attached to the answer; that the note and contract stipulated for a greater rate of interest than 10 per cent. on the amount received from said loan company, and that said note, in so far as it exceeded \$2,000, was and is void, and other necessary allegations of plea of usury in due form. (2) That they only received \$2,000 from said association, and that it never built any house for defendants; that defendants contracted to pay \$1,000 interest on the \$2,000 loaned them, payable in monthly installments of \$50 each; that they paid said monthly installments from October 19, 1892, to December 21, 1894, as they matured, making \$1,350; that on March 5, 1896, they paid 15 other installments, with \$2 interest thereon, making \$752, all of which payments aggregate \$2,102; that one-third of each payment was for interest, and plaintiff collected and received it knowing it was usuri-

ous. B. M. McMahan filed a general denial, and answered specially that plaintiff loaned Cain & Ballew \$2,000, for which the note declared upon was given; that, under the contract declared upon, the premises were to be kept insured for plaintiff's benefit; that up to December 21, 1894, Cain & Ballew had paid plaintiff \$1,350 on said note; that about December 28, 1894, said house was destroyed by fire; that at that time the house was insured for \$2,000, and the policies payable to plaintiff as its interest might appear; that both of said policies were issued by solvent companies, and that the house was of greater value than the insurance thereon, and that the policies were binding obligations, and legal and collectible, and of the value of \$2,000; that they were subject to the plaintiff's control, and in law its property; that all of the amount due could have been collected, and that plaintiff did collect enough to have paid in full the indebtedness of defendants to plaintiff; that on July 15, 1895, said McMahan loaned and advanced to said T. M. Cain and J. W. Ballew \$2,500 in money, building material, and labor, as evidenced by five promissory notes of Cain & Ballew of that date, and for \$500, maturing, respectively, every six months after their date; that said Cain & Ballew executed a contract to McMahan to secure the payment of said five notes, in substance the same as that executed to said loan association, filed as an exhibit to his plea; that another storehouse was erected with said money, material, and labor so furnished by McMahan on the same lots; that the lien of McMahan is superior to any lien of plaintiff thereon; that McMahan, after the destruction by fire of the building, executed and delivered to plaintiff a written agreement recognizing the priority and superiority of plaintiff's lien over his; that when he did so he knew the insurance policies were outstanding and had not been collected, but that they were collectible, and that plaintiff could collect enough to satisfy its entire claim, and, believing plaintiff would collect said insurance and pay said claim, he executed said obligation; that if plaintiff has not collected said policies and paid its debts in full, its action is in fraud of his rights, and by reason of such negligence, carelessness, or fraud he is entitled to have his lien adjudged superior to that of plaintiff; that Cain & Ballew have defaulted in the payment of all of said notes, and he has been compelled to institute suit to foreclose his lien on said property, and declares them all due, as by the terms of the notes and contract provided. Prayer for judgment for his debt, interest, costs, and attorney's fees, foreclosure of his lien, and that it be declared superior to any claim of plaintiff on the said property, and for general relief. Defendants Lillie Cain and others answered by general denial, and adopted the answer of T. M. Cain et al. To the cross bill filed by defendant McMahan, defendants T. M. Cain and J. W. Ballew answered by general denial.

Plaintiff, by supplemental petition, in answer to defendants, filed a general denial, and pleaded specially that if the representations alleged by defendants were made, to the effect that the transaction was a loan of money, then the representations, etc., were made by Bradford & Chapman, and not by plaintiff, nor any agent authorized to represent it; that Bradford & Chapman were agents of plaintiff only to the extent of receiving applications from parties who desired houses built, and, after contracts were made, then to look after and see to the construction of houses, but had no other authority; that defendants about August or September, 1892, entered into a fraudulent conspiracy with said Bradford & Chapman for the purpose of unlawfully obtaining money from plaintiff; that plaintiff in good faith acted on the written application sent it by defendants through Bradford & Chapman, and entered into the contract sued upon, and complied with it by building the house and delivering it to defendants; that by the written contract defendants agreed to pay plaintiff \$1,150, and executed their note for \$3,000, as alleged in its petition. By further supplemental petition in reply to the answer of defendant McMahan, plaintiff filed a general denial, and pleaded specially that it used every means and diligence within its power to realize and collect the insurance on the building, and collected all that could be collected thereof; that McMahan knew of, consented to, and was a party to the terms of compromise and settlement with insurance companies; that plaintiff collected \$752, and applied it to the indebtedness of Cain & Ballew; that the balance of the insurance was collected by Cain & Ballew; that McMahan expressly waived and surrendered the said insurance, and consented and agreed that plaintiff could collect and apply it to the indebtedness of Cain & Ballew; that McMahan waived his lien, and made it inferior to that of plaintiff. There was a trial by the court without the intervention of a jury, and a judgment for appellee against T. M. Cain and J. W. Ballew for its debt and costs, and against all the defendants for a foreclosure of its lien upon the property. There was a judgment in favor of McMahan against T. M. Cain and J. W. Ballew for his debt and costs, and a foreclosure of his lien upon the property. The judgment expressly makes McMahan's lien subject to the lien of appellee. From this judgment McMahan and said Cain & Ballew have prosecuted an appeal to this court.

Appellants' first assignment of error reads: "The court erred in holding that the note and contract sued upon was not a loan of money, but a contract to build a house, and in rendering judgment for the plaintiff for the amount of the note, interest, and attorney's fees, and in foreclosing the lien on the lots described in plaintiff's petition, because the evidence showed that the transaction was a loan of \$2,000 (two thousand dollars), payable in sixty monthly installments of \$50 each." The appellee is

51 S.W.—56

a corporation having its principal place of business in Corsicana, Navarro County, Tex. It is engaged in the business of building and erecting houses for a consideration. Bradford & Chapman were the agents of the association at Greenville, Tex. Cain & Ballew, a firm composed of T. M. Cain and J. W. Ballew, owned a business lot in the town of Emory, Rains county, Tex., upon which they desired erected a storehouse 40 feet wide and 40 feet long. They made a written application to the appellee, through its said agents, Bradford & Chapman, in which, after describing the lot upon which they desired the storehouse erected, they further stated: "We desire to improve said property in accordance with the plans and specifications herewith submitted, which are made part of this application. Being unable to pay cash for improvement of said premises, we desire you to erect and build the structures and buildings indicated in said plans and specifications, and to furnish all the material and labor necessary therefor. We desire to pay you for said improvements the sum of \$1,150 in cash, and \$3,000 in sixty monthly installments of \$50 each." The Texas Building and Loan Association accepted this application, and on the 19th day of September, 1892, entered into a written contract with Cain & Ballew and their wives, whereby it agreed to furnish and perform the work and erect and build a one-story brick building storehouse, 40 feet wide and 40 feet long, upon the lot described in said application, situated in Emory, Rains county, Texas. The contract expressly stipulated for and provided for a builder's, mechanic's, and material man's lien upon said lot and improvements. This contract was duly signed and acknowledged by the parties, and was sufficient to create a lien upon the property. The consideration for said improvement was the sum of \$3,000, to be paid as stated in the application, to be paid as follows: \$1,150 in cash, and \$3,000 in sixty monthly installments of \$50 each. On September 24, 1892, the Texas Building and Loan Association entered into a contract with one Sheppard, whereby he agreed to furnish the labor and material to construct the house according to plans and specifications made a part of said contract, for the sum of \$3,150. These were the same plans and specifications made a part of the application of Cain & Ballew to the appellee. Sheppard completed the house, and on the 14th day of January, 1893, Cain & Ballew accepted the house, and executed to Sheppard a receipt therefor, in which they stated that on September, 1892, they made a contract with appellee to build a house for them, and that appellee had, through its subcontractor, Sheppard, built the house, and that it was satisfactory. Cain & Ballew had on hand at the time the several contracts were made a quantity of brick, and they furnished Sheppard, the subcontractor, the material for the house, amounting to \$1,150. Sheppard credited this sum on the contract, and

paid him the balance of \$2,000 in cash. This \$1,150 so paid to Sheppard was accepted by appellee in lieu of the cash payment it was to receive from Cain & Ballew. There was verbal testimony to the effect that there was no contract between the parties except the one evidenced by these writings. The contract, upon its face, evidenced a builder's contract, and created a lien upon the lot and improvements, and the trial court did not err in so holding. The transaction not being a loan of money, it was not usurious. *Paddock v. Association* (Tex. Civ. App.) 36 S. W. 1008.

Appellants, under their third assignment of error, present the following proposition: "The judgment is void, and contravenes the constitution and laws of this state, to the extent that it attempts to create and foreclose a mechanic's lien on the building erected with money furnished by McMahan subsequent to the destruction of the building erected with money furnished by appellee, for the construction of which appellee furnished neither material nor labor." The house erected by appellee for Cain & Ballew was destroyed by fire on December 28, 1894. In July, 1895, Cain & Ballew entered into a contract with B. M. McMahan, by the terms of which McMahan contracted to erect a storehouse 60 feet wide by 90 feet long on a certain lot in Emory, Rains county, Tex., therein described by metes and bounds, and which lot includes the lot upon which the former storehouse stood. Cain & Ballew were to pay \$2,500 for said house, for which they executed their five promissory notes, each dated July 15, 1895, each for \$500, payable to the order of B. M. McMahan,—the first maturing January 15, 1896; the second, July 15, 1896; the third, January 15, 1897; the fourth, July 15, 1897; and the fifth, January 15, 1898. These notes drew interest from date at the rate of 10 per cent. per annum, and 10 per cent. attorney's fees in case of legal proceedings to enforce collection; and, if not paid within 20 days after maturity, the holder had the option to declare the entire series due. McMahan caused the house to be erected as specified in his contract, and it was this house that was standing upon the lot at the time appellee brought this suit. McMahan's notes had not been paid, and his contract created a builder's lien upon the property. It is here contended by the appellants that, if the appellee had a builder's lien upon the property, then it attached only to the building erected by appellee, and under the constitution and laws it did not attach to the building subsequently erected by another, with which appellee was in no way connected, and concerning which it had no contract. In this contention we do not concur. By the terms of the statute the contractor, upon complying with its requirements, is given a lien on the house or improvements erected by him, and also on the lot or lots of land necessarily connected therewith. Rev. St. art. 3294. This lien, when so established, will continue until discharged or barred by limitation. Upon the destruction of the

house or improvement, and the erection of another house thereon, such house became a part of the realty, and subject to the lien. Such lien would take priority over a lien secured by a contractor in replacing the destroyed house. It has been held that a mechanic's lien, when once secured, takes precedence of all claims to the property improved arising thereafter. *Hotel Co. v. Griffiths*, 88 Tex. 575, 33 S. W. 652; *Keating Implement Co. v. Marshall Electric Light & Power Co.*, 74 Tex. 605, 12 S. W. 489. In this case, after McMahan had secured his lien and erected the second house on the lots, he executed to appellee an instrument reading as follows: "In consideration that the Texas Building & Loan Association of Corsicana, Texas, forbears at this time bringing suit against Cain & Ballew and myself for foreclosure of its mechanic's lien upon 40x90 feet of lots 1, 2, and 3 in block 3 in Emory, and the further consideration that said association will permit said Cain & Ballew to pay up that part of their indebtedness to it which is now past due, I hereby agree and consent that the claim and lien which I hold against said parties and property shall be and is a second lien, and subject to the lien and claim of said association; and I hereby waive and postpone any and all lien or liens that I have or may have upon said lots and the building thereon situated, and give preference and priority of lien to said association to secure the claims of said association against said Cain & Ballew, as evidenced by their notes set out in their said mechanic's lien. It being understood that my lien shall be second and subordinate to the claims of said association, and I consent and agree that said association may extend the time of payment of said claim from time to time, as they see fit, without prejudice to their lien or claim, and without notice to me. [Signed] B. M. McMahan. Emory, Texas, Feb. 29th, 1896." By the terms of this instrument, McMahan agreed and consented that the claim and lien which he held against said property should be, and was, a second lien, and subject to the lien and claim of appellee; and he expressly agreed to waive and postpone any and all lien or liens that he had, or might have, on said lots, or the building situated thereon, and give preference and priority of lien to appellee to secure its claim against Cain & Ballew. So far as McMahan is concerned, by this agreement he has admitted the validity and priority of appellee's lien upon the lots and improvements, and will not now be heard to dispute the same.

Appellants group their fourth, fifth, and sixth assignments of error, and present thereunder the following proposition: "Where mortgaged property or other collateral security is intrusted directly to the creditor, he becomes a bailee, and is liable for injuries to the trust fund growing out of his negligence or malfeasance of such bailee." In addition to the builder's lien held by the appellee to secure its debt, Cain & Ballew took out insurance upon the building erected by

appellee, to the amount of \$2,000, and had the loss, if any, payable to the appellee as its interests might appear, and delivered the policies to appellee. This insurance was evidenced by two policies, each for \$1,000, and each in a different company. In the latter part of December, 1894, the building was destroyed by fire. For some reason the insurance was not paid, and suit was brought against the insurance companies upon the policies. In these suits McMahan was the attorney for Cain & Ballew. On March 3, 1896, while these suits were pending, the claim was compromised by Cain & Ballew; the companies paying 66⅔ cents on the dollar, amounting in the aggregate to \$1,333.33. At the time of this compromise there was past due appellee from Cain & Ballew, upon said debt \$750. Out of the money paid by the insurance companies, appellee was paid \$752, and the balance was paid to Cain & Ballew. The insurance companies were solvent, and the loss was greater than the amount of the policies. McMahan knew a compromise was contemplated by Cain & Ballew, but did not know its terms, and did not consent to the compromise. There is no allegation or proof that Cain & Ballew are insolvent. The only party complaining about the application of the insurance money is McMahan. By the terms of the agreement executed by him only three days before the making of the compromise, McMahan agreed with the appellee that in consideration of its forbearance at that time in bringing suit against Cain & Ballew and himself for foreclosure of its mechanic's lien upon the property, and the further consideration that said association would permit said Cain & Ballew to pay up that part of their indebtedness to it which was past due, the claim and lien which he held against said parties should be, and was, a second lien, etc.; and he further consented and agreed that said association might extend the time of payment of its claim from time to time, as they saw fit, without prejudice to their lien or claim, and without notice to him. At the time of the making of this agreement, Cain & Ballew were in default to the association \$750. They were then in a position where suit could be instituted against them by appellee for a foreclosure of its lien. The agreement was made in consideration of appellee forbearing to bring suit, upon Cain & Ballew paying the amount past due. It further authorized the association to extend the time of payment of its claim without notice to him. If it be admitted that appellee's proposition announces "correct principle of law,—which we do not decide,—yet, under the facts, it could not be invoked in this case. The association relied upon McMahan's agreement, and did accept the amount past due, and did forbear bringing suit. If all of the insurance had been collected, by the terms of the agreement, the appellee was only entitled to so much of the same as would pay that part of the debt of

Cain & Ballew which was then past due. It must have been contemplated that the balance of the insurance money would be paid by Cain & Ballew. We think, in this agreement, McMahan is estopped from questioning the application of the money received in settlement of the insurance property.

We have considered the second proposition urged by appellants under their fourth and sixth assignments of error, and our opinion that under the facts appellants are in no position to invoke the same. This proposition does not announce a correct principle of law.

We do not think there is any merit in appellants' fourth, fifth, and sixth assignments of error, and they are overruled. The judgment is affirmed. Affirmed.

HURD v. TEXAS BREWING CO.

(Court of Civil Appeals of Texas. March 1896.)

PLEADING — REPLY — NECESSITY — ACTION — TRUSTEE — APPEAL — REVIEW — PROPOSITIONS.

1. Plaintiff sued a corporation, as owner of stock on which a dividend had been declared, to recover the dividend. The plaintiff alleged that plaintiff held the legal title to the stock, and was entitled to the dividend to secure the payment by the owner of the stock of the note which he had given by them to the cestui que trust, and that it had been paid. The plaintiff made no defense, and by virtue of the same stood as denied. *Held*, that evidence that plaintiff also held said stock as security for the payment of the note was inadmissible under the pleadings, and should have been set out by a plea in avoidance and avoidance in reply to defendant's answer.

2. Plaintiff sued a corporation, as owner of stock on which a dividend had been declared, to recover the dividend. The plaintiff alleged that he held the legal title to the stock, and was entitled to the dividend for the purpose of securing the payment by the owner of the stock to the cestui que trust of the note which he had given by them to the cestui que trust, and that a surplus over the amount of the note arising from the sale, was wrongfully retained by the cestui que trust on an individual account, and was to be paid to the plaintiff (describing it) of one of the pledgors. *Held*, that setting out of such other note did not constitute a defense, and the omission of the plaintiff to set out by his answer that such stock was also held as security for the payment of other note.

3. If facts exist which entitle a trustee to recover dividends thereon notwithstanding it appears that such dividends have been paid to the cestui que trust, such facts must be alleged.

4. The supreme court will not reverse the judgment of the trial court in refusing an amendment after the parties have announced their readiness for trial, if it does not clearly appear that the trial court has abused its discretion, under Say St. art. 1188, providing that all amendments must be filed before the parties announce their readiness for trial, and not thereafter.

5. When the bill of exceptions fails to state the grounds of the trial court's ruling in granting an amendment to the pleadings, or the circumstances thereof, the presumption is that the court's discretion was properly exercised.

Error from district court, Tarrant County, Texas, in the case of Irby Dunklin, Judge.

Action by Andrew R. Hurd against the Texas Brewing Company. From a judgment of the district court, Tarrant County, Texas, in the case of Irby Dunklin, Judge.

in favor of defendant, plaintiff brings error. Affirmed.

Bomar & Bomar, for plaintiff in error. W. R. Sawyers, for defendant in error.

CONNER, C. J. Briefly stated, this was a suit by plaintiff in error against defendant in error in which it was alleged by plaintiff, in substance, that in January, 1895, defendant in error declared a dividend of \$1,900 on 475 shares of its capital stock at the time and theretofore owned by plaintiff in error, which it had failed to pay plaintiff. Defendant in error answered, in substance, that plaintiff was not the real owner of said stock; that it had been issued to said plaintiff in error as naked trustee only, to secure a debt of \$46,000 due the National Bank of Commerce by the firm of Casey & Swasey, a co-partnership composed of Martin Casey and C. J. Swasey; that said bank was at the time of said dividend the real owner of said stock, and that said dividend had been paid to Casey & Swasey, who paid the same to said bank, since which time Casey & Swasey had paid off and discharged the said \$46,000 indebtedness; and it impleaded Casey & Swasey, and prayed for judgment against them for any sum that might be adjudged against it. Casey & Swasey appeared, and answered, setting up substantially the same facts as set up by defendant in error, and further alleged that said \$46,000 indebtedness had been paid off by the sale of said 475 shares of stock by said bank with which it had been deposited as security as aforesaid, and that the proceeds of such sale resulted in an excess of \$785 that had been by said bank illegally applied to an individual indebtedness of Martin Casey. There was a trial, and judgment, January 18, 1898, that plaintiff in error take nothing as against defendant in error, and that defendant in error take nothing as against Casey & Swasey.

The following facts were shown: The certificate of stock described by the plaintiff in error was issued to Andrew R. Hurd for 475 shares in May, 1894, transferable only on the books of the company; the shares being for \$100 each. On July 16, 1894, a note for \$46,000, given for the indebtedness above referred to, was signed by Casey & Swasey, Martin Casey, and C. J. Swasey. In said note it was recited that said stock was pledged as collateral security to secure the same. It had the following further provision: "Deposited with said bank as collateral security for the payment of this note, and to be held as security for the payment of this or any other liability of the undersigned to said bank, due or to become due, now contracted or hereafter to be contracted, the following property." Said 475 shares of stock were then described. Said note also gave the bank the right to sell said stock in case of default, etc. It was shown by the cashier of the said National Bank of Commerce that

475 shares of the capital stock of the brewing company were turned over to the National Bank of Commerce as collateral to secure said note, and it was agreed that the same should be issued by the brewing company in the name of Andrew R. Hurd, and held as collateral to secure said bank in the payment of said note; that said Hurd had no interest at any time in said stock, save as trustee; that about March 25, 1895, said note fell due, and was paid by the sale of said collateral of 475 shares of stock, under the power of sale in the note; that there was left after the payment of said note by the sale of the collateral \$785. It was further shown that a dividend of 4 per cent. on the capital stock of the Texas Brewing Company had been declared in January, 1895, said dividend amounting to the said sum of \$1,900, and that said dividend was paid to Casey & Swasey. It was further shown by Martin Casey, among other things, that he had collected said dividend in January, 1895, and paid the same to the National Bank of Commerce.

The court excluded evidence offered by plaintiff in error to show that the stock in question was held as collateral to secure the payment of two other notes besides the \$46,000 note, on the ground that plaintiff had not pleaded said other notes. The other notes referred to were: One note executed by Martin Casey, payable to John Foster, cashier, for the sum of \$7,975, dated February 17, 1893, payable six months after date, with interest from maturity at 8 per cent. per annum; and, second, one note for \$10,000, dated January 1, 1891, executed by the Huffman Implement Company to Sallie Huffman, and indorsed by C. J. Swasey, said note being indorsed to the National Bank of Commerce. After the exclusion of this evidence, plaintiff asked leave to file a trial amendment, so as to authorize the introduction of said testimony, which was refused, and the court instructed the jury to find for defendant, which was done, resulting in judgment as aforesaid. The assignments of error call in question the action of the court in so excluding said evidence and in refusing to permit said amendment. We are of opinion that no error in this has been shown. It is clear that plaintiff in error sued as the legal and absolute owner of the stock in question. No other right is set up in his petition. The defendant in error's answer was to the effect that he was but the naked holder of the legal title, for the purpose of securing the payment of a note given by Casey & Swasey to the National Bank of Commerce, which note had been in fact paid. This, if true, certainly constituted a perfect defense to plaintiff's cause of action. So far as shown by the record, plaintiff in error makes no answer to this defense, but by force of the statute it is to be considered denied. So stood the issues as made by the pleadings when the parties went to trial. The fact, if

true, that plaintiff in error held title as trustee to secure the payment not only of the note for \$46,000, as alleged by defendants, but also for the payment of the two notes offered in evidence, was in the nature of a plea in confession and avoidance, and we think should have been pleaded in answer to the defense presented.

It is insisted that defendants pleaded such other note or notes, and that, therefore, the omission is cured. We cannot agree to this construction of the pleadings. It is true that, among other things, Casey & Swasey stated in their answer, which was also adopted by defendant in error, that after the payment of the \$46,000 note there was a surplus of \$785 that had been illegally applied on an individual note, describing one of the notes so offered in evidence by plaintiff in error; but the bank had not been made a party, and no relief was invoked by reason of such appropriation of said surplus. The \$46,000 note was not described or set out in any of the pleadings, and we think that, to give effect to that provision showing that the 475 shares had been deposited to secure the \$46,000, "or any other liability of the undersigned to said bank, due or to become due," it should appear in some of the pleadings. How else could it be supposed that defendant in error and Casey & Swasey would have notice of, and a consequent opportunity to meet, such an issue with proof? See *Telegraph Co. v. Smith*, 88 Tex. 9, 28 S. W. 931, and 30 S. W. 549; *Ware v. Shafer*, 88 Tex. 44, 29 S. W. 756. But if in error as to this conclusion, there is another view that would seem to be conclusive of the question. As before stated, among other things, defendants alleged, and it was afterwards shown, that the dividend in question was in fact paid by Casey & Swasey to said bank, who beyond dispute was the real beneficial party entitled to receive the same. This fact is undisputed in the proof, nor was there any offer to controvert it. If a state of facts existed that entitled the naked trustee to recover said dividends notwithstanding the actual receipt thereof by the real party in interest, we think such trustee should have pleaded such facts. No such matter was pleaded by appellant.

Nor are we able to say that there was error in refusing to permit plaintiff to amend as requested. Our statute provides that "all amendments to pleadings * * * when court is in session must be filed under leave of the court, upon such terms as the court may prescribe, before the parties announce ready for trial, and not thereafter." *Sayles' Civ. St. art. 1188*. The statute in express terms denies the right of amendment after an announcement of ready for trial. We are not inclined to enlarge exceptions to this statutory rule, and we think it should be made to clearly appear that the trial judge abused his discretion before reversing a ruling apparently in exact accord with legisla-

tive direction. The bill of exceptions to the action of the court here complained of, omitting formal parts, is as follows: "Be it remembered that on the trial of the above cause, and after the court had ruled out the testimony as shown in bill of exception No. 1, plaintiff, by his attorney, asked leave of the court to file a trial amendment and plead so as to authorize the admission in evidence of said testimony, and setting up that he held said stock as collateral security to the notes ruled out by said bill of exceptions; all of which the court refused to permit, and the plaintiff excepted." It will be noted that the grounds of the court's ruling are not stated, nor are the circumstances relating thereto set out in the bill. No offer or attempt is here made to avoid the legal effect of the actual receipt of the dividend sued for by the beneficiary. The rule is statutory that the bill should state the action of the court, "with such circumstances or so much of the evidence as may be necessary to explain it" (*Sayles' Civ. St. art. 1361*); and it must appear therefrom that error to the prejudice of the party complaining has been done. Every presumption is in favor of the action of the court, and the circumstances may have been such as to show that the court's discretion was properly exercised in the matter. It is stated in appellant's brief that he sought to withdraw his announcement of ready for trial, but the record contains no evidence of such request. Judgment affirmed.

ABILENE LIVE-STOCK CO. v. GUINN.

(Court of Civil Appeals of Texas. May 27, 1896.)

SCHOOL LANDS—APPLICATION TO PURCHASE—TRESPASS TO TRY TITLE—LEASES—ISSUES AND PROOF—APPEAL.

1. An application to the commissioner of the general land office to purchase school lands, where in compliance with the act of 1895, is good under the amendatory act of 1897.

2. In trespass to try title to school lands, it was proper to exclude a lease of the lands to plaintiff's grantor, where the lease had been abandoned and canceled, and the grantor had afterwards made an application to purchase.

3. In trespass to try title, where there is a special answer not pleading fraud and collusion between plaintiff and his grantor in the purchase of school lands, such issue cannot be proven or submitted under the plea of not guilty.

4. The appellate court may show a reason not relied on by appellant, in the assignment of errors in his brief, against the giving of a certain instruction.

Appeal from district court, Taylor county; T. H. Conner, Judge.

Trespass to try title by the Abilene Live-Stock Company against E. J. Guinn. From a judgment for defendant, plaintiff appeals. Reversed.

Wagstaff & Lasley, for appellant. R. E. Chandler, for appellee.

HUNTER, J. This was an action of trespass to try title to a section of school land

situated in Taylor county, and was filed by appellant February 15, 1898. The appellee pleaded "Not guilty," and set up improvements made in good faith, and specially that the E. B. Sparks, appellant's vendor, who applied to purchase said land from the state, was not a citizen of the state of Texas at the date of his application, and was not a bona fide resident upon any land within a radius of five miles of the section in question. The case was tried by a jury, who found in favor of appellee for the land, upon which judgment was rendered, and from which judgment this appeal is taken.

It seems that the appellee moved his family upon the section in controversy on August 19, 1897, with bedding, cooking utensils, etc., and cooked, ate, and slept there until on the 21st of the same month, when, under the advice of his attorney, after having made his application to the land commissioner to purchase the same on the 20th, he left the land temporarily, and went back to gather his crop, about five or six miles from this section. He and his family often returned to the land, and camped, cooked, ate, and slept on it; and he carried poles upon it, and built a pen about three feet high, and cleared off a place for his residence, and trimmed up the trees on and around it, and ever since the 19th of August, 1897, has claimed it as his home. After gathering his crop, he moved his family on it November 1, 1897, and built his residence and fences, and dug a well, and cleared land and put it in cultivation, and has lived on it with his family ever since as his home, and has had no other.

On the trial of the cause the appellee's application to the commissioner of the general land office to purchase the land was admitted only for the purpose of sustaining his claim for improvements placed upon the land in good faith, but was excluded from the consideration of the jury on the question of appellee's title to the section, upon the ground that it was made to conform to the act of 1895 for the sale of such school lands, excluding the amendatory act of 1897. There is no cross assignment of error to this ruling of the lower court; but as we shall reverse the judgment on other grounds, necessitating another trial, we think it not improper to state that in our view of the question, as presented by the record, the application should not have been so limited. It seems that the requirements of such an application are the same under the act of 1895 as under the act of 1897, and we think the form of the application, if in compliance with the act of 1895, was good under the act of 1897.

The first assignment is overruled, because the court did not err in excluding the Sparks lease. He had abandoned and canceled his lease, and made application to purchase the section, and the appellant must stand or fall on the application of Sparks to purchase. The title under the lease had terminated, and possession under a title that had ceased and

terminated would not have been sufficient to recover upon.

The second error assigned complains of the court's action in submitting to the jury the issue of fraud and collusion between Sparks and the appellant in the purchase of the land, the evidence tending to show that Sparks' application was in fact made for the appellant corporation; and this assignment we are compelled to sustain, upon the ground that no such issue was pleaded by the defendant, and, there being a special answer, it could not be proved under the plea of not guilty. We notice that this reason why the charge was erroneous is not specifically set forth under any proposition in appellant's brief, but the assignment clearly charges error in the giving of the instruction, and it is now settled practice that in such case the appellate court may show a reason for the error not relied on by the appellant.

There are other errors assigned, but we think they will not probably arise on another trial, and we therefore pass them without discussion. For the error pointed out, the judgment is reversed, and the cause remanded.

CONNER, C. J., not sitting.

BLACKMAN v. SCHIERMAN.

(Court of Civil Appeals of Texas. June 8, 1899.)

ACTION TO CANCEL DEED — FRAUDULENT DEED — IMPEACHMENT BY GRANTOR — EVIDENCE — INSTRUCTIONS — DELIVERY OF DEED — RECORDING — FORM OF JUDGMENT.

1. Equity will, at the suit of the administrator of the grantor, where he died in possession, set aside a deed made to defraud the grantor's creditors, which was never delivered by him or accepted by the grantee, though recorded by one having no authority so to do.

2. The rule that, where the rights of creditors are not involved, equity will not permit a grantor or his executor to invalidate his deed by proving that it was given for the purpose of defrauding creditors, has no application where the deed so executed was never delivered to the grantee, though it was recorded by one having no authority so to do.

3. In an action to cancel a deed, where the pivotal question was whether a deed from the person under whom both parties claim was delivered, it is not prejudicial error to admit instruments in evidence to show the common grantor's title.

4. In an action by an executor, testimony as to the contents of a letter written by defendant to deceased is inadmissible to show his acceptance of a deed made by deceased, under Rev. St. § 2302, relating to transactions with decedents, though defendant has given plaintiff notice to produce the letter, and he has not done so.

5. In an action to cancel a deed, an instruction that, if the grantee did not accept the conveyance during the lifetime of the grantor, he cannot recover, is not erroneous, where the evidence is conflicting, and the validity of the deed depends upon its acceptance.

6. A deed executed by a grantor, but never delivered, will not, after his death, be treated as a testamentary disposition, in the absence of evidence of such an intention on the part of the grantor.

7. The recording of a deed by one not authorized so to do by the grantor will not be given the effect of a delivery of the deed.

8. In an action to cancel a deed, where the complaint prayed for the cancellation of the deed, removal of a cloud on the title, quieting title, and general relief, and the defendant set up an affirmative claim to title, and sought to recover the land, a judgment awarding a recovery of the land to plaintiff is authorized by the pleadings.

Appeal from district court, Navarro county; L. B. Cobb, Judge.

Suit by William Schierman, as executor, against John W. Blackman, Jr. From a decree in favor of complainant, defendant appeals. Affirmed.

On the 6th day of June, 1898, appellee instituted this suit in the district court of Navarro county to cancel a deed made by his testator, James Cosgrove, to appellant. Appellee's original petition alleges, in substance, that on March 10, 1896, his testator, Cosgrove, made and executed a pretended deed from himself to appellant, by which he, for a recited valuable consideration, pretended to convey to appellant 75 acres of land in Navarro county; that in fact the deed was without consideration, but that Cosgrove, imagining that his land would be levied on to satisfy some security debts he had incurred, pretended to make the sale of the land to appellant for the purpose of hiding and covering up the land, believing appellant would never claim it; that Cosgrove never intended to give the land to appellant, but only notified him he had made such a deed; that appellee, without the knowledge of Cosgrove, had the deed recorded, and then gave it to Cosgrove, in whose possession it remained until the death of Cosgrove, when it came into appellee's possession, as his executor, and that neither the deed nor the land was ever delivered to appellant by either Cosgrove in his lifetime, or appellee since his death; that the deed was never intended to pass the title; that the security notes which Cosgrove feared he would have to pay were settled by compromise, wherefore the contingency by which the title might have passed to appellant never happened; that since Cosgrove's death appellant is claiming, and trying to sell, the land; that he never asserted any claim to the land prior to Cosgrove's death, etc. The prayer of the petition is that the deed be canceled, and appellee's title to the land be quieted, etc. The appellant's answer presented: (1) A general demurrer. (2) A general denial. (3) A special answer alleging that the deed in question was made, acknowledged, and filed for record by said Cosgrove in good faith, and upon a valuable and good consideration, viz. to recompense appellant for money he had expended for medical attention and medicines for Cosgrove during his serious illness at appellant's house, in New Orleans, in 1892, and in testimony of his gratitude to his nephew, appellant, for the care, kindness, and nursing shown and given him by appellant during said sickness; that Cosgrove wrote appellant that he had deeded him

the land; and that appellant wrote Cosgrove, accepting the conveyance. (4) Appellant also, by cross bill, made Margaret J. Schierman, wife of appellee, a party, alleging that she was the sole devisee under the will of Cosgrove, and by the cross action sued appellee and his wife for the land, in trespass to try title. Mrs. Schierman answered appellant's cross action by plea, "Not guilty." The trial terminated in a verdict and judgment for plaintiff, from which the defendant has appealed.

The evidence was sufficient to justify the jury in finding the existence of the following facts, which we, in support of the verdict, conclude were established by proof upon the trial: (1) James Cosgrove was the common source of title. (2) James Cosgrove was surety for the debt of his son-in-law, William Schierman, and becoming fearful that an attempt would be made to force him to pay this debt, and for the purpose of defeating any such effort, he made a deed to his nephew, John W. Blackman, Jr., purporting, for a valuable consideration, to convey the land in question. (3) No consideration was in fact paid for the land. Some years previous, Cosgrove was sick at Blackman's house, received at the latter's hands kind and affectionate treatment, and the expense, including \$25, physician's bill, was paid by Blackman. Blackman was not reimbursed by Cosgrove for this expenditure. It was not intended that the title to the land should pass by the deed. The deed was never delivered. Blackman was not given possession of the land, and made no claim to it until after the death of Cosgrove. (4) William Schierman paid off or discharged the debt for which Cosgrove was surety, and the contingency never arose for the creditors to enforce payment by Cosgrove, the surety. (5) Cosgrove notified Blackman by letter of the making of the deed,—Blackman then residing in New Orleans, La., and Cosgrove in Navarro county, Tex.,—but it was not shown that there was any acceptance of the conveyance by Blackman. (6) The deed was recorded soon after its execution, but William Schierman caused this to be done without the knowledge of Cosgrove, and did not inform him of the fact that it was recorded. Cosgrove acknowledged the deed, and left it with the notary to affix his certificate of acknowledgment. He sent Schierman for the deed afterwards, and, thinking it should be recorded, Schierman had this done. (7) Cosgrove died testate. William Schierman was constituted independent executor of his estate, accepted and qualified as such, and Mrs. Schierman was made sole devisee in the will. (8) It was not shown that the estate owed any debts.

John H. Rice, for appellant. O. W. Croft, for appellee.

FINLEY, C. J. (after stating the facts). 1. The overruling of the general demurrer to

the petition is first assigned as error. Under this assignment the legal proposition is urged that the law will not permit the executor to avoid his testator's deed by showing that it was made for a fraudulent purpose; citing, as support, *Danzey v. Smith*, 4 Tex. 412. The case cited holds that the heirs cannot impeach the deed of the ancestor under whom they claim upon the ground that the conveyance was without consideration, and made merely for the purpose of putting the property out of the reach of creditors. The discussion indicates that the same rule would apply to a suit prosecuted by an executor or administrator for the sole benefit of heirs or devisees, and later cases have expressly held that an executor or administrator cannot impeach such a conveyance. *Cobb v. Norwood*, 11 Tex. 556; *Connell v. Chandler*, 13 Tex. 5, 6; *Wilson v. Demander*, 71 Tex. 605, 9 S. W. 678. That case does not decide the question which arises upon the facts alleged and proven in this case. The ground upon which the deed in question is sought to be canceled as a cloud upon title is that the conveyance of the land was never consummated, because there was no delivery of the deed, and the pretended grantee never accepted the conveyance or acquired possession of the land. Where no question of fraud is involved, it is well settled that a delivery of the deed is essential to render the sale of land complete and effective. *Hubbard v. Cox*, 76 Tex. 239, 13 S. W. 170; *Steffian v. Bank*, 69 Tex. 513, 6 S. W. 823; *McLaughlin v. McManigle*, 63 Tex. 553. In *Hunt v. Butterworth*, 21 Tex. 133, it is held that, a fraudulent gift not being consummated by delivery of the deed in the lifetime of the donor, and the latter dying in possession, the property is assets in the hands of the administrator, and he may maintain an action for its recovery. Mr. Justice Wheeler, delivering the opinion of the court, recognizes the general rule that a fraudulent conveyance binds the grantor and privies, but also states and establishes limits or exceptions to this rule. This case comes within the exception that, where the fraudulent gift has not been consummated by delivery of the deed, the administrator or heir may maintain a suit for a recovery of the property. The court did not err in overruling the general demurrer.

2. The court permitted William Schlerman to testify, over objection of appellant, that, when Cosgrove executed the deed to Blackman, he (Schlerman) owed some notes on a gin, and Cosgrove was surety upon said notes. The court also permitted C. W. Croft, Esq., to testify, over appellant's objection, that when Cosgrove acknowledged the deed before him, as notary, he asked Cosgrove why he was making the deed, and Cosgrove replied that he was surety on some notes of William Schlerman, his son-in-law, and he feared his land might be levied on by the holders of the notes, and he was putting the land in his nephew's name in order to cover it up from

the holders of such notes for the time being, and that it might not become necessary to give this land to his nephew. The second and third assignments of error, based upon the admission of this evidence, are presented together; and under them the single legal proposition is urged, that, where the rights of creditors are not involved, equity will not permit the grantor, nor his executor, to invalidate such a deed by proving that the grantor made the deed for the purpose of hindering, delaying, or defrauding his creditors. This general proposition has already been considered, and need not be further discussed. The evidence was material and admissible, in connection with other evidence tending to establish the allegation that there was no delivery of the deed, and no intention that title should thereby be passed. Had the uncontroverted evidence shown an executed conveyance, a different rule would obtain. A mere unexecuted intention to commit a fraud is not placed under the same ban of the law as a consummated act of fraud. In an action to set aside an alleged fraudulent conveyance, it has been held that delivery of the deed must be alleged. *Doerfler v. Schmidt*, 64 Cal. 265, 30 Pac. 816. The law deals with acts, not mere unconsummated intentions.

3. The fourth assignment raises the question of the admission of improper evidence. Over the objection of irrelevancy and immateriality, the court permitted the plaintiff to introduce in evidence these instruments: "(1) Deed from Parmalee and wife to Jas. Cosgrove, dated June 13, 1862, conveying 1,301 acres of the W. M. Love survey, in Navarro county, for a recited consideration of \$6,000 cash. (2) Deed from Jas. Cosgrove to John W. Blackman, Sr., dated December 28, 1868, conveying 480 acres of land of said survey, for recited consideration of \$1,200 cash. (3) Deed from Jas. Cosgrove to Wm. Croft, conveying 320 acres of said survey, for a recited consideration of \$700. (4) Power of attorney from John W. Blackman, Sr., and wife, to Jas. Cosgrove, dated June 2, 1875, empowering Cosgrove to sell and make deeds to grantor's land in Navarro county, out of the Love survey. (5) Deed from Blackman, Sr., by Jas. Cosgrove's attorney, to Margaret J. Cosgrove, dated August 31, 1880, conveying 160 acres of the Love survey, for consideration of grantee's 3 notes, for \$266 each. (6) Deed from Margaret J. Cosgrove to Jas. Cosgrove, dated March 13, 1886, conveying 535 acres of the Love survey; consideration being cancellation of the notes of Margaret J. Cosgrove given to Jas. Cosgrove. (7) Deed from John W. Blackman, Sr., by Jas. Cosgrove's attorney, to Margaret J. Cosgrove, dated May 23, 1879, conveying 380 acres of the Love survey, for a consideration of \$2,000, in 5 notes, of \$400 each. (8) Deed from Wm. Croft to Wm. Young, dated December 26, 1874, conveying 160 acres of the Love survey, for consideration of \$880 cash. (9) Deed from John W. Blackman, Sr., to Jas. Cosgrove, conveying

grantor's interest to whatever lands the records of Navarro county show him to be entitled to in said county, for consideration of \$1, and other considerations valuable in law, dated October 8, 1894." There is no legal proposition pointing to any specific element or elements common to these instruments upon which the objection is based. It is merely announced that "the admission of improper evidence, which may have improperly influenced the jury, is cause for reversal." We are left to conjecture as to the real question intended to be presented for decision. This manner of presenting for revision the rulings of the trial court upon the admission of evidence is quite unsatisfactory. *Cobb v. Norwood*, 11 Tex. 556. The land in question in this suit is 75 acres out of the W. M. Love survey, and all these instruments relate to the title of this survey, or parts of it. It is true that James Cosgrove was clearly the common source of title, and it was not necessary to go back of the common source; but, because a common source is shown, it is certainly not material error to admit a deed in the plaintiff's chain of title beyond the common source. We think it manifest from the record that appellant sustained no injury from this evidence. The real issue in the case, under the evidence and the charge of the court, was whether there was an executed conveyance of the land in suit by James Cosgrove to John W. Blackman, Jr. The uncontroverted evidence showed that the deed itself was never actually delivered, and that it was put to record without the authority or consent of the grantor. The evidence showed that Cosgrove notified Blackman by letter that he had made the deed, and there was an issue in the evidence whether Blackman accepted the conveyance. Upon this point the court instructed the jury that, if Blackman did accept it, the deed became effectual to bind the grantor, and his executor could not recover. This was the pivotal issue of fact, and we cannot see how the deeds in question, under this assignment, could have affected such issue to appellant's hurt. We hold that the assignment should not be sustained.

4. The answer of John W. Blackman, Jr., to the twenty-third interrogatory, was excluded upon objection of plaintiff, and this ruling is assigned as error. The answer was to this effect: "I distinctly remember, in my reply to Mr. Cosgrove's letter of July 7th, that I stated or intimated that I would accept his offer to deed me this land." Notice had been given the plaintiff to produce this letter, and he had not done so. It is believed that this evidence is inhibited and rendered incompetent by article 2302, Rev. St. Garrison v. King's Adm'r, 35 Tex. 183.

5. The sixth and seventh assignments complain of the charge of the court to the effect that, if Blackman did not accept the conveyance during the lifetime of Cosgrove, plaintiff should recover. It is first urged, under these assignments, that such acceptance

should be presumed. The evidence made it a doubtful issue of fact, and in this respect the charge was not error. *Hubbard v. Cox*, 76 Tex. 239, 13 S. W. 170; *Steffan v. Bank*, 69 Tex. 518, 6 S. W. 823. It is next insisted that the deed is in the nature of a testamentary disposition of real estate, and, not having been revoked by the grantor in his lifetime, inured to appellant's benefit on the death of the grantor. It is sufficient to say of this proposition that there is no evidence upon which it can properly be based.

6. The eighth assignment challenges the verdict as contrary to the charge as applied to the facts. This assignment is not sustained by the record. Under this assignment we will notice the matter of the recording of the deed, although this point is not directly raised by the assignment. As previously stated, the deed was caused to be recorded by Schlerman, on the suggestion of the notary, without the knowledge or consent of the grantor. The recording of a deed under such circumstances was not the act of the grantor, and should not be given the effect of a delivery of the deed. *Culmore v. Genove* (Tex. Civ. App.) 24 S. W. 83.

7. The last assignment objects to the form of the judgment, because it awards a recovery of the land. The prayer of the petition is for cancellation of the deed, removal of cloud, quieting title, and for general relief. Appellant set up affirmative claim to title, and sought a recovery of the land. The judgment rendered was authorized by the pleadings. We find no error in the judgment, and it will be affirmed. Affirmed.

EMERSON v. BEDFORD et ux.

(Court of Civil Appeals of Texas. May 27, 1899.)

DEEDS—CONSTRUCTION—CONVEYANCE OF STREETS.

A deed of several blocks of land separated by streets, as laid out by the grantor, conveys the title to the intervening streets as effectually as if they had been expressly included.

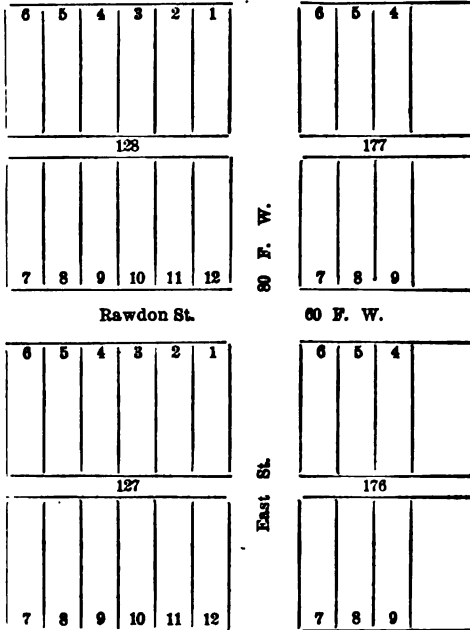
Appeal from district court, Knox county: S. I. Newton, Judge.

Injunction by H. G. Bedford and wife against S. P. Emerson. Judgment for plaintiffs, and defendant appeals. Reversed.

Jo. A. P. Dickson, Fitzhugh & Smith, and Stephens & Chase, for appellant. Morgan & Coombes, for appellees.

STEPHENS, J. H. G. Bedford and wife brought this suit in the district court of Knox county to enjoin a writ of possession in favor of S. P. Emerson issuing from the district court of Dallas county upon a judgment to which H. G. Bedford, but not his wife, was a party defendant. This writ directed the sheriff of Knox county, who was also made a party to this suit, to place appellant in possession of blocks 128, 129, 177, 178, 179, 180,

and the north half of blocks 127 and 176, in the town of Benjamin, in Knox county. These blocks, with the intervening streets, had thus been laid off:



Bedford and wife occupied a dwelling house situated upon Rawdon and East streets, where they cross each other, and sought by injunction to limit the scope of the writ of possession to the blocks separated by and abutting on the streets, upon the ground that no title to the streets passed to appellant by the conveyance of the surrounding blocks. This view was adopted by his honor, the district judge, and judgment was entered in accordance therewith, as will be seen from his second conclusion of law, reading: "The judgment passing the title of the four blocks of land adjoining the streets on each side to defendants did not pass the title to the lands in the streets."

The fourth conclusion of fact reads: "At the time they conveyed the streets, H. G. and F. E. Bedford owned the four blocks of land which said streets divide." The deed referred to in this conclusion was made and recorded in March, 1890, with the accompanying plat as indicated above; but no person was named as grantee, the concluding clause of the deed reading: "And we herein and hereby relinquish all our respective rights, title, or interest in and to any and all lands included or contained inside the limits of said streets, to be the common property of the general public, for their use and behoof forever." It seems, however, that these streets were never opened and used or otherwise accepted by the public; but that did not affect the rights of the subsequent grantees of the blocks, taking conveyances with reference to the streets. What, then, is the legal effect of

a deed conveying several blocks of land separated by streets, as between the grantor, who has laid off the land into blocks and streets, and the grantee of the blocks, who has accepted a conveyance thereof with reference to such plat? This question is answered for us by the opinion of Chief Justice Lightfoot in *Bond v. Railway Co.* (Tex. Civ. App.) 39 S. W. 978, in which case a writ of error was denied. The authorities are there cited and quoted from, and we can add nothing to what is so well stated in that opinion. It results that the deed under which appellant deraigned title, conveying the blocks on both sides of the streets, had the effect of conveying the title to the intervening streets themselves, just as effectually as if they had been expressly included. The judgment of like import should be given like effect. Therefore, upon the uncontroverted facts so briefly set forth in the statement of facts and in the court's conclusions of fact, taken in connection with facts admitted in appellees' petition for injunction, the judgment is reversed, and here rendered in favor of appellant.

KING COUNTY LAND & LIVE-STOCK CO.
et al. v. THOMSON.

(Court of Civil Appeals of Texas. June 21, 1899.)

TRIAL—AMENDED ANSWER—CORPORATIONS—RENEWALS OF INDEBTEDNESS—RELEASE OF LIENS—DEEDS—QUANTITY OF LAND—BURDEN OF PROOF.

1. It is not reversible error of the trial court to permit the plaintiff to file a trial amendment which is not necessary to plaintiff's right to recover, though he had announced ready for trial, and had introduced all his testimony.

2. In an action on notes of a corporation where the defendant contends that such notes were given in violation of an agreement between the stockholders providing that no debt or liability shall be created by the corporation to exceed a certain amount, without the consent of the owners of four-fifths of all the stock, the burden of proof is on the defendant to show that such notes created a new debt, within the meaning of the agreement.

3. The execution of new notes without the consent of the owners of four-fifths of all the stock for a pre-existing indebtedness, is not the creation of a new debt or liability, within the meaning of an agreement entered into between the old stockholders of the corporation and a purchaser of a portion of the stock, providing that no debt or liability shall be created by said corporation to exceed \$20,000 without the consent of the owners of four-fifths of all the stock.

4. The action of creditors of a corporation, who are also stockholders, in releasing liens by which their debts were secured, does not injuriously affect the interest of one to whom shares of stock have been transferred as collateral, where the funds realized from the property so released were not misappropriated, as such holder occupies merely the position of a stockholder.

5. Exceptions to an amended answer which was not filed until the day of trial, pleading set-off, and seeking to make new parties, and have them served with citation, without offering any excuse for not having done so sooner, are properly sustained.

6. On a conveyance of 39,800 acres, with 10 days' time to determine whether the field notes

contained such number of acres, the vendee, by accepting the deed, takes the risk of the number of acres, and a shortage of 62 acres in such surveys is not unreasonable, authorizing damages.

Appeal from district court, Travis county; R. E. Brooks, Judge.

Action by R. M. Thomson against the King County Land & Live-Stock Company and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

On March 9, 1886, the King County Land & Live-Stock Company, a private corporation, and Ike T. Pryor, purchased the properties of the Phoenix Land & Cattle Company; the King County Land & Live-Stock Company acquiring a three-fourths, and Pryor a one-fourth, interest therein. In payment for the property referred to, the King County Land & Live-Stock Company executed certain promissory notes. March 30, 1886, Ike T. Pryor purchased 250 shares of stock of the King County Land & Live-Stock Company, and at the same time the following agreements were made:

"The State of Texas, County of Travis. Whereas, I. T. Pryor, of said county and state, has this day bought from J. B. Rector, W. J. Montgomery, R. M. and T. A. Thomson, also of said county and state, sole stockholders in the King County Land & Live-Stock Company, two hundred and fifty (250) shares, of one hundred (\$100) dollars each, out of the one thousand shares of issued and paid-up stock of said company; and whereas, the hereinafter stipulations 1, 2, 3, and 4 entered into and constituted an inducement and consideration for the sale and purchase of said stock, it is therefore agreed: First. That neither of the said parties hereto shall sell the stock owned by them to a nonstockholder without giving all the other parties hereto an opportunity to purchase on the same terms. Second. That no debt or liability shall be created by said corporation to exceed twenty thousand dollars (\$20,000) without the consent of four-fifths ($\frac{4}{5}$) of all the stock. Third. Said I. T. Pryor hereby binds himself, his executors, administrators, in the event that either of the other parties hereto are compelled, by virtue of their individual indorsement on certain bonds issued by said company to Nelson & Noel, of St. Louis, Missouri, March 1, 1886, and amounting in the aggregate to fifty thousand dollars (\$50,000), to pay any part of said bonds, that he will refund to the party or parties so paying one-fourth ($\frac{1}{4}$) of what they may be compelled to pay, provided in no event shall he be compelled to pay more than one-fourth ($\frac{1}{4}$) of the whole amount which the other parties may be compelled to pay. This stipulation is based upon the fact that said Pryor has received one-fourth ($\frac{1}{4}$) of the amount realized for said bonds, and said Pryor takes his stock subject to the existence of the mortgage on the property of the company made to secure said bonds, and stands in this respect on the same footing with the

other parties hereto. Fourth. In the purchase of said two hundred and fifty (250) shares of stock by said Pryor, it is expressly understood that he becomes a stockholder and member of said corporation upon an equal footing, in all respects, with the other stockholders, and entitled to have and enjoy all property rights, and all privileges of every character whatsoever belonging to the other parties hereto, to the extent of the stock acquired by him in said corporation. Executed by signing five copies hereof, each party retaining a copy, and each being deemed an original, this, the 30th day of March, 1886. R. M. Thomson. W. J. Montgomery. Ike T. Pryor. John B. Rector."

Though not signed by T. A. Thomson the above contract was shown to be binding on him.

"The State of Texas, County of Travis. Know all men by these presents, that I, Ike T. Pryor, of said state and county, in part consideration of 250 shares of stock, of \$100 each, of the King County Land & Live-Stock Company this day conveyed, transferred, and assigned to me by W. J. Montgomery, R. M. Thomson, T. A. Thomson, and John B. Rector, all of said county and state, I hereby transfer, set over, and assign to said King County Land & Live-Stock Company, all the property and rights of property in land, cattle, horses, mules, equipments, etc., acquired by me under and by virtue of a certain contract and conveyance made by me and the King County Land & Live-Stock Company, on the one side, and the Phoenix Land & Cattle Company, on the other; said instrument being dated on the 9th day of March, 1886, and signed also by the stockholders of the said Phoenix Land & Cattle Company, to wit, by R. E. Mabry, S. R. Crawford, and W. G. Mellier. And the said King County Land & Live-Stock Company is hereby authorized and empowered to take deeds, bills of sale, etc., direct to itself to all the property aforesaid to which I am entitled under said contract. Witness my hand, this, March 30, 1886. [Signed] Ike T. Pryor." The total balance owing for the property purchased from the Phoenix Land & Cattle Company was \$108,365.19; and on December 9, 1886, the King County Land & Live-Stock Company executed nine promissory notes, payable to S. R. Crawford, R. E. Mabry, and W. G. Mellier, aggregating the amount above stated. Said notes were secured by mortgage on the cattle purchased from the Phoenix Land & Cattle Company, estimated at 12,000 head. On January 1, 1892, there was a meeting of the stockholders of the King County Land & Live-Stock Company, when the secretary reported to the meeting the purchase of 51 head of horses from I. T. Pryor for the sum of \$2,295. At this meeting all the stockholders were present, and on motion of Pryor the following preamble and resolution were unanimously adopted: "Whereas, on the 9th day of December, 1886, the company made and delivered to one W. G. Mellier its two

certain promissory notes, each for \$12,155.55, each bearing 10 per cent. interest from November 20, 1888, and payable, respectively, on or before November 20, 1888 and 1889; and whereas, on May 19, 1888, the company executed to Thomson Bros. and Pryor a certain other note for \$6,155.55, payable on or before November 20, 1889, with 10 per cent. interest from November 20, 1886, which said last note represented that much of a certain note executed by said company on the said 9th of December, 1886, for \$12,155.55, payable to S. R. Crawford on or before November 20, 1889, each of which notes was secured by the company's mortgage on about 12,000 head of cattle and their increase, in King county, Texas, each and all of which notes were also signed by each of the stockholders of the company, to wit, W. J. Montgomery, John B. Rector, I. T. Pryor, and R. M. and T. A. Thomson; and whereas, each of said notes is now due, and is held and owned by said Montgomery and Rector, who owned each one-third, and R. M. and T. A. Thomson, who owned the other one-third, upon which said notes there is due:

On the first note.....	\$18,534 28
On the second note.....	18,534 28
On the third note.....	9,486 98

\$46,555 54

—and whereas, it was agreed that the \$2,295 due by the company to I. T. Pryor for horses should go as a credit on the foregoing indebtedness at the rate of \$3 for \$1, or \$6,885, leaving a balance due by said company on said notes of \$39,670.53: Wherefore, be it resolved that said amount constitutes a just and valid claim and debt against the company, secured by its mortgage on the cattle and their increase, amounting to about 12,000 head, located in King county, Texas, which mortgage is a valid subsisting mortgage, but the property is to be subject—First, to a subsequent mortgage or trust deed to secure \$50,000 in bonds, executed to Lewis Hancock, as trustee; second, that the president execute the note or notes of the company under its corporate seal, and attest it by the secretary and treasurer, for the amount of said indebtedness, due on or before three years after date, with 8 per cent. interest, the interest to be paid annually, or to become as principal,—which notes may be in such sums as the said parties may desire, and payable to all, or the amounts may be divided in separate notes, and, in case one of the notes be executed to W. J. Montgomery, then the vice president shall execute the same; which notes shall express and show that they represent the original indebtedness which was secured by the said originals, and that the new notes be secured by the same, and that the old notes be preserved to show how the indebtedness occurred and the security preserved."

In pursuance of said resolution, notes were executed as follows: "\$13,223.51. Austin, Texas, January 1, 1892. Three years after date, for value received, the King County Land

& Live-Stock Company promises to pay to the order of John B. Rector, at his office in the city of Austin, Texas, thirteen thousand two hundred and twenty-three and $\frac{1}{100}$ dollars, with interest from date hereon until paid at the rate of 8 per cent. per annum, the interest payable annually, and, if not so paid, to become as principal, and bear interest at the same rate as principal. This note is given for one-third of amount due on three notes executed by the company, two dated December 9, 1886, payable to W. G. Mellier, each for \$12,155.55, due, respectively, November 20, 1888, and November 20, 1889; and the other for \$6,155.55, dated May 19, 1888, payable to Thomson Bros. and Pryor on November 20, 1889,—all of the notes bearing 10 per cent. interest from November 20, 1886, and secured by the company's mortgage on 12,000 head of cattle and the increase, in King county, Texas, which mortgage exists and is alive; and this note and one other for like amount, and two others each for one-half this amount, are secured by said mortgage on said cattle and their increase. This note is executed in its corporate name, and under its seal, by its president and secretary. The King County Land & Live-Stock Company, per W. J. Montgomery, President. [Seal.] Attest: R. M. Thomson, Secty." This note is indorsed with the following credits: April 8, 1896, \$1,200; April 27, 1896, \$3,050. This note is also indorsed as follows: "This note is canceled by a new note, dated April 27, 1896, for \$14,200 (fourteen thousand two hundred dollars). John B. Rector." The note to W. J. Montgomery, of January 1, 1892, is exactly similar to the John B. Rector note, and has similar indorsements upon the back thereof, except that Montgomery makes the indorsements, instead of Rector. The note executed to Thad A. Thomson is as follows: "\$6,611.75. Austin, Texas, January 1, 1892. Three years after date, for value received, the King County Land & Live-Stock Company promises to pay to the order of Thad A. Thomson, at his office in the city of Austin, Texas, (\$6,611.75) six thousand six hundred and eleven and $\frac{75}{100}$ dollars, with interest from date hereof until paid at the rate of eight per cent. per annum, the interest payable annually, and, if not so paid, to become principal and bear interest at the same rate as principal. This note is for one-sixth of amount due on three notes executed by the company,—two dated December 9, 1886, payable to W. G. Mellier, each for \$12,155.55, due, respectively, November 20, 1888, and November 20, 1889, and the other for \$6,155.55, dated May 19, 1888, payable to Thomson Bros. and Pryor on November 20, 1889; all the notes bearing ten per cent. interest from November 20, 1886, and secured by the company's mortgage on 12,000 head of cattle and increase, in King county, Texas, which mortgage exists and is alive, and this note and one other for like amount, and two others, each for double the amount of this, are secured by said mortgage on said cattle and their increase. This

note is executed in its corporate name, and under its corporate seal, by its president and secretary. King County Land & Live-Stock Co., per W. J. Montgomery, President. [Seal.] Attest: R. M. Thomson, Secty." The note is indorsed with the following credits: April 8, 1896, \$1,050; April 27, 1896, \$1,075. The note is also indorsed: "Credit by new note for balance due, viz. \$7,100, April 27, 1896." Across the face of said note is indorsed: "Canceled by new note of even date of last credit herewith for \$7,100, payable two years after date, this April 27, 1896. T. A. Thomson, per R. M. Thomson." The note to R. M. Thomson, of January 1, 1892, was for like amount as the Thad A. Thomson note, and in all respects similar, including the credits and indorsements thereon. The notes referred to as being renewed by the notes of January 1, 1892, were introduced, and across the face of the Meller note, due November 20, 1889, was the following indorsement: "This note and two other notes renewed January 1, 1892 (see Ledger, p. 127), and placed in four notes,—one to W. J. Montgomery for \$13,223.51; John B. Rector, \$13,223.51; R. M. Thomson and T. A. Thomson, two notes, \$6,611.75, one-half each. The new notes retaining the same lien as the old."

The minute book of the stockholders of the King County Land & Live-Stock Company shows, that a meeting was held on April 27, 1896, at which were present W. J. Montgomery and R. M. and T. A. Thomson, and John B. Rector was represented by his proxy, W. J. Montgomery, duly authorized by power of attorney; and "it appears from the minutes of said meeting that the State National Bank of Austin presented to the stockholders two notes held and owned by it, executed by the company,—one to Thad A. Thomson for \$6,611.75, and one to R. M. Thomson for like amount, bearing date January 1, 1892, by virtue of a resolution of the stockholders on the 1st day of January, 1892, and demanded payment of same, with accrued interest, but expressed a willingness to carry said indebtedness, if the company would execute new notes for the principal and interest then due. On motion it was duly resolved, by a vote of all the stockholders represented, and being three-fourths of the entire stock, that the president be, and he is hereby, instructed and authorized to execute, in the name of the company and under its corporate seal, its two promissory notes, each for \$7,100,—one payable to Thad A. Thomson, and the other to R. M. Thomson, two years after date, to bear interest from date at 8 per cent. per annum, and providing that the interest be made payable annually, and, if not paid, to be added and become principal, and to bear interest as principal, it being resolved that said sum of \$7,100 was justly due by the company upon each of said notes. It was further provided that the said notes of January 1, 1892, be indorsed canceled by these new notes, and that the old notes be preserved, so as to clearly identify the transaction; and it further appearing to said stockholders

that there were two other notes executed by the company at the same time, and under the same resolution, each for \$13,223.51,—one payable to W. J. Montgomery, and the other to John B. Rector, with 8 per cent. interest per annum, as stated in the Thomson note,—and that there is now justly due upon each of said notes \$14,200, bearing 8 per cent. interest, it was resolved that the company, through its officers, execute to W. J. Montgomery and John B. Rector, each, a note for said amount of that date, and that the notes of January 1, 1892, be canceled across their face and preserved, so as to show the identity of the transaction."

The minute book further shows another meeting held on November 24, 1896, "at which meeting it is recited that the following stockholders of said corporation were present, to wit, W. J. Montgomery, John B. Rector, I. T. Pryor, R. M. Thomson, and T. A. Thomson, owning over three-fourths of all the capital stock of said company, and also being over three-fourths of stockholders, at which meeting the secretary and treasurer reported that, in pursuance of the resolution of April 27, 1896, with reference to the indebtedness of the company to the parties below named, the following promissory notes had been duly executed and delivered, to wit: T. A. Thomson, \$7,100; R. M. Thomson, \$7,100; John B. Rector, \$14,200; W. J. Montgomery, \$14,200,—being amounts due to each, respectively, as shown by said resolution. Each of the new notes is dated April 27, 1896, and bears interest at the rate of 8 per cent. per annum from date of note, payable annually, or to be added in and become as principal, and bear same rate of interest, and also that each of the old notes had been canceled, so as to show the whole transaction, and filed with the company's papers. Which report was unanimously ratified and confirmed."

It was also shown that on May 19, 1888, at a meeting of the stockholders of said company, a resolution was unanimously passed, authorizing the company to execute to Thomson Bros. and Pryor two notes,—one for \$6,155.55, and one for \$6,000,—payable on or before November 20, 1889, with 10 per cent. interest from November 20, 1886, being in lieu of note No. 1 of series No. 3 to S. R. Crawford for \$12,155.55; and that said Crawford note be canceled, and that the new notes held by Thomson Bros. and Pryor be secured as the Crawford note was, and take its place in said mortgage, and that the company had executed the notes authorized by this resolution. The notes sued on are as follows: "\$14,200. No. ——. Austin, Texas, April 27, 1896. On or before two years after date, the King County Land & Live-Stock Company promise to pay to the order of John B. Rector, in Austin, Texas, fourteen thousand two hundred dollars, for value received, with interest from date at the rate of eight per cent. per annum, payable annually; and, if interest be not paid when due, to become as principal, and bear same rate of

interest. This note is given under a resolution of the board of stockholders this day adopted, and is given as renewal of a note executed by said company to John B. Rector the 1st day of January, 1892, for 18,228⁵¹/₁₀₀ dollars, and this note shall have all the rights and liens it had under and by virtue of said note of January 2, 1892. In witness whereof, the company signs its name by its president, and causes it to be attested by the secretary, under the seal of the company. The King County Land & Live-Stock Company, by W. J. Montgomery, President. [Seal.] Attest: R. M. Thomson, Secty." This note is indorsed with the following credits: "July 17, 1897. Interest paid to April 27, 1897, \$1,136.00. Received from the estate of L. A. Ellis, deceased, \$1,686.66% and carrying out the provisions of section 3 of a contract dated February 19, 1898, between the holders of stocks of the King County Land & Live-Stock Company, a further credit of five thousand dollars (\$5,000) is made on the note,—making a total credit of \$6,686.66%. [Signed] Mrs. L. B. Rector, per N. A. Rector, Agent. June 2, 1898." Said note is also indorsed, in blank, by said "L. B. Rector, per N. A. Rector, Agent and Attorney in Fact." The note to W. J. Montgomery is in all respects similar to that of the J. B. Rector note, and indorsements and credits thereon the same, except that the one year's interest was paid on May 19, 1897. It was also indorsed, in blank, by W. J. Montgomery. The R. M. Thomson note was as follows, to wit: "\$7,100. Austin, Texas, April 27, 1896. On or before two years after date, the King County Land & Live-Stock Company, a corporation created under the laws of the state of Texas, promise to pay to the order of R. M. Thomson, at the State National Bank, in the city of Austin, Texas, seven thousand one hundred dollars, for value received, with interest from date at the rate of eight per cent. per annum, interest payable annually, or to become as principal and bear the same rate of interest. In witness whereof, the president hereto signs the name of the company by him as president, and has caused the corporate seal to be hereto attached, this, the 27th day of April, 1896. The King Co. Land & Live-Stock Co., by W. J. Montgomery, Prest. [Seal.] Attest: R. M. Thomson, Secretary." This note is indorsed with the following credits: "May 11, 1897, interest, \$568, paid to April 27, 1897. Received from the estate of L. A. Ellis, this day, eight hundred and thirty-three and 33¹/₄ dollars (\$833.33¹/₄); and, carrying out the provisions of section 3 of contract dated February 19, 1898, between the holders of stock of King County Land & Live-Stock Company, a further credit of (\$2,500) two thousand five hundred dollars is made on this note,—making total credit of \$3,333.33¹/₄. June 2, 1898." The T. A. Thomson note was similar in every respect to the R. M. Thomson note, with similar indorsements of credit. The notes above referred to, dated April 27, 1896, were all indorsed to R. M. Thomson.

February 19, 1898, the following agreement was entered into: "The State of Texas, County of Travis. Whereas, R. M. Thomson, Thad A. Thomson, W. J. Montgomery, and John B. Rector, of said state and county, hold several notes executed by the King County Land & Live-Stock Company, due April, 1898, aggregating about forty-two thousand dollars, together with accrued interest thereon, providing for attorney's fees therein; and whereas, I. T. Pryor, of the county of Bexar, said state, was once a stockholder in said company, owning one-fourth of the capital stock, which it is claimed by the devisees of L. A. Ellis was heretofore transferred to L. A. Ellis, of said county of Travis, to secure an indebtedness due by said Pryor to said Ellis; and whereas, the said Ellis has departed this life, leaving his executrix, Amanda M. Ellis, his surviving widow, and C. G. Ellis, Emmette A. Ellis, India Myrtle Ellis, and Leigh Ellis, of whom said Amanda M. Ellis is guardian, the surviving children of said L. A. Ellis, being the only devisees, now the holders and owners of the said stock formerly belonging to the said Pryor; and whereas, said devisees claim that said notes should not be held as a just debt against the property of said company, so far as the same is represented by the one-fourth of the stock held by the said devisees, and that said notes are an unjust burden upon said stock and the property of said company represented thereby; and whereas, said company and the holders of said three-fourths interest in said stock, being the holders of said notes, have agreed with the said devisees upon an adjustment, in part, of the differences between them suggested above, and desire to reduce the same to writing: Therefore, be it remembered, that this agreement witnesseth: First. That said company will, on or before the 5th day of March, 1898, convey to C. G. Ellis 39,800 acres of land out of the southern portion of said company's pasture, located in King county, Texas, described as follows: Beginning at a point 3,091 vrs. south of the N. E. corner of survey 128, in the name of J. B. Rector, and N. W. corner of survey 49, in the name of R. M. Thomson; thence west 12,014 vrs. to the west line of survey 170, in the name of R. M. Thomson; thence south, with west line of 170 and 118, to Wichita river; continue S. to S. W. corner of survey 104; thence S., 45 E., to S. E. corner 12 B. S. & F.; thence with the southern boundary line of the King County Land & Live-Stock Co. to S. E. corner of their surveys; thence north, with east boundary line of their surveys, to N. E. corner of survey 183; thence west, with south boundary line of M., E. & P. R. R. survey, to its S. W. corner; thence N. to a point due east of S. E. corner of A. Coleman survey; thence W. to the N. E. corner of 128 and N. W. corner 49; thence S. 3,091 vrs. to the beginning,—containing 39,800 acres of land patented, to be conveyed to said Ellis, with satisfactory evidence of title, with

opportunity of determining that these field notes contain 39,800 acres in ten days. The dividing line between the land to be conveyed to Ellis and the land of the King County Land & Live-Stock Co. is to be established and fenced at the joint expense of both parties, or their assigns, whenever either party shall demand it, and it shall remain a joint fence. If practicable, however, the material of the south boundary line of the seven-section pasture may be used in the construction of said fence, and, until the fence is established along said dividing line, each party shall be entitled to use the land so lying in the other's pasture, and pay customary rents to the other, if in use or leased by said party. Second. That said devisees, upon the receipt of the deed conveying said land to C. G. Ellis, will pay to the said R. M. Thomson and Thad A. Thomson and W. J. Montgomery and John B. Rector the sum of five thousand dollars, which shall be credited upon said notes, and shall not be repaid to the devisees, unless this agreement is violated by the holders of said notes or said company, and then only by the party so violating it, but not the others; and said devisees shall also surrender their one-fourth of said stock. Third. That said holders of said notes may at any time on or after or before their maturity bring what may be considered a friendly, though bona fide, action upon said notes to recover the balance due thereon, after crediting said \$5,000, and also \$15,000, as if paid by said three-fourths stockholders, and in such action the said Amanda M. Ellis, or all of said devisees, or any portion of them, may be made parties to said action; but it shall be obligatory upon the holders of said notes to notify the said devisees, or some one of them, or Eugene Williams, their attorney, in writing, that such action has been brought. Fourth. That, on the trial of said action, the only issues to be determined shall be—First, whether or not said notes constitute or represent a valid obligation against said company; second, whether or not all the property of said corporation prior to the execution of said deed to C. G. Ellis is liable therefor; and third, whether the proportion of property owned by said company represented by the stock formerly owned by said Pryor could be made responsible for the said notes or any part thereof. The holders of said notes shall have the right to establish the validity of their debt against said corporation independent of the question whether said notes technically represent said debt or not, said devisees not admitting the validity of the same; and on said trial the said devisees shall have the right, if they so elect, to make themselves parties to said suit, or to defend said suit in the name of the said company, but shall not charge said company anything for attorney's fees, it being intended that this agreement shall stand in lieu of the said 39,800 acres of land, more or less, estimated to be the prorated portion in value of the entire real prop-

erty owned by said company which would be represented by said Pryor stock, the said 39,800 acres of land, more or less, being hereby expressly relieved of any character of liability or lien to secure the said notes, so that the said C. G. Ellis may hold the said 39,800 acres of land, more or less, free from any claim by said company on said notes, if any, or any other debt of said company. Fifth. And in the event it shall be determined in said suit that the said notes represent a valid obligation against said corporation, and that all of the property of said corporation prior to the date of the deed to C. G. Ellis should be held liable therefor, the said devisees promise to pay at Austin, Texas, to the owners of said judgment, one-fourth of the amount of same, except as otherwise prescribed in the tenth paragraph, provided, however, that the limitation as to attorney's fees mentioned in the seventh paragraph of this agreement is here recognized; it being claimed by said devisees that the said notes are not a just debt against the said company, and especially against their interests therein, as represented by said stock, but, being desirous of paying what is justly due the holders of said notes, said devisees obligate themselves as above. Sixth. The said company and said three-fourths stockholders shall retain all the remainder of the property of the said company, should the said devisees or the said company defeat said action; but, should the holders of said notes recover any amount against the said company which these devisees would be required under this agreement to pay, then any cash or credits belonging to said company shall be considered as still the assets of said company, thereby giving to said devisees the benefit of the one-fourth interest therein, but all lands, other than the 39,800 acres aforesaid, shall remain the property of the company. Seventh. That, should said judgment be such as would require said devisees to make any payment thereupon, they shall pay the costs of court; but the attorney's fee for which they would be responsible shall not exceed one-fourth of two hundred and fifty dollars, although it may be that said notes provide for a larger sum, or a larger fee be fixed by judgment therefor. Eighth. The said C. G. Ellis agrees to accept a deed without warranty, made by order of a majority of the directors of said company, the taxes to be paid out of the corporation personal property assets for 1898 and previous years, if any; the balance only of such assets being subject to division, should Ellis be defeated in the suit. Ninth. If, before or after institution or determination of said suit, any of the holders and owners of said mentioned obligations against the King County Land & Live-Stock Company should die, partition, or sell a part or all of the property of said corporation remaining after the execution of said deed, such act or acts of said parties or of said corporation shall not in any manner interfere with or affect the issues

agreed above to be determined in said suit. Tenth. If, prior to the institution of said suit or during its pendency, three-fourths of the claim represented by said notes shall be paid by a sale of the lands belonging to said corporation remaining after the deed to said Ellis, and for such reason said claim or claims shall be reduced to one-fourth the amount now claimed, then, in that event, the said devisees agree to pay the entire judgment so recovered, if any, after crediting such payments, and paragraph 5 of this agreement is so modified. Witness the hands of the said three-fourths holders of said stock, and the said company, by its president, attesting the same with its corporate seal, and the hands of said devisees, in duplicate, this, the day of February 19th, A. D. 1898. Amanda M. Ellis, India M. Ellis, Leigh Ellis, Emmette A. Ellis, P. A. Turner, D. A. Turner, by Their Attorney in Fact, C. G. Ellis. C. G. Ellis. The King County Land & Live-Stock Company, per W. J. Montgomery, Prest. W. J. Montgomery. R. M. Thomson. Thad A. Thomson. John B. Rector, per Mrs. John B. Rector."

July 23, 1898, R. M. Thomson brought this suit against the King County Land & Live-Stock Company, Amanda M. Ellis, individually and as executrix of the estate of L. A. Ellis, deceased, and the children and devisees of L. A. Ellis, deceased. The suit was founded upon the notes of date April 27, 1896, and the agreement dated February 19, 1898. The notes made payable to Rector, Montgomery, and T. A. Thomson had been transferred to the plaintiff as a matter of convenience. The answers of the defendants, as well as the pleadings filed by the plaintiff, are quite voluminous, and we deem it unnecessary to set them out in detail. A judgment was rendered for the plaintiff, and the defendants have appealed. There is scarcely any conflict in the testimony, and therefore we have deemed it unnecessary to file formal conclusions of fact on every phase of the case. Some other facts may be referred to hereafter.

Eugene Williams, for appellants. Rector & Rector, for appellee.

KEY, J. (after stating the facts). Appellants complain of the action of the court in permitting the plaintiff to file a trial amendment after the parties had announced ready for trial, and had introduced all their testimony. The court permitted the amendment to be filed, as stated. The amendment pleaded in detail the execution of the notes dated January 1, 1892, and alleged that the notes sued on were given in lieu of the former notes, and prayed that, in case it be determined that the notes sued on in the original petition did not technically represent the original indebtedness, the plaintiff recover on the original indebtedness. Under the very liberal rule established by our su-

preme court (*Telegraph Co. v. Bowen*, 84 Tex. 479, 19 S. W. 554), we doubt if this should be held reversible error, even if the trial amendment was necessary to the plaintiff's right to recover. However, we do not regard the amendment as necessary. The original petition charged that the defendant company, being justly indebted therefor, executed the notes sued on. The petition made a prima facie case. It alleged facts showing liability against the defendants, and it did not devolve upon the plaintiff to plead the transactions antecedent to the execution of the notes sued on. The notes sued on do not, in terms, evidence the creation of new debts. For aught that appears on their faces, they may have been given for debts created prior to the agreement of March 30, 1896. Hence, the burden rested upon the defendants, not only to plead and prove the agreement, but to explore the consideration of the notes, and show that they created a debt or liability against the corporation that did not exist at the time the agreement was made. Several assignments of error attack the validity of the notes sued on, upon the ground that they created a debt or liability against the corporation exceeding \$20,000, without the consent of four-fifths of all the stock, as required by the agreement of March 30, 1896.

Counsel for appellants claims that, at the time the stockholders attempted to authorize and ratify the execution of the notes sued on, Ellis was the owner or had such interest in the stock formerly owned by Pryor as subrogated him to Pryor's rights under the contract referred to, and that as Ellis did not consent to the execution of said notes, and as they created a debt exceeding \$20,000, they were unauthorized and void, because prohibited by the second section of the contract. The testimony shows that Pryor had previously placed his stock with Ellis, as collateral security for borrowed money, and that in August, 1894, all of Pryor's stock, except one share, had been transferred on the books of the company to Ellis. However, it is not very clear from the testimony whether, at the time the notes in suit were executed, Ellis was the absolute owner of the stock, or held it as collateral security for his debt. But, whether as absolute owner or as pledgee, it may be that he had such interest in the stock as would require his consent to the creation of a new debt in excess of \$20,000. Assuming that he had such interest, we agree with counsel for appellee that the execution of the notes sued on was not the creation of a new debt or liability, within the purview of the contract referred to, and therefore the consent of four-fifths of all the stock was not required to authorize the corporation to execute the notes. The contract is to be construed in the light of the facts existing and known to the parties at the time it was made. Pryor knew that the corporation

was in debt at the time he bought into it. He could not, by any contract between him and the corporation, or between him and the other stockholders, release his interest from existing liability to the creditors of the company, and he doubtless knew that fact. He realized, however, as shown by the testimony, that, as he was only acquiring a one-fourth interest, he could not prevent the creation of new debts, unless there was a valid agreement, requiring the vote of more than three-fourths of the stock to create such debt; and it was to protect him in this respect that section 2 was placed in the contract. There is nothing on the face of the contract, or disclosed by the testimony in reference to the circumstances then existing, to indicate that Pryor felt any concern about the form of the pre-existing indebtedness,—whether the outstanding notes of the company remained payable to the creditors then holding them, or whether new notes for the same indebtedness were executed, payable to the same or other persons; and we think it would be a strained construction of the contract to hold that the execution of new notes for the same debts, though payable to other persons than those named in the former, would be a violation of the contract. We therefore hold that the execution of the notes sued on did not create a new debt or liability, within the meaning of the contract, and that said notes are valid obligations against the King County Land & Live-Stock Company and all of its property.

It is also urged that, there having been a renewal of the indebtedness and release of the lien on cattle securing the debt, and appellee and Montgomery, as officers of the company, having received the proceeds of the sale of the cattle released from the lien, and confused the same with other funds of the company, the Ellis stock is released from liability. There is no merit in this contention. The Ellis estate occupies no better position than that of stockholder in the corporation, and it is not shown that any funds or other property of the corporation have been misapplied or diverted by Thomson or any one else. If appellee and his associates saw proper to release liens by which their debts were secured, such action on their part could not injuriously affect the owner or holder of the shares of stock formerly owned by Pryor. Nor did the court err in sustaining exceptions to so much of appellant's amended answer as sought to offset or recover the sum of \$2,000, alleged to be due by the corporation to Pryor, and \$1,250, claimed for personal property, or the proceeds thereof, alleged to be held by Thomson, as trustee. The pleading referred to was filed on the day of trial, and it sought to make new parties, and have them served with citation, without offering any excuse for not having done so sooner. Nor was error committed in failing to allow appellants anything as damages resulting from short-

age, conflict, and failure to get possession of portions of the 39,800 acres of land referred to in the agreement of February 19, 1898. The testimony will support a finding, and we therefore find that, in accepting the deed referred to, appellants took the risk of the number of acres. Besides, the shortage, if any, was not shown to exceed 62 acres, which, in surveys aggregating over 39,000 acres, is not unreasonable to expect, and should not be regarded as material. The evidence tending to show conflict as to 92 acres was unsatisfactory, especially as to the number of acres in conflict; and the testimony fails to show that any other person is rightfully in possession of any of the remainder of the 39,800 acres. No reversible error has been shown, and the judgment will be affirmed. Affirmed.

MILLER et al. v. ANDERS et al.¹

(Court of Civil Appeals of Texas. March 25, 1899.)

ADMINISTRATOR'S SALE—DELIVERY OF DEEDS
—WAIVER—LIMITATIONS OF ACTIONS.

1. An administrator's sale was confirmed, but the administrator declined to deliver the deed because of the refusal of the purchaser to execute a mortgage to secure a note given for the purchase price. Subsequently, by agreement, the administrator recovered judgment against the purchaser for the amount bid, and foreclosure of lien on the land. *Held*, that the purchaser was entitled to delivery of the deed, as the subsequent proceedings perfected the sale.

2. An administrator is estopped to deny that there was a sale, where he has procured a judgment for the purchase price, and foreclosure of vendor's lien on the land.

3. The effect of an agreement for judgment for the price of land sold at administrator's sale, and for foreclosure of lien, is the same as though a mortgage to secure the purchase price of land had been given in the first instance.

4. Failure of an administrator to take a mortgage to secure deferred payments on sale of land will not operate to retain superior title in the estate where the statutes in effect at the time of the transaction do not so provide.

5. The action of an administrator in waiving the taking of a mortgage to secure deferred payments on sale and electing to enforce the contract of sale by judgment and foreclosure is binding on the estate and heirs.

6. The right to subject land to the payment of the purchase money depending upon the enforcement of a judgment against the purchaser, the absence of a grantee of such purchaser from the state does not operate to suspend the statute of limitations, and this though such grantee assumed payment, such assumption not having been accepted.

Error from district court, Hill county; J. M. Hall, Judge.

Trespass to try title by Mrs. V. F. Anders and her husband, N. B. Anders, against J. W. Spalding and D. S. Hamilton. M. M. Miller, Emma B. Miller, Mrs. Mary C. Ezzell, and Mrs. A. B. Baskin intervened. Plaintiffs recovered judgment against all the parties, and interveners bring error. Affirmed.

¹ Writ of error denied by supreme court.

Gano, Gano & Gano, for plaintiffs in error. McKinnon & Carlton, for defendants in error.

RAINEY, J. This is an action of trespass to try title brought by Mrs. V. F. Anders, who was joined by her husband, N. B. Anders, against G. W. Spalding and D. S. Hamilton, to recover 80 acres of land patented to M. M. Miller, assignee of William Stull. Appellants, who were the heirs of M. M. Miller, intervened, claiming a superior title to the land, and in the alternative to foreclose a judgment lien for the purchase money. The defendants pleaded the general issue, pleas of limitations of 3, 5, and 10 years, and suggestion of valuable improvements. In reply to the plea of intervention, plaintiffs pleaded that W. T. Norment, a former husband of Mrs. Anders, is dead; that it is not shown that there was any administration on his estate, and that the claim which is the basis of interveners' demand was never presented to the administrator of Norment, nor in any way rejected by his administrator or executor, nor in any way attempted to be foreclosed in the probate court; and that this court is without jurisdiction to determine the matters and things set up in the plea of intervention. And they further pleaded general denial, and statute of limitations of 2, 4, and 10 years, and that in the sale of the land by the administrator to Kendall, through whom Mrs. Anders claims title, no express lien was reserved; and, further, that the lien sought to be foreclosed by interveners in the alternative was barred by the 10-years statute of limitations. The plaintiffs recovered judgment against all the parties, and interveners appeal. The only controversy here is between plaintiffs and interveners.

Conclusions of Fact.

Coombes, the administrator of the estate of M. M. Miller, obtained from the probate court of Dallas county, where said administration was pending, permission to sell certain lands belonging to said estate, which included the tract in controversy and two tracts situated in Ellis county. The sale was made, and said three tracts were bid in by Kendall for the sum of \$374.10, for which he executed to said Coombes his note, with two sureties. This sale was reported to the probate court by the administrator, and confirmed by said court. Said Coombes, administrator, executed a deed to said Kendall, but the same was not delivered at that time, because Kendall refused to execute a mortgage. Subsequently said administrator brought suit against Kendall and his sureties on said note, and on June 2, 1873, recovered judgment for \$489.38, with stay of execution until August 1, 1873. Subsequently, in 1876, by agreement the cause was redocketed, and said administrator recovered judgment against said Kendall alone for said purchase money and foreclosing the lien on said land;

a dismissal having been had as to the sureties, they being insolvent. An order of sale issued on the last judgment against Kendall to Ellis county, under which the two tracts of land situated in Ellis county were sold for the sum of \$187.10; this amount being all that was received by said administrator on the purchase price of said lands. There is no positive testimony that the deed executed by Coombes, as administrator, to Ellis county, was ever delivered. Coombes, by deposition, testified on this point that he made a deed to said Kendall, but did not know where the deed was; that he kept it in his possession until judgment was rendered in 1876 against Kendall. W. C. Ware testified that he was present at the former trial of this cause on the 21st day of March, 1894, and heard the testimony of said Coombes, who was introduced in person as a witness for defendant on said trial; that said Coombes is now dead; that he testified on said trial that the deed made by him as administrator of the estate of M. M. Miller, deceased, to Kendall, to the land, was never delivered by him to said Kendall, because said Kendall would not comply with the terms of the sale, and never paid the purchase money; that the said Coombes never did know what finally became of the deed, but, as stated, it was never delivered to Kendall, because Kendall always refused to comply with the terms of the sale, or to pay the purchase money. In December, 1884, said Kendall executed a deed to W. T. Norment, the former husband of Mrs. Anders, and delivered the same to Judge E. G. Bower, to be handed to Norment upon Norment paying over to Bower the purchase money due by Kendall to Coombes, administrator. The consideration for the making of said deed was 40 chances, at \$10 per chance, making \$400, in a raffle of a diamond cross then being gotten up by Norment, and the payment of the balance due by Kendall to said Coombes on the purchase price for said land. Norment borrowed the deed from Judge Bower, and never returned it to him. The deed was recorded in Ellis county January 23, 1875, and in Hill county February 3, 1875. At the time this land was sold under order of the court, another tract was bid in by Nat Burford, and a deed made to him by the said Coombes, in which no express lien was reserved on the land, and it was shown that that was the form of deed used at that time by said Coombes as administrator. In February, 1875, Norment and wife left the state of Texas, and Norment never returned to Texas; and Mrs. Anders did not return to the state until she came with her present husband, two or three months before the institution of this suit in August, 1892. Defendants in error filed their plea of intervention February 27, 1894. Mrs. Emma B. Miller, one of the interveners, was married to her present husband in 1860, and remained a married woman from that time to the trial

of this cause. At the time of her marriage she was the surviving widow of M. M. Miller, deceased, who died in 1859, upon whose estate said Coombes subsequently administered. Mrs. Mary C. Ezzell and Mrs. A. B. Baskin and M. M. Miller, interveners herein, were the only children of M. M. Miller, deceased, and Mrs. Baskin and Mrs. Ezzell were both married prior to the close of the administration upon the Miller estate, and the discharge of said Coombes as administrator, which occurred in 1881. They had continued married up to the time of the institution of this suit; Mrs. Ezzell being still married to S. R. Ezzell. They were the sole heirs at law of said M. M. Miller, deceased, and had never received anything on account of the lands involved herein.

Opinion.

Under the facts of this case, two propositions arise for solution: (1) Was the estate of Miller divested of title to the land in controversy by virtue of the proceedings stated in the foregoing conclusions of fact? (2) If so, were the interveners entitled to have the land subjected to the payment of the balance of the purchase money remaining unpaid?

On the first proposition it is insisted by plaintiffs in error that there was no deed to the land delivered by the administrator, Coombes, to the purchaser, Kendall, and for that reason no title passed to Kendall. There is no direct proof that the deed was delivered, but Coombes states that he held the deed until the trial of the cause, in which he, as administrator, recovered judgment on the note given by Kendall for the purchase money, and foreclosing the lien on the land to secure the payment thereof, and that he did not know where it was. No account is given of the deed after this, and it is not improbable that he produced it on the trial at that time, and actual or constructive delivery thereof made to Kendall, as Kendall was entitled to a deed when he agreed to a recovery on the notes and foreclosure of the lien. But, if there was in fact no delivery of the deed, we are of the opinion that the plaintiffs in error, by reason of said judgment and the partial enforcement thereof, should not be heard to assert that there was no sale, as the procuring of said judgment by the administrator perfected the sale of the land to Kendall. *Morris v. Turner*, 5 Tex. Civ. App. 708, 24 S. W. 959; *Coddington v. Wells*, 59 Tex. 49; *Dalton v. Rust*, 22 Tex. 133; *Terrell v. McCown* (Tex. Sup.) 43 S. W. 2. The evidence also shows that said judgment was rendered on an agreement between Coombes, administrator, and said Kendall, that the cause should be redocketed, and "that plaintiff have judgment for the amount of the note sued on, interest, and costs, and for the foreclosure of his vendor's lien upon the land set out and described in plaintiffs' petition; that the same be sold in satisfaction of the debt and costs," etc. This was a consummation of the obliga-

tion resting upon Kendall to secure the payment of the note executed by him for the purchase money. The effect of the agreement and foreclosure of the lien was substantially the same as though Kendall had executed a mortgage to secure the notes in the first instance, and a foreclosure of the lien had by virtue thereof, and he was entitled to a conveyance as prescribed by law.

Plaintiffs in error also insist that, as the statute required the administrator to take from the purchaser of land at an administrator's sale a mortgage to secure the deferred payments, the superior title remained in the estate, although the administrator executed and delivered to Kendall an absolute deed on its face, and received no mortgage from Kendall. We do not concur in this contention. Such a rule does not apply in contracts between parties when acting in their individual capacity, and the statutes existing at the time of the transaction under consideration did not indicate a different rule when applied to administrators' sales. On this proposition, the supreme court, in the case of *Rindge v. Oliphint*, 62 Tex. 682, holds that "under a decree of the probate court ordering the sale of land of an estate to be made on a credit of twelve months, with approved security, and retaining a lien on the land to secure the payment of the purchase money, the deed, reciting the sale, by virtue of the order of the court, of the tract of land in controversy and of another tract, for a certain given sum, without distinguishing the amount bid for the two tracts, respectively, and the further fact that the purchaser had executed his note for the above-named sum, payable in twelve months, as the consideration of the sale, and in no wise reserving the vendor's lien in such deed, conveys title to the purchaser, and the note being barred the vendor's lien cannot be enforced." The procuring of judgment on the note against Kendall, and the foreclosure of the lien, and the proceeding to enforce it by the sale of the land in Ellis county thereunder, constituted an election on the part of the administrator to enforce the contract of sale, which bound the estate; and the heirs are not now in an attitude to rescind the sale and claim the land.

On the second proposition, that plaintiffs were entitled to subject the land to the payment of the purchase money not paid, we are of opinion that the claim is barred by limitation. The statute of limitation began to run on the judgment against the estate before the administrator was discharged, in 1881, and after his death limitation did not cease to run on account of the disabilities of plaintiffs in error. Nearly 18 years elapsed from the rendition of the judgment against Kendall, and about 13 years after the discharge of the administrator, before plaintiffs in error set up their claim by intervening in this suit; there being no action taken in the meantime to keep the judgment in force. But it is insisted that the absence of Norment and wife from the

state prevented a bar by limitation. The right to subject the land to the payment of the purchase money depended upon the enforcement of the judgment against Kendall, and, as that is barred, no right of action exists thereon. Had the judgment against Kendall been kept alive, a different case would be presented, but that was not done. Norment having assumed the payment of the purchase money when he bought from Kendall affords plaintiffs no relief, as such assumption was never accepted by the administrator or by the plaintiffs in error.

As to the dealings with the land between Norment and Kendall, we are of opinion that plaintiffs in error are not concerned therewith. They stand in the position of plaintiffs in this action, and, in order for them to recover, they must show that the superior title remained in the estate. In this they have failed, and the judgment is affirmed. Affirmed.

HOLLON v. HALE.¹

(Court of Civil Appeals of Texas. April 22, 1899.)

EXECUTION SALE—PURCHASE BY PLAINTIFF—FAILURE OF TITLE—SETTING ASIDE SATISFACTION.

Where the execution creditor purchases property sold under his execution, and the amount is credited on the writ, and it is satisfied, he may have such satisfaction set aside on showing that the property sold belonged to a third person, and the doctrine of caveat emptor does not apply, although the purchaser had notice, at the time of sale, of the claim of such third person.

Error from district court, Lamar county; E. D. McClellan, Judge.

Action by Hattie S. Hale against D. P. Hollon. Motion by plaintiff in execution to set aside satisfaction entered in pursuance of execution sale. Motion granted, and defendant brings error. Affirmed.

Dudley & Moore and H. D. McDonald, for plaintiff in error. Hale & Hale, for defendant in error.

BOOKHOUT, J. This was a motion filed by defendant in error as plaintiff against plaintiff in error as defendant to set aside and cancel the satisfaction theretofore entered on a certain execution issued on a judgment of said court in favor of said Hale against said Hollon, on the ground that plaintiff got no title to the property she bought in satisfaction thereof. Defendant resisted the motion, on the ground that the rule of caveat emptor precluded the relief sought in such cases. On the hearing of said motion by trial without a jury, the court rendered judgment setting aside and canceling such satisfaction, and reviving the judgment, and awarding execution thereon, the same as if no such satisfaction had ever been entered. To said judg-

ment, and the findings of law and fact filed, Hollon duly excepted, gave notice of appeal, and brings up his case by writ of error.

The material facts, which are shown in the findings, are as follows: "In No. 5,752, of Hattie S. Hale vs. D. P. Hollon, the plaintiff, Hattie S. Hale, owned and held a judgment of the district court of Lamar county, Tex., against the defendant, D. P. Hollon, which was the enforcement of a vendor's lien on certain real estate in Paris, Tex. (Lamar county), dated in April, 1894, for near \$2,500, and the lien was enforced, the real estate sold thereunder, and that there was a balance left unpaid on her judgment of about \$1,300. Afterwards, and in June, 1894, among others, an abstract of said judgment, with balance due thereon, was duly and legally filed, recorded, and indexed, as provided by law, in McLennan county, Tex., on the 15th day of October, 1894. An execution was duly issued by the clerk of said court on said judgments for a balance due on each, and levied on an undivided interest of defendant in certain real estate in McLennan county, as the property of D. P. Hollon, which was duly sold by the sheriff of McLennan county on the first Tuesday in December, 1894, at Waco, after advertising, etc., as the law requires; and at said sale V. W. Hale, who was the agent and attorney of Mrs. Hattie S. Hale and the other plaintiffs in execution, bought said property in trust for them, but had the deed made by the sheriff made to him for convenience, but held it in trust for them, and the amount of her (Hattie S. Hale's) bid was about \$1,300, which, after paying the costs in cash, was credited on the execution, and it was returned, 'Satisfied.' At said sheriff's sale at Waco, one W. R. Hollon, brother of D. P. Hollon, gave notice that the property about to be sold was not the property of the latter, but was the property of him, the said W. R. Hollon; and the agent of plaintiffs in all the several executions was present when said notice was given, he having purchased it from D. P. Hollon before that time. The abstracts of said judgments were filed, recorded, and regularly indexed in June, 1894, and prior to any transfer from D. P. Hollon to W. R. Hollon of the property levied on. At the time the abstracts were filed the property (real estate) afterwards levied on, and afterwards sold by the sheriff, was the property of one S. E. Hollon, who was a sister of D. P. and W. R. Hollon, and she was a non compos mentis, and had been from infancy, and she was then aged and infirm, and at her death D. P. Hollon would, by inheritance, be entitled to one-third of her property. Some time in October, 1894, she died intestate, after which the execution of Mrs. Hattie S. Hale (who was the widow of V. W. Hale's deceased brother) was issued and levied on the property, together with other executions, controlled by V. W. Hale, the levy being made on a one-third interest therein, as the property of D. P. Hollon, and the sale made, and deed made

¹ Writ of error denied by supreme court.

to V. W. Hale in his own name, but as matter of fact he purchased in trust for Mrs. Hattie S. Hale and others for whom he purchased at the same time. Subsequent to the sale and sheriff's deed to V. W. Hale, he, the said V. W. Hale, purchased the interest of Mrs. Hattie S. Hale and all others under whose executions the land was sold (except Elizabeth Carpenter's interest), and paid their debts, some of them in full, and he paid J. J. Miller, who also held a judgment against D. P. Hollon, under which the property was sold, a less amount than the whole judgment, by way of compromise agreement between them, by which purchase and payment said V. W. Hale became the owner of whatever interest D. P. Hollon had in said property at the time the executions were levied, if any, and of the judgments against Hollon under which the sale was made, and he, by agreement as well as by subrogation, had and has all the rights of the several plaintiffs in execution. Subsequent to the sheriff's sale and deed to V. W. Hale in trust, he brought suit in the district court of McLennan county, Tex., against both D. P. Hollon and W. R. Hollon, to cancel a deed made by D. P. Hollon to W. R. Hollon for all the interest the former had in and to the estate of his non compos mentis sister, S. E. Hollon, which was dated in June, 1894, and after all the abstracts of Hattie S. Hale, Elizabeth Carpenter (the said Elizabeth Carpenter having judgment against D. P. Hollon for about \$1,300), J. J. Miller, and Mrs. A. L. Ownby had been filed and properly recorded and indexed, and V. W. Hale bought D. P. Hollon's interest under all the executions in trust for plaintiffs therein. S. E. Hollon died in October, 1894."

The sole question raised by this appeal is: Can the plaintiff in judgment who purchases the property of the defendant at execution sale, and credits the bid upon the writ, have such satisfaction of the judgment set aside, upon its being ascertained that the purchaser got no title? The decisions of this state, as well as those of other jurisdictions, are difficult to reconcile in their holdings upon this question. The question was incidentally before the supreme court in the case of *Harle v. Langdon's Heirs*, 60 Tex. 560, and it was there intimated that in such a case the rule of caveat emptor applies, and that the relief will not be granted. On the other hand, it is held that a levy upon land in this state is not a satisfaction of the judgment. *Cavanaugh v. Paterson*, 47 Tex. 198. Again, it is held that, if the title of the land was not affected by the sale, the consequence is that the judgment debtor is the owner of his estate as before, and the judgment remains in force unaffected by anything done under the execution. *Townsend v. Smith*, 20 Tex. 465. The case of *Stone v. Darnell*, 25 Tex. Supp. 435, is more nearly in point than any case we have found in the Reports of this state. In that case Stone's land was sold under valid process, and purchased by Dar-

nell. Stone brought suit for the land, on the ground that it was his homestead, and not subject to levy and sale. He recovered. *Id.*, 20 Tex. 11. Darnell then brought suit against Stone for the recovery of the purchase money paid by him, claiming that Stone got the benefit of the satisfaction of the judgment against him. It was held that he could recover. In that case the court uses the following language: "When the defendant recovered back the land by the judgment of a court of competent jurisdiction, the right of the plaintiff to have the money he had paid, and which had been applied in satisfaction of the execution, was perfect." 25 Tex. Supp. 435. We think the principles announced in the cases of *Townsend v. Smith* and *Stone v. Darnell*, *supra*, should be held applicable to this case. It seems to be held in these cases that when real estate is sold at execution sale as the property of the defendant in execution, to which it is ascertained he had no title, he may be held liable for the purchase money which has been thus applied in satisfaction of his judgment or debt. This is the construction Mr. Freeman places on these decisions, and he treats the question as settled in this state in favor of granting the relief. *Freem. Judgm.* (4th Ed.) § 478, note 3; *Freem. Ex'ns* (2d Ed.) § 352. When we look to other jurisdictions, we find an irreconcilable conflict in the decisions. Mr. Freeman states that there is a slight preponderance of the authorities in favor of granting the relief. *Freem. Judgm.* §§ 478, 478a. But counsel for the appellant contend that the purchaser had notice from the true owner of the land at the time of the sale that he had acquired the land, and title was in him, and therefore the rule of caveat emptor should be held to apply. The same contention was made in the case of *Cowles v. Bacon*, 21 Conn. 451; and the court, in passing upon it, held that the rule applies, although the plaintiff in execution, when he caused this execution to be levied, had notice, from the records or otherwise, that the defendant had executed a conveyance of the land levied on, but erroneously supposed that such conveyance was fraudulently made, and was therefore, as to him, void. The court in that case uses the following language: "Such a mistake constitutes no just reason why the defendant should not pay the unsatisfied balance of the debt. The former neither got, nor did the defendant lose, anything by this mistaken levy." It is held that the rule of caveat emptor has its legitimate force in precluding any idea of a warranty by the defendant in execution or by the sheriff. *Ritter v. Henshaw*, 7 Iowa, 98; *Freem. Judgm.* (4th Ed.) § 478. We think it only equitable, where the defendant in execution has parted with nothing by the sale, that the plaintiff in judgment, who has acquired nothing by his purchase, should have his judgment restored to him as it was previous to the sale and satisfaction. Where the satisfaction of a

judgment results from a sale under void or irregular process, the authorities in this state seem to be uniform that relief will be granted. *Burns v. Ledbetter*, 56 Tex. 582, and authorities there cited. We regret that we have been compelled to decide this case on the brief of the appellant only, the appellee having failed to file a brief in this court. We conclude there is no error in the judgment, and it is affirmed. Affirmed.

By an oversight, we failed to embrace in the opinion certain findings of fact of the court below which were considered in preparing the opinion in this case. Our attention having been called to the matter, we file the same as additional conclusions of fact herein:

"Elizabeth Carpenter has never received from any source anything on her judgment against D. P. Hollon. W. R. Hollon resisted the suit brought against them by V. W. Hale to cancel the deed or conveyance of D. P. Hollon to W. R. Hollon, on the grounds that no title was in D. P. Hollon at the time of the levy of the executions, but that he had conveyed his expectancy in his sister's estate to W. R. Hollon before the date of the levy, and before the date of his sister's death, and that W. R. Hollon's title was good, and the district court so held and decreed, on a cross bill filed by W. R. Hollon, and also entered a decree canceling the deed made by the sheriff to V. W. Hale, D. P. Hollon testifying on behalf of W. R. Hollon on his cross bill, and that this judgment was affirmed by the court of civil appeals and by the supreme court of Texas, and W. R. Hollon's title declared good, and neither of the plaintiffs in execution has ever received anything for the respective amounts credited on their respective executions arising out of the sale of the real estate in McLennan county, except that V. W. Hale paid them by and for his purchase of their interest in their respective judgments, and their interest in the land, if any, sold thereunder, and V. W. Hale has received nothing from any source for the amounts so paid by him, amounting to about \$6,350, and that said D. P. Hollon has never paid said amount, or any part thereof, to him or any one else."

WILKS v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

CRIMINAL LAW—APPEAL—REFUSAL OF CONTINUANCE—BILL OF EXCEPTIONS—NECESSITY—BURGLARY—INDICTMENT—SUFFICIENCY.

1. Without a bill of exceptions, the refusal of a continuance because of the absence of a material witness cannot be reviewed.

2. An indictment stating that defendant did, by force, threats, and fraud, break and enter a house, without stating whether in the day or night, is sufficient to prove either kind of burglary.

Appeal from district court, Franklin county: J. M. Talbot, Judge.

Henry Wilks was convicted of burglary, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of burglary by breaking and entering a certain house with intent to commit the offense of theft, and his punishment assessed at two years' confinement in the penitentiary.

There are no bills of exception in the record. Appellant's first complaint is that the court erred in overruling his motion for continuance, based on the absence of his mother, whom he claims was a material witness in his behalf. There is no bill of exceptions to the action of the court overruling the same, and hence it cannot be revised. Nor, without said bill of exceptions, is it a ground for new trial. However, in the face of the overwhelming evidence in behalf of the state, the evidence of the absent witness does not appear to be probably true.

Appellant's second ground set up in his motion for new trial is that the indictment is fatally defective. The indictment does not state whether the burglary was a day or night time burglary, but does state that defendant "did, by force, threats, and fraud, break and enter the house." This is sufficient to prove either character of burglary. *Carr v. State*, 19 Tex. App. 635; *Martin v. State*, 21 Tex. App. 1, 17 S. W. 430. The evidence is ample to support the verdict, and the judgment is in all things affirmed.

MORGAN v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

CRIMINAL LAW—APPEAL—REVIEW—HOMICIDE—CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS.

1. The admission of evidence in a criminal case cannot be reviewed, where no bill of exceptions was reserved.

2. The fact that part of a paragraph of the charge in a criminal case is objectionable is no ground for a reversal, where that portion of the charge, when taken in connection with the entire paragraph, is correct.

3. Where the homicide was committed by lying in wait for accused, and shooting him in the back, after having procured a pistol and bought a box of cartridges for that purpose and threatened the life of deceased, it is unnecessary to charge on murder in the second degree, though the evidence is circumstantial.

Appeal from district court, Titus county: J. M. Talbot, Judge.

John Henry Morgan was convicted of murder, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the pen-

tentiary for life. The record does not contain an assignment of errors, nor is appellant represented by briefs or otherwise by the record in this court. Looking to the motion for new trial, we find two errors suggested with reference to the court's charge and one with reference to the admission of testimony. With regard to the admission of testimony it is sufficient to state that a bill of exceptions was not reserved. The criticism of the fifth paragraph of the court's charge selects an excerpt of a line or two from the whole subdivision, and asks that the conviction be set aside upon the supposed error contained in this excerpt. When viewed in the light of the entire paragraph, the criticism has no merit. A new trial was also sought upon the ground that the court erred in not charging the law applicable to murder in the second degree. Usually where the state relies upon circumstantial evidence to prove murder the law applicable to murder in the second degree should be given. But this is only in cases where the testimony suggests such degree, or when the attending circumstances do not show a killing of the first degree. Where the testimony is clear and conclusive that the killing would be murder in the first degree, it is not necessary to charge the law applicable to an inferior degree of homicide. The court is required to charge the law applicable to the case made by the testimony. When this has been done, the demands of the law are satisfied. The evidence shows this killing to have been in pursuance of a formed design, that the slayer waylaid at night, and killed his victim by shooting him in the back. The deceased had been on a visit to the woman whom he expected to marry in seven or eight days, and was returning to his room, when defendant, from the roadside, shot and killed him. He had threatened his life on account of his proposed marriage, the girl being a niece of the defendant. During the day preceding the homicide at night, appellant secured a 38-caliber pistol, and bought a box of cartridges. Deceased was killed with a 38-caliber pistol. After the homicide the pistol and 35 of the 50 cartridges were found secreted in appellant's house between the mattresses on his bed. We are of opinion that, where an assassin waits by the roadside for his victim, under the cover of night, and shoots him in the back, having previously threatened to kill him, this is murder in the first degree, and it leaves no room for any inferior degree of homicide. Finding no error in the record, the judgment is affirmed.

CHRISTIAN v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1899.)

GRAND JURY—SECRECY—WITNESS—IMPEACHMENT.

Under Code Cr. Proc. art. 404, requiring grand jurors to keep their proceedings secret, except where the truth of evidence before them in

a criminal case is under investigation, a witness cannot be cross-examined as to his testimony before the grand jury on a matter not brought out in chief.

Appeal from district court, Hopkins county; Howard Templeton, Judge.

Hiller Christian was convicted of seduction, and he appeals. Reversed.

King & Sweeton, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of seduction, and his punishment assessed at three years' confinement in the penitentiary, and he appeals.

On the trial, defendant introduced as a witness one Bill Post, and asked him if he knew the general reputation of the prosecutrix, to which he replied that he knew nothing detrimental to her. He was then asked what parties visited the house of the prosecutrix, to which he replied, "Mac Horton, the Stephens boys, the Culpeper boys." The witness was then passed to the prosecution for cross-examination. The state then asked the witness, on cross-examination, if he had not been before the grand jury and sworn that he had had intercourse with prosecutrix, and if he did not afterwards go before the grand jury and tell that body that he had sworn falsely. Appellant objected to said questions and answers: "(1) Because said witness had not testified to any fact detrimental to the state, and the manner of examination of said witness by the prosecution, in effect, made him a state witness, and could not be impeached by the state, because he had testified to no facts damaging to the prosecution, or of a nature calculated to surprise the district attorney; (2) because it was an exposure by said witness of matters transpiring before the grand jury, when the witness had not testified differently on the stand to what he had testified before the grand jury the last time, and because the facts proved by said witness upon his examination by defendant did not make his testimony before the grand jury a material issue upon the trial of this cause; (3) because said testimony would be calculated to prejudice the minds of the jury against defendant." Said objections were overruled, and the witness compelled to answer said question, to which he stated that he had sworn before the grand jury that he had carnal intercourse with the prosecutrix, and that he afterwards went back before the grand jury and retracted what he said, and testified that his former statement was untrue. The court explained this bill by stating, "This witness testified that he was induced by defendant to go before the grand jury and falsely testify that he had carnal intercourse with Zena Harper, and then testified that he afterwards went back and retracted his false statement."

This question has recently been under consideration by this court, in the cases of Hines v. State (Tex. Cr. App.) 39 S. W. 935, and Gutgesell v. State (Tex. Cr. App.) 43 S. W.

1016. And we there laid down the doctrine that the only contingency that authorized the state to go into the grand-jury room, and prove what the witness there testified to, was marked out in article 404, Code Cr. Proc., which states the oath required of the grand jurors; and the only limitation put upon the oath is where the truth or falsity of evidence given in the grand-jury room in a criminal case shall be under investigation,—that is, no grand juror is authorized by his oath to give testimony on the stand in regard to any other matter than that specified in the oath itself. If the defendant had proved by this witness that he had had intercourse with the prosecutrix, then it would have been permissible on the part of the state, in cross-examination of said witness, to show that he had sworn differently before the grand jury, or, in case he denied it, then to contradict him; that is, the truth or falsity of his statement when on the stand would then be directly in issue. But we do not understand such to be the case here. On the contrary, the witness was not asked in regard to this matter by the defendant, and he gave no testimony on that issue; and it was not competent for the state, on cross-examination, to show what he may have testified before the grand jury about other matters not inquired about in his examination in chief. It may have been competent for the state to have shown that the defendant was attempting to tamper with the witness by procuring him to fabricate testimony; and it may have been competent for the state, by this witness or other witnesses, to have shown that appellant approached them on the subject. The state, however, was not content to stop here, but went further, and required the witness to state what had occurred in the grand-jury room. Under our statutes on the subject, and the construction which has been placed thereon by this court, he could not go into the grand-jury room and bring out what may have occurred there, except under the very contingency provided in the statute.

Appellant assigns a number of other errors, but we do not deem it necessary to discuss them. On account of the admission of this improper testimony, the judgment is reversed, and the cause remanded.

WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1899.)

THEFT—EVIDENCE—VARIANCE—INSTRUCTIONS.

1. Where, in a prosecution for the theft of a horse, the proof of the state was that accused had formerly traded the horse to prosecutor for a quantity of corn, and accused testified that the transaction was a loan on both sides, and there was no evidence that the horse was given as security for the loan of the corn, it was error to charge that a conviction might be had if accused had delivered the horse as security for the corn, and then taken her away; there being no such issue in the case.

2. Under an indictment for the theft of an animal from a certain person, a conviction cannot be had on proof that the person named in the indictment was the owner of the animal, and that it had strayed from him, and had been taken possession of by a third person and put in his lot, from whom accused fraudulently procured it.

Appeal from district court, Sabine county; Tom C. Davis, Judge.

Bill Williams was convicted of theft, and he appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of the theft of a horse, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

In the view we take of this case, we deem it necessary to discuss but two bills of exception.

Bill No. 6 complains of the following charge of the court, to wit: "But if you find beyond a reasonable doubt that defendant sold the horse in question to Henry Williams, and delivered the said horse to Williams, or if you find beyond a reasonable doubt that defendant got some 15 bushels of corn from Henry Williams, and delivered to Henry Williams the possession of said horse as the security for said corn, and you find beyond a reasonable doubt that afterwards, in the county of Sabine, state of Texas, about the time charged in the indictment, defendant fraudulently took said horse from the possession of the said Henry Williams," etc., you will convict defendant, etc. Defendant excepted to said charge because there was no fact proved which raised the issue that defendant took said horse from the possession of the said Henry Williams,—either from the range or otherwise; and because there was no fact raising the issue that defendant delivered said horse to Henry Williams as security for 15 bushels of corn, and then afterwards taking him; because there is no allegation in the indictment, nor issue raised by the proof, that the horse in question was delivered to Henry Williams as a security for the corn or other debt. We think appellant's contention in this bill is well taken. The testimony for the state, in substance, shows that the prosecuting witness, Henry Williams, traded 15 bushels of corn to appellant for the horse in question, which horse got away from Henry Williams' actual possession, and was taken up by witness Bennett, from whom appellant got the horse. The testimony of appellant, in substance, was that appellant loaned the prosecuting witness, Henry Williams, the horse, and Williams loaned appellant the corn. No witness, as far as we have been able to discover, states anything about the corn being bought by appellant, and the horse placed as security therefor. It is error for the court to charge an issue not applicable to the facts of the case, when that issue is calculated to injure the rights of appellant. We think this is such a charge. Williams v. State, 11 Tex. App. 63; Lum v.

State, Id. 483; *Mayfield v. State*, 23 Tex. App. 645, 5 S. W. 161.

Appellant's seventh bill of exceptions complains of the failure of the court to charge all the law applicable to, and raised by, the evidence, in this: The facts proved fairly raise the issue that if defendant obtained possession of the horse in question from R. E. Bennett, and not from Henry Williams, that then, in that even., there would be a fatal variance between the allegations in the indictment and the proof, and the jury should have been instructed, if they so found, or had a reasonable doubt as to the existence of such fact, they should acquit defendant. The substance of the witness R. E. Bennett's testimony is as follows: "Some time in June, 1898, I noticed one evening near my house a little mare that seemed to be about three years old. The mare appeared to be gentle, and I told the little negro I had there to turn her in my lot,—that some one would come along for her. No one came by that night, so I kept her that night in my lot, and fed her night and morning, intending to keep her until some one came along who owned her. Some time during the day I saw defendant pass my house, and called him and asked him if he knew of any one who had lost a colt, and described this one to him. He said 'Yes'; that Ed Taylor had lost one, or it had gotten out of his field, that just suited the description I gave him of this mare. He stood up in his stirrups, and looked over into my lot, and then said that the mare I had taken up was Ed Taylor's. I then asked him if he would take her back to him, and he said he would, as he was hunting his horses. Appellant got down, took a rope, went into the lot where this mare was, put the rope on her, and led her out of the lot and went away." This exact question was raised in the case of *Tinney v. State*, 24 Tex. App. 112, 5 S. W. 831. In that case it was alleged in the indictment: That the stolen horse belonged to, and was taken from the possession of, M. C. Doyal, for the owner; that the horse left his premises, in Gonzales county, and started off, with a bell upon it, on the 17th of July. Was seen in Caldwell county on the 18th, some 12 miles from home. On the 21st it was taken up by one Hurst, who, after making inquiry for the owner, and failing to find him, took the horse to his home, intending to stray it, and there staked him in his field and fed him. That night the horse was taken from Hurst's field, and, the next seen of the horse, he was in possession of defendant, on the 24th, in Dewitt county, where defendant sold him to one Jones. It was insisted that there was a fatal variance between the allegation and the proof as to the party from whom the possession of the animal was taken. The court said: "If Hurst had simply found the animal as an estray upon his premises, and, without taking actual manual possession and control of him, had only taken steps to stray him, it seems that, until he had complied with the laws

regulating estrays, such constructive possession would not have conferred upon him sufficient special ownership to justify an allegation that he was the owner in possession, the animal having been stolen from him. When stolen, this animal was in his actual care, control, and management, for he had staked it out in his field where he had fed it. Actual care, control, and management are expressly declared by our law to constitute the possession contemplated in our statute of theft." *Bailey v. State*, 18 Tex. App. 427; *Frazier v. State*, Id. 434; *Littleton v. State*, 20 Tex. App. 168. In this case the evidence clearly shows that the witness Bennett had the actual control and management of the animal at the time it was taken from him. We think, therefore, that the court erred in not charging that Bennett had possession of the animal. It is not necessary to discuss the other assignments, but for the errors pointed out the judgment is reversed, and the cause remanded.

BURNS v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

CRIMINAL LAW—CONTINUANCE.

1. Where no diligence has been used by defendant to procure an unknown witness, except the issuance of a process, which the sheriff returned, not executed, three days before trial, it is not error to deny his motion for a continuance.
2. Where the facts stated in defendant's application for continuance, based on the absence of an unknown witness, showed that such witness would unquestionably refuse to testify, and could not be compelled to testify, because his testimony would incriminate himself, it is not error to deny the application.

Appeal from district court, Wharton county; Wells Thompson, Judge.

The defendant, J. B. Burns, was convicted of larceny. The court denied his motion for a new trial, based on its action in denying his motion for a continuance. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of the theft of one head of cattle, and his punishment assessed at two years' confinement in the penitentiary, and he prosecutes this appeal.

The only bill of exceptions in the record is reserved to the action of the court in overruling appellant's application for continuance, and in overruling his motion for new trial, based on the action of the court in overruling the motion for continuance. Appellant says by his application that he desired the attendance of J. H. Fergusson, alleged to reside in Frio county. The diligence used to procure this witness was the issuance of process for him on the day after the indictment was presented. Said process was returned three days before the trial, by the sheriff of said Frio county, not executed, with the statement

that said witness did not live in Frio county, and was not to be found there, after search and inquiry. No diligence was used, after the return of the process, to secure the witness, although three days elapsed from that time before the case was tried. But concede that appellant used diligence, it does not occur to us that the witness, if he could have been procured, would testify to the facts set up in the application, because these facts, if testified to by the witness, would certainly incriminate him as the guilty party. If the facts stated be true, the witness would unquestionably refuse to testify to the same, and the court would have been powerless to compel him to give such inculpatory evidence against himself. The defense set up here is of a most extraordinary character. It shows, if it be true, that appellant made a most peculiar trade with a stranger,—a horse trader, who was traveling through the country; that he traded him a horse, and delivered said horse to him with the understanding that when said horse trader returned through that country he was to bring him the money for the horse, or, if he could find him a bull yearling near by, that he would deliver him the bull yearling for said horse; that in pursuance of said trade, while defendant was absent from his home, said Ferguson returned, and put the bull yearling in question in the pasture of appellant, leaving a note to the effect that he had brought the bull yearling there, and turned him in the pasture, to pay for the horse. This was a singular trade in all its features. It is remarkable that appellant should intrust his horse to a stranger under such conditions, and still more remarkable that this stranger should run the risk of paying a debt, which, under the circumstances, he might well evade, by committing the theft of a yearling. The owner of the yearling in question, who lived in the neighborhood, as soon as he lost it, made search, and inquired twice of this defendant, who informed him that he had no such yearling. It was, however, discovered by the party in defendant's pasture. When found, the prosecutor's brand had been changed into a brand not exactly like appellant's brand, but no doubt intended to resemble it. It does not occur to us that the defense set up here is even plausible, and we cannot agree that the court erred in overruling the motion for continuance to find an unknown witness by whom it was expected to prove facts that would send him to the penitentiary. We have examined the record carefully, and find no errors in the same, and the judgment is affirmed.

PITTS v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1899.)

FORGERY—INDICTMENT—INSTRUCTIONS—VERDICT.

1. Although an indictment charges in separate counts the forgery of an instrument and the ut-

tering of the same, a conviction cannot be had for both offenses.

2. In 1898 an indictment was presented charging defendant with forgery by altering a deed. There was no testimony as to when the forgery occurred. The deed had been executed in 1877, and recorded in 1880, and in 1894 defendant had it re-recorded to cure an alleged error in the original record. *Held*, that a requested charge that, if the forgery occurred more than 10 years prior to the presentment of the indictment, the jury should acquit, should have been given.

Appeal from district court, Bosque county; J. M. Hall, Judge.

John M. Pitts was convicted of forgery, and appeals. Reversed.

Word, Dillard & Word, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The indictment, in the first count, charges forgery by altering a deed, and in the second charges uttering the same instrument. Both counts were submitted by the court in the charge. The verdict was general, and in the following language: "We, the jury, find the defendant guilty as charged, and assess his punishment at confinement in the state penitentiary for five years." The judgment entered upon this verdict adjudges appellant guilty of the "offense of forgery, and knowingly and fraudulently uttering, publishing, and using as true and genuine a forged instrument." The sentence follows the judgment, and is pronounced for both violations in the same language as found in the judgment. It was proper in separate counts to charge both forgery and uttering the forged instrument, but a conviction could not be had for both offenses, though thus charged, nor a separate punishment for each. *Miller v. State*, 16 Tex. App. 417; *Crawford v. State*, 31 Tex. Cr. R. 51. 19 S. W. 766. With reference to the count setting up the alteration of the deed, appellant asked the court to instruct the jury, if the forgery occurred more than 10 years prior to the presentment of the indictment, they should acquit of that offense. This charge should have been given. There is no testimony in the record specifically showing when the forgery occurred. There are facts and circumstances tending to show that it might have been committed, if at all, 10 years or more before the finding of the indictment. The deed was executed January 6, 1877, and was filed for record in November, 1880, and recorded the following month. Some years subsequently appellant claims that the original record of the deed was erroneous in the particulars in which the forgery is charged to have occurred, and to cure that he had the deed re-recorded in 1894. The indictment was presented on August 21, 1898. So if, under the facts, the jury should believe there was a forgery, and that it occurred more than 10 years before the 21st of August, 1898, the offense of forgery would be barred.

The court did not err in refusing to permit the introduction of the examined copy of the original field notes, which formed the

basis of the deed. The loss of the original was not sufficiently accounted for, and there was not sufficient diligence used in hunting up said original field notes.

As presented by another bill, no prejudicial error is shown in the action of the court permitting Robertson to testify that in his opinion the alteration occurred within two years from the time he saw the instrument, in September, 1894, because this testimony was withdrawn from the jury, and they instructed to disregard it. We do not believe this error, as presented, is of sufficient importance to reverse the judgment. For the reasons indicated, the judgment is reversed, and the cause remanded.

STEWART v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1899.)

MANSLAUGHTER—INSTRUCTION—RIGHT OF SELF-DEFENSE.

In a prosecution for manslaughter, where the evidence in support of the defense of self-defense tends to show that deceased was preparing to make an attack on defendant, it is error to base defendant's right of self-defense on the theory that deceased had made an attack on him, as defendant did not have to wait until deceased had actually assaulted him.

Appeal from district court, Waller county; Wells Thompson, Judge.

Mike Stewart was convicted of manslaughter, and his punishment assessed at five years' confinement in the penitentiary. From the judgment of conviction he appeals. Reversed.

Lipscomb & Styles, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. After instructing the jury in regard to the appearance of danger and the law of retreat, the court gave this charge: "If, from the evidence, you believe the defendant killed the said Walter Lewis, but further believe that at the time of so doing the deceased had made an attack on him, which, from the manner and character of it, and the relative strength of the parties, and the defendant's knowledge of the character and disposition of the deceased, caused him to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable expectation or fear, the defendant killed the deceased, then you should acquit him. And if deceased was armed at the time he was killed, and was making such an attack on defendant, and if the weapon used by him and the manner of its use was such as were reasonably calculated to produce death or serious bodily harm, then the law presumes the deceased intended to murder or aimed to inflict serious bodily injury upon defendant." The testimony tended to show that deceased and defendant, a short time previous to the homicide, had had a personal difficulty in the rear end of a sa-

loon; that deceased left the premises, the threat to "fix" himself and return. rectly after deceased left, defendant also appeared. In a short time deceased returned entered the saloon, and was rather boisterous inquiring for defendant, and cursing "Stewarts." He was ordered by the proprietor to leave, and as he stepped out of the saloon he was fired upon and killed by defendant. When he entered the saloon, his right hand was under his coat, about the hip pocket. The hand was in the same position at the time the pistol fired. After the occurrence a rock was found under the body. He seemed to have had no pistol. In view of this state of case, we believe the objection of appellant to the charge above quoted is meritorious. The charge submits the case upon the theory that the deceased had made an attack on defendant. Under the facts this assumption is unwarranted, and it turned the issue of defense not upon apparent danger, but upon the fact that deceased had then made an attack. Defendant based his right upon the theory, under this evidence, that deceased was armed himself, and returned to the scene of the homicide for the purpose of bringing about a deadly conflict, and was then seeking him for that purpose, and to this end was then approaching him. Defendant was standing outside the building on the sidewalk. This tactical question was thoroughly discussed in *Phipps v. State* (Tex. Cr. App.) 31 S. W. 2d, and this same charge held erroneous. For the reasons given in the *Phipps Case*, we believe this charge erroneous. The judgment is reversed, and the cause remanded.

HOLT v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1899.)

CRIMINAL LAW—CONTINUANCE—REMARKS OF JUDGE—APPEAL—NECESSITY OF STATEMENT.

1. Where there is no statement of facts in record on appeal, alleged error in refusing a continuance on account of the absence of a witness cannot be considered.

2. A judgment will not be reversed for removal of the judge made when the petit jury for the week was impeached, in the absence of any showing that defendant was prejudiced thereby.

Appeal from district court, Ft. Bend county; Wells Thompson, Judge.

Alex Holt was convicted of assault with intent to rape, and appeals. Affirmed.

C. C. Everett, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to rape, and his punishment assessed at 10 years' confinement in the penitentiary, and he appeals.

There is no statement of facts in the record. Appellant's first bill of exceptions in the action of the court overruling his motion for continuance. The motion was predicated

on the absence of one Mariah Jane Holt, an alleged resident of Ft. Bend county. The testimony of said witness might, under certain circumstances, have been material; but, not having the statement of facts before us, it is impossible for us to determine how material said testimony would have been. The relations between appellant and the prosecutrix may have been very intimate, and she may have even written a note to him, and yet the testimony of the rape may have been overwhelming. In the absence of a statement of facts, we cannot reverse the case on this ground.

The next bill of exceptions is with reference to the failure of the court to instruct the jury in respect to evidence of handwriting by comparison. We are not sufficiently advised that this was rendered necessary.

Appellant also reserved a bill of exceptions to the action of the court when the petit jury for the week was impaneled. Some of the remarks made by the judge may have been improper, yet we fail to see how any prejudice resulted to appellant therefrom. The bill does not even show that any of the petit jury who heard the remarks were taken in this case, or that any of said jurors were questioned by him as to any effect that said remarks may have had on them with reference to the particular case. In the absence of some showing of prejudice to appellant, the action of the court below will not be revised.

No error appearing in the record, the judgment is affirmed.

BARFIELD v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1899.)

CRIMINAL LAW—INDICTMENT—PROOF—VARIANCE—EXCEPTIONS TO TESTIMONY—SUFFICIENCY—LARCENY—CIRCUMSTANTIAL EVIDENCE.

1. Where an indictment alleges that the offense was committed on a certain date and anterior to presentment, proof of commission two years prior to the date stated is not a material variance.

2. An objection to testimony, as stated in a bill of exceptions, that it is immaterial, is too indefinite.

3. In a prosecution for larceny, defendant's statements as to when he got the property in question may be disproved by circumstantial evidence.

Appeal from district court, Hill county; J. M. Hall, Judge.

Lon Barfield was convicted of larceny, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of the theft of a horse, and his punishment assessed at confinement in the penitentiary for a term of three years, and he appeals.

Appellant complains that the court erred in permitting the witness John Morgan to

testify that he missed his horse in "June, '96," which testimony was objected to by defendant on the ground that the indictment alleged that the offense was committed in "June, 1898," and that the testimony of said witness, so long anterior to the date alleged in said indictment, was incompetent and irrelevant. As indicated in the bill of exceptions, the gravamen of appellant's complaint is that the witness stated that his horse was stolen in "June, '96." In a different portion of the witness John Morgan's testimony appears this statement: "The calendar for 1896 shows that Sunday night before June 19th was June 14th." And it further appears from the statement of facts that the appellant carried the horse to the city of Waco on June 20, 1896. We do not think it was a material variance in the date in the indictment and the date of the offense, since the indictment states on its face that the offense was committed "anterior" to the presentment of the same, and the proof shows that the horse was stolen in the year 1896; and it certainly would not make any difference if the indictment states it was committed in 1898.

Appellant complains because the court permitted the witnesses John W. Baker, Dock Wyse, and Horace Tripp to testify to the conversation with defendant in the year 1896. The objections urged to the introduction of said testimony, as stated in the bills, is "because the same is immaterial." The bill should state wherein and how the testimony is immaterial. Such an exception is too vague and indefinite. *Wade v. State*, 37 Tex. Cr. R. 401, 35 S. W. 663; *McGrath v. State*, 35 Tex. Cr. R. 422, 34 S. W. 127, 941. Moreover, we believe the testimony of the witnesses was admissible, because the same was a declaration made by defendant, and going to show defendant's guilt. *Langford v. State*, 17 Tex. App. 445; *Ferguson v. State*, 31 Tex. Cr. R. 93, 19 S. W. 901.

Complaint is made of the court's charge wherein the jury were instructed that the statements made by defendant with reference to when he got the horse in question might be proved untrue by circumstantial evidence, provided the circumstantial evidence is sufficient to satisfy the minds of the jury, etc. We think this fact could be proved by circumstantial evidence, and therefore do not think the court's charge was erroneous. *Whart. Cr. Ev. §§ 10, 11*; *Franklin v. State* (Tex. Cr. App.) 39 S. W. 690. Furthermore, we think the evidence authorized the court to give the charge.

The criticism contained in the fifth assignment is not well taken. There was no error in the charge of the court calculated to injure the rights of appellant. Nor do we think the court erred in refusing to give special charges Nos. 2, 3, and 4 requested by appellant. We think the verdict of the jury is supported by the evidence, and amply supports the fact that the horse was taken in

Hill county, and the plea of limitation urged by appellant is refuted by the statement of facts before us. The judgment is affirmed.

POLK v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1899.)

FORGERY—INDICTMENT—INNUENDO.

An order directed to L., asking him to let P. have one pair of shoes, was altered to include "to bits of shaggars, one pond of ducco, one dress patton." *Held*, that an indictment for forgery was insufficient which failed to explain who L. was, and what the terms added to the order meant.

Appeal from district court, San Augustine county; Tom C. Davis, Judge.

Dave Polk was convicted of forgery, and he appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of forgery for altering a genuine instrument, and his punishment assessed at two years' confinement in the penitentiary. The genuine instrument is as follows: "May 8, 1897. Mr. Lynch please let Dave Polk have 1 pr shoes and charge the same to me and oblige. I. L. Matthews." This was altered by Dave Polk by the addition of the following: "to bits of shaggars one pond of ducco one dress patton,"—so as to make the instrument read, when altered, as follows: "May 8, 1897. Mr. Lynch please let Dave Polk have 1 pr shoes and charge the same to me and oblige. I. L. Matthews. to bits of shagger one pound of dacco one dress patton." Motion in arrest of judgment was made because the indictment does not show on its face that an offense against the law has been committed by defendant. We are of opinion that this motion should have been sustained. There are no explanatory or innuendo averments in the indictment. Who the "Mr. Lynch" was is not stated; nor what the terms, "to bits of shaggars," "one pond of ducco," and "one dress patton," mean. These matters should have been explained by proper averments. We observe that when the completed instrument, after being altered, is set out, we find the expressions, "to bits of shagger one pound of dacco one dress patton," in place of the terms, "to bits of shaggars one pond of ducco one dress patton," alleged to be added. So there is a difference between the addition as alleged to have been made to the instrument and that set out in the instrument itself after having been altered. The expression "shaggars," set out in one part of the indictment, is written "shagger" in another part; the word "pond" is written in the second place "pound"; and "ducco" in one place is made to read "dacco" in another. But, if these variances are of small import, still there are

no innuendo averments explaining what was meant by the additions to the original order. For want of proper explanatory and innuendo averments, we believe the indictment does not set out a case of forgery. The judgment is reversed, and the prosecution ordered dismissed.

WYNNE v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

ASSAULT WITH INTENT TO MURDER—EVIDENCE—INSTRUCTIONS—NEWLY-DISCOVERED EVIDENCE.

1. In a prosecution for an assault with intent to murder, evidence that defendant was afraid of accused a few days prior to the difficulty is inadmissible, where there is no evidence that he was afraid of him at the time of the difficulty.

2. It is not error to charge that defendant had a right to act in self-defense, if prosecutor made the "first demonstration" against him.

3. An accused is not entitled to a new trial for newly-discovered evidence consisting of facts within the knowledge of his own witnesses.

4. Where, in a prosecution for an assault with intent to murder, the evidence showed that defendant shot prosecutor a second time while he was fleeing, an issue whether defendant had a knife in his pocket is immaterial, where he drew no knife.

Appeal from district court, Shelby county; Stephen P. West, Judge.

Good Wynne was convicted of an assault with intent to murder, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.

Appellant complains of the action of the court in refusing to permit him to prove by the witness Gray that some two days before the shooting defendant came to his (witness) house, and told him of threats that he had heard Ballard had made against him, and also told witness that he desired to visit his sick mother, but was afraid to go to see her for fear of meeting defendant. The bill of exceptions falls to show the object of this testimony. It is not, as we understand it, an effort on the part of appellant to prove threats and their communication to defendant; but the proposition appears to be that this testimony was admissible to show that appellant was afraid of the prosecutor. There is nothing in the case, if we look to the record, to show that this testimony was relevant to any issue presented by the testimony. He evidently did not manifest any fear of appellant on the occasion of the difficulty. The same character of testimony was excluded as to the witness Hughes; and what we have said above applies to the action of the court in excluding this witness' testimony.

There is nothing in the objection urged to the remarks of the district attorney in his closing speech. We fail to see how said remarks could be distorted into a suggestion that it was a reference to the failure of the appellant to testify in the case. We have examined the court's charge carefully, and, in our opinion, it was a fair presentation of all the issues in the case.

Appellant specially complains of the charge on self-defense. We are inclined to the view that there was no self-defense in this case. But, concede that there was, the charge of the court fairly presents this issue. The use of the words "first demonstration" was not improper. Under it the jury were simply told that, if the prosecutor made the first demonstration against appellant, appellant had a right to act in self-defense either on actual or apparent danger.

Nor is there anything in appellant's claim of newly-discovered evidence. The witnesses Paul and Arthur Braly were the appellant's own witnesses; and it was appellant's duty to fully confer with his witnesses about the case. If he had done so, he would certainly have ascertained the conversation between the prosecutor and said witnesses as to the knife, when he was carrying the same. But we do not regard this as material. Appellant drew no knife on the occasion of the difficulty; and whether or not he had a knife in his pocket, it occurs to us, is immaterial. In the view we take of this case, and it does not occur to us to be controverted, appellant first drew his pistol on the prosecutor, who told him that he was unarmed, and he had the advantage of him. He went to Paul, in the presence of defendant, and tried to borrow a pistol, but failed; and when he turned towards defendant, and told him again he had the advantage of him, he could shoot him if he wanted to, appellant shot him, and, after he fled, continued to pursue him, and shot him again. The jury were exceedingly lenient in their verdict, and we do not see what reason appellant has to complain. The judgment is affirmed.

CREIGHTON v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

SEDUCTION—BILL OF EXCEPTIONS—SUFFICIENCY—EVIDENCE.

1. A bill of exceptions complaining of the rejection, in a prosecution for seduction, of evidence that prosecutrix kissed and had been kissed by several men named, sufficiently shows the materiality of the evidence.

2. In a prosecution for seduction, evidence that prosecutrix had kissed and been kissed and embraced by other men than defendant is admissible, as tending to show lack of chastity.

Appeal from district court, Coke county: J. W. Timmins, Judge.

Cliff Creighton was convicted of seduction, and he appeals. Reversed.

T. A. Blair, B. W. Rimes, Perryman & Averitt, John L. Dyer, and Penry & Garrett, for appellant. Sims & Snodgrass and Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of seduction, and his punishment assessed at a fine of \$2,000. By bill No. 1 appellant complains of the court's refusal to permit Mrs. Green, the mother of the prosecutrix, to testify on cross-examination that some time in 1896 she saw Jim Weathers embrace and kiss the prosecutrix at the home of witness. In the moonlight just outside the door of witness' house; which testimony was excluded, at the instance of the state, on the ground that it was irrelevant and immaterial, and because it was not an act of carnal intercourse or proof of general reputation. And by bill No. 2 he complains of the failure of the court to permit prosecutrix, Rosa Green, to testify on cross-examination that she had, both before and after her alleged seduction by defendant, kissed and been kissed by and had submitted to the embrace of Jim Weathers, and had kissed and been kissed by Jess Adams, Will Burnett, Lee Martin, Will Compton, and John Lane, all young men living in the neighborhood of prosecutrix; which proposed testimony was objected to by the state upon the same ground set up in bill No. 1. The state insists that the two bills of exception relied upon by appellant, as above stated, are not sufficient within themselves to indicate the materiality of the testimony proposed by appellant to be proved. Bill No. 2, however, is certainly not subject to this objection, wherein it says that appellant proposed to prove by the prosecutrix that she kissed and had been kissed by Jess Adams, Will Burnett, Lee Martin, Will Compton, and John Lane. We think this testimony was admissible, and that appellant's bill sufficiently presents the same to authorize us to reverse the judgment for the reasons therein stated. If prosecutrix had been kissed and embraced by Jim Weathers, and had kissed and been kissed by the other parties named, such circumstances appellant ought to have been permitted to introduce before the jury, as tending to show a lack of chastity on the part of the prosecutrix. We think the court erred in failing and refusing to permit the introduction of said testimony. We have carefully examined all of appellant's other assignments of error, and do not think there is any material error in the ruling of the court upon the matters complained of. But, for the error above discussed, the judgment is reversed, and the cause remanded.

TUTTLE v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

SWINDLING—VARIANCE—INSTRUCTIONS—BILL OF EXCEPTIONS.

1. In a prosecution as accomplice in swindling, where the indictment alleged that the dealings in the matter of transferring the property from the swindled company to defendant's principals occurred between one S. and defendant's principals, evidence that the goods were actually segregated from the stock of goods by another, and by him delivered to defendant's principals under the immediate dictation and orders of S., does not constitute a variance between the allegations and proof.

2. An instruction in a criminal case which imposes on the state an additional burden of proof cannot be complained of by defendant.

3. An error alleged to have been committed by the trial court in the admission of evidence will not be noticed by the appellate court unless a bill of exceptions is reserved.

Appeal from district court, Kaufman county; J. E. Dillard, Judge.

Joe Tuttle was convicted of swindling, and appeals. Affirmed.

Ed R. Bumpass, W. P. Williams, and Wm. H. Allen, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted as an accomplice to the crime of swindling,—the principals being T. J. and N. Singleton,—and his punishment assessed at confinement in the penitentiary for a term of two years, and he appeals.

The indictment alleges the dealings in the matter of transferring the property from the R. P. Rhea Company occurred between the vice president, N. E. Shands, and the principals, T. J. and N. Singleton. On the trial the state, over appellant's objection, was permitted to prove by Shands and Monger that Monger in fact sold the goods to the Singletons. Shands and Monger testified that the trade was made between Shands and the Singletons, and that all the transactions leading up to the actual separation of the goods, and the delivery of same to the Singletons, occurred between Shands and the Singletons; that Monger was the clerk in the house; that Shands was in charge of the house, and, after the trade was consummated with the Singletons, he selected Monger as the clerk to make the segregation and delivery of the goods to the Singletons. The fact that Monger actually separated and delivered the goods does not constitute a variance between the allegation in the indictment and the proof on this question. Monger was but the servant of Shands in the matter, and he acted under his immediate dictation and orders in delivering the goods.

It is contended the court committed error in submitting the insolvency of the Singletons in his charge. This was very favorable to defendant. While there is no direct testimony as to the insolvency of the Singletons, and, so far as the matter is concerned, we may

concede that there is no evidence on the question at all, yet this charge was favorable to appellant, because it authorized the jury to find they were insolvent, before they could convict appellant for advising them to commit the crime charged. In other words, this was a burden upon the state, and could not operate prejudicially to appellant. It was in no manner calculated to injure any of his rights. The court fully instructed the jury with regard to the law of the case, and he especially cautioned them that, before they could convict appellant of being an accomplice, they must find from the evidence that he advised the Singletons to the commission of the offense before they obtained the goods. Hence there was no error in refusing the special requested charge. And in this connection the court, not only in the general charge, but in a special charge requested by appellant, gave this phase of the law to the jury.

Appellant's contention on motion for new trial that the court erred in permitting Williams to testify to appellant's confessions will not be noticed, because a bill of exceptions was not reserved. Nor is there any merit in the contention that the evidence is insufficient to support the judgment. The circumstances, we think, are cogent, and they are supplemented by the confession of appellant. The judgment is affirmed.

JOHNSON v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1899.)

CRIMINAL LAW—CONTINUANCE—CONDUCT OF COUNSEL—ROBBERY—INSTRUCTIONS.

1. A motion for a continuance on account of the sickness of an attorney is properly overruled where the defendant had the services of two attorneys, one of whom—an able attorney—had represented him at the examination, and on the hearing for bail on habeas corpus.

2. A defendant's counsel has no right to contradict a prosecuting witness as to his testimony on a previous hearing, unless he desires to do so as a sworn witness.

3. An instruction that, if the jury believe defendant obtained the property—alleged to have been procured by robbery—from S. by purchase or gift, to acquit him, does not prejudice defendant, though there was no evidence that defendant got said property by gift.

Appeal from district court, Fannin county; E. D. McClellan, Judge.

Wilbur Johnson was convicted of robbery, and appeals. Affirmed.

John O. Meade and James H. Lyday, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of robbery, and his punishment assessed at confinement in the penitentiary for a term of five years, and he appeals.

Appellant made a motion to continue the case because J. C. Meade, Esq., whom he claimed was his leading attorney, was sick

and could not attend the court. The court explains this bill by showing that appellant had the services of another able attorney, to wit, James H. Lyday, Esq., who had represented him at the examining trial, and the trial for bail on habeas corpus, and who was then present and acting as his counsel, and that he also had the services of another attorney, to wit, T. P. Steger, Esq., employed by him in the case. We fail to see any resultant injury to appellant from the overruling of his motion to continue or postpone the case.

Appellant by his second bill excepted to the action of the court in sustaining the protest of the district attorney as to the method of defendant cross-examining the prosecuting witness, Jos. Seagall. It occurs to us, there was no error in this action of the district attorney. The conduct of defendant's counsel in this respect was improper. He had no right to contradict the witness about what he had testified to previously, unless he desired to do so as a sworn witness.

The court instructed the jury on behalf of appellant that, if they believed appellant got the property—alleged to have been procured in the robbery from Jos. Seagall—by purchase or gift, to acquit him. Appellant objected to this charge of the court on the ground, as he claimed, that there was no evidence that appellant got said property by gift,—that appellant claimed to have purchased the same. If this be true, still we fall to see how the charge of the court in reference to the procurement of the property by gift could have prejudiced appellant. But it occurs to us that there is some testimony in the record suggesting a gift of some of the alleged property. Some objections are made to other portions of the court's charge, but we have examined the same carefully, and find no error therein. The testimony, in our opinion, supports the verdict of the jury, and the judgment is affirmed.

MARTIN v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1899.)

HOMICIDE—PROVOCATION—EVIDENCE—ADEQUATE CAUSE.

1. Deceased had insulted accused's wife, denouncing her as a prostitute, and ill feeling between deceased and accused resulted. On the day of the killing, deceased was on the premises of accused's renter, adjoining him, contrary to the interdiction of accused. Accused's wife informed him that deceased was on the premises again, and had been walking up and down the partition fence, seeking to look into their residence. She then went out and requested deceased to depart, but he used insulting language towards her, which was heard by accused, who at once secured his gun, went outside, and shot deceased. *Held* that, on the question of provocation reducing the offense to manslaughter, the jury could consider the previous insults.

2. The jury could look to all the facts in determining whether adequate cause, and sudden

passion engendered thereby, was the cause of the killing.

3. On the issue whether accused fired from a window or the corner of the house, testimony of witnesses, who had experimented on the scene, that accused could not have fired from the window and made the holes in the fence and barn which were made with the stray shot, was admissible.

Appeal from district court, Hays county; H. Teichmueller, Judge.

Frank Martin was convicted of murder, and he appeals. Reversed.

Will G. Barber, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and his punishment assessed at seven years' confinement in the penitentiary.

Complaint is made of that portion of the court's charge submitting the law of manslaughter which instructs the jury "that the provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation." The law of manslaughter was applicable largely on account of the insulting conduct and language used by deceased in reference to the wife of appellant. There had been ill feeling between appellant and deceased for a considerable space of time prior to the homicide. The language used by deceased was of a very opprobrious character, denouncing appellant's wife as a vile woman,—in other words, a prostitute. These expressions were made known to appellant. On the evening of the homicide deceased was on the premises of one McKean, adjoining the residence of appellant. Appellant was the owner of the premises occupied by McKean, McKean being his renter. It seems that the presence of deceased, Hodges, had been interdicted on said premises by appellant. Just prior to the homicide, appellant's wife informed him of the fact that Hodges was on the premises again, and had been walking up and down the partition fence, seeking to look into their residence. Mrs. Martin (appellant's wife) went out in the back yard, and requested deceased to leave the premises. He used insulting language towards her at the time, which was heard by appellant. He immediately secured his gun, went to the northeast corner of his residence, and, as he got in view of deceased, raised his gun and shot deceased. There are a great many facts and circumstances introduced in evidence which show the state of feeling between the parties. We only state in a general way the evidence bearing upon the question of manslaughter, and the exception to the charge because it limits the adequate cause to a provocation arising at the time of the homicide. Under this state of case the jury were charged as above stated, limiting the provocation to the time of the commission of the offense. The court further charged in this connection that if the jury believed "that deceased immediately before

the killing insulted appellant's wife, and, under the immediate influence of sudden passion provoked by such insults, appellant killed deceased, to find him guilty of manslaughter"; and, further, that in judging of what transpired at the time of the homicide, and the intention with which defendant committed the homicide, to view the facts from his standpoint, in view of the relations existing between the parties and the threats made by deceased, if he made such threats. The court limited manslaughter to the provocation arising at the time of the killing. As was said in *Tucker v. State* (decided at present term) 50 S. W. 711: "Where insulting conduct or language is relied upon to reduce the homicide to manslaughter, the party is entitled, where the facts in evidence suggest the issue, to a charge in reference to the first meeting after the insulting conduct or language has been communicated; and in such case giving in charge the requirements of article 699, Pen. Code, in reference to the provocation arising at the time, is erroneous,"—citing *Williams v. State*, 24 Tex. App. 637, 7 S. W. 333; *Eanes v. State*, 10 Tex. App. 421. Defendant had the right to have the law in regard to insulting conduct as a provocation given in charge to the jury, not limited, under the facts of this case, to the insulting language used at the time of the homicide. The jury could look to the previous insults as well. This question has been frequently decided. Therefore we deem it unnecessary to discuss it. The error complained of is intensified by the further charges of the court, wherein the jury were told that "if Frank Martin killed deceased by shooting him with a gun, under the influence of sudden passion, and that such passion was not, however, produced by the insult of Hodges to his wife at the time, but by reason of former insults offered him and his wife, and the enmity existing between them, he would be guilty of murder in the second degree"; and, further, that "if deceased killed Hodges by shooting him with a gun, with a deliberate mind, and in pursuance of a formed design, with intent to revenge former insults and wrongs of deceased, * * * he would be guilty of murder in the first degree." While the jury only convicted of murder in the second degree, this latter charge especially had the tendency to minimize, and perhaps turn against him in the minds of the jury, the defensive matters based upon the insulting conduct and language of deceased prior to the evening of the homicide. If viewed in the light of the provocation given at the time of the killing, the former insulting language and conduct of deceased towards appellant's wife would serve to intensify the passion arising at the time of the killing, and the defendant had the right to have the jury view the homicide from that standpoint. The court seems to have taken the view that the

former provocations and insulting conduct could only be viewed by the jury in the light of circumstances tending to show malice and evil intent on the part of defendant, and to prevent such testimony from being used by the jury for the purpose of showing sudden passion. As we understand the law, defendant had the right to have the insulting conduct given at the time of the killing viewed in the light of the former provocation and insulting conduct. Such are the authorities in this state.

We are also of opinion that, in submitting the law of manslaughter under the facts of this case, the jury should have been further instructed that they could look to all the facts and circumstances in determining whether adequate cause, and sudden passion engendered thereby, were the cause of the killing.

It was a contested question on the trial whether appellant shot deceased from the window of his house, or from a point in his yard near the northeast corner of the residence,—the state's theory being that he fired from the window; and appellant's, that he fired from the corner of the house while standing in the yard. The issue was one of vital importance, and the testimony positive both ways. Among other witnesses introduced was S. R. Kone, by whom appellant proved various experiments made by placing parties at the corner of the house, and where the shot took effect in the fence and in the barn, and where deceased stood, in order to ascertain whether appellant actually stood at this point, or fired from the window. Without going into details, many observations and a few experiments were made by this witness and others. The contention of defendant was, if the shot was fired from the window, they could not have made the holes in the fence and barn, as shown to have been made by the shot from appellant's gun, and which missed deceased. After detailing these experiments, defendant proposed to prove by him that after making these experiments the shot holes in the fence could not have been made by any one firing from the window as testified by the state's witnesses. We believe, under the circumstances of this case, this testimony should have been admitted. It is sometimes practically impossible for the witness to detail facts and circumstances so as to convey a correct idea of the facts sought to be proved by him,—as, for instance, comparing the tracks upon the ground with the shoes found upon the accused. This is denominated by the writers as being a shorthand rendering of the facts, and under such circumstances this character of testimony is generally admissible. *Powers v. State*, 23 Tex. App. 42, 5 S. W. 153; *Clark v. State*, 28 Tex. App. 189, 12 S. W. 729; *Crumes v. State*, 28 Tex. App. 516, 13 S. W. 868. For the reasons indicated, the judgment is reversed and the cause remanded.

REAGAN v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1899.)

CRIMINAL LAW—FORMER JEOPARDY—CONVICTION OF LESSER OFFENSE.

In a prosecution for aggravated assault, it is prejudicial error to strike a plea of former conviction of an affray, based on the facts on which the prosecution for aggravated assault rests, where accused was afterwards convicted of simple assault, since the former conviction would be a bar to a conviction for simple assault.

Appeal from Karnes county court; F. Theodore Barnes, Judge.

T. J. Reagan was convicted of assault, and he appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged, by indictment, with aggravated assault. When the case was called for trial, he interposed a plea of former conviction. The plea is in proper form, and alleges that appellant had been convicted in the justice court under a complaint charging him with an affray, that the facts upon which that conviction was predicated were identical with the facts to be proved in this case, and that it was the same transaction. The complaint and judgment were set out in the plea. Without going into a detailed statement of the plea, we are of opinion that it was sufficient to raise the question of former conviction. A demurrer interposed by the county attorney to this plea was sustained, and appellant reserved his exception. On the trial appellant was convicted of simple assault. We deem it unnecessary to go into a discussion of the questions involved. The plea of former conviction, if true, was sufficient to defeat a conviction for simple assault in this case; and the court erred in striking it out. The judgment is reversed, and the cause remanded.

ROEBUCK v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1899.)

THEFT—CHARGE ON CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.

Where the evidence in a prosecution for theft is purely circumstantial, a charge that the ownership of property in question may be shown by circumstances sufficient to satisfy the jury beyond a reasonable doubt that the property belonged to the alleged owner is insufficient.

Appeal from district court, Newton county; Stephen P. West, Judge.

James Roebuck was convicted of theft, and he appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of the theft of a hog, and his punishment assessed at two years' confinement in the penitentiary. Appellant complains of the following portion

of the charge of the court, to wit: "The ownership of property as alleged may be shown by circumstances, provided same are sufficient to satisfy the jury beyond a reasonable doubt that the same belonged to the alleged owner." This is a case of purely circumstantial evidence, and we think the court should have given a full and complete charge upon this phase of the law. It has been repeatedly held that, where the evidence is circumstantial, it is the imperative duty of the court to charge upon the law of circumstantial evidence. *Burrell v. State*, 18 Tex. 713; *Howell v. State*, 16 Tex. App. 93; *Crowell v. State*, 24 Tex. App. 404, 6 S. W. 318. The case nearest analogous to this one is *Bryant v. State*, 16 Tex. App. 149. The charge there on circumstantial evidence was as follows: "In order to convict on circumstantial evidence, the circumstances must be so connected as to exclude every reasonable hypothesis but the guilt of defendant." The charge was excepted to because not sufficiently full and specific to enable the jury to understand and apply the rules applicable to circumstantial evidence. We there held the exception well taken. Nor do we think the charge in this case sufficient upon this phase of the law. The books are replete with indorsements of charges on circumstantial evidence, and it is not necessary for us here to say how the charge should be worded. We do not think the evidence is sufficient on the question of the identity of the hog as being the hog of the prosecuting witness. Because the court failed to charge on circumstantial evidence, and because of the lack of sufficient proof of identity as above indicated, the judgment is reversed, and the cause remanded.

Ex parte CANNON.

(Court of Criminal Appeals of Texas. June 21, 1899.)

HABEAS CORPUS—PERSON COMMITTED WITHOUT BAIL—APPEAL—DISMISSAL.

An appeal in habeas corpus proceedings from a judgment refusing to enlarge a person held without bail on a criminal complaint will be dismissed, where, before the hearing of the appeal, accused is indicted for the offense in question, and arrested on a capias issued thereunder, so that he is no longer held under the complaint.

Appeal from district court, Robertson county; W. G. Tallafarro, Judge.

O. D. Cannon, held without bail to answer a criminal charge, petitioned for habeas corpus, and from a judgment remanding him to custody he appeals. Dismissed.

T. S. Henderson, J. D. Gann, and Ford & Ford, for appellant. J. C. Scott, Dist. Atty., Simmons & Crawford, J. L. Goodman, C. W. Kinard, and Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged by complaint with the murder of one Gray.

Being refused bail upon habeas corpus proceeding, he prosecuted his appeal to this court.

Since the filing of the transcript here, the grand jury of Robertson county have returned a bill of indictment charging him with the murder of said Gray. Under this indictment, relator has been arrested on a capias issued from the district court of said county, and is now held under and by virtue of said capias, and is no longer held by virtue of the complaint and process thereunder. These matters are made to appear by satisfactory evidence to this court, and motion is made by the assistant attorney general to abate and dismiss this appeal because of the detention under the process of the district court. The motion is well taken. The appeal is therefore dismissed.

MATTHEWS v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

THEFT — INDICTMENT — CONTINUANCE — INSTRUCTIONS—REMARKS OF COUNSEL—HARMLESS ERROR.

1. A description of the stolen property, in an indictment for theft of cattle, as "one head of cattle," is sufficient.

2. A second application for a continuance, which does not show that the applicant could not secure the desired testimony from some other source than the absent witness, is properly overruled.

3. Where the prosecution has proved a confession on the part of defendant, a request for a charge on circumstantial evidence is properly overruled.

4. In a prosecution for cattle theft, a remark of counsel, "The evidence in this case, beyond question, shows that this defendant is the thief, and society is entitled at your hands to protection from all thieves and violations of the law," is not improper.

5. A refusal to instruct the jury to disregard remarks of counsel is not error, in the absence of a written request for such instruction.

6. Error in the remark of the prosecuting attorney that it was strange that defendant brought no one to impeach the character of a certain witness for the state when such witness had testified at a former trial is not ground for reversal, when it was provoked by remarks of defendant's counsel attacking such testimony, and by cross-examination as to whether such witness had not testified at a former trial and been impeached.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

D. L. Matthews was convicted of the theft of cattle, and appeals. Affirmed.

Lattimore & Browning, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of the theft of cattle, and his punishment assessed at two years' confinement in the penitentiary.

Appellant made a motion to quash the indictment on the ground that the description of the property stolen, to wit, "one head of cattle," is too general. This question has been expressly decided against the contention of appellant. *Matthews v. State* (Tex. Cr. App.) 48 S. W. 190; *White's Ann. St.* § 1544.

The first bill is reserved to the action of the court overruling his motion for continuance. Neither the application nor the bill shows whether it is the first or second application. If it is the second application, it does not comply with the statute because the same does not show that appellant could not secure the testimony from some other source than the absent witness. *Logan v. State* (Tex. Cr. App.) 48 S. W. 575. Furthermore, in the light of the testimony adduced upon the trial, we do not think any of the absent testimony would have probably changed the result, or that the same is probably true. *McAdams v. State*, 24 Tex. App. 86, 5 S. W. 826; *Cunningham v. State*, 26 Tex. App. 83, 9 S. W. 62.

Appellant's special charges Nos. 3 and 5 upon the corpus delicti are not correct enunciations of law, and hence the court did not err in refusing to give them. Nor did the court err in refusing charge No. 4 on circumstantial evidence, since the state had proved a confession on the part of appellant.

His fourth bill complains of the closing argument of Jas. W. Swayne, county attorney, in the following language: "The evidence in this case, beyond question, shows that this defendant is the thief, and society is entitled at your hands to protection from all thieves and violations of the law,"—to which appellant objected "as calculated to injure his rights with the jury, and to induce them to think that they ought to convict this particular defendant to please society; and defendant asked the court to stop the attorney, and instruct the jury not to regard the same." The court refused to do so, and appellant excepted. We do not think there is any error in the remarks of the county attorney. Furthermore, we have held it is the duty of appellant to present a written charge instructing the jury to disregard such remarks. This was not done. *Wilson v. State*, 32 Tex. Cr. R. 22, 22 S. W. 39; *Norris v. State*, 32 Tex. Cr. R. 172, 22 S. W. 592; *Rahm v. State*, 30 Tex. App. 310, 17 S. W. 416; *House v. State*, 19 Tex. App. 227.

In bill No. 6, appellant complains of the following: "The county attorney, in his closing argument to the jury, stated 'that it was very strange that the defendant didn't bring some one here to prove something against the character of Jim Keys when Jim Keys had testified in this same case on a former trial thereof,' to which argument of the county attorney defendant then objected on the ground that it was a reference to a former trial of this case," etc. The court explains the bill as follows: "Said statement was brought out by defendant's cross-examination of witness Keys, that he had testified herein before on a former trial, and, the defendant having put in evidence to impeach Keys, the state introduced a number of witnesses showing that the general reputation of Keys for truth and veracity was good in the community where he lived; and the defendant in dis-

cussing the evidence, made a vigorous attack upon witness Keys' testimony, and it was in reply to what defendant's attorney had said that the county attorney made the remark complained of." Defendant had proved the fact of former trial. "We think the explanation of the court attached to this bill renders the remarks of the county attorney harmless. It appears that state's counsel had been provoked into making the remark by the action of appellant's counsel. We have held heretofore that, where counsel for the state has been provoked to comment upon the failure of the defendant to testify by the action of defendant's counsel, we would not reverse the judgment on this account. *Parker v. State* (Tex. Cr. App.) 45 S. W. 812; *Pierson v. State*, 21 Tex. App. 14, 17 S. W. 468; *Smith v. State*, 21 Tex. App. 277, 17 S. W. 471. The evidence supports the verdict, and, no error appearing in the record, the judgment is in all things affirmed.

WILSON v. STATE

(Court of Criminal Appeals of Texas. June 21, 1899.)

INDICTMENT—GROUNDS FOR QUASHING—THEFT OF CATTLE—EVIDENCE—HEARSAY—INCrimINATING EVIDENCE—ACCOMPLICES—ALIBI—GRAND JURY—INSTRUCTIONS.

1. In the absence of a statutory provision, the fact that a private prosecutor appears in the grand-jury room, at the invitation of the district attorney, to examine the witnesses, is not a ground for quashing the indictment, where it is not shown that he was present when the grand jury were deliberating or voting on the accusation.

2. In a prosecution for the theft of cattle, evidence of a witness that he had been employed by defendant to butcher a red cow in 1898, and had put the hide in some high weeds over the butcher-pen fence, at the request of defendant, was inadmissible, where there was no evidence that such cow was the animal alleged to have been stolen.

3. It was error to refuse a charge directing the jury to disregard testimony erroneously admitted.

4. Evidence of a witness that he saw certain officers doing certain things, and heard them make a certain remark, is inadmissible, as hearsay.

5. The constitutional right of the accused to refrain from giving evidence against himself applies to the giving of testimony before the grand jury.

6. The right of accused to refuse to give incriminating evidence protects him from being required to produce private papers which are incriminating.

7. In a criminal prosecution, where defendant produced and identified a bill of sale, it was error to allow the state to cross-examine him to show that he refused to produce such bill of sale before the grand jury on the ground that it would tend to incriminate him, and that the court fined and imprisoned him for such refusal.

8. A charge on the law of accomplice testimony should be given, on request, where there is evidence of complicity in the crime.

9. A charge on alibi should be given where defendant swears that he was at another place at the time of the alleged crime.

Appeal from district court, Milam county; M. J. Moore, Special Judge.

Robert Wilson was convicted of theft, and he appeals. Reversed.

Henderson, Streetman & Freeman and E. A. Wallace, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of the theft of cattle, and his punishment assessed at four years' confinement in the state penitentiary, and he appeals.

Appellant filed a motion to set aside the indictment, and, as a ground of said motion, urged that the indictment should be quashed because Col. N. H. Tracy, an attorney at law, was present and examined the witnesses concerning the said alleged theft before the grand jury; he having been employed as a private prosecutor to prosecute defendant. There is no provision of the statute prohibiting the mere presence of another attorney representing the county attorney, or that such would operate as a quashal of the indictment. While there is no provision of the law authorizing the presence of other parties, except the county or district attorney, or attorney appointed under the authority of the court in the absence of the county or district attorney, yet the fact that an attorney appears in the grand-jury room at the instance and invitation of the district attorney will not operate to quash the indictment. There is no suggestion in this motion that the private prosecutor was present when the grand jury were deliberating upon the accusation against defendant, or were voting upon the same. This, of course, would be ground for quashal of the indictment. *Rothschild v. State*, 7 Tex. App. 519; *Goode v. State*, 2 Tex. App. 520; *Terry v. State*, 15 Tex. App. 66. We do not think the court erred in refusing to quash the indictment.

Over appellant's objection, the witness Eliza Pearce was permitted to testify that appellant had employed witness and his brother to butcher a red cow in the summer of 1898, and requested him to put the hide of said cow in some high weeds over the butcher-pen fence, and that, in obedience to said instructions, he put said hide in some high weeds just across the fence from the slaughter pen, and near the slaughter house. Appellant objected to this testimony because it was not shown that the same was the cow for which appellant is herein charged with stealing, because it does not appear that said transaction was in any wise connected with the cattle for which defendant is herein charged with stealing, and because said evidence is irrelevant and incompetent to prove any issue upon this trial, and because said evidence was calculated to cause the jury to believe that defendant had stolen said cow, and thereby create and produce in the minds of the jury prejudice against defendant. We think all of said objections are well taken. The fact that appellant may have stolen another cow, or any circumstance indicating

that he had done so, unless it was contemporaneous with the taking of this one, on the question of intent, certainly would not be admissible on the trial of appellant in this case; and hence, unless there is some evidence showing that this particular cow, whose hide the witness was directed to place at a certain spot, was the hide of the animal alleged to have been stolen, the testimony would not be relevant to any issue before the jury. After having admitted said testimony, the court erred in not giving the special charge requested by appellant, directing the jury to disregard said testimony. And the witness Eliza Pearce was also permitted to testify, over appellant's objections, that she saw the officers, Bond and Lewis, looking around the slaughter house of defendant, and heard said officers say they were looking for stolen hides. This testimony was purely hearsay, and should not have been admitted. It was calculated to prejudice the rights of appellant.

Appellant testified during the trial that he bought for his firm three head of cattle, for the theft of which he is herein charged, from Doc Simmons, at appellant's market place, in the city of Rockdale, said purchase being made in the presence of Allen Isaacs, that at the time of said purchase said Simmons executed to defendant a bill of sale to said cattle, and that Isaacs witnessed the execution of the bill of sale; and the defendant then and there introduced said bill of sale in evidence, and after the introduction of said bill of sale, and after defendant's said testimony was given concerning the same, the state offered to prove by defendant, on cross-examination, that he refused to produce said bill of sale before said grand jury, and refused to state where said bill of sale was, upon the ground that the production of the same, and his testimony concerning it, would tend to incriminate and connect him with criminal offenses against the laws of this state, and that the criminal offenses referred to were the theft of said cattle and the forgery of said bill of sale, and that the court fined him \$100 for refusing to produce said bill of sale, and remanded him to jail until he produced the same, and that he still refused to produce said bill of sale before the grand jury, and that he had been continuously in jail since said fine, to wit, October 25, 1898, and was then confined in jail for his refusal to produce said bill of sale (no evidence whatever having been introduced by the state pertaining to the defendant's refusal to produce said bill of sale before the grand jury, nor pertaining to his being punished by fine and imprisonment for such refusal); and defendant objected to the introduction of said testimony, because defendant, prior to the time he was before the grand jury, had been charged with the theft of the cattle described in the bill of sale, before the magistrate, and was, at the time he was before the grand jury, under bond to appear before the trial court to answer for

said charge (it being the same offense for which he was on trial), and because the production of said bill of sale before the grand jury, and his answers to questions concerning it, would tend to incriminate and connect him with the commission of criminal offenses against the laws of the state, and because his refusal to produce said bill of sale before the grand jury, and his refusal to give evidence concerning it, was a right guaranteed him by the constitution and laws of this state, and because said evidence was irrelevant and incompetent to prove any issue upon said trial. In *Ex parte Wilson* (Tex. Cr. App.) 47 S. W. 906, we hold that a bill of sale under which witness had claimed to hold certain property, with the theft of which property he and others were charged, is obviously material, and, therefore, where witness shows that such bill of sale would tend to connect him with the crimes of forgery and theft, he cannot be required to produce it. The constitutional provision that "in all criminal prosecutions the accused shall not be required to give evidence against himself" applies to the giving of testimony before the grand jury as well as in court. The protection against being required to give oral testimony incriminating the witness applies equally when it is sought to require him to produce any private books or papers. It is a well-known aphorism of the law that you cannot do indirectly that which the law prohibits from being done directly. The appellant, in this case, when the effort was made to incriminate him by the forced production of the bill of sale, was compelled at that time to plead his constitutional rights; and certainly it would be violative of the letter and spirit of this constitutional provision to permit that same circumstance and act on the part of appellant (that is to say, his refusal to produce the bill of sale) to be used as a criminative fact against him in a subsequent trial of the case of theft. The constitution provides that no one shall be forced to give evidence against himself; and if an effort is made to force a party to give evidence against himself, and he is driven to the necessity of resorting to the courts to protect himself against this unconstitutional act, certainly his efforts to so protect himself should and ought not to be used as a criminative fact against him in a subsequent prosecution. We think the court erred in permitting the state to invade the proceedings in the habeas corpus proceeding. We would not be understood, however, as indicating that any facts and circumstances, other than the above, going to incriminate defendant and to discredit his testimony, would not be admissible. We therefore hold that the court erred, as stated, in permitting the habeas corpus proceeding to be injected into this trial.

Appellant complains of the court's failure to charge the jury on the law of accomplice's testimony, with reference to the testimony of the witnesses Tom Cummings and Eliza

Pearce. An inspection of the testimony of these two witnesses discloses sufficient evidence of complicity on their part in the theft to render a charge on the law of accomplices necessary. We think it was error for the court to fail to so charge.

Complaint is also made of the court's failure to charge on the law of alibi. Defendant had sworn that he was at another and different place at the time of the alleged theft, and we think the court erred in failing to charge on alibi. See *Joy v. State* (just decided) 51 S. W. 933. For the errors discussed, the judgment is reversed, and the cause remanded.

BARTLETT v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1899.)

RAPE—EVIDENCE—INSTRUCTIONS.

1. Under an indictment charging rape by force, a charge on simple assault and battery is proper.
2. In a prosecution for rape on a girl under 15 years of age, testimony of the prosecutrix that she had intercourse with defendant, and testimony of a physician who examined her a few days after the outrage that she had had intercourse with some one, is sufficient to sustain a conviction, although there is testimony of a physician that the intercourse may have occurred after the time testified to by prosecutrix.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

W. T. Bartlett was convicted of rape, and appeals. Affirmed.

Estes & King, for appellant. D. W. Wilcox and Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of rape upon a girl under the age of 15 years, she not being his wife, and his punishment assessed at five years' confinement in the penitentiary. There are no bills of exception in the record. There was no error in the court defining simple assault and battery. Among other things, the indictment charges a rape by force; and, under this aspect of the case, it was proper for the court to charge the law of assault. Nor is there any error in the court's charge on alibi. As given, it is a charge which has been often approved by this court. It is contended that the evidence is not sufficient to support the verdict. The prosecutrix makes a clear case of carnal intercourse between defendant and herself. It is uncontradicted that she is under 15 years of age. It is shown by the testimony of a physician who examined her a few days after the alleged outrage—and on this the evidence was incontestable—that carnal intercourse occurred between the girl and some one. There is testimony of a physician which tends to show the intercourse may have occurred subsequent to the time to which she testified. But these matters of conflict in the testimony were settled

by the jury adversely to appellant, and we see no reason for disturbing their verdict. The judgment is affirmed.

WOODSON v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1899.)

CRIMINAL LAW—CUSTODY OF JURY—INSTRUCTIONS—APPEAL—EXCEPTIONS.

1. An assignment of error in the admission of evidence will not be considered, when no bill of exceptions was reserved.

2. Failure of the sheriff to post notice of the appointment of his deputies cannot be urged as a ground for setting aside a verdict of a jury which was in the custody of one of such deputies.

3. A conviction will not be set aside on the ground that, before the jury was sworn or the panel completed, one of the jurors was permitted to leave the jury box for a short time.

4. A requested instruction is properly refused when its substance has been fully given in other charges.

Appeal from district court, Polk county; L. B. Hightower, Judge.

James Woodson was convicted of illegal voting at a general election, and appealed. Affirmed.

James E. Hill, Jr., and F. Campbell, for appellant. D. W. Wilcox and Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of illegal voting at a general election.

Error is urged in regard to the action of the court permitting the state to introduce a copy of the judgment of the district court of Galveston county showing appellant's conviction of a felony, and the mandate of the court of appeals showing the affirmance of the judgment. This was introduced to show his disqualification to exercise the right of suffrage. No bill of exceptions was reserved to this action of the court. It therefore will not be revised.

It is contended that J. A. Vinson was not a duly-qualified deputy sheriff. Vinson, it is asserted, summoned the talesmen, and also waited upon the jury in their retirement while deliberating upon appellant's case. This question was investigated upon motion for new trial, and it was shown that he was a deputy sheriff, and had been since 1895, and that he was appointed a deputy sheriff after the election in 1898, took the oath of office, and qualified as such officer, and was the first deputy appointed by the sheriff. In this connection it is also contended that he was not such deputy, because the sheriff had failed to post a notice in the office of the county clerk, specifying his deputies. The failure of the sheriff to post said notice cannot be pleaded here to set aside the verdict of the jury.

It is also contended that the verdict should be set aside because of the separation of the jury. This question was before the court on motion for new trial, and it was shown after the parties had accepted a part of the jury, and while the sheriff was summoning tales-

men, the juror Gay asked permission of the court, and was permitted, to leave the jury box for a short time. This was before the jurors were sworn, and before the panel had been completed. After the jury were sworn, there was no separation, but they were kept together.

Appellant requested the court to charge the jury that if they should find from the evidence that defendant did vote as alleged, believing he had a right under the law to vote, or if, from the evidence, or a want of evidence, defendant voted, not knowing that his vote was illegal, or believing that he could vote, they should acquit. This matter was fully set forth in the charge given by the court, and reiterated in two special charges asked by defendant. The charge of the court and the special charges given called this matter sharply to the attention of the jury, and instructed them that if the defendant believed he had a right to vote at that election, or if he believed that he had been pardoned by the governor, or if they had a reasonable doubt of either proposition, they should give him the benefit of that doubt, and acquit. In this respect the charge of the court was favorable to defendant. Finding no error in the record, the judgment is affirmed.

BLACKWELL v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

FALSE PRETENSES—CASHING CHECK.

It is not a crime to draw and get cashed a check on a bank where the maker has no money deposited, where there are no false or deceitful means resorted to, to induce the person cashing the check to do so.

Appeal from Tom Green county court; T. C. Wynn, Judge.

R. E. Blackwell was convicted of swindling, and appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted for swindling C. W. Zenker out of the sum of \$20, and his punishment assessed at one day's imprisonment in the county jail and a fine of \$100. The charging part of the information is, in substance, as follows: That R. E. Blackwell, by means of false pretenses and devices and fraudulent representations, then and there knowingly and fraudulently made by him to Will Hennesdorf, agent and employé for C. W. Zenker, did induce the said Hennesdorf to deliver to said Blackwell, by the means aforesaid, the sum of \$20, in lawful money of the United States, upon the representation that he, the said Blackwell, had money in the San Angelo National Bank of San Angelo, Tex., and wanted a San Angelo National Bank check, which the said Hennesdorf gave to said Blackwell; and the information then goes on and states that said Blackwell gave the said party

a check on said bank for \$20, when in truth and in fact he did not have any money in said bank, and that the said sum of \$20 was delivered to said Blackwell upon said false and fraudulent pretenses, etc. In the above we have only stated the substance of the information. However, the information and complaint are in due form. On the trial, the witness Will Hennesdorf, who is the main prosecuting witness, instead of testifying to the facts set out in the complaint and information, in his testimony, among other things, states: "If the defendant told me at that time when I cashed the check that he had any money in the bank on which it was drawn, I do not remember it." And further he stated: "No, I do not remember having cashed the check on the representations of the defendant that he had any money in the bank, for I do not remember that he made any representation to that effect, but cashed it on the check, believing it to be good. I thought from defendant's statement about having cattle at the depot that he was a cattle man, and supposed his check was good. I do not remember any statement he made, other than his statement about having cattle at the depot." We find no statement in the record controverting the testimony of the main prosecuting witness. There is no evidence in the record to support the verdict. It is not a violation of the law simply to give a check on a bank where a party has no money; but there must be some false and deceitful means and method resorted to at the time the party obtains the money upon the check, such as representing that the party has money in the bank, or that the check will necessarily be cashed, or something of this kind. *Ayers v. State*, 37 Tex. Cr. R. 1, 38 S. W. 792; *Martin v. State*, 36 Tex. Cr. R. 125, 35 S. W. 976. No evidence appearing in the record to support the verdict, the judgment is reversed, and the cause remanded.

HIGHSMITH v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1899.)

CRIMINAL LAW—CONTINUANCE.

A continuance to obtain the testimony of absent witnesses is properly refused, where their evidence would be of no service to defendant.

On motion for rehearing. Overruled.

For former opinion, see 50 S. W. 723.

Makemson & Fisher, Robt. A. John, J. M. Hurt, and G. W. Jones, for appellant. W. W. Nelms and Mann Trice, for the State.

HENDERSON, J. This case was affirmed at a former day of this term, and now comes before us on motion for rehearing.

Appellant's principal contention is to the effect that this court erred in holding that the court below did not err in overruling appellant's motion for continuance, and in refusing to grant appellant a new trial for the error committed in overruling his motion for continuance. We discussed this matter at

length in the original opinion, and we there held that appellant was lacking in diligence in suing out process for the absent witnesses, C. S. Fielder, Arthur White, and Mrs. Lizzie Hosman; that the testimony of said witnesses, even if they had been present, in our view of the case, was immaterial, inasmuch as the record shows without controversy that appellant was the aggressor in the difficulty. Appellant, however, insists that, though he may not have used diligence in procuring said witnesses, yet it appearing, after the conviction, that the testimony of said witnesses would have been material and probably true, another rule prevails, and that a new trial will then be granted in the interest of justice, although appellant may have been lacking in diligence; and, furthermore, he insists that the testimony of both the communicated threats of Fielder and the uncommunicated threats of White and Mrs. Hosman would be material, both as tending to show who was likely the aggressor and brought on the difficulty, and as tending to render more significant the actions of deceased on that occasion, from the defendant's standpoint. Appellant, in this connection, further urges that the court committed a very serious error in stating that the former difficulty between deceased's son Joe Evans and appellant occurred about a year before the homicide, whereas, in truth and in fact, it occurred, as appears from the record, only three months prior to the homicide; and also that the court was not authorized in stating that, after the time when said threats should have been communicated, deceased and appellant must have met a number of times, as they lived in the same neighborhood, etc.; and that we were further in error in stating that bad blood existed between the parties, deceased and defendant, it being insisted that the record does not disclose any animosity on the part of defendant towards deceased, however much it may indicate animosity towards defendant on the part of deceased.

We concede that we were in error in stating that the former difficulty between appellant and deceased's son Joe occurred about a year before the homicide. The record is somewhat confused on this subject, and we were thereby misled. On a closer inspection, it is apparent that the difficulty occurred between deceased's son Joe and defendant on August 21, 1897, just three months before the homicide. Of course, the time being shorter than stated in the original opinion, there would be less opportunity for the parties to have met between the time of the difficulty, in August, and the homicide, in November. Still, the parties lived close neighbors. Deceased, in going to town, traveling immediately by appellant's house, in the very nature of things there were frequent opportunities of meeting. Besides, as to the witness Fielder, by whom alone it was alleged communicated threats could be proved, it is not stated when said threats were made, save that they

were made after the difficulty between appellant and deceased's son. How long after we are not informed. It is stated that they were communicated before the homicide, but how long before we are not told. The rule is that presumptions will not be indulged to help out the failure of appellant to definitely state these matters. In the view we take of this question, we do not consider that it makes any material difference that the threats were communicated a year or only three months before the homicide. In either event, as stated in the original opinion, the parties, being near neighbors, must have met; and, if appellant entertained any apprehension of danger from deceased on account of said threats, ample opportunity was afforded to have him arrested and put under a peace bond.

In regard to the existence of bad blood between the parties, and that this feeling was shared in by defendant, we think the record throughout discloses this. We will only cull from the testimony enough to show the animus of appellant's mind towards deceased, and that it had existed for some time. The fight between Joe Evans (son of deceased) and defendant, in which the former got the worst of it, occurred about three months before the homicide. It was shown that threats by deceased against defendant were shortly afterwards communicated to him. George McCutcheon stated that he knew the bad feeling that had existed between Evans and Highsmith for some time. Deceased had been picking at John (defendant) ever since he was a little boy. This same witness testified that, during the difficulty, defendant, with his pistol drawn and presented at deceased, who had a knife in his hand, said, "God damn you, drop it! You have been making your John Branch plays with that knife before." The evidence of this same witness shows that deceased bought the knife in question some time before, and, in connection with said knife, had made some threat against defendant to this same witness, who told him that "that knife would get him into trouble yet." This, it appears, was communicated to defendant. From this testimony and other evidence in the record we do not think it can be seriously contended that appellant did not entertain animosity towards deceased antedating the homicide for some months.

Now, as to the motion for continuance, there can be no question that appellant was utterly lacking in diligence. He claims that Fielder was a material witness, and yet this record shows that he knew where Fielder lived; that his residence was near Langtry, in Val Verde county; but, notwithstanding this, he states, as a reason for his failure to issue process for said witness until the 24th of January (which was 14 days after his arrest), that he was seeking to ascertain his whereabouts, and did not learn of this until the 23d of January, 1898. This, as stated, was an utter lack of diligence on his part to procure what he alleges to be very material

testimony. The threats expected to be proven by the other absent witnesses it is not claimed were communicated. Concede, however, that the question of diligence cuts no figure when the matter comes up on motion for new trial, we still adhere to our original opinion, that an impartial review of the testimony of the eyewitnesses fails to disclose the materiality of the testimony of the absent witness. George McCutcheon, who was the only eyewitness who saw and testified in regard to the entire difficulty from start to finish, although used by the state, was evidently not an unfriendly witness to defendant. The other witnesses who saw the difficulty after it had begun and its termination were Albert Highsmith, father of appellant, Mr. and Mrs. Will Highsmith, Mattie Brown, and Susie Magruder. None of the defendant's witnesses antagonize the state's witness George McCutcheon as to the beginning of the difficulty, and, of course, as to the inception of the conflict, the case must rest on his testimony. True, several of appellant's witnesses, who state they were sitting on the gallery of Albert Highsmith's house, about 75 yards from the place of the difficulty, state they saw deceased, Evans, when he rode up to where defendant was. Will Highsmith says Evans rode along, and wheeled his horse right in behind defendant, when the difficulty began. Albert Highsmith testified on this point: "I noticed Evans for the first time when he was within twenty steps of defendant. He rode up until he got right on the boy, turning his horse near him as he approached. The defendant's horse was facing south across the road, and just as Evans' horse got behind the boy's, going east, he wheeled his horse around, and as he did so I saw him make an attempt as if he was going to cut him." Now, it will be noticed that not one of these witnesses states he was immediately present, and does not assume to state what occurred before this, except the witness George McCutcheon. This witness states that he saw defendant pass deceased just before they got across the culvert, coming in his direction. This culvert was some 200 yards from the witness, down the road in the direction of Hutto. "I did not notice anything when he passed him. When John got to the gate, I was in about four steps of the gate. John said to me, 'What makes you walk and look so sleepy?' Defendant and I were standing talking, and Mr. Evans was then about 20 or 30 steps off, coming towards us, traveling in an ordinary gait for a walking horse. As Evans came up, I spoke to him, first saying, 'Howdy, Tom;' and he said, 'Howdy, George.' When Evans was within a few feet of us, defendant turned his head towards deceased, and said to him, 'What is that you have got up your sleeve?' The deceased replied, 'That is all right;', and continued riding on. When deceased's horse's head reached a point nearly opposite the tail of defendant's horse, the defendant again asked, 'What is that you

have got up your sleeve?' Evans again replied, 'That is all right;' and sorter checked up his horse, but did not stop. Defendant then said, 'You God damned hypocritical son of a bitch, it's a knife you have, and you have it for me.' Deceased then stopped his horse, and turned facing south, in the same direction defendant's horse was facing, and, shaking the knife out of his sleeve, said, 'Well, durn you, if nothing else will do you, it is a knife, and I've got it for you.' As deceased stopped his horse and turned, defendant turned his horse around, pulling him back, and facing his horse to deceased, and pulled his pistol, and cocking it, threw it down on deceased, and continued cursing him. Deceased was at this time facing defendant with his knife in his right hand, with the blade pointing towards defendant, and was gritting his teeth at defendant. Deceased then caught hold of the lapels of his coat in each hand, and, holding his coat open, said, 'If you want to murder me, just shoot.' At this time defendant and deceased were about two horse lengths apart, defendant having pulled his horse around and back several feet towards Hutto, but still keeping his pistol leveled on deceased. About this time Albert Highsmith, defendant's father, came running out from the house, and calling to defendant to not shoot. When he got out near the road, he pulled his pistol, and, leveling it at deceased, said, 'You want to murder my boy.' Deceased replied, 'No; you want to murder me.' When Albert Highsmith got to the road, deceased turned from defendant, and rode across to near where Albert Highsmith was standing, facing Albert Highsmith, with his back turned towards defendant. Albert Highsmith told deceased to drop his knife. Deceased answered, 'I will die first.' Deceased then turned his horse again towards defendant, and with his knife still in his right hand, with the blade pointed outward towards defendant, and his arm extended, defendant then said, 'God damn you, drop it! You have been making your John Branch plays with that knife before.' Evans said, 'I will die first; if you want to murder me, just shoot.' Evans was then standing up in his stirrups, pointing his knife towards defendant, and gritting his teeth. (Witness here illustrated how Evans was motioning with his arm and knife.) John then shot him. When the shot was fired, deceased was about 6 or 7 feet from defendant. I did testify at the examining trial that it was about 14 feet, but have since learned that it was about 6 or 7 feet. When deceased was shot, he settled back in his saddle, and said, 'You have killed me; let me go home and die.' The defendant said nothing, but, as deceased turned and rode away, he said something about his friends who would see him through this. Albert Highsmith said, 'If you want any more, just come back again.' When the shot was fired, deceased was nearer to Albert Highsmith than to defendant. Both defendant and Albert High-

smith had their pistols leveled on him." We have given substantially his testimony in chief, and the cross-examination did not materially change this.

As stated before, no one but the witness George McCutcheon was immediately at the place of the difficulty, and heard and saw what the parties said and did. We do not understand that there is any clash as to the origin of the difficulty between the evidence of McCutcheon and the evidence of the defendant's witnesses. They heard nothing, and they saw nothing, until deceased stopped, and turned towards defendant, and we think a fair review of George McCutcheon's evidence establishes without controversy that appellant began the difficulty. It is strenuously urged by appellant that it appears from the testimony that deceased, as he approached defendant, who had stopped in the road to talk to George McCutcheon, was riding directly onto defendant, as if he were menacing him; but we submit that his testimony, fairly considered, does not bear out this contention. It is true McCutcheon's testimony shows that deceased was riding towards defendant, and he may have been on the same side of the lane, yet he was not coming as if to attack him or to ride him down. He was in the act of passing appellant, who called to him, not once, but thrice. When deceased was nearly opposite defendant, riding in an ordinary walk, defendant turned his head towards deceased, and said to him, "What is that you have got up your sleeve?" Deceased merely replied, "That is all right;" and continued right along. Again, when deceased's horse's head reached a point nearly opposite the tail of defendant's horse, defendant asked, "What is that you have got up your sleeve?" Evans replied, "That is all right;" and "sorter checked up his horse, but did not stop." Defendant still persisted, and denounced him as a "God damned hypocritical son of a bitch," and told him that it was a knife he had up his sleeve, and that it was for him. If this was not language calculated to provoke a difficulty, then we are unable to understand the use of plain, emphatic, abusive language.

It will be observed, in this connection, that Evans had just previously passed defendant en route from Hutto to his home, and, if he had desired to attack him, there was certainly then a better opportunity than afterwards, when defendant had reached his home, and was surrounded by his family and friends. He made no effort at this time, and the evidence shows that when defendant passed him he then had his knife up his sleeve, and defendant must have observed it. He was passing him the second time. But appellant, not content to allow him to pass along in peace, challenged him in regard to his purpose in carrying a knife up his sleeve; not content with his reply that it was all right, proceeded to denounce him in bitter and vindictive and abusive language, eminently calculated to provoke and bring on a difficulty. As stated, the origin of this difficulty must rest or fall on the testimony

of George McCutcheon, because no witness contradicts him, and, measured by his testimony, we fail to see what purpose threats, however malignant or diabolical, would have served. It occurs to us that, under such circumstances, threats, instead of being an advantage, would have been a circumstance of aggravation, as showing animus. If threats, under such circumstances, will afford a justification or mitigation of the offense, as was said in *Johnson v. State*, 27 Tex. Cr. R. 738, "a full floodgate would be given to the most wicked passion, and murder, fearful as it already is, in a tenfold greater degree would stalk through the land clothed in the panoply of the law."

If we take up the other witnesses after they come upon the scene, we fail to find, from a fair review of their testimony, that there was at any time an abandonment of the difficulty. The most that can be said is that there was a temporary cessation as Albert Highsmith came out of his house with his pistol. Nor does the testimony of any of the other witnesses suggest to our minds that at any time appellant's right of self-defense, as claimed by him, was restored, on account of any acts or conduct on his part. Both appellant and Albert Highsmith were armed with pistols. Deceased's only weapon was a knife. According to the testimony of Albert and Will Highsmith, when Albert Highsmith came out into the road with his pistol, deceased, from some account, turned from defendant, and confronted Albert Highsmith. He says that he was going to his boy, but deceased turned his horse, and cut him off, and then drew his knife on him in a striking position; that he then drew his pistol, and said, "You want to murder my boy." Deceased replied, "You want to murder me." Both defendant and Albert Highsmith, it seems, about this juncture, demanded that he drop his knife, and he replied that he would die first. From some cause deceased turned towards defendant, according to their testimony, and advanced on him, when he shot him. At no time, does it occur to us, was there a stoppage or interruption of the difficulty. Events followed each other in rapid succession, and evidently a very short space of time ensued between the beginning and the end of the difficulty. Appellant, having provoked the difficulty, followed it up. Reinforced by his father, both armed with pistols, they had a vast advantage over deceased; and, under the circumstances exhibited in this record, they had no right to disarm him, much less to slay him because he refused to be disarmed.

The animus of defendant is further manifest by his declarations made immediately after the homicide. As testified by Susie Magruder and Mattie Brown (two little visiting girls at the house of Albert Highsmith), defendant said, as he came in: "'God damn him, I wish I had killed him. God damn him, I believe I will go and kill him yet.' He then said to us: 'Little girls, you need not be afraid. All of this is caused by little girls' talk.'" In our view of the case, it makes no difference that

deceased when he was shot was advancing on defendant with a drawn knife. His adversary had begun the difficulty. Reinforced by his father, and armed with superior weapons, they had followed it up. If deceased did advance upon defendant, menaced and beset as he was, he had a right to act in self-defense; and we fail to see how the threats proposed to be proved by the absent witnesses, whether communicated or uncommunicated, would in any wise, either at the beginning or during the entire progress of the difficulty, have benefited appellant. According to the original opinion, what deceased did after he was attacked was proved by positive testimony. His conduct was manifest, and it did not require threats to give it additional significance. Nor, as before stated, was it a question as to who began the difficulty. There was no controversy as to this matter. In whatever light the question may be viewed, we fail to see what benefit the testimony of the absent witnesses would have served in this case.

We understand appellant also complains of some of the charges of the court, and that the court should have given some of the charges requested by him. This matter was discussed in the original opinion, and we do not deem it necessary here to reiterate what was then said. The motion for rehearing is overruled.

BYAS v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

CRIMINAL LAW—FORMER ACQUITTAL—RAPE—BURGLARY—ALIBI—INSTRUCTIONS.

1. A plea of former acquittal may be stricken out by the court, where the indictment shows that the former acquittal was for a distinct offense, other than that for which the accused is on trial.

2. A former acquittal of an attempt to commit rape is not a bar to a prosecution for an attempt to commit burglary for the purpose of committing rape, involving the same offense.

3. Defendant's denial that he was at the place where the burglary was committed does not, of itself, require a charge on alibi.

Appeal from district court, Tarrant county; Irby Dunklin, Judge.

Jesse Byas was convicted of an attempt to commit burglary, and he appeals. Affirmed.

O. S. Lattimore, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an attempt to commit burglary, and his punishment assessed at two years' confinement in the penitentiary.

Appellant excepted to the action of the court in striking out his plea of former acquittal. He was indicted in this case for an attempt to commit burglary. The plea of former acquittal set up an indictment in two counts,—the first charging him with an assault with intent to rape, and the second charging him with an attempt to commit rape. The plea alleged that it was one and the same trans-

action for which appellant was then being tried. On motion, the plea was stricken out, and appellant reserved an exception. It has been held that it was competent for the court to strike out a plea of former acquittal where the indictments show that the former acquittal was for a distinct offense from that for which the party was being tried. *Wright v. State* (Tex. Cr. App.) 40 S. W. 491; *Wheelock v. State* (Tex. Cr. App.) 38 S. W. 182. Counsel insists, however, that appellant could have been convicted under the former indictment for an attempt to commit rape, and this would be a bar. The allegation was that it was one and the same transaction, and he refers us to the case of *Herera v. State*, 35 Tex. Cr. R. 607, 34 S. W. 943. That was a case in which the defendant had been previously convicted for an assault with intent to murder, and had served his time, and was afterwards put on trial for the same transaction on a charge of robbery. We there held that the plea of former conviction for assault with intent to murder, involving the same transaction, was a good plea in bar. But we do not believe it is applicable to this case. An attempt to rape by force, as defined by our statute, requires the same character of force as in an assault, but goes beyond mere preparation, and stops short of the assault itself. This definition was thoroughly discussed in *McAdoo v. State*, 35 Tex. Cr. R. 603, 34 S. W. 955. Evidently an attempt to commit a rape apprehends that the party is in a situation to make an assault; that is, conceding that an attempt to commit a rape by force is sufficiently defined by the statute, and can be committed at all. An attempt at burglary for the purpose of committing rape does not apprehend that the party is in a situation to commit either an attempt to rape or an assault with intent to commit a rape. The charge of an attempt to commit a burglary for the purpose of committing a rape apprehends that the party attempting the burglary must commit it before he can commit the ulterior offense. Though, on the former trial, proof may have been made of the attempted burglary, as part of the res gestae, yet, if the case had stopped there, there would have been no proof of an attempt to rape, or of an assault with intent to commit a rape, because the party must make a breach of the house before he could do either. And if, on a former trial, the proof had stopped with an attempted burglary of the house, the court should have instructed an acquittal. These are as much distinct offenses as burglary and theft, or as forgery and uttering a forged instrument, and a conviction or acquittal of the one is not a bar to the prosecution of the other. The court did not err in striking out the plea.

Appellant excepted to the charge of the court because it failed to submit the question of alibi to the jury. It appears that appellant excepted to the charge of the court, as given, for the reason that it failed to charge on alibi. The court informed counsel that if

he really desired such a charge, and would prepare it, the court would give it, although the court thought it doubtful whether such a charge was applicable, from the facts proved on this trial. We have examined the record carefully, and in our opinion such a distinct charge was not required. We do not understand that appellant offered any affirmative proof that he was elsewhere at the time of the alleged attempt at burglary, further than that he denied being at the place when it was committed. He was evidently in that vicinity, according to the testimony of his own witnesses. The general charge of the court that they should acquit defendant unless they believed "from the evidence, beyond a reasonable doubt, that defendant did by force attempt to enter the house mentioned in the indictment, and that it was then and there his intention to have carnal knowledge of the said Ella Garrett by force, and without her consent," and the court's charge on reasonable doubt, we think, were sufficient. We have examined the court's charge in connection with the special requested charges, and in our opinion the charge of the court sufficiently covered all the material issues in the case, and none of the requested charges were necessary. No error appearing in the record, the judgment is affirmed.

OROOMES v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1899.)

ASSAULT WITH INTENT TO RAPE—EVIDENCE—RES GESTÆ—CONSENT—CRIMINAL LAW—APPEAL—STATEMENT OF FACTS—FILING—DILIGENCE—STATUTES—CONSTRUCTION.

1. In a prosecution for an assault with intent to rape a child, her declarations, made immediately after she came out of the house where she was assaulted, are admissible as a part of the *res gestæ*, though she was incompetent as a witness, as having no capacity to understand the obligation of an oath.

2. Accused's statement made to the officer who arrested him is inadmissible in his behalf to rebut testimony that he had previously made a different statement tending to admit guilt.

3. An assignment that a verdict of guilty is contrary to the law and the evidence will not be considered in the absence of a statement of facts.

4. A district judge has no authority to file a statement of facts in a criminal case as of a date within 10 days allowed by his order for filing, where it was not presented within such time.

5. An accused's attorney does not exercise such diligence as to entitle accused to a consideration of a statement of facts that was not filed in time where the attorney sent the statement to the county attorney with request that he submit it to the judge, and have it filed.

6. Under Pen. Code, art. 608, providing that, "if any person shall assault a woman with the intent to commit the offense of rape, he shall be punished," one may be convicted of assault with intent to rape a child under 15 years old, though she consented to sexual intercourse, and no force was used, in view of article 633, making it rape to have carnal knowledge of a child under 15 years old, though she consents, and article 634, making the definition of force required for an assault and battery applicable to rape, and the

Code defining an assault as any unlawful violence on the person of another.

7. When the words of a statute are not explicit, the intention is to be collected from the context, the occasion and necessity of the law, the mischief felt, and the remedy in view.

Davidson, P. J., dissenting.

Appeal from district court, Johnson county; J. M. Hall, Judge.

George Croomes was convicted of an assault with intent to rape, and he appeals. Affirmed.

O S. Lattimore, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was indicted for an assault with intent to rape one Nora McClure, a female, then and there under the age of 15 years; and another count is that he did then and there unlawfully attempt to have carnal knowledge of Nora McClure, a female, then and there under the age of 15 years, said attempt not constituting an assault with intent to commit the offense of rape. Upon this indictment appellant was convicted, and the jury assessed his punishment at confinement in the penitentiary for 35 years, and he appeals.

The record does not contain a statement of the facts, and there are but two bills of exception. The first bill of exceptions complains of the action of the court permitting Mrs. McClure, the mother of the injured child, to testify as to certain statements which were made by the child to her a short time after the alleged assault, to which defendant objected, because such statements would be hearsay, and because said Nora McClure was incompetent to testify, and such evidence would be the repetition of the statement of a person who was so incompetent; which objections were overruled, and Mrs. McClure testified: "I was about twelve feet from the negro's house, when the door opened, and Nora came out, crying. I took her up, and asked her what was the matter, and took her about fifteen steps away, and talked to her about it. And she said George got her to come into his room by telling her he wanted to show her a pretty, and that he unbuttoned her panties and unbuttoned his pants, and took out a long black thing, and hurt her." It appears from the first part of this bill that the judge had declared said Nora McClure as incompetent to testify, on the ground of incapacity to understand the nature and obligation of an oath. We do not think the contention of appellant is correct. The mere fact that the child was incompetent to testify in court would not render her statement inadmissible when the same was almost a part and parcel of the act itself. It appears that the mother did not take the child more than 15 steps from where the injury occurred, and the declaration was there made by her as to what appellant had done to her. We think the evidence was admissible as part of the *res gestæ*, and the mere fact that the child was incompetent to testify as a witness in

the trial would not render her statement, in the present instance, inadmissible. Certainly her acts and declarations do not show any character or kind of premeditation, but are what the books frequently term "verbal acts," and clearly come within the rule of *res gestæ*. *People v. Ah Lee*, 60 Cal. 85; *McGee v. State*, 31 Tex. Cr. R. 71, 19 S. W. 764; *Testard v. State*, 26 Tex. App. 260, 9 S. W. 888; *Castillo v. State*, 31 Tex. Cr. R. 145, 19 S. W. 892; *Whart. Cr. Ev.* (8th Ed.) pp. 262, 263; *Underh. Cr. Ev.* p. 468. The only authority we have found that states the contrary of this proposition is *Underh. Cr. Ev.* p. 474, in this language: "If the complainant is too young to comprehend the nature and responsibility of an oath, her testimony is not admissible, nor are her statements made out of the court permitted to be proved." In support of this proposition the text cites *Reg. v. Nicholas*, 2 Car. & K. 246; *Rex v. Williams*, 7 Car. & P. 820. These authorities are not before us, but we do not think they announce the correct principle of the law in this case.

Appellant's second bill of exceptions complains of the action of the court permitting the witness Mrs. McClure to testify: That when she went towards defendant's room the door was opened, and the child came out, and the defendant sprang behind the door; and that she saw the skin of his body between his pants and shirt; and that, after she took the child away, she came back, and talked to defendant, and asked him what he meant by mistreating her child so; and defendant said: "Mrs. McClure, I have not hurt her yet. For God's sake, don't tell on me, and I will do anything on earth you want me to." That thereafter defendant was a witness on his own behalf, and testified: "The child came out to my room, with her little drawers down, and wanted me to fasten them up, and I declined, and she commenced to cry; and her mother came and took the child down to the closet, and whipped her, and then came back, and asked me what I had done to the child; and I said, 'Nothing;' and she said I had, and that she was going to tell her husband on me, and he would kill me; and I begged her not to do anything like that, for he might just come out there, and kill me, without giving me a chance to explain; and I did not say to Mrs. McClure, 'I have not hurt her yet; for God's sake don't tell on me.'" And that thereafter defendant offered as a witness Willey Pollard, the deputy sheriff who arrested him, and offered to prove by said Pollard that he had a conversation with defendant two hours after his arrest, and before he had consulted counsel, and before he had seen any one; and that defendant, in said conversation with him, made the same statement as made by him on the witness stand,—to which the state objected, and the court sustained the objection. And the bill further shows that by said Pollard defendant would have proved that about two hours after his arrest he made to said Pol-

lard the same statement as by him here testified. There certainly was no error in the court's refusal to permit the introduction of the statement of the witness Pollard, because the same was a self-serving declaration of appellant, and as clearly within this rule: It is possible to make one. We do not gather from the bill that appellant objects to the testimony of Mrs. McClure, but, as we understand the bill, her testimony was placed in in order to show that the testimony of the witness Pollard was admissible. We do not think her testimony, although admissible in itself, would justify the witness Pollard to detail the self-serving declarations of appellant. We know of no rule which says that the admission of testimony perfectly legitimate will justify or furnish a predicate for appellant to introduce self-serving testimony.

Appellant's first ground of complaint in his motion for new trial is that the verdict of the jury is contrary to the law and the evidence. We cannot consider this contention in the absence of the statement of facts. And in this connection we find among the papers what purports to be a statement of the facts filed since the making up of the transcript. The transcript was filed in this court on February 23, 1899, at Dallas, and the purported statement of facts was filed on March 15, 1899. Attached to the purported statement of facts is an affidavit, substantially as follows: "O. S. Lattimore states that he was attorney for appellant, who was tried on June 18, 1898, in the district court of Johnson county, charged with assault to rape one Nora McClure; that in the afternoon of the date of said trial three witnesses testified; that up to noon there was no stenographer to take down the evidence, but that when court adjourned for dinner affiant procured the services of H. R. Whyte, a competent and reliable stenographer, who took down the testimony of the other witnesses and of Mrs. McClure when she was recalled in the afternoon; that all that part of the statement of facts heretofore attached was taken down and written out by said stenographer. Affiant says that immediately after the conviction of said Croomes he made a motion for new trial and in arrest of judgment, which was duly filed. Affiant requested that he be notified at his home, in Ft. Worth, Texas, of such time as the district judge would hear said motion. Affiant was subsequently notified that said motion would be heard and disposed of upon, to wit, the _____ day of _____, and was present, and presented said motion in person; but that same was overruled. That said day upon which action was had upon said motion was at the end of the said term of the court, and affiant moved the court to grant him a ten-day order in which to file said statement of facts, which the court stated to affiant would be entered. That Hon. J. M. Hall, the judge of said court, then stated to affiant that, if said statement of facts was not agreed upon and filed within the time so allowed by law, that

he would have the same filed back as of a date within said time so allowed by law. That affiant immediately requested said stenographer to make out and prepare that part of said statement of facts which was taken down by him, and affiant at once prepared a correct statement of such of the facts of this case as were not heard by said stenographer; and within a day or two after the order of said court overruling said motion affiant forwarded said entire statement of facts to the county attorney of Johnson county, requesting him to examine same, and agree to same, and have same approved by said judge, and filed with the record. That prosecuting attorney, instead of doing so, and failing and refusing to agree to said statement, and to submit same to said judge, or to file the said statement of facts, together with one made out by himself with said judge, kept same for some time, and then returned same to affiant with a statement that he could not agree to same, and with a further statement that he would not agree to the statement made out by the stenographer. Affiant thereupon returned said statement to said county attorney with the request that he submit same to the said judge, whom affiant was informed was away from his said home, and in another part of his district, and to have the same filed. Affiant says that he was not informed that there was no statement of facts filed, and fully believed that same was filed until, to wit, the — day of January, 1890, when he was informed that none was filed, and then asked said prosecuting attorney for his said statement, and said attorney informed him that he did not know where the same was. Affiant further states that he made every effort to get the same filed as above indicated, and that the statement hereto attached is a correct statement of the facts." We have thus copied the entire showing of appellant why the statement of facts was not filed in accordance with law. The same presents no semblance of reason or excuse why the same was not filed, and we would not review the matter at all were it not for the serious charge against appellant. Affiant states that the district judge agreed to file the statement of facts back, although it were not presented within the 10 days allowed by his order. There is no statute or law in Texas that permits the district judge to do anything of the kind; and certainly, if appellant was relying upon such matter, it would not show diligence, but would show a reckless disregard of a statutory provision. This trial occurred in Johnson county. Appellant's counsel states that he resides in Ft. Worth. All the above and foregoing facts, without reiterating them here, show that no such diligence has been resorted to by appellant or his counsel as will entitle him to a consideration of the purported statement of facts. *Nichols v. State*, 37 Tex. Cr. R. 616, 40 S. W. 502; *Spencer v. State*, 34 Tex. Cr. R. 238, 30 S. W. 46, and 32 S. W. 690.

The fourth ground of appellant's motion for

new trial is that the court erred in refusing to instruct the jury that there must have been an intention in the mind of defendant at the time of the alleged assault to use whatever force might have been necessary to overcome resistance on the part of the said Nora McClure. And his fifth ground is that the court erred in failing to tell the jury that in an assault with intent to rape there must have been force used by defendant. The sixth ground is that the court erred in failing to define an assault with intent to rape. We will consider these assignments together, as they involve the principle of law enunciated in *Hardin v. State* (Tex. Cr. App.) 46 S. W. 803. In order to get the matters involved in this question in proper shape, we will state the statutes germane to and bearing upon the offense charged in the indictment. Article 633. Pen. Code, defines rape as "the carnal knowledge of a woman, without her consent, obtained by force, threats or fraud, or a female under the age of fifteen years, other than the wife of the person, with or without her consent, and with or without the use of force, threats or fraud." Article 608 provides that, "if any person shall assault a woman with the intent to commit the offense of rape, he shall be punished," etc. Article 611 defines an assault with intent to commit a crime as the existence of facts which bring the offense within the definition of an assault, coupled with the intent to commit such offense. Article 587 defines an assault as an attempt to commit a battery. Article 640 provides that on the trial of an indictment for rape, if that offense, though not committed, shall be attempted by the use of any of the means spoken of in articles 634 to 636, to wit, force, threats, or fraud, but not such as to bring the offense within the definition of an assault with intent to commit rape, the jury may convict of an attempt to commit the offense. The latter clause of the syllabus in the *Hardin Case*, supra, which conforms with the opinion, is: "Held, that there could be no assault of a female consenting to sexual intercourse, though under fifteen years of age, and therefore, rape not having been consummated, a defendant could not be convicted of an assault with intent to rape; nor, since there was no force, threats, or fraud used, was he guilty of an attempt to commit the offense, as provided in article 640." We do not agree to this proposition, but think the very converse of this is the law of this state. Before passing to other matters, we note one statement in the opinion in the *Hardin Case*, supra, as follows: "Why could not the legislature prohibit the consummated act without intending to punish for an attempt to commit the act? In other words, we are of opinion that the legislature simply desired to punish the completed act, and nothing more." We wish to say here that the legislature never did expect that the courts of this country would place the interpretation upon the law of assault with intent to rape that was placed upon it in the

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from being an assault. If the act is unlawful, it is an assault. The mere fact that the party injured consents to it does not prevent it from being an assault. Therefore, without elaboration, we hold that, whether the female under 15 years of age consents or not to an assault with intent to rape, it is an offense, and it makes no difference whether or not there is any force. To hold otherwise destroys the unity of these statutes, and renders invalid a provision of the assault with intent to rape statute. This position is strengthened by the previous adjudications of our own court. As far back as *Mayo v. State*, 7 Tex. App. 342, Presiding Judge White said, in combating the idea that force is necessary to make out an assault with intent to rape: "The answer to this position is that the law makes carnal intercourse of a female under ten years ipso facto rape; the tender years of the female stand in lieu of and supply all that would be requisite to allege and prove in other cases. Now, if the party can be convicted and punished where he has accomplished his purpose, is it not, a fortiori, absurd to say he cannot be punished under similar circumstances for attempting to perpetrate the crime? The law says it is not necessary that force, fraud, or threats shall be used on a female under ten in ravishing her, and, if she consents, it is rape nevertheless. And so in the attempt she may consent, and yet the attempt is an act of force and fraud, because she is incapable of consent, and to take advantage of her consent is both force and fraud in contemplation of law." This decision was rendered some time during the year 1879, and it has since then, by a train of decisions of this court, been upheld, until June 15, 1898, when the case of *Hardin v. State*, supra, was decided. And in *Mooney v. State*, 29 Tex. App. 257, 15 S. W. 724, Judge Hurt, who rendered the opinion in *Hardin v. State*, supra, used this language: "The second position urged by the state is that, 'the woman being asleep when penetrated, rape is the result, though no greater force is used than that involved in the act.' We have given this proposition a thorough examination. The authorities are quite inharmonious. Apparently there is a serious conflict of opinion upon this subject, but, when carefully scrutinized, the conflict will be found to a great extent apparent only. Our researches lead us to these conclusions: If the statute defines rape to be carnal knowledge of a woman by force, and without her consent, then the proposition above stated is correct. On the other hand, if the statute defines rape to be the carnal knowledge of a woman by force, and against her consent, then the proposition is not correct. Some cases hold the proposition correct whether the statute says 'against' or 'without.' *Harvey v. State* (Ark.) 14 S. W. 645 (Dec. 1, 1890). But we will let Lord Campbell, C. J., state the rule. He states the result of the authorities very clearly, as follows: 'The question is, what is the real definition of the crime of rape,—whether it is the

ravishing a woman against her will, or without her consent. If the former is the correct definition, the crime is not in this case proved; if the latter, it is proved.' *Reg. v. Fletcher. Bell, Crown Cas. 71*. But it may be asked, what about force? If only the force commonly involved in the act is sufficient, why is it made a part of the definition of the offense? From the authorities we conclude that force is added as a test of consent. Without any test, we know absolutely that, if asleep, she did not consent. If awake, to be raped, she must not consent. Here we have a question of fact which, owing to its nature, is very difficult of solution, and hence the necessity for a severe and searching test. * * * When the woman is asleep there is no contest of strength, and hence no necessity for greater force than that ordinarily involved in the act." We think the principle enunciated in the *Mooney Case*, supra, is correct, and clearly at variance with the principle announced in *Hardin v. State*, supra. Referring to the authorities throughout the United States, we find this general summary of the same in 2 Am. & Eng. Enc. Law (2d Ed.) p. 987: "By the weight of authority in the United States a child under ten years (in some states twelve years) of age is incapable of consenting to the sexual act, and therefore any one attempting to have sexual connection with a female under the age of consent is guilty of rape if the connection is consummated, and of assault with intent to rape if it is not consummated, even if such female does give her consent to the act."

We do not deem it necessary to review the authorities on this question further, but will say in conclusion that we do not think that the legislature intended to say that a child under the age of consent could not have an assault with intent to rape committed upon her where she consents. Nor do we think it necessary to allege that any force was used, or to prove any force; and therefore we hold that the indictment in this case alleges an offense within the letter and spirit of the law of assault with intent to commit rape upon a female under the age of 15 years. No error appearing in the record, the judgment is affirmed.

DAVIDSON, P. J., dissents.

McAVOY v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

ASSAULT WITH INTENT TO RAPE—INDICTMENT—SEVERAL COUNTS—CONSTRUCTION—INSTRUCTIONS—CONSENT.

1. An indictment for assault with intent to rape may contain two counts,—one alleging an assault with intent to rape a woman by force, she being under 15 years of age; and the other alleging an assault with intent to rape a child under the age of 15 years, with allegations of force and without force.

2. Where an indictment alleges that defendant assaulted a child under 15 years of age, to

"ravish and carnally know," defendant may be convicted by proof of force or without such proof.

3. In a prosecution for an assault with intent to rape, it is error to unite an instruction on the subject of an assault with force and without force into one instruction, as an accused is entitled to a distinct enunciation of the different phases of the law applicable to the facts of the case.

4. One is guilty of an assault with intent to rape a child under 15 years of age where he has slightly touched her person while intending to have carnal intercourse with her.

Appeal from district court, El Paso county; A. M. Walthall, Judge.

L. N. McAvoy was convicted of an assault with intent to rape, and he appeals. Reversed.

Jay Good, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an assault with intent to rape, and his punishment assessed at 10 years' confinement in the penitentiary.

The indictment, in the charging part, is as follows: "That L. N. McAvoy, on or about the 18th day of December, A. D. 1897, and anterior to the presentment of this indictment, in the county and state aforesaid, in and upon Carrie Race, a woman, then and there under the age of fifteen years, did make an assault, with the intent then and there to commit the offense of rape upon the said Carrie Race by then and there, without the consent of the said Carrie Race, attempting by force, threats, and fraud to have carnal knowledge of her, the said Carrie Race, the said Carrie Race not being then and there the wife of the said L. N. McAvoy; against the peace and dignity of the state. And the grand jurors aforesaid, upon their oaths aforesaid, do further say, charge, and present in and to the district court of El Paso county, Texas, at the January term, 1898, thereof, that heretofore, on or about the 18th day of December, 1897, in El Paso county, in the state of Texas, L. N. McAvoy did then and there in and upon Carrie Race, a female, then and there under the age of fifteen years, make an assault, with the intent on the part of him, said L. N. McAvoy, then and there, by means of said assault, her, the said Carrie Race, to ravish and carnally know, she, the said Carrie Race, not being then and there the wife of him, said McAvoy; against the peace and dignity of the state." Appellant filed a motion to quash the indictment for the reason that it alleges in one place that Carrie Race, the party alleged to be assaulted, was a woman, and in another place that Carrie Race was a child under the age of 15 years, and could not consent to the defendant having carnal intercourse with her; and that the defendant, in order to properly prepare his defense, had a right to know whether he was charged with assaulting a woman capable of consenting to carnal intercourse, or a child under the age of 15 years. We do not think there is any merit in this

contention. An inspection of the indictment shows that it has two separate and distinct counts,—one of assault with intent to rape a woman by force, she being under 15 years of age; and another to rape a child under the age of 15 years, with allegations of force and without force. In this connection, however, we desire to call attention to a clause in the indictment wherein appellant is charged with assault with intent to rape a child under 15 years of age. It states that "L. N. McAvoy did then and there in and upon Carrie Race, a female, then and there under the age of fifteen years, make an assault * * * to ravish and carnally know," etc. We have heretofore held that the word "ravish" presupposes force in the carnal knowledge, and we hold that where the indictment alleges "ravish and carnally know," and also stated that the party is under 15 years of age, that the prosecution can be successfully maintained by proving force or not, according to the proof in the case; in other words, we hold that such an indictment charges force by the use of the word "ravish," and that the term "carnally know" does not charge force, when applied to a female under 15 years of age. We think this indictment is good.

Appellant, in his motion for new trial, complains of the following portion of the court's charge, to wit: "Now, if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, in the county of El Paso, and state of Texas, on or about the 18th day of December, 1897, did make an assault upon the person of Carrie Race with an intent on his part then and there to commit the offense of rape upon her, the said Carrie Race, by then and there, with or without her consent, having carnal knowledge of her; and if you further believe from the evidence beyond a reasonable doubt that the said Carrie Race was then and there a female under the age of fifteen years, and not the wife of the defendant, L. N. McAvoy; and if you further believe from the evidence beyond a reasonable doubt that at the time defendant made said assault upon the said Carrie Race (if you find that he did make said assault upon her) that the defendant intended to gratify his passion upon her person, and to the extent above defined, and that he intended to do so at all events, and notwithstanding any resistance on her part; and if you further believe from the evidence that at the time of said alleged assault the said Carrie Race did not then and there give her consent thereto, and should you so believe beyond a reasonable doubt,—then you will find the defendant guilty of assault with intent to rape, as charged in the first count in the indictment, and assess his punishment at confinement in the penitentiary for any term of years not less than two." An inspection of this charge shows that it is a contradiction in terms. We do not mean to be understood as saying that, where the evidence authorizes it, the court should not be permitted to charge an assault

with intent to rape by force or without force as the circumstances may authorize; but we do not think it is proper to mix and mingle these two charges as has been done in this case. We think appellant has a right to clear and distinct enunciation of the different phases of the law applicable to the facts of the case. This charge does not award him this privilege. We think the charge was erroneous in the particulars pointed out.

Appellant further complains of the charge of the court in telling the jury that "the slightest entry, however,—even an entry between the labia of the pudendum,—would constitute rape," etc. We think it would be better, where technical words of this character are used, to explain to the jury the meaning of the same.

Appellant also complains that the court erred in instructing the jury that the slightest touching of the person of Carrie Race, with the ulterior purpose and intent on the part of defendant at the time to force his male organ into the female organ of the said Carrie Race, would constitute an assault with intent to rape. This charge would be applicable to the second count of indictment. This was decided adversely to appellant's contention in *Croomes v. State* (decided at the present term) 51 S. W. 924; and for a discussion of the principle of law involved in this matter, and the special charges asked by appellant, reference is made to the opinion in that case. We do not think it necessary to review the other assignments of error. The judgment is reversed, and the cause remanded.

LUTTRELL v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1899.)

CRIMINAL LAW—CHANGE OF VENUE—ESTOPPEL—CONTINUANCE—DILIGENCE—HEARSAY EVIDENCE—BRIBING WITNESS—IMPEACHMENT—REFRESHING RECOLLECTION.

1. A change of venue granted in 1894 under an indictment then pending, on the ground of prejudice against the accused, is not res judicata where a new indictment for the same transaction is presented in the same court three years later.

2. An agreement that the court would authorize a continuance of the cause if no motion for a change of venue would be made at the succeeding term does not estop the accused from making such a motion at the succeeding term.

3. A motion for a continuance is properly refused where diligence is not exercised.

4. A witness cannot testify to what others have told him in regard to matters connected with the criminal offense, since hearsay.

5. It is proper to reject evidence where its relevancy is not shown.

6. It will not be presumed that the accused authorized his attorney to bribe a witness.

7. It is reversible error to permit a witness to testify that the attorney for defendant attempted to bribe him, where it is not shown that defendant authorized his attorney so to do.

8. Evidence of a witness' general reputation for veracity is admissible where testimony has been offered to show that he had been in jail, or charged with criminal offenses.

9. A witness may refresh his recollection by the testimony taken down by him in the grand-jury room.

10. It was error to allow the state to prove by a witness that the city marshal had arrested him on the previous day, where no connection between the arrest and any issue in the case is shown.

Appeal from district court, Hunt county; Howard Templeton, Judge.

Louis Luttrell was convicted of murder in the first degree, and he appeals. Reversed.

R. L. Porter, S. D. Stinson, W. C. Jones, John Wynne, and Tom C. Thornton, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life, and he appeals.

The case was filed at the Dallas branch of this court on October 1, 1897, and was submitted on the 20th of April, 1898, at the Austin term. The record is written with a pen, and contains 436 pages; 215 pages thereof being the statement of facts. This record should have been condensed into not exceeding 200 pages; 50 pages of which would have been sufficient for the statement of facts, showing every essential feature of the case to be passed on by this court. We consider it a just subject of criticism that this court has, by this method of practice, been compelled to go through much unnecessary matter, consuming time that should have been devoted to other subjects. It serves but very little purpose in making a statement of facts to embody every word and sentence each witness may have uttered on the stand. All that we desire is a proper presentation in the statement of facts of the salient features of the case; and, where witnesses agree on any given point, it would be a very easy matter to state what one witness testified on the question, and then state that others, naming them, agree with such witness. If a fact is not traversed, or is conceded, such should be stated; and where witnesses testify on immaterial points, not important to be considered in any bill of exceptions or charge of the court, such might be well omitted. Of course, this does not apply to cases in which it is insisted that the evidence does not support the verdict. In all such cases the record should be full. We make these remarks because the record is unnecessarily large and unwieldy. But these observations apply equally in many cases that come to this court, and we may be compelled in self-defense, when such records come up, to adopt a rule requiring the parties to restate and condense the record.

On a night in September, 1893, one Ed Doggett (a young blacksmith, about 20 years of age), on his way from the business part of the city of Greenville to his home, a short distance from the public square, was shot and killed on one of the public streets of said city, the slayers evidently being con-

cealed in a lumber yard fronting on Stone-wall street. At the January term, 1894, the grand jury of Hunt county returned an indictment against defendant and one John English for the murder. The venue in the case was subsequently changed to Collin county on the ground of the existence of prejudice against appellant in Hunt county. The case pended there for several terms of court, and was eventually dismissed on the part of the state, because of its inability to procure testimony to secure the conviction of appellant. Subsequent to this the state discovered other testimony, and the parties were again indicted in Hunt county, on January 30, 1897. At the following July term the case was called for trial. A trial was had, which resulted in the conviction of appellant. On the trial the state offered the positive testimony of an eyewitness to the homicide, and this evidence was strongly reinforced by circumstances testified to by other witnesses. The motive assigned by the state for the homicide was to the effect that appellant and John English, a short time prior to the killing, attempted to rob the First National Bank of Greenville, and that deceased was either cognizant of same, or had knowledge of some fact in connection therewith that would lead to the identity of Luttrell and English as the guilty parties; and that on said account appellant and his co-defendant conspired together, and in pursuance thereof shot and killed deceased. Defendant entered a plea of not guilty, and relied on the weakness of the state's case, and also on the plea of alibi. On the trial, appellant filed a motion to change the venue of the case on the ground of prejudice against him, and on the ground that there was a secret formidable combination against him; and in this connection he also insisted that, the court having formerly changed the venue on a previous indictment to Collin county, the question of a change of venue was *res adjudicata*, and that it was the duty of the court to recognize this, and change the venue of the case. With reference to the latter proposition we have this to say: That the former change of venue, made in 1894, of an indictment and case then pending against appellant in Hunt county, on the ground of prejudice then existing against him, could not be an adjudication of the question on the new indictment for the same transaction (the old one having been dismissed), presented in the district court of Hunt county in 1897, three years later. It was a new indictment, presented long subsequent to the change in the former case, and under new conditions. The court in such case might take cognizance of the former change, and it might afford some evidence of the existence of prejudice formerly; but it could not be considered *res adjudicata* as to the then existence of prejudice in Hunt county. The court did not err in overruling the application on this ground. The state

controverted the appellant's motion for a change of venue on the ground of prejudice and formidable combination, and in connection therewith the court explained that the parties at a former term of the court (defendant being present) had agreed that the court would authorize a continuance of the cause at that term if they would not make a motion for a change of venue at the succeeding term of the court. This was claimed to be an estoppel on appellant, but we cannot so consider it. On the motion the court heard testimony pro and con, and we are not prepared to say that the court abused its discretion in refusing to change the venue.

Appellant made a motion for the continuance of said cause. Clearly, appellant was lacking in diligence, and on this ground the court was justified in overruling the motion.

Appellant objected to the testimony of the witness Jack Williams to the effect that Neal Fitts sent for him one night to help catch a horse out on the prairie, and that Will Fitts and a negro told him that a couple of men had ridden up to the lot, and put guns in their faces, and asked where he (witness) was. This testimony was hearsay, and its relevancy was not shown. We do not think it was admissible. The state was permitted to show by Jack Williams (who was an important witness in matters pertinent to the homicide and the connection of appellant therewith) that P. C. Arnold, an attorney for defendant, attempted to bribe him (witness) to leave the country. Defendant objected to this testimony—First, because it was hearsay; and, second, because it was calculated to unduly prejudice the action of the jury against defendant. These objections were overruled, and the court, in approving the bill, states that it was shown that Arnold was at the time Luttrell's attorney, and was acting as such in the transaction. If appellant was shown to have been connected with or had authorized the action of Arnold, said testimony would not only have been admissible, but would have been very damaging to appellant. But aside from the fact that he was the attorney of appellant, there is absolutely no testimony tending to show that he was authorized by appellant to bribe, or offer to bribe, said witness to leave; and we apprehend that it will not be seriously contended that authority to bribe a witness comes within the scope of an attorney's employment to assist in the defense of the case. In the absence of some testimony or statement in the bill of exceptions showing some authority on the part of defendant's counsel to bribe a witness, it cannot be presumed that such authority was given. However beneficial the absence of a witness may be to a defendant in any given case, in the absence of some proof of authority, any attempt on the part of counsel to get rid of a witness must be attributed as of his own motion; yet it cannot be gainsaid that such testimony coming before a jury must necessarily be fraught with

injury to an appellant on trial. In the absence of proof of authority, the jury would nevertheless be apt to believe that the lawyer did not act on his own responsibility, but that there must have been some suggestion from the defendant, and so, without proof, visit upon defendant the sin of his counsel. This is not a new question in this court, but it has always been held that, before testimony of this character is admissible in any case, there must be proof of some connection or of some authority conferred by defendant; otherwise, the testimony as to such defendant is purely hearsay. *Favors v. State*, 20 Tex. App. 156; *Barbee v. State*, 23 Tex. App. 199, 4 S. W. 584; *Nalley v. State*, 28 Tex. App. 387, 18 S. W. 670. The state introduced evidence to show that the state's witness Melton had a good reputation for truth in the community in which he lived. This was objected to by defendant on the ground that no attempt had been made by defendant to impeach said witness. The court, however, certifies that said testimony was offered after defendant had tried to impeach Melton, not only by contradicting his evidence, but by introducing in evidence proof that he had been charged to be, and was in fact, guilty of theft, etc. It seems permissible to sustain a witness who has been assaulted by proof showing that he has been in jail, or been charged with other criminal offenses by evidence supporting the general reputation for truth of such witness. *Farmer v. State*, 35 Tex. Cr. R. 270, 33 S. W. 232; *Whart. Ev.* § 491. There was no error in the action of the court permitting the witness Barker to refresh his recollection by the testimony taken down by him in the grand-jury room. There was no error in the court permitting the introduction of the state's witness J. W. McGinnis when admitted, nor permitting his testimony as to conversations with defendant. It was not necessary to lay a predicate, as for the impeachment of defendant, as to these matters. It was original evidence against him. We do not believe it was permissible to allow the state to prove by the witness J. W. McGinnis that the city marshal of Greenville, W. R. Velvin, had arrested him on the previous day. No connection whatever is shown between witness' arrest and any issue presented in the case against appellant. But, inasmuch as there was testimony tending to show that Velvin was a friend of defendant, it was calculated to suggest that the arrest of McGinnis, whose testimony was material, and appears to have been recently discovered, was instigated by some animus on the part of Velvin against him because he was a witness against defendant.

In all, 29 bills of exception were reserved, but we have discussed all that we regard as material as involving questions likely to occur on another trial. We would here, however, suggest that a number of bills are taken to the argument of the district attorney. Some of the language attributed to him appears to be outside of the record, and of a character

calculated to inflame the minds of the jury unduly. It is suggested, also, in some of the bills, that during the time these remarks were being made the court was off the bench (perhaps in an adjoining room), and separated by the crowd from the jury and counsel. The court, however, does not appear to agree to this latter suggestion. Of course, we take it that in the proper administration of law the judge ought to be and is present during the entire trial. As to the remarks of counsel, we are not prepared to say that we would reverse the case on that ground. As stated, however, some of the remarks were of an intemperate character, and should have been promptly restrained by the court. On another trial we take it that such conduct will be avoided. On account of the admission by the court of the illegal testimony before discussed, the judgment is reversed, and the cause remanded.

HESTER v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1899.)

ARSON OF SCHOOL HOUSE—OWNERSHIP—EVIDENCE—SUFFICIENCY—OPINIONS.

1. In a prosecution for burning a school house, parol evidence that the burned property was a school house, and who was the county judge when it was burned, is sufficient proof of ownership, under Rev. St. arts. 3909, 3964, making county judges the owners of school houses as trustees, and requiring deeds of school property to be made to them.

2. In a prosecution for arson, a witness' opinion that tracks found near the burned building were made by defendant's horse is inadmissible, though he may testify that the horse made tracks similar to those found near the building.

3. Where the evidence is circumstantial, it must be sufficient to point with moral certainty to defendant's guilt, and exclude every reasonable hypothesis consistent with his innocence.

Appeal from district court, Bandera county; I. L. Martin, Judge.

Taylor Hester was convicted of arson, and he appeals. Reversed.

Geo. Powell and O. Montague, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of arson, and his punishment assessed at confinement in the penitentiary for a term of five years; hence this appeal.

The indictment alleged that the building burned was a public school building in district No. 12 of said Bandera county, and was the property of J. B. Langford, county judge of said county. On the trial no record evidence was introduced of the title, and the state was permitted, over appellant's objections, to prove by J. B. Langford that he was county judge, and that the school house and the property was his, holding it in trust for school district No. 12 and for the patrons thereof. The objections were that the best evidence of this fact was the deed which vested title in the

county judge of said county, and appellant refers us to articles 3909, 3984, Rev. St. These articles constitute the county judge the owner of all school houses and the lands on which they are situated, as trustee for the respective communities or districts, and require deeds of conveyance to be made to the county judge and his successors in office. We are further referred to the cases of *Tuller v. State*, 8 Tex. App. 501; *Rogers v. State*, 26 Tex. App. 404, 9 S. W. 762. Neither of said cases appears to be in point. In the *Rogers Case*, there is some intimation, if the ownership is alleged to be not in the occupant, but in the owner of the fee, that record proof of this fact should be made. In the charge of arson, ordinarily the ownership is alleged in the occupant, and in such case there is no question that parol proof can be made of such character of ownership. The indictment here charged, however, public property devoted to school purposes, and it was not claimed that it was in the actual occupancy of the county judge. The law, however, vests the title and ownership in him as trustee for the district or school community in which such school building may have been situated; that is, by creation of the law, the title is vested in him, and where a deed is made it is required to be to him as trustee, etc. In a number of the states the statutes in regard to arson cover certain public buildings by name, but, outside of some particular public state buildings, we have no statute on the subject. Mr. Bishop says that it is not necessary to allege ownership where the arson is a public building. 2 Bish. Cr. Proc. § 36. And to the same effect see *Mott v. State*, 29 Ark. 147; *State v. Roe*, 12 Vt. 93; *State v. Johnson*, 93 Mo. 73, 5 S. W. 699. The indictment charged the building to be a public school building in district No. 12, and charged that the ownership was in J. B. Langford, as county judge. We hold that, inasmuch as the law vests title of such property in the county judge, it was sufficient in this case to prove the character of the property and to prove who was the county judge at the time. Of course, if there was a deed in existence, the introduction of this proof would have been an easy matter, and have saved any question on this subject.

As to appellant's third bill of exceptions, we are of opinion that the witness was permitted to go too far in giving his opinion that the tracks found by him and tracks made by appellant's horse were one and the same track. He should have given the facts as to the size and shape of the tracks in question, whether shod or not, stating the similarity, and might then have stated that the track made by appellant's horse was exactly similar in size and shape to the tracks found on the ground.

There was no error in the court's charge on principals.

This was purely a case of circumstantial evidence, and, in our opinion, the testimony was not sufficient to authorize a conviction. The rule prescribed in such character of case

is that the testimony must be so strong as to point with a moral certainty to appellant's guilt, and must at the same time exclude every reasonable hypothesis consistent with appellant's innocence. If it be conceded that the tracks found on the ground leading from appellant's house to within 300 yards of the school house were made by appellant's horse, still it by no means follows that said tracks were made on the occasion when said school house was burned; the proof being by no means certain as to this point. Nor does it follow that if said tracks were made by appellant's horse, this, in conjunction with the other circumstances of the case, which are by no means strong, points with that degree of certainty to appellant's guilt which is required in cases of this character of evidence. In our opinion, the proof is stronger to the effect that the house was accidentally destroyed by the fire which was built in the stove on that Sunday than that appellant set fire to and burned it. We do not deem it necessary to reiterate the facts or discuss the testimony. We have given it a careful examination, and, in our opinion, it does not sustain the conviction. The judgment is reversed, and the case remanded.

JOY v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

CUTTING FENCES—EVIDENCE OF OWNERSHIP—CRIMINAL LAW—PRINCIPAL—IMPEACHMENT OF WITNESSES—INSTRUCTIONS—REVERSIBLE ERROR.

1. In a prosecution for cutting fences, the possessory ownership may be proved by parol.

2. An instruction that one may be guilty as principal though he was not actually present when the offense was committed is erroneous.

3. An instruction that accused's actual presence was unnecessary to make him guilty as principal in the commission of the offense is reversible error, where there was evidence that he planned the offense with others, and conflicting evidence as to whether he was present when it was committed.

4. Where testimony is admitted for the purpose of impeaching accused's witness, and is inadmissible for any other purpose, and is of a character likely to be considered by the jury against accused, a failure to instruct to consider the testimony only as affecting the witness' credibility is error.

Appeal from district court, Kimble county; M. D. Slator, Judge.

Tobe Joy was convicted of fence cutting, and he appeals. Reversed.

Walter Anderson, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of fence cutting, and his punishment assessed at confinement in the penitentiary for one year, and he appeals.

Appellant complains of the action of the court in permitting parol proof of the ownership of the fence in question. He claims in this connection that the fence is a part of the realty, and that title to realty can only be

proven by record testimony. Fence cutting is in the nature of a trespass, and in a civil action parol proof can be made in regard to the possessory ownership of the land on which the alleged trespass is claimed to have been committed. We see no reason why, in a criminal prosecution for cutting a fence, the possessory ownership cannot be proven by parol. We are referred by the assistant attorney general to our statute with reference to unlawfully cutting timber on the land of another, and the decisions thereunder. This, however, is controlled by statute. See article 828, Pen. Code. The rule laid down, however, in said cases, is applicable to a case of this character. *Belverman v. State*, 16 Tex. 131; *Phillips v. State*, 17 Tex. App. 174; *White v. State*, 27 Tex. App. 638, 11 S. W. 643; *Hester v. State* (Austin Term, 1899) 51 S. W. 932.

The court gave the jury the following instruction on principals: "All persons are principals who are guilty of acting together in the commission of an offense. When an offense has been actually committed by one or more persons, the true criterion to determine who are principals is: Did the parties act together in the commission of the offense? Was the act done in pursuance of a common intent, and in pursuance of a previously formed design, in which the minds of all united and concurred? If so, then the law is that all are alike guilty, provided the offense was actually committed during the existence and in the execution of the common design and intent of all, whether in point of fact all were actually bodily present on the ground when the offense was actually committed or not." And also the following charge on alibi: "If, from the evidence in this case, you have a reasonable doubt as to whether the defendant was present at the time of the commission of the offense alleged in the indictment, or participated in the commission of the offense as a 'principal,' as that term is herein defined to you, you will acquit him." Appellant excepted to these charges, and asked a special charge on the subject of alibi, which was refused. There was some proof in the case tending to show that the parties before cutting the fence had planned to cut it, and the state's proof showed that appellant was present at the cutting. Appellant, however, offered proof of an alibi. In this connection it is further shown that after the jury were out some time deliberating they returned into court, and made the following inquiry of the judge: "If the defendant was not present at the time and place of the cutting of the fence charged in the indictment to have been cut, could he be a principal in the commission of the offense?" and the court verbally called the attention of the jury to that part of his charge on principals. They retired again, and, after being out a short time, the court then brought them back into court, and marked out and called to their attention that particular portion of the charge defining principals. The

jury then retired, and subsequently, within an hour, returned into court a verdict against appellant. The court's charge was erroneous, and evidently was calculated to injure appellant. *Dawson v. State* (Tex. Cr. App.) 41 S. W. 599; *Yates v. State* (Tex. Cr. App.) 42 S. W. 296; *Bell v. State* (Tex. Cr. App.) 47 S. W. 1010; *Wright v. State* (Tex. Cr. App.) 48 S. W. 191; *Sessions v. State*, 37 Tex. Cr. R. 58, 38 S. W. 605. The charge of the court on principals and on alibi were directly in conflict, and the jury must have been confused in the first instance by the two contradictory charges. When they returned into court, from the instruction then given them they must have believed that the charge on principals was superior to the charge on alibi.

During the trial of the case, the state put Jim Davis on the stand, and he testified to certain criminating statements made by defendant, to the effect that defendant told him that he and others cut the fence. On cross-examination the said witness was asked if he did not, at a certain time and place, tell Jim Taylor that Jeff Hardin and Bob Davis, two state's witnesses, had told him (witness) that he had to swear against the fence cutters, to which witness replied, "No." Defendant then introduced Jim Taylor, who testified that the witness Davis did tell him, at the time and place mentioned, that Jeff Hardin and Bob Davis had told him that he had to swear against said parties. Thereupon the district attorney, on cross-examination, asked said witness Jim Taylor if defendant, Tobe Joy, did not twice try to induce him (Taylor) to assist in cutting said fence. The witness answered, "No." Thereupon the district attorney asked said witness if he (witness) did not tell Jeff Hardin on two different occasions that defendant had tried to induce him (witness) to assist in cutting said fence, to which witness answered, "No." Thereupon the district attorney placed said Hardin upon the witness stand, and asked him if witness Taylor did not tell him (Hardin) on two occasions mentioned that defendant, Tobe Joy, had tried to induce him (Taylor) to assist to cut the fence in controversy; to which said Hardin answered that said Taylor did tell him on the occasion mentioned that defendant had tried to induce him (Taylor) to assist in cutting said fence,—said testimony being offered for the purpose of affecting the credibility of the witness Taylor. Appellant excepted to the action of the court in neglecting and failing to charge the jury as to the purpose for which said testimony was admitted, and to limit same in his charge. Unquestionably said evidence could only have been admitted to affect the credibility of the witness Taylor. It was not original testimony against defendant, but was of a character to be used by the jury against him. In our opinion, the court should have limited this testimony in its charge to the purpose of impeachment. The judgment is reversed, and the cause remanded.

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for conviction, a charge to acquit if the jury have a reasonable doubt as to whether such possession was obtained by purchase or gift, by assault and violence, is sufficient, without further charging that if defendant, when first arrested and charged with robbery of the goods found in his possession, gave a reasonable explanation thereof, the burden is on the state to show its falsity.

2. Where evidence, part of which is not admissible, is offered by a party in a criminal case, his bill of exceptions complaining of the rejection thereof must specifically point out the portion that is admissible.

3. On a habeas corpus trial of several persons charged with committing a robbery, one of the testified at length as to the circumstances, and another testified that such testimony was substantially correct. On the subsequent trial, the latter, he testified contrary to some of the statements in the testimony given on the habeas corpus trial, which statements were introduced to impeach him. *Held*, that the balance of the testimony given on the habeas corpus trial, which did not explain or relate to the contradictory statements, was inadmissible, under Code Cr. Proc. art. 791, providing that when part of a declaration is introduced the whole of it on the subject is admissible, and when a declaration is introduced any other declaration necessary to explain it is admissible.

4. In a prosecution for robbery, a charge that the jury believe that defendant obtained possession of the property by gift or purchase if they have a reasonable doubt as to whether he obtained possession thus or by assault and violence, though there is no evidence that the charge is not prejudicial to defendant, so as to require reversal, under Code Cr. Proc. art. 723, requiring reversal if any statute regulating criminal cases is disregarded.

5. In a criminal case, on the trial of which evidence is properly excluded, the evidence is merely in the hands of the prosecuting witness.

6. In a criminal case, because of the exclusion of evidence, is properly refused on a motion for a new trial the evidence, if proper diligence was used before the trial.

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10. In a criminal case, on the trial of which evidence is properly excluded, the evidence is merely in the hands of the prosecuting witness.

11. In a criminal case, on the trial of which evidence is properly excluded, the evidence is merely in the hands of the prosecuting witness.



falsity of the explanation." On this phase of the case the court charged the jury as follows: "If defendant obtained from Joseph Seagall possession of any of the property described in the indictment, or if other persons were in company with the defendant and obtained possession of any of such property from Joseph Seagall, yet if you believe that such possession of said property was obtained by purchase or by gift, or by both purchase and gift, from said Joseph Seagall, or if you have a reasonable doubt as to whether such possession of the property was obtained by purchase or gift, or by means of assault, violence, or putting said Seagall in fear of his life or bodily injury, then you must acquit the defendant." We do not think it was necessary in this case for the court to charge as requested by appellant. In cases of robbery, where possession is only one of the circumstances relied upon for the conviction, recent "possession," as that term is ordinarily understood, does not have to be charged upon, as it is where the possession alone is relied upon for conviction. In *Hays v. State*, 36 Tex. Cr. R. 533, 38 S. W. 171, we held that the charge of the court authorizing the jury to acquit, if they believed defendant had bought the pistol, or if they had a reasonable doubt concerning the matter, was an apt presentation of the defense, and better than if the court had charged upon recent possession and reasonable explanation. And we think the same statement would apply to the charge given by the court in this case; that it was a better charge, and more appropriate to the facts of this case, than a charge on recent possession, such as was asked by appellant. We do not think the court erred in failing to give said charge. *Berry v. State*, 37 Tex. Cr. R. 44, 38 S. W. 812; *Mathews v. State*, 32 Tex. Cr. R. 355, 23 S. W. 690; *Teague v. State* (Tex. Cr. App.) 31 S. W. 401; *Ledbetter v. State* (Tex. Cr. App.) 32 S. W. 903; *Gilmore v. State* (Tex. Cr. App.) 33 S. W. 120.

Appellant's second bill complains of the action of the court in the following particular: It appears that there had been a habeas corpus trial of appellant and other parties, including Walter Thompson. Walter Thompson testified on the habeas corpus trial at length, detailing the facts of the supposed robbery. It is not necessary to state in full all of his testimony, which is attached as an exhibit to this bill, but we think we can make it sufficiently intelligible by stating the substance of appellant's contention. The state had offered in evidence four extracts from the written testimony of Walter Thompson on habeas corpus trial, as is fully shown by bill of exceptions No. 2. Thereupon defendant offered the entire written testimony of the said Walter Thompson, for the purpose of enabling the jury to determine whether or not the same was substantially the same as is defendant's testimony on this trial. But the state objected to the introduction of all of

said written testimony, because the same was irrelevant, illegal, self-serving, immaterial, and was an attempt by defendant to get before the jury the testimony of the said Walter Thompson, defendant's co-defendant, now charged in this court by bill of indictment with the same offense with which this defendant is now being tried, which objections were by the court sustained. On the habeas corpus trial above mentioned, after the said Walter Thompson had given his testimony, appellant took the stand, and stated that the testimony of Walter Thompson was substantially correct. And appellant's bill of exception No. 3 complains of the following proceeding: Appellant was fully sworn, and testified as a witness in his own behalf, and in his testimony denied that he or any of his three co-defendants robbed the injured party, Joseph Seagall, at the time and place as detailed by the said Seagall and claimed in his testimony; that he and three co-defendants purchased from said Joseph Seagall all the articles found on them when they were arrested. He testified, on cross-examination, among other things, as follows: "It was just after Hays called the peddler back that he (Hays) said, 'What if I was constable of precinct No. 1,' etc., as stated in my examination in chief. And Hays went to the buggy, and picked the pistol up that was in the scabbard, and showed it to the peddler, and then put it back in the buggy. No; Hays never, at any time, had the pistol in his pants. It is not a fact that, when Hays told the peddler to come and get his damned box, he (Hays) held the box out in his hand, and when the peddler did not come back he (Hays) dropped the box and broke it. No; it is not a fact that the Dutchman, or peddler, gave us all a present. No; it is not a fact that the Dutchman, or peddler, said he would give us all a present, and he did not then set down his grip, and give us a white handkerchief apiece. He gave us nothing, but we paid him for everything we got from him. Yes; I was present in the court room, and heard my co-defendant Walter Thompson testify on the habeas corpus proceedings instituted by all four of us before Judge McClellan for bail. I also heard the clerk of this court read said testimony over to the said Walter Thompson, and I was requested by my attorneys to and did pay close attention to the reading of said Walter Thompson's testimony. The clerk also swore me on said habeas corpus trial. I then testified orally that I had heard my co-defendant Walter Thompson testify in said proceeding. I also testified that I had heard the clerk read said testimony over to said Walter Thompson, and I also swore that the same was substantially correct. I don't remember Thompson swearing on said habeas corpus trial that Hays had the pistol in his pants on his left side when he called the Dutchman back. I don't remember of Thompson swearing on that trial that Hays held the Dutchman's, or peddler's, box up, and told

the Dutchman to come back and get his damned box, and when the Dutchman did not come back that Hays dropped the box on the ground and broke it. The box was broken after the peddler came back to where we were. Hays just pitched the box towards the peddler when it was broken. I don't think Thompson swore on said trial that the Dutchman, or peddler, said he would give us a present, and set his grip down, and gave us a white handkerchief apiece. I don't think he swore on said trial that there was nothing taken from the Dutchman but what was paid for, except what he gave us. The peddler did not give us anything. We paid for all we got." The state then offered to read in evidence to the jury, for the purpose of impeaching the defendant, the following extracts from the written testimony of Walter Thompson on the habeas corpus trial, to wit: "First. 'When Hays called the Dutchman back, Hays had the pistol in his pants on his left side.' Second. 'When he told the Dutchman to come back and get his damned box, Hays held the box out in his hand, and the Dutchman did not come back, and Hays dropped the box and broke it.' Third. 'The Dutchman said he would give us a present, and set his grip down, and gave us a white handkerchief apiece.' Fourth. 'There was not anything taken from the Dutchman but what was paid for, except what he gave us,'"—to the introduction of which the defendant objected, "because the jury could not judge from these partial extracts from said testimony whether defendant so understood it when read, nor whether from these partial extracts the statement of Walter Thompson, as defendant understood it, and his statement on the stand in this case, were substantially the same."

We will consider these two bills of exception together. The court adds the following explanation to bill of exception No. 2: "The court told defendant's counsel that, if there was any other portion of said written testimony which in any way referred to, explained, or threw any light upon any of the matters and transactions contained in those portions of said testimony offered and read in evidence to the jury by the state, the defendant could read to the jury as evidence in this case all such portions. But defendant did not call the court's attention to any such portions, and did not claim that any other portion of said written testimony explained or related in any way to such matters and transactions, but claimed that the same was admissible under the general rule that, where a part of a declaration or conversation is introduced, the whole of it upon the same subject is admissible, if offered by the other party." We think a sufficient answer to the contention of appellant is found in the bill itself, in that the same does not point to us any portion of the evidence that is admissible, but claims that the court erred in failing to admit all of it. Certainly appellant cannot contend that the whole of the

witness Walter Thompson's testimony is admissible, simply because extracts of same were introduced to impeach defendant. If there are any portions of it that qualify said impeachment, or refute the contention of the state that appellant had made a contrary statement on the habeas corpus trial, that portion would be admissible. But the court in his explanation says that appellant did not point out any portion of said testimony that was admissible. Where some of the evidence objected to is admissible, and some of it not, it is necessary that the bill of exceptions point out that portion of the evidence which is admissible. Where a party offers all of a record, and says it is admissible, and a part of it might be admissible, and part evidently is not, we will not select out for appellant that part which is admissible, but he must do so himself in his bill of exceptions. *Rucker v. State* (Tex. Cr. App.) 47 S. W. 1014. We do not think there was any error in the action of the court, as indicated in either of said bills of exception. See Code Cr. Proc. art. 791; *Kunde v. State*, 22 Tex. App. 96, 3 S. W. 325; *Green v. State*, 17 Tex. App. 395. And see, also, on the question as to how a bill of exceptions shall be worded, *Coyle v. State*, 31 Tex. Cr. R. 604, 21 S. W. 765; *Woodson v. State*, 24 Tex. App. 153, 6 S. W. 184; *Buchanan v. State*, 24 Tex. App. 195, 5 S. W. 847; *Rahm v. State*, 30 Tex. App. 310, 17 S. W. 418; *Schoenfeldt v. State*, 30 Tex. App. 695, 18 S. W. 640.

Appellant's fourth bill of exceptions complains of the action of the court in the giving of the following charge: "If the defendant obtained from Joseph Seagall possession of any of the property described in the indictment, or if any other persons were in company with defendant and obtained possession of any of such property from Joseph Seagall, yet if you believe that such possession of said property was obtained by purchase or by gift, or by both purchase and gift, from said Joseph Seagall, or if you have a reasonable doubt as to whether said possession of the property was obtained by purchase or gift, or by means of assault, violence, or putting said Seagall in fear of his life or bodily injury, then you must acquit the defendant." Appellant complains of this charge on the ground that there is no evidence whatever that defendant or his co-defendants acquired said property, or any portion thereof, by gift, to authorize said charge. Conceding the contention of appellant in this respect to be correct, we do not think it was such error as was calculated to injure the rights of appellant; and under article 723, Code Cr. Proc., enacted by the 25th legislature (Laws 1897, p. 17), we do not see fit to reverse the judgment on this account. *Stewart v. State* (Tex. Cr. App.) 50 S. W. 459; *Wright v. State* (Tex. Cr. App.) 40 S. W. 491; *Brite v. State* (Tex. Cr. App.) 43 S. W. 342.

We note that the assignment of errors complains of the court's charge in several particulars, but these objections are not presented by bill of exceptions nor in motion for new trial. This being the case, we cannot review the

same, even if they are erroneous. Code Cr. Proc. art. 723; *Stewart v. State* (Tex. Cr. App.) 50 S. W. 459.

Appellant insists that he should be granted a new trial on the ground of newly-discovered evidence. We do not think there was any error in refusing to grant a new trial on this account, because the testimony desired would have simply served to impeach the prosecuting witness; and, furthermore, there is no diligence shown to secure their testimony. Nor do we think the same was probably true, in the light of the record before us. The trial court has passed upon the application in this regard, and we see no reason to doubt the correctness of its discretion. The jury have passed upon the facts, and have found appellant guilty, and there is no reason shown why the judgment should be disturbed, and the same is therefore in all things affirmed.

FURLOW v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1899.)

HOMICIDE—EVIDENCE—REMARKS OF COUNSEL—JURY—SUMMONS—ATTACHMENT—EXAMINATION—APPEAL—EXCEPTIONS.

1. A failure of the sheriff, in his return of a writ for a special venire of 140 jurors, to make a full enough showing as to diligence in his efforts to secure service on 7 not served, is not ground for quashing the venire, since, on proper motion, a more complete return could be obtained.

2. A juror who has not been summoned cannot be attached for nonattendance.

3. Failure of the court to offer to have absent jurors summoned is not error, in the absence of a motion by defendant.

4. It is not error to refuse to issue an attachment for an absent juror, when it appears that such juror is a nonresident, and therefore not liable to serve.

5. Evidence that defendant had stated that he would stop the laying of a road across his land, with a gun, is admissible, where the shooting took place while the road was being laid out, although it was the result of an altercation not connected therewith, since it tends to show defendant's animus in being there with his gun.

6. Improper remarks of the prosecuting attorney, in endeavoring to excite sympathy for deceased's family, are not ground for reversal, when they were provoked by similar remarks of defendant's attorney concerning defendant's family.

7. Error in exhibiting deceased's children to the jury is not available, where not excepted to.

8. Improper remarks of the judge in impaneling the regular jury for the week are not available as error, where the jurors, on being impaneled for the case, were not examined as to whether they had been influenced by such remarks, and there is no affidavit of any jurors showing that they were influenced thereby.

Appeal from district court, Ft. Bend county; Wells Thompson, Judge.

Frank Furlow, Sr., was convicted of manslaughter, and appeals. Affirmed.

John C. Mitchell and M. J. Hickey, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of manslaughter, and his punishment as-

sessed at two years' confinement in the penitentiary, and he prosecutes this appeal.

Appellant filed a motion to quash the special venire on the ground that 7 of the special venire who were drawn to try the case were not served by the sheriff, and the sheriff's return did not show the character of diligence used to summon them. It is shown that a special venire of 140 men was drawn, and all were served, except some 12. The return of the writ as to 7 of the names stated simply that they "could not be found in the county after diligent search and inquiry." Appellant, as before stated, urges that the return should have stated the character of diligence; that the statement of the sheriff was merely a conclusion, and not the statement of any facts. The statute (article 651, Code Cr. Proc.) requires the officer to state the diligence that has been used to summon the jurors, and the cause of the failure to summon them. We know of no case, however, that goes to the extent of holding that the officer should state that he went to the home of the juror, or to his office or place of business, or how many times he went to such place or places, or how much time he spent in searching for the absent juror. In *Lewis v. State*, 15 Tex. App. 647, a return similar to this, with the addition that the sheriff went to the residence of the juror, was held sufficient. And see, also, *Parker v. State*, 33 Tex. Cr. R. 111, 21 S. W. 604, and 25 S. W. 967; *Charles v. State*, 13 Tex. App. 658. Ordinarily, we take it that the return stating that the officer used due diligence would mean that he made search where the juror was likely to be found, and that further return, that he failed to find him, would be a sufficient statement of the case. *Powers v. State*, 23 Tex. App. 42, 5 S. W. 153; *Rodriguez v. State*, 23 Tex. App. 508, 5 S. W. 255; *Williams v. State*, 29 Tex. App. 89, 14 S. W. 388; *Gay v. State* (Tex. Cr. App.) 49 S. W. 612. But whether or not it is the duty of the officer to make a more complete return as to details it is not necessary to decide in this case. We do hold that his failure to make a more complete return than was made herein was not a sufficient ground for quashing the entire special venire. On a proper motion, appellant might have required the sheriff to make a more complete return as to the diligence used for the absent jurors. It occurs to us that the sheriff made a good showing as to the diligence used in summoning the special venire. He actually summoned 128 out of a total of 140 drawn on the list, and of these 117 were actually present.

Appellant also complains because the court did not offer to have said 7 absent jurors summoned or attached. The court was not authorized to have them attached, for they had not previously been summoned. *Rodriguez v. State*, supra. If appellant had any ground for believing that said jurors could have been procured, he might, on proper

motion, have invoked the action of the court to have them summoned himself.

Appellant also objected to the refusal of the court to issue an attachment for the juror J. M. Damon. This juror appeared to be regularly drawn and summoned, but he failed to answer. When process was asked for the juror, the court was informed by the sheriff that said Damon was not a resident of the county, that he had moved away a short time before he had been summoned, and that he was afterwards summoned while in Richmond. The statement of the sheriff was not gainsaid, and it would have been a useless consummation of time to have sent out process for said juror.

The state, on cross-examination of appellant, who was a witness on his own behalf, asked him: "Did you not state in the court house in Richmond, Ft. Bend county, Texas, during the month of August, 1898, in the presence of Walter Bertrand, that you would stop the laying out of the road through your land, with a shotgun?" Over the objections of appellant, the witness answered, "No." Appellant insists that this testimony was not admissible, because the same did not constitute a threat by defendant against the deceased, Seay, and because the defendant in his direct examination was not interrogated in respect to said matter. The court appears to have admitted said testimony for the purpose of laying a predicate to impeach defendant. The witness Bertrand was afterwards introduced, and testified that defendant did tell him on the occasion mentioned that he would stop the laying out of the road through his land, with a shotgun. In this connection we would observe that appellant complains in his motion for new trial of the failure of the court to limit this testimony to the purpose of impeachment. Moreover, he complains of the use of it by the district attorney as original testimony. Unquestionably, in our opinion, the court was correct in the admission of said testimony, though he assigned an incorrect reason for its admission. It was original testimony. It was the declaration of defendant as to his purpose of preventing the opening of a road across his land, and foreshadowed his animus in going to the place of the homicide on that fatal day. It is urged in this connection that the difficulty did not occur in regard to opening the road across the defendant's land. But this was undoubtedly the occasion of defendant going down there, and the altercation ensued about this very matter. He began to abuse the parties for going there; said they were his enemies; and, when deceased replied to this, he remarked that he did not include him, but meant two others (naming them). Deceased then replied that, as far as he was concerned, he had nothing against him, except he heard that defendant had been talking about his son; and to this defendant replied that he was a damned liar. Deceased replied

that he would not take it, and then take his gun away from him and put it over his head, and, according to the witnesses, started towards defendant. He shot him. As stated before, the action of defendant made to Be clearly admissible on the part of the state as original testimony, indicating animus in going down there armed with a gun. It was testimony supportive of the state. Of course, it was not conclusive; but appellant could come in and show that he went down there for a peaceful purpose, and carried his gun simply out of habit, and not for the purpose of interfering with the commission of a crime, and thus raise a difficulty with them. The court authorized to use this as original testimony, and there was no necessity on the part of the court to limit it.

Appellant presents a bill of exception to the closing speech of the district attorney. We quote from the bill: "During the delivery of the closing argument of the district attorney, the four lit of the deceased man (J. R. Seay) in front of the jury, at a distance of five feet from the jury, having been out of the audience and so placed the commencement of the district attorney's argument, by the deceased's body there they remained, frequently crying, during the entire closing of the district attorney. The bringing of the children in front of the jury being done in the presence of the district attorney, in his address to the jury, he said in his address to the jury: 'Yes, gentlemen (so he said) he did; and by that shot, gentlemen, me God), he has left these four little children that you see sitting before you. By that shot defendant made the children, you see in front of you, orphans, as their mother lies dead in the graveyard; and they are left fatherless and motherless and without a home. Talk about sympathy, gentlemen, these little orphans cry out to you for justice. They appeal to you to make the defendant pay the debt he owes the state for murdering their father; little weeping children, and all the while, will applaud you when you make the debt he owes the state.' The district attorney further that the attorneys for the defense, at the time, in open court, promptly to the foregoing language of the district attorney, to which the court replied, 'your bill of exceptions,' but gave no objection to the district attorney, nor restrained him. The court, in expounding the bill, says: 'The remarks of the district attorney were evidently made in answer to the argument of defendant's counsel J. (the children and female relatives of the deceased were present in the court room), who appealed to the sympathy for the children of defendant.'

district attorney said he was glad the defendant had appealed for sympathy for his children, as it gave him the right to say that the deceased's children, who were very young, were more entitled to sympathy than those of defendant, who were grown." Now, as explained by the bill, the remarks of the district attorney were in response to similar remarks of the defendant's counsel in regard to the wife and children of defendant. Both were perhaps improper, but the one was an offset to the other. We understand that only the remarks were excepted to, and not the scenic performance of placing the children in front of and close to the jury during the closing argument of the state. If this conduct had been excepted to, another question would be presented; for we cannot but regard this as an unwarranted attempt to influence the jury by bringing the deceased's weeping children before them to inflame and excite their sympathy. This character of sensational display should never be permitted in the courts of justice, neither for the state nor the defendant. Of course, the relatives and friends of both deceased and defendant have a right to be in the court room and in the audience, but the court should carefully avoid the obtrusion of this character of influence on the jury. No exception, however, having been reserved as to this matter, we do not feel authorized to reverse the case on that account.

It seems that the learned judge, in impaneling the regular jury for the week, which was some three days before the case against defendant was taken up for trial, in a lengthy address exhorted them as to their duties. Among other things, he told them that the old saying that "it is better that ninety-nine guilty men should escape punishment than that one innocent man should suffer" was all wrong; that thousands of criminals had been turned loose on that sort of suggestion; that, in his opinion, it was better that an innocent man should be convicted, now and then, than that 99 bloody murderers, burglars, and robbers should be turned loose upon the country. He also told the jury that the Horbach Case was frequently used to befuddle juries; it was frequently used to fabricate the defense based on the hip-pocket movement; and he admonished the jury, when such a defense was raised to shield the guilty criminal, to scrutinize it closely. And furthermore he suggested to them that reasonable doubt was often invoked to frighten juries from their duty, and that shrewd lawyers frequently urged jurors, in the trial of cases, that, if there was any doubt, the defendant should be acquitted, but that such was not the rule; that our laws were intended for the protection of society; and that jurors should see to it that they were not influenced by any amount of sophistry. This, in substance, and much more, is presented in the bill of exceptions as the remarks of the judge to the jury for the week on their impanelment. The bill states that said charge, though delivered to the jury

for the week, was heard by them and others who were on the special venire, several of whom were on defendant's case, and that one of the jurors who tried defendant's case was on the regular jury for the week, and was present on the regular panel, and heard the foregoing charge when the same was given by the judge. The bill, it occurs to us, is defective, in not showing that the jurors, when they were impaneled, were examined as to this matter of the court's charge, to ascertain whether or not it in any wise unduly influenced them against appellant. Nor are we informed, by any affidavits, or otherwise, of the jurors who tried the case, that they were in any wise unduly influenced against defendant on account of said charge of the court. If appellant deemed that said charge proved injurious, as having affected the minds of the jury unduly against him, they should have been rigidly examined on their voir dire, or if, in the result of the trial, any juror who sat in the case was unduly influenced against defendant on account of anything said by the court in the charge referred to, the bill should have been accompanied by proper affidavits. Nothing of this character is presented, and we are not informed how said remarks, if it be conceded that they were entirely improper, should have influenced the jury against appellant. An able brief has been filed by appellant's counsel, and an eloquent criticism of the learned judge's charge delivered as above stated to the jury is presented; but it appears to us that appellant, in this respect, is much like Archimedes, who required a fulcrum on which to place his lever before he should be enabled to overturn the world. We greatly admire the eloquence of counsel in this respect, but we apprehend his bill of exceptions does not give it a proper support. Finding no reversible error in the record, the judgment is affirmed.

MURPHY v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

HOMICIDE—CHANGE OF VENUE—CONTINUANCE—JURY—COMPETENCY—CHALLENGES—EVIDENCE.

1. Where a motion for change of venue on account of local prejudice is not accompanied by the affidavits of compurgators, as required by statute, the allowance of such change on the court's own motion is within the discretion of the court, and a refusal to do so is not reviewable.

2. Where an application for continuance to procure witnesses to prove accused's good character and to establish an alibi shows due diligence, and there is no showing that such witnesses could not be procured, it is error to refuse such continuance.

3. Improper remarks of the judge in impaneling the regular jury for the week are not available as error, where the jurors, on being impaneled for the case, were not examined as to whether they had been influenced by such remarks, and there is no affidavit of any of the jurors showing that they were influenced thereby.

4. Error in overruling a challenge of a juror for cause is unavailing, where appellant's bill does not show that he had exhausted his peremptory challenges, and was therefore obliged to accept such juror.

5. Evidence that one who had witnessed the murder had afterwards identified accused from among a number of prisoners is inadmissible.

Appeal from district court, Ft. Bend county; Wells Thompson, Judge.

James Murphy, alias William Jones, was convicted of murder, and appeals. Reversed.

C. C. Everett and R. H. Woody, for appellant. John M. Pinckney, Dist. Atty., L. M. Williamson, Co. Atty., Wharton Bates, Spencer C. Russell, and Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder, and his punishment assessed at death, and he prosecutes this appeal.

Appellant made a motion for change of venue, alleging prejudice against appellant in the county of Ft. Bend. This was only sworn to by appellant, with no compurgators. The application shows, as an excuse for failure to procure the compurgators, that appellant was a strange negro, and friendless, and the case was one of unusual interest, and a certain confession of appellant had been published in a newspaper, and had gone broadcast over the county, and so much prejudice had been engendered against appellant that he could not obtain a fair and impartial trial, and that he could not procure compurgators to make the affidavit for change of venue. This was overruled by the court. Appellant also presented said motion, and asked that the court order proof on the same, and exercise his discretion to change the venue as upon his own motion. This the court declined, and appellant excepted. We cannot say that the court committed an error in regard to overruling the application for change of venue. It was not a compliance with the statute for a change on appellant's motion, for it was not accompanied by the affidavits of compurgators. While the statute authorizes the change of venue on the court's own motion, yet we know of no rule that would compel the court to exercise its discretion. We would further observe in regard to this motion that, while appellant suggested to the court to order proof, the motion does not show that he offered any evidence of any witness or witnesses. While we cannot say that the court erred in overruling the application for change of venue, we would observe that the presentation of the question called on the court very strongly to thoroughly investigate the condition of the public mind with reference to the charge against defendant, in order to ascertain whether or not he should exercise his discretion to change the venue of his own motion; and we indulge the presumption that the court did this.

Appellant made a motion for continuance to obtain James B. Dickson and C. C. Spanes, of Phillips county, Ark., where appellant was al-

leged to have been raised, to prove the general reputation of defendant as being a man of peaceful conduct, of unimpeachable character, and of harmless disposition, and further to prove that he had never been guilty of any offenses in Arkansas, and had not left that state on account of any charge. (This was in rebuttal of the alleged rumor that the state would seek to prove this by the alleged confession of appellant.) The continuance was furthermore sought to procure the testimony of Mrs. Boardman, alleged to reside near the town of Donaldsonville, in Ascension parish, La. It was alleged that by this witness appellant would be able to prove that he had worked for her in the month of October, 1898, and until the 2d day of November, 1898; that he left her place on Wednesday morning, November 2d; and that it was physically impossible for him to have been at Richmond, in Ft. Bend county, on the night of November 2, 1898, the time when the state's evidence would show that Kirkland, the deceased, was killed at his home in said last-mentioned county. In this connection defendant showed that this was his first application for continuance; that he had been confined in jail since November; that he was not able to employ counsel; that he was only indicted on the 18th day of March, 1899; that counsel was appointed for him by the court on the 22d day of March; and that such counsel immediately conferred with their client, and set about obtaining all the information possible in regard to his case; that there had been no examining trial, and that the state had studiously kept from defendant a knowledge of the case against him; that his counsel sued out a writ of habeas corpus to obtain bail, and for the purpose of developing the state's case; that the district attorney, in order to defeat the purpose of counsel to obtain a knowledge of the state's case, admitted the case to be ballable, and the court, at his suggestion, refused to allow appellant to examine the state's witnesses, whom he had subpoenaed. That appellant's counsel, from information derived from their client, wrote to defendant's relations and friends in Arkansas to obtain all the information they could with reference to defendant, but only within the past day or two had they received any reply, and that counsel had therefore not had time to obtain the depositions of witnesses necessary and indispensable to defendant's defense; and that defendant had no means to meet the expenses of hunting up witnesses or taking depositions. In the view we take of this matter, the court should have granted the continuance, or, if the term admitted, at least have postponed the case a sufficient length of time to enable counsel to obtain the depositions of said witnesses. Aside from the corpus delicti (that is, the death of deceased by violence), the state's case depended almost wholly on the testimony of officers as to appellant's confession of the homicide. No witness was produced by the state showing that appellant was in the town of Richmond, Ft. Bend county, on the 2d day of

November, 1898; and certainly if he could prove by Mrs. Boardman, of Donaldsonville, La., or by any one else, that he was at Donaldsonville on the 2d of November, it would be very material testimony on his behalf. And, moreover, if appellant could prove by persons who had known him all his life that he had borne a good reputation in the state of Arkansas, where he lived, he was entitled to this testimony. The application shows that, as soon as the court appointed counsel for him, they immediately set about an investigation of the case, and, so far as we are advised, used all diligence necessary to inform themselves, and to endeavor to obtain testimony to meet the state's case. Counsel, as well as defendant, make affidavit to this application for continuance, and in the absence of the statements appearing unreasonable, or of any controversy on the part of the state as to the diligence used, we must assume that the diligence stated is true; and there is nothing to show that the information derived by his counsel as to the facts that they could prove is either unreasonable or untrue. At any rate, appellant should have been afforded an opportunity to obtain the testimony sought by him. No doubt, it is important that speedy trials be had in all criminal cases, and that the guilty be brought to punishment, but it is of far more importance that nothing be done in the course of a trial that smacks of unfairness or of undue haste. It may be that appellant cannot procure this testimony,—cannot prove the facts stated by him; but we cannot assume that he could not, and he should have been afforded an opportunity to procure the depositions of these witnesses.

Appellant shows by bill of exceptions that a part of the special venire summoned to try him were present and heard the charge of the court given in the impaneling of the petit jury delivered on the Monday morning preceding the trial. This is the same charge objected to in *Furlow v. State* (decided at the present term) 51 S. W. 938, and what we said there is applicable to this case. Appellant shows here that two of the veniremen said that they heard said charge, and they were objected to as incompetent. The court, however, held that they were competent, and appellant accepted them as jurors. Appellant's bill should have gone further, and shown that said charge of the court was calculated to influence the jurors in their trial of the defendant, and should have further shown that appellant exhausted his challenges, and was compelled to take these jurors.

Appellant objected to the testimony of Parnell, sheriff of Ft. Bend county, and of Rich, sheriff of Wharton county, in regard to the confessions which they testified that defendant made to them; it being claimed by appellant that defendant, at the time these confessions were made, was in jail, and was coerced by such sheriffs, and induced by them and others, by undue influence, to make said confession. From the bills as presented, it would appear

that said evidence was admissible. Where a defendant is in jail, or other place of confinement, the burden is on the state to show that a proper warning was given, and that the confessions were freely and voluntarily made, and the court should always see to it that this burden is fully discharged; and, if there is any suggestion of undue influence or unfairness in procuring the confession, still, if the court deems it admissible, the jury should be fully instructed on the subject, and, if it does not appear to them to have been freely and voluntarily made, after defendant being duly warned, they should be charged to reject it altogether.

Appellant objected to the testimony of Mrs. Kirkland, as shown by the following bill: "Be it remembered that on the trial of this cause, on the 7th of April, 1899, after the state's witness, in her original direct examination, Mrs. Kirkland, had testified fully as to the presence of the negro burglar in the residence of the deceased, Mr. Kirkland, on the night of Wednesday, the 2d of November, 1898, the witness testified that on Friday, the 11th of November, 1898, she (the witness), at the sheriff's invitation, went to the jail in Richmond, and entered the jail office, where five or six large negroes were present in line, with their faces away from witness and their backs towards witness. It was thereupon proposed by the state to prove by Mrs. Kirkland, the witness, that witness pointed out and picked out the defendant from said five or six negroes as being the one most resembling the negro burglar who had struck witness' husband. This was objected to in open court by the defendant on the grounds that the said pointing out and picking out by the witness was an after test, and in the nature of a self-serving declaration and act on the part of the said state's witness, and that the proposed testimony was wholly irrelevant, inconclusive, and incompetent for any purpose as original testimony; but the court, over the defendant's said objections and exceptions at the time, permitted said state's witness, Mrs. Kirkland, to make answer, and she did make answer, in substance, that of the said negroes in line in the said jail office, with their backs towards the witness, that she pointed out and picked out the defendant as looking like the negro burglar who had been in her house on the night of the 2d of November, 1898; that in general size and general appearance, and more particularly with respect to size, breadth, and depth of chest, did he resemble the negro burglar referred to. The state's attorney then asked witness whether or not the witness believed defendant was the man, to which witness replied that she believed he was the man. Simultaneously with the beginning of said answer, defendant raised the objection that the witness' belief was totally incompetent, which objection was sustained. But the court did not at that time, nor at any other time, verbally or otherwise, instruct the jury to disregard the said answer." This bill is qualified thus: "The court cautioned and told

the jury to disregard the belief of the witness.' " It was entirely competent for Mrs. Kirkland, in her examination in chief, to state whether or not she then identified the defendant on trial as being the same person whom she saw in her room on the night of the 2d of November, 1898; and she was authorized to give her reasons for such identification,—his size, general appearance, etc., or any other facts that enabled her to identify him; and, if she could not be positive as to such identification, she could state her belief or best impression. But it was not competent for her to testify that she identified him on other occasions as being the same person, unless on cross-examination she had been impeached by showing that, on some occasion since, she had attributed the homicide to some other person than the defendant. We understand this scenic performance at the jail was offered as original testimony on the part of the state. This was hearsay and inadmissible. *Reddick v. State*, 35 Tex. Cr. R. 463, 34 S. W. 274. The witness was permitted to state, over appellant's objection, that, at the sheriff's request, she went to the jail in Richmond, and, entering the jail office, where five or six large negroes were presented in line, with their backs towards witness, witness there pointed out the defendant, and selected him from five or six negroes as being the one most resembling the negro burglar who had struck witness' husband. While this character of testimony was not admissible as original evidence, it was eminently calculated to impress the jury. True, she could not be certain. Indeed, so uncertain was she that she was only willing to state her belief (which the bill shows the court struck out) that it was appellant. Yet this scenic arrangement and performance no doubt influenced the jury to strongly believe that, although she only saw the party for an instant on the night of the homicide, and then only his back, shoulders, and side of his face, yet, having picked him out from a number of other negroes, whose general size only is stated, this circumstance would be calculated to strongly suggest to the jury that appellant must be the man, as she could pick him out from others; and thus the confessions of appellant made to the officers would be re-enforced by this illegitimate testimony. In our opinion, it should not have been admitted.

There are other questions raised in the record, but they are of a character not likely to occur on another trial, and we will not discuss them. But for the errors pointed out the judgment is reversed, and the cause remanded.

SKELTON v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

CRIMINAL LAW—MOTIVE—EXPLANATION—EVIDENCE—HEARSAY.

1. Where, to show motive for an assault, the prosecuting witness testified that he and accused had had a discussion over the matter of accused's

having opened a letter belonging to witness, it was competent for accused, after having testified that the letter had not been taken from the post office by him, and was torn open when shown to him, to explain what was said and done by him at the time, and that he did not read any part of the letter, but returned it to the post office.

2. A witness for the state,—having testified that he had told the prosecuting witness, after the shooting, of a threat made against him by accused,—in an answer to a question by the defense, referred to his having, in the same conversation, told the prosecuting witness of what a third person had told him about a pistol. *Held*, that it was error to permit the state, on redirect, to bring out, as part of the conversation, what the witness had also told the prosecuting witness that such third person had said, as hearsay.

Appeal from district court, San Saba county; M. D. Slaton, Judge.

G. C. Skelton was convicted of assault with intent to murder, and he appeals. Reversed.

Walters Bros., for appellant. D. W. Wilcox and Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of two years.

Appellant's fourth bill complains of the action of the court in the following particulars: After the state had proved by the prosecuting witness, Lon Shelton (the assaulted party), for the purpose of showing the motive for the assault, that he and appellant had never had any particular trouble prior to the time of the assault; that he and defendant had never had any quarrel, but that they had met in November, 1893, before the alleged shooting (in August, 1894), and discussed a circumstance that previously occurred, with reference to defendant having opened a letter belonging to witness Shelton. Subsequently appellant took the stand in his own behalf, and was asked by his counsel to state all that he knew about this letter transaction. Appellant proceeded to do so, and stated that he did not get said letter out of the post office himself, but that it was brought to his father's home (where he was then living) by some member of the family, and, when appellant came to the house, his mother, who was nearly blind, handed appellant the letter, already broken up, and asked him to read it. Appellant stated that he returned the letter to the post office. He was then asked by his counsel to state to the jury whether or not he read the letter, or any part of it, and what was said or done by him, if anything, relative thereto, to which questions and answers the state objected, and the court sustained the objection, and refused to permit appellant to testify further concerning said letter. Appellant contends that, if permitted to answer said question, he would have testified that when he commenced to read the letter he soon noticed from its contents that it was not intended for him, nor for any of his family, and so stated to his mother, and then, for the

first time, noticed the address on the envelope, and that it was addressed to Lon Shelton, and without reading the letter through, or noticing anything more of its contents, he immediately replaced it in the envelope and sent it back to the post office. We think the court erred in refusing to permit the appellant to so testify. Where the state proves a motive for the act, appellant has a right to disprove the motive.

Appellant's fifth bill of exceptions complains of the following: The state proved by Burrill Stockton that at the Mesquite school house, in San Saba county, in the summer of 1894, prior to the time Lon Shelton was shot, witness heard defendant say that, if Lon Shelton did not mind, he would get hell shot out of him. Appellant then, upon cross-examination, proved by the witness that the first person he repeated this statement to was his father, whom he told a few weeks after it occurred, and after Shelton was shot. Witness did not remember if he told any one else of it until he told Lon Shelton about it. Counsel for appellant then asked, "When and where did you first tell Lon Shelton about that remark?" And witness answered that he told Lon Shelton about it at their first meeting after Shelton was shot, which was in Austin, in February, 1897. Counsel for appellant then asked, "Did you not, upon the trial of Emmett Vaughan, last week, testify to a little more stuff that you claimed to have told Lon Shelton in that same conversation,—something that you claimed Joe Jones told you after the shooting in regard to Emmett Vaughan and this defendant?" To which witness replied: "Yes; I testified in the Vaughan case to having told Shelton in this same conversation in Austin about what Joe Jones had told me about a pistol." Thereupon the court permitted the state, over appellant's objection, to prove by this witness the whole of his conversation with Lon Shelton in Austin concerning the shooting, and that in that conversation he had told Shelton that in the spring of 1895, some months after the shooting of Shelton (the previous August), Joe Jones had told witness that he (Jones) then owned a 38-caliber Smith & Wesson pistol, which he had gotten from Emmett Vaughan after the shooting, and that he (Jones) was satisfied that Emmett Vaughan and Carey Skelton (appellant) were the ones that shot Lon Shelton. Defendant objected to the introduction of this testimony by the state upon the ground that it was hearsay, immaterial, and irrelevant, and that neither defendant nor Emmett Vaughan, who had also, by separate indictment, been charged with this offense, were shown to have been present when it occurred. The judge appends to this bill of exceptions the following: "The court overruled the objections because the defendant had put in evidence a portion of said conversation in Austin between Lon Shelton and the witness Stockton." This is true, as stated by the learned judge; but it does not follow that all of the conversation had by the

witness Shelton in Austin could be introduced, simply because appellant had introduced a small portion of it, unless the balance of the conversation would throw light upon or explain that portion of said conversation brought out by appellant. Appellant simply proved by the witness this statement: "Yes; I testified in the Vaughan case to having told Shelton in this same conversation in Austin about what Joe Jones had told me about a pistol." Now, then, the admission of this statement certainly would not permit the introduction of the following statement: "That he [Jones] was satisfied that Emmett Vaughan and Carey Skelton [appellant] were the ones that shot Lon Shelton." This latter statement does not explain the former in any way, and it would be pure hearsay; and evidently it was very prejudicial to the rights of appellant to permit the hearsay opinion of the witness Jones as to the guilt or innocence of Emmett Vaughan and appellant to be introduced as a criminative circumstance against appellant. The evidence is purely circumstantial and quite meager, and we think that the introduction of this statement, as stated, was very prejudicial to the rights of appellant, under the peculiar circumstances of this case. We therefore hold that the court erred in permitting said last statement to be introduced. *Chumley v. State*, 20 Tex. App. 547; *Felder v. State*, 23 Tex. App. 477, 5 S. W. 145; *Maines v. State*, 23 Tex. App. 568, 5 S. W. 123.

We do not think the evidence raises the issue of alibi, as contended by appellant.

In the view we take of this case, we do not deem it necessary to discuss the other assignments of error. For the error discussed, the judgment is reversed and the cause remanded.

WUERTEMBERG v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

PERMITTING MINOR IN BILLIARD HALL— EVIDENCE—CONVICTION.

A conviction of knowingly permitting a minor to remain in a billiard hall is warranted where the presence of the alleged minor in the hall is conceded, and it appears that he was 19 years of age, wore a mustache, was clerking for a merchant, that accused had known him for 10 years, and that he permitted him to remain without inquiring as to his age, though he testified that he believed him to be of age, without giving any reason for his belief.

Appeal from Tom Green county court; T. C. Wynn, Judge.

Phillipi Wuertemberg was convicted of an offense, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of knowingly permitting a minor to be and remain in his billiard hall. The only question presented for our consideration is whether the proof is sufficient to sustain the conviction.

tion. We have examined the record carefully, and in our opinion it is sufficient. The prosecuting witness, who was 19 years of age, states that he had a mustache, that he shaved two or three times a week, and that he was clerking in the town for one Swarts, and had been for some time. But it was shown that defendant had known him for 10 years (that is, since he was 9 years of age), and he thus admitted that he knew him as a boy; and, while he states that he believed he had reached his majority, still no fact is shown that would suggest a predicate for this belief. No inquiry whatever was made on his part to know whether or not the minor had become of age, and having known him from his early boyhood, during all these years, in our opinion the facts sufficiently charged home to appellant knowledge of his minority at the time of the offense. The judgment is affirmed.

COLTER v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

INDICTMENT — CORRECTING DEFENDANT'S NAME—FORGERY—EVIDENCE—OTHER OFFENSES—APPEAL—HARMLESS ERROR—FAILURE TO OBJECT.

1. Code Cr. Proc. art. 549, authorizing the correction of an indictment by inserting defendant's name therein as suggested by himself, and by changing the style of the cause so as to give the true name, authorizes a correction of the name wherever it occurs, and not merely in the formal parts of the indictment.

2. One accused of forgery may be asked if another case was pending against him in which he was charged with forging the name of a certain person.

3. In a prosecution for forging an order, error in admitting testimony as to the meaning of the order may not be of sufficient importance to require a reversal of a conviction.

4. Evidence that the purported drawer had customarily authorized his tenants and employes to sign his name in drawing similar orders is inadmissible, where defendant was not an employe or a tenant.

5. Evidence that the purported drawer at the time of the alleged forgery would have been willing to have indorsed paper for defendant to the amount of the order is inadmissible.

6. A bill of exceptions to the remarks of the county attorney will not be considered, where accused did not ask for the withdrawal of the remarks, nor reserve any exceptions.

Appeal from district court, Kaufman county; J. E. Dillard, Judge.

Izell Colter was convicted of forgery, and he appeals. Affirmed.

J. S. Woods, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of forgery, and his punishment assessed at two years' confinement in the penitentiary.

The indictment charged appellant with the offense under the name of "Isalah Colter." He suggested that his name was "Izell Colter," and not "Isalah Colter." In accordance with this suggestion, the indictment was

amended so as to make the name "Isalah Colter," wherever it occurred in the indictment, "Izell Colter"; thus substituting "Izell" for "Isalah." Objection was reserved, and a special charge requested instructing the jury to acquit on account of a variance; that is, that the court had authority only to change the name "Isalah" in the formal portion of the indictment, but not in the charging part, to correspond with appellant's suggestion as to his true name, and that, having changed the name in the formal portion, the name as originally found must remain "Isalah" in the charging part, and thereby constitute a variance. If this is the correct rule, we would have this remarkable condition in the law: That, by suggesting a name other than the one by which he is indicted, a change would be required in the formal part of the indictment, and the authority withheld to change it in the charging part, and thus place it within the power of a defendant, by suggesting his true name, to constitute a variance in every such indictment. This would be a singular absurdity. The statute must be reasonably construed, and no construction should be placed upon an act of the legislature that would lead to an absurdity. Article 549, Code Cr. Proc., provides: "If the defendant, or his counsel for him, suggest that he bears some name different from that stated in the indictment, the same shall be noted upon the minutes of the court, the indictment corrected by inserting therein the name of the defendant as suggested by himself, the style of the cause changed so as to give his true name, and the cause proceed as if the true name had been first recited in the indictment." This statute is not attacked on constitutional grounds, and, so far as we are aware, has not been, and it has been upon our statute books since the creation of the Code of Criminal Procedure. If the legislature had the authority to authorize defendant to suggest that his true name be inserted in the indictment, then the court in this instance acted properly in having the name corrected wherever it occurred in the indictment to correspond with the defendant's suggestion. The statute does not limit the place in the indictment where this correction shall be made, but refers to the name wherever it occurs.

While upon the witness stand appellant was asked if there was pending against him another case, in which he was charged with forging the name of Grant Hurley. Under the unbroken line of decisions in this state, this testimony was properly admitted. This testimony was properly limited by the court in his charge.

Mr. Thompson, while upon the stand, was handed the alleged forged order, and asked to state to the jury his understanding of what it meant. His reply was that it was an order by A. J. Hurley to Thompson Bros. for a buggy and harness. It was thought necessary by the pleader to include innuendo averments in the indictment, and we sup-

pose this evidence was introduced to prove said averments. While this may have been error, yet, as presented, it is not of sufficient importance to require a reversal of the judgment. *Dickson v. State*, 34 Tex. Cr. R. 1, 28 S. W. 815, and 30 S. W. 807.

Defendant, on cross-examination, proposed to prove by A. J. Hurley that it was his custom, at the time of this forgery, to authorize tenants and employes on his farm to sign his name to orders and instruments, for goods and things, to keepers of stores in Kaufman, Tex., subject to his ratification. The witness was not permitted to answer this question, but would have answered in the affirmative. The court explains this bill by stating that the evidence showed appellant was not at the time of the forgery either a tenant or in the employ of A. J. Hurley, and therefore the testimony as to the course of dealing between Hurley and his tenants and employes was immaterial; hence excluded. This ruling of the court is clearly correct.

This witness was further asked if, at the time of the forgery, he would not have indorsed paper for defendant to the amount alleged in the forged order. The witness would also have answered this in the affirmative, but was not permitted to do so. This ruling of the court was also correct.

Appellant presented a bill of exceptions to the remarks of the county attorney in his closing argument to the jury. The court signed this bill, with the statement that there was no exception reserved to the remarks, nor was the court asked to withdraw same from the jury. The testimony is ample to sustain the verdict of the jury, and the judgment is affirmed.

BEAN v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

ASSAULT WITH INTENT TO MURDER—EVIDENCE—WITNESSES—IMPEACHMENT—INSTRUCTIONS—MALICE—DEFINITION.

1. In a prosecution for assault with intent to murder, the testimony of defendant's witness on cross-examination, denying that he had refused to assist in defendant's arrest, and that he had stated to a certain person immediately after the difficulty that there had been no shooting, is relevant, so that he may be impeached by the testimony of said person.

2. It is not error to define "malice" instead of "malice aforethought."

3. Proof that defendant fired twice from his shotgun immediately after he had had a conversation with another, and that the shot had entered a post and fence in the immediate vicinity of the latter, while he was riding along the road, is sufficient to sustain a conviction of an assault with intent to murder.

Appeal from district court, Hunt county; Howard Templeton, Judge.

Charley Bean was convicted of an assault with intent to murder, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for an assault with intent to murder. On cross-examination, the defendant's witness Stalling was asked if, when Groves and the officer came to his house on the night of and just after the shooting, he did not tell Groves there had been no shooting there that night, and that the gun was broken; and if he did not refuse to assist in the arrest of defendant. He denied making any of these statements, as well as refusing to assist in the arrest of defendant. Groves was placed upon the stand, and contradicted Stalling. The objection urged was that it was not competent to thus contradict the witness on irrelevant matter, and the statements were not made in defendant's presence. The objections are untenable. The testimony was relevant, and was competent to impeach the witness in regard to these matters.

The court's charge is criticised, in that it defines "malice" instead of "malice aforethought." That portion of the charge reads as follows: "Malice," in its legal sense, means the intentional doing of a wrongful act towards another, without legal justification or excuse." If the court had used the expression "malice aforethought," instead of the word "malice," in this sentence, it seems, in the view of appellant, the charge would have been correct. His objection is hypercritical. *Martinez v. State*, 30 Tex. App. 129.

We think the verdict of the jury is supported by the evidence. Defendant fired twice from his shotgun. Several shot took effect in a post, and others struck the wire fence in the immediate vicinity of where the alleged assaulted party was riding along the road. This shooting occurred immediately after a conversation between the defendant and the alleged assaulted party. The court properly submitted the issues of the case, and our judgment is that this conviction is just and proper. The judgment is affirmed.

OHOWNING v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

THEFT OF CATTLE—BRANDS—EVIDENCE OF OWNERSHIP—BILL OF SALE AS EVIDENCE—INSTRUCTIONS.

1. That a bill of sale of the stolen property made by defendant was not acknowledged or recorded does not render it inadmissible in a prosecution for the theft.

2. That the bill of sale of a stolen animal, executed by defendant, described the brand on the animal as different from the one used by the owner, does not render it inadmissible in a prosecution for the theft, but merely affects its weight.

3. Under Rev. St. art. 4630, providing that no brands shall be recognized as evidence of ownership of the animals on which they are used, unless such brands are recorded, an instruction in a prosecution for the theft of an animal, that a certified copy of the brand of the alleged owner, which had been recorded since the theft, might be considered with other evidence, in determining the ownership of the animal, is error.

4. Where a person executed a bill of sale of a steer belonging to another, the title passes to the buyer so as to render the seller liable for theft, although at the time the bill of sale was executed the steer was running at large upon the range.

5. Testimony of one partner as to the terms of a written contract made by his partner with a third person, based on information received from his partner and not from an examination of the contract, is inadmissible, because hearsay.

6. Under Rev. St. art. 4930, providing that no brands shall be recognized as evidence of ownership of the animals on which they are used, unless recorded, the admission of testimony, in a prosecution for the theft of a steer, that the alleged owner had used a certain brand for 19 years, without limiting it to the question of identity, is error.

Appeal from district court, Willbarger county; G. A. Brown, Judge.

E. R. Chowning was convicted of the theft of cattle, and appeals. Reversed.

F. C. Beckett and F. P. McGhee, for appellant. Matlock, Cowan & Burney and Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of the theft of one head of cattle, and his punishment assessed at confinement in the penitentiary for a term of two years.

The first bill of exceptions complains of the action of the court permitting the witness L. Glidden to prove the execution and delivery to himself of a bill of sale by defendant, on the ground that said bill of sale was not acknowledged or recorded, and because the brand on the bill of sale, to wit, **qq**, is not the same brand as the proof shows was on the cattle of P. M. Burnett, which was **9999**. We know of no law that requires a bill of sale to be acknowledged or recorded before the witness would be allowed to testify to the execution of said bill of sale by appellant, where appellant is being prosecuted for the theft of the animal for which the bill of sale was made. Appellant's second objection to the bill of sale is not tenable, because said objection, if a fact, would simply go to the weight of proof that the bill of sale would carry with it, and not to its admissibility.

Appellant's second bill of exceptions complains of the failure of the court to charge the jury that if they believed from the evidence that, before he butchered the steer, the witness Glidden knew, or had reason to know, that the steer described in the bill of sale from defendant to him was not in fact the steer belonging to Jack Probasco, then said witness is an accomplice, "and his evidence must be corroborated by other evidence before you can find defendant guilty." We do not think the court erred in failing to give this charge, because we do not think the evidence raises that issue.

Appellant's third bill complains of the failure of the court to submit the good faith with which L. Glidden bought the steer as an issue to the jury. We do not think there was any error in this.

His fourth bill of exceptions is as follows:

"It had been shown that no one knew the steer, alleged to have been stolen by defendant, to belong to P. M. Burnett by the flesh marks of said steer, and the state offered in evidence what purported to be the recorded brand of P. M. Burnett from records of county clerk of Knox county, Texas, showing P. M. Burnett's brand to be **9999** on left side; but the certificate of said brand thus offered in evidence did not show when this brand had first been put of record,—whether before or after the alleged theft in this case. Defendant objected to the introduction of this record of brand for any purpose, because it did not appear when same had been recorded. The court overruled said objection, and admitted said brand in evidence to the jury, and same was read in evidence to the jury as evidence of ownership,"—to which defendant excepted. The last statement of the law on this subject by us was in *Turner v. State* (Tex. Cr. App.) 45 S. W. 1020. We there held that "a brand recorded after the theft of an animal claimed to have been marked with it affords no proof of ownership, but may be shown as a circumstance, with others, to identify the animal stolen, and the jury should be limited in its consideration to this proposition. A brand recorded before the theft of an animal claimed to have been marked with it affords proof of ownership." This same principle of law is asserted in *Lockwood v. State* (Tex. Cr. App.) 28 S. W. 200; *Horn v. State*, 30 Tex. App. 541, 17 S. W. 1094; and also see Rev. St. 1895, art. 4930. If the case of *Tittle v. State*, 30 Tex. App. 597, 17 S. W. 1118, conflicts with this proposition, the same is hereby overruled to whatever extent the same does conflict.

Now, reverting to the bill of exceptions above quoted, we think the court erred in permitting the introduction of said testimony without limiting the effect of said testimony to the issue of identity of the animal; the certificate of registration showing that the brand had not been recorded at the time of the theft of the animal. Article 4930, Rev. St., reads: "No brands, except such as are recorded by the officers named in this chapter, shall be recognized in law as any evidence of ownership of the cattle, horses or mules, upon which the same may be used." We hold that while the brand cannot be used, if unrecorded, as indicated by said statute, as any evidence of ownership of the cattle, still the brand, though unrecorded, may be proved in order to identify the animal stolen, and the jury should be limited in its consideration to this proposition. This bill of exceptions is especially well taken, when we consider the charge of the court, as follows: "As to the proof of the ownership of the cattle in question in this case, you are instructed that the certified copy of the brand introduced as that of P. M. Burnett is not sufficient, within itself, to prove ownership of said cattle as alleged in the indictment, in that said copy fails to show said brand had been properly

recorded prior to the alleged theft of said cattle, but said copy and evidence may be considered by the jury, in connection with all other evidence before you, in determining whether the said P. M. Burnett was the actual owner, or had actual control, care, and management, of the cattle described in the indictment, at the time of the taking of said cattle, if it was done." This charge violates the article of the Revised Statutes above quoted. Said article (4930) states that, unless the brand is recorded, a certified copy of the same shall not be any evidence of ownership. But we hold that it can be looked to, however, for the purpose of identifying the animal, but not for the purpose of proving the owner of the animal. The evidence in this case perhaps would have supported the verdict on the question of ownership without the introduction of this unrecorded brand. But the court's charge is erroneous. *McWilliams v. State*, 44 Tex. 117; *Saddler v. State*, 20 Tex. App. 195. The court should have limited the effect of said brand to the question of identity of the animal, and not permitted the same, as indicated in the charge, to be used as proof of ownership. The court also erred in giving the charge above quoted.

Appellant's fifth assignment complains of the action of the court refusing to give a charge to the jury that the evidence tended to show that J. R. Sumner was bailee of Spears & Watkins with respect to possession of steers bought by said Spears & Watkins of P. M. Burnett, and that the possession of Sumner is in law the possession of Spears & Watkins as to such steers. We do not think the evidence raised this issue.

Appellant's sixth bill complains of the court's refusal to charge that if they believed that, at the date of the bill of sale of the steer defendant is charged with stealing in the indictment, said steer was on the range, then no title passed to Glidden to said steer, though defendant might have had full authority to steal said steer. This is not the law.

Appellant's eleventh bill complains of the action of the court permitting the witness J. T. Spears to testify that he and his partner, Watkins, put some steers in the pasture of J. R. Sumner, in Hardeman county, known as the "Brice Pasture"; that they put in 528 head of steers brought from Knox county, and bought of P. M. Burnett, and branded 9999 on the left side; that the same were put in said pasture in April, 1898, and stayed there for a few days to get water, and they aimed to get them all out of this pasture; that his partner took the cattle out of the pasture, and said he got all of them. The state asked this witness, if any of these 9999 steers got out of this pasture on the range again, if the firm of Spears & Watkins could assert any ownership, or exercise any control, management, or care, as to such cattle on the range; to which witness said they could not, as such cattle could not be distinguished from other 9999 cattle on the range, and that P. M.

Burnett had the exclusive control, care, and management of such cattle, if any escaped from the pasture. Witness was asked by defendant if he made the purchase in person, and answered that his partner, Watkins, did the buying, but that witness paid for the steers. He also stated that he was told by his partner that he and P. M. Burnett had a contract under which this purchase was made, but he did not know whether it was in writing or not. To this defendant objected, on the ground that the terms of the contract were the best evidence, and the witness stated to the jury that, if the steer got out on the range again, Spears & Watkins would exercise no control, management, or care of the same; that no tally brand was placed on the cattle bought by witness' firm; and that P. M. Burnett had the care, control, and management of all cattle on the range in the 9999 brand, and that witness' firm asserted no claim to them. Defendant objected to all this as hearsay, and that the contract itself was the best evidence as to the rights of Spears & Watkins and P. M. Burnett with respect to the title to this steer, if any had escaped from Spears & Watkins. If the contract between Spears & Watkins on one side and Burnett on the other was in writing, as contended by appellant, the contract itself would be the best evidence of the terms of said sale; and if the witness Spears is attempting in this bill of exceptions to testify to facts told him by his partner, Watkins, we see no reason why this should not be hearsay, and therefore inadmissible. But if the witness Spears knows the contract of purchase between his partner and P. M. Burnett from actual knowledge, and not hearsay, he would be, of course, permitted to tell what that was, provided the contract of sale was lost or had never been in writing. And if he knows, as a matter of fact, that, if there were any of the 9999 cattle loose upon the range, those cattle were not Spears & Watkins', but were the cattle of P. M. Burnett, he can testify to that effect, but he has no right to give an opinion or to tell what other people told him. We therefore think the court erred in permitting this testimony to be introduced. 1 Greenl. Ev. §§ 112-124; Rice, Ev. § 71.

We also think the court erred in permitting the witness T. W. Roberts to testify that he knew the cattle brand of P. M. Burnett, and that he knew P. M. Burnett had run the 9999 brand on the left side for a cattle brand for the last 19 years, because the court did not limit the effect of this testimony to the identification of the animal. Certainly, if the witness Roberts knew that P. M. Burnett had exclusive control, care, and management of all cattle on the range in said 9999 brand, he could testify to that fact.

In conclusion, we will state that we have read the able brief of special counsel for the state with great interest, and note the ingenious argument he makes on the admissibility of the brand on the issue of the pos-

session of the animal, although the statute inhibits its use, when unrecorded, to prove ownership. This contention, we take it, is amply answered in the case of *McKenzie v. State*, 32 Tex. Cr. R. 568, 25 S. W. 426, wherein we held that, if the unrecorded brand is no evidence that the actual owner owns the animal, it cannot be evidence that the special owner has the management and control of the animal or possession thereof. For the errors discussed the judgment is reversed, and the cause remanded.

JONES v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1899.)

CRIMINAL LAW—APPEAL AND ERROR—REVIEW OF INSTRUCTIONS.

1. Where the record, on appeal, contains no statement of facts, a refusal to give a special instruction will not be reviewed.

2. Where the general charge of the court is not objected to either in the bill of exceptions or motion for new trial, it cannot be reviewed.

3. Where the record contains no statement of facts, and defendant did not complain of the action of the court until his motion for new trial, and the lowest punishment under the law was assessed against him, it will not be assumed, on appeal, that an improper charge to the petit jury at the time they were impaneled and before the trial of any case was begun injured defendant.

Appeal from district court, Ft. Bend county; Wells Thompson, Judge.

Lewis Jones was convicted of an assault with intent to murder, and appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of two years; and he appeals.

The record contains no statement of the facts. Appellant, among other things, complains of the failure of the court to give the following charge: "In order to reduce a voluntary homicide to the grade of manslaughter, it is necessary, not only that adequate cause existed to produce the state of mind referred to,—that is, of anger, rage, sudden resentment, or terror,—sufficient to render it incapable of cool reflection, but also that such state of mind did actually exist at the time of the commission of the offense. Although the law provides that the provocation causing the sudden passion must arise at the time of the killing, it is your duty, in determining the adequacy of the provocation, if any, to consider in connection therewith all the facts and circumstances in evidence in the case; and if you find that by reason thereof the defendant's mind at the time of the assault was incapable of cool reflection, and that said facts and circumstances were sufficient to pro-

duce such state of mind in a person of ordinary temper, then the proof as to the sufficiency of the provocation satisfies the requirements of the law; and so in this case you will consider all the facts and circumstances in evidence in determining the condition of the defendant's mind at the time of the alleged assault, and the adequacy of the cause, if any, producing such condition. If you believe from the evidence, beyond a reasonable doubt, that the defendant, with a deadly weapon, or instrument reasonably calculated and likely to produce death, by the mode and manner of its use, in a sudden transport of passion aroused by adequate cause, as the same is herein explained, and not in defense of himself against an unlawful attack, reasonably producing a rational fear or expectation of death or serious bodily injury, did make the assault as herein charged, you will find defendant guilty of an aggravated assault," etc. The record containing no statement of the facts, we are not able to say whether or not the special instruction was required by the evidence or not. *Sanchez v. State* (Tex. Cr. App.) 46 S. W. 249; *Dannerly v. State* (Tex. Cr. App.) 45 S. W. 921; *Wilkerson v. State* (Tex. Cr. App.) Id. 805; *Lee v. State* (Tex. Cr. App.) 44 S. W. 836. There is no criticism whatever of the general charge of the court, either in bill of exceptions or motion for new trial; and hence the same cannot be reviewed. *Stewart v. State* (Tex. Cr. App.) 50 S. W. 459.

Appellant reserved the following bills of exception, which complain of the use by the court of the language therein contained, to wit:

First bill: "On the 27th day of March, 1899, during the present term of this court, same day being Monday, and the day that the petit jury to try criminal cases for the week and for the third week of said court, that at the time the said petit jury was impaneled, and before the trial of any case was begun, the court called all of said jurors to the same side of the bar, and proceeded to give them a verbal charge as to their duties as jurymen, and their duties as to trial of causes that would be submitted to them. Said jury was 24 in number, and was the entire panel for the week. Among other things which the court then and there instructed them about, he gave them the following charge and instruction as to the law of reasonable doubt, and charged them to bear what he said in this regard in mind in the trial of all causes that would be submitted to them: 'Gentlemen: I want to call your attention to the law of reasonable doubt, what is frequently urged as defense for crime, and which will be urged in most, if not all, cases that will come before you while you are the jury for this week. I will give you this charge upon these subjects here now, because the law restricts me from giving it to you in the particular cases that arise as they arise. What is meant by reasonable doubt is not any mere supposi-

tion, but is one that arises and is founded upon the evidence of the case. Shrewd lawyers urge and represent to jurors in the trial of cases that, if there is any doubt in the case, the defendant should be acquitted, and urge the old saying that it is better that ninety and nine guilty men go free than one innocent man be convicted, and upon this doctrine, and upon the unreasonable extension of the defense of reasonable doubt, thousands of criminals have been turned loose upon society in Texas. I don't think I ever saw an innocent man convicted. We hear of them now and then way off, but, like the bag of gold at the end of the rainbow, when we approach they vanish. Now, I believe, and I think every right thinking man thinks with me, that it is better that an innocent man be convicted now and then than that 99 bloody murderers, burglars, and robbers be turned loose upon the country. This doctrine of reasonable doubt, as urged by shrewd lawyers in this state, has no application, and should have no weight with jurors. Our laws are intended for the protection of society, and, while they do not aim in any instance at the conviction or punishment of the innocent, yet it is of the highest importance to you and me that the guilty do not escape through the influence of such sophistry as I have called your attention to, which, in the great majority of cases, when urged as a defense, is like the famous hip-pocket defense in homicide, to which I will call your attention,—is a manufactured and fictitious defense; and, whenever the jurors see such defenses raised to shield the guilty criminal, it is not only their duty, as the judges of the fact, to disregard it, but to disregard it altogether. If the innocent man is convicted, he can appeal to the higher courts, and get his case righted. By reasonable doubt is not meant an ordinary doubt, not any small doubt, but a doubt arising out of all the testimony. I charge you to recollect these matters, and be guided by these general instructions in the trial of each and every case that shall be submitted to you in which such matters will arise, and hope that your conduct as jurors will conform to them; and if you, as jurors, are guilty of any improper conduct, I will give you notice right now that the one or ones so guilty will be fined not less than one hundred dollars, and the one so fined will not get it remitted.' That this language was heard by all of the said 24 jurors, and that defendant was put on trial on the following day, and was the first party tried by said jury after receiving the said charge, and that at the time of the trial he exhausted his peremptory challenges, and was compelled to take as jurymen 12 of the original jurymen who heard this charge, and all of the said 12 jurymen who tried his case were part of the 24 who heard this charge,"—to which defendant excepted.

Second bill: "That upon the impaneling of the jury for the third week of the present term of this court, as fully set out and ex-

plained in his bill of exceptions No. 1 hereinabove, the court at the same time and under the same circumstances, as alleged in said bill, further charged said petit jury as follows verbally as to the law of cases that might arise before them, and charged them upon the law of self-defense that was relied upon by the defendant in this case: The court charged said jury as follows: 'It has been the law in Texas since the time of the decision of the Horback Case, by Roberts, a judge, that in criminal cases the jurors must look at the case from the defendant's own standpoint, and put themselves in the defendant's place, and there has come up under this ruling what has become known as the "hip-pocket defense," which defense has been the means of turning loose thousands of criminals in Texas. A defendant comes into court, and says that the wounded or deceased man put his hand behind him, or made some kind of hostile motion, and defendant thought he meant to shoot or to hurt him, and justifies himself on this ground. When a case of this kind comes up before you, sift it to the bottom, and see if it is a bona fide defense, and if, upon the trial of the case, it should be developed that the wounded or deceased man was not armed at the time of the killing, then it should raise in your mind that this defense is false and manufactured, and should be disregarded by you altogether. If the jury should find that the deceased or injured man was armed at the time, then this would be a good defense, but otherwise it should be disregarded, and it is your duty to so disregard it.' That these remarks and this charge was set up as reason for new trial herein, and was one of the grounds of said motion, which motion was overruled," and defendant excepted.

We are at a loss to know why a trial judge should use the language contained in these bills of exception. It is highly reprehensible, and is certainly not proper in the due administration of the laws of this state. But in the absence of the statement of facts, and in view of the fact that appellant did not complain of the action of the court until his motion for new trial, and in view of the further fact that the lowest punishment under the law was assessed against appellant, we have no means by which we can say that the remarks of the judge injured appellant. But we desire here to emphasize what we said in *Gaines v. State* (Tex. Cr. App.) 42 S. W. 380, to wit: "However improper and indelicate such expressions as are here attributed to the judge may be, they do not of themselves afford a ground for the reversal of the cause. As was said in *McCauley v. Weller*, 12 Cal. 500: 'If the judge act illegally on the trial, or deny the prisoner his legal rights, this would be a cause on appeal for reversal; but we would not undertake to say that this instruction operated a legal disqualification of the judge to sit.' The most that can be said is that such conduct will cause a closer and more rigid scrutiny of the errors complained of." And

see, also, *McMahon v. State*, 17 Tex. App. 321; *Davis v. State*, 19 Tex. App. 201. However, we hope never to see any such statement as this in any record again. Trial courts in this country are supposed to be, and usually are, places of justice, administered under the due process of the laws of this country, and any effort to minimize, ridicule, or bring into disrepute the process of the courts is reprehensible in the extreme. No error appearing in the record such as would authorize a reversal, the judgment is affirmed.

FRANKLIN v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1890.)

JURY—CHALLENGES AND OBJECTIONS—CRIMINAL LAW—EVIDENCE—DECLARATIONS BY DECEASED—TRIAL—ARGUMENT AND CONDUCT OF DISTRICT ATTORNEY—FELONIOUS HOMICIDE—PROXIMATE CAUSE OF DEATH.

1. The action of lower court in sustaining a challenge by the state to jurors because they were opposed to capital punishment in cases of circumstantial evidence will not be reviewed, in the absence of showing that the case was one of purely circumstantial evidence.

2. On the trial for homicide, it is not error to refuse to permit defendant to prove that deceased declared some days before his death "that, if his friends had not interfered, he would have fixed defendant."

3. The district attorney, on a trial for murder, in addressing the jury, remarked that "crimes of this kind, the negro boy and his six-shooter violating the laws against gambling, are getting too frequent, and you should make an example of this big, strong man." *Held* not improper, in the absence of any showing that defendant was prejudiced thereby.

4. Remarks by the district attorney to the defendant's attorney intended to belittle his exceptions should not be allowed.

5. The defendant shot the deceased in the leg above the knee, inflicting a wound not necessarily fatal. On the Sunday, the physician attending him advised amputation of the leg to prevent gangrene, but he and his mother refused to permit it until four or five days later, after gangrene was manifest, when it was too late, and no amputation was made. On the ninth day he died from gangrene caused by the bullet. *Held*, that the refusal of the deceased to permit amputation was not such gross neglect or manifest improper treatment as would justify defendant's acquittal of felonious homicide, under Pen. Code, arts. 652, 653, which exonerate a defendant, where there has been neglect or manifest improper treatment.

Appeal from district court, Bexar county; Robert B. Green, Judge.

Benjamin Franklin was convicted of manslaughter, and appealed. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of manslaughter, and his punishment assessed at two years' confinement in the penitentiary, and he appeals.

The homicide occurred in a casual difficulty at a saloon in the city of San Antonio. Deceased applied to appellant, who was keeping the bar, for another deck of cards, and was

informed that he had none, and a quarrel ensued. Deceased, who was a larger man, slapped defendant in the face, and one or two of the witnesses say that he knocked him down. Defendant then got a pistol, and shot deceased in the left leg, just above the knee. Nine days thereafter deceased died, as claimed by the state, from the effects of the wound in question.

Appellant reserved a bill of exceptions to the action of the court sustaining the objections of the state to certain jurors, on the ground that they were opposed to the infliction of capital punishment for a crime in cases involving circumstantial evidence. The bill does not show whether the case was one of purely circumstantial evidence; and, looking to the bill alone, we assume in favor of the action of the court that it acted properly.

There was no error in the action of the court refusing to permit defendant to prove by witnesses that deceased declared some time before his death that it was his fault that he struck defendant, and, if his friends had not interfered, he would have fixed him so he could not have done it. This was not shown to be either *res gestæ* or dying declarations. It was a bare statement of deceased, made some days after he was shot, and, as such, was not admissible in evidence.

Appellant asked a charge on self-defense. The charge requested recited certain facts claimed to have been proved by the testimony. Without discussing the propriety or legality of the charge in question, we would say that the court gave a correct charge on the subject of self-defense, fully covering that phase of the case as presented in the evidence.

The district attorney, in his closing argument, made these remarks: "Crime is on the increase in this state, and crimes of this kind, the negro boy and his six-shooter, in these dives, violating the laws against gambling, are getting too frequent; and you, gentlemen of the jury, should make an example of this big, strong man, stronger than any man on the jury, and break up this reputation for crime this section of the country has." We are not prepared to say that this part of the bill shows anything reprehensible. For aught that appears, the remarks of the district attorney were not unauthorized. At any rate it is not shown that they were calculated to unduly prejudice appellant. The latter part of the bill, however, does show conduct reprehensible on the part of the district attorney. When appellant's counsel arose to reserve his bill of exceptions, the district attorney remarked, "Yes, take a bill of exceptions to everything I say. It is all excepted to,—everything I say excepted to." We would observe here that counsel has a right at all times during the progress of the case, in proper manner, to reserve a bill of exceptions to any action of the court or counsel deemed improper, and he has a right at all times in taking his bill of exceptions to be treated in

a respectful manner. No doubt the purpose of the district attorney was to belittle his exception. This course of practice should not be allowed.

Appellant insists that the verdict of the jury is contrary to the court's charge and the evidence adduced on the trial. And, in this connection, he urges that the testimony of Dr. Cameron shows that the wound inflicted was not necessarily a fatal wound; that no bone of the leg was broken, but the bullet merely cut the main artery of the leg; that he was called in on the same day after the wound was inflicted to see the patient, and he advised amputation of the limb to prevent blood poison, but that deceased and his mother refused to permit it at that time; that several days afterwards blood poison was manifest, and deceased was then willing for the limb to be amputated, which was not done, it being too late. He gave it as his opinion that, if deceased had followed his advice and permitted the amputation at the time he was first called, he did not think he would have died. He further testified that he attended deceased daily, and sometimes went to see him two or three times a day, and four or five days after the wound was inflicted he noticed under the toe nail of the wounded leg a dark spot that he recognized as the incipient appearances of gangrene or blood poison; that the bullet caused the gangrene or blood poison, and deceased died from the blood poison; that, in his opinion, deceased did not die from the immediate effects of the shot; that the shot was not necessarily fatal, and the shock from the bullet striking and making the wound did not produce death; that he could not say that deceased would certainly have lived had the amputation been performed. He further stated that there was no malpractice or gross neglect in the treatment of deceased, save and except the refusal of deceased to permit his limb to be amputated when he was first called in. The court gave the following charge on this subject, which we quote: "You are instructed that homicide is the destruction of the life of one human being by the act, agency, procurement, or culpable omission of another. The destruction of life must be complete by such act or agency. But, although the injury which caused death might not under other circumstances have proved fatal, yet, if such injury be the cause of death, without its appearing that there has been any great neglect or manifestly improper treatment by some other person, such as the physician, the deceased, the nurse, or other attendant, it would be homicide; and if you believe from the evidence that some one shot the deceased, and inflicted upon him a wound which was not in itself necessarily mortal, and that the wound inflicted produced blood poisoning, or any other effect which would result in the death of the deceased, the party inflicting the injury would be as guilty as if the wound was one which would of itself inevitably lead to death, unless it appears that

there was great neglect or manifest improper treatment by some other person, such as a physician, the deceased, the nurse, or some other attendant. You are instructed that, if the wound inflicted would not necessarily result in death, and it appears that there has been any gross neglect or improper treatment of the party injured, by the physician, the deceased, the nurse, or other attendant, it is not homicide in him who inflicts the first injury. But, if the injury, though not necessarily fatal, yet, if said injury results in death, then it would amount to homicide, unless it appears that there has been gross neglect or improper treatment of the person injured by physician, the deceased himself, the nurse, or other attendant." We do not understand that appellant contends this charge is erroneous, but that on it and the testimony in that connection appellant should have been acquitted of felonious homicide. We do not understand our statute on the subject which exonerates a defendant where it appears that there has been any gross neglect or manifest improper treatment of the person injured to apply to a case of this character. Articles 652, 653, Pen. Code. It is not like the case where a person receives a wound not necessarily fatal, and takes some disease in no wise connected with or superinduced by the wound, and dies therefrom. Nor in our opinion can it be said that, because of the wound inflicted, the person injured was called on to decide whether or not, under the advice of a physician, he would have the limb amputated, that his failure or refusal to have such limb amputated can be termed gross neglect or manifestly improper treatment. The percentage of deaths from an amputation of the leg above the knee is considerable, and the testimony of a physician that a person may or may not get well is more or less speculative. Gangrene or blood poisoning had not set in when the physician gave this advice, nor does he state that blood poisoning would not have set in if the amputation had taken place. We hold that this refusal of the person shot under the circumstances to have his limb amputated cannot be imputed to him as gross neglect or manifestly improper treatment. We quote Mr. Bishop, on this subject, as follows: "The doctrine is established that a blow resulting in death constitutes a killing, though the individual might have recovered had he used proper care or submitted to a surgical operation, which he refused. It is a killing, though the man would not have died had the surgeon treated the wound properly, or had the medical attendant used due skill. So that the death is the combined result of the wound and the maltreatment. And where an injury was inflicted by a blow, which incompetent medical judgment rendered an operation advisable, preliminary to which chloroform was administered, and during its administration the patient died, and but for it he would not have died, it was ruled that the blow would be the cause of the death, within the law of felonious homicide.

And so death resulting from a disease brought on by the wound is regarded as death from the wound, and it is the same when resulting from an amputation which the wound made necessary." 2 Bish. Cr. Law, § 638; Hart v. State, 15 Tex. App. 202; Hale, P. C. 428; Com. v. McPike, 3 Cush. 181. As stated above, the physician's opinion that deceased would have gotten well had he permitted the amputation was more or less speculative on his part. We do not understand the physician to say that in every case where the main artery of the leg is penetrated or cut, and the party does not immediately bleed to death, blood poisoning is bound to follow; and, unless such be the case, it could scarcely be said that deceased was guilty of gross neglect or manifest improper treatment by taking the chance of saving his limb, although he may have refused to take the advice of the physician in the matter. This is not in conflict with the construction of our statute laid down in Morgan v. State, 16 Tex. App. 593. The refusal of deceased to have his limb amputated, under the circumstances, was neither preventing nor aiding in the fatal effects of the injury received. It is sufficient to say in this case that death resulted from a disease brought on directly by the wound which was inflicted by appellant; and, the proof showing that there was no manifest improper treatment or gross neglect of this wound after its infliction, appellant cannot say that his act was not the proximate cause of the death of the deceased. The charge of the court fairly submitted all the issues in the case, and gave defendant the benefit, not only of manslaughter, but of aggravated assault and self-defense. The jury found him guilty of manslaughter, and, in our opinion, the evidence amply sustains this verdict. The judgment is affirmed.

PACE v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

CRIMINAL LAW—THEFT OF CATTLE—CONTINUANCE—WANT OF DILIGENCE—INSTRUCTIONS—EVIDENCE.

1. An application for continuance for want of testimony of a witness is properly overruled where it shows no diligence to obtain the evidence, and in the light of the other evidence it probably is not true.

2. After the court has overruled a motion for continuance for want of testimony of an absent witness, it is not error to exclude as evidence the subpoena and sheriff's return thereon showing the date of its issuance and service on such witnesses.

3. On a prosecution for theft of cattle, an instruction that, if the jury believed accused won the animal at a game of cards, they must acquit, is proper where the evidence raised such an issue, and the court, in a subsequent portion of the charge, instructed on reasonable doubt.

4. An instruction is properly refused where it is substantially given in the main charge.

5. Where the court, in a prosecution for theft, erroneously charges on circumstantial evidence, the error is harmless, where the case is not one depending on circumstantial evidence.

Appeal from district court, Hill county; J. M. Hall, Judge.

Bob Pace was convicted of theft of cattle, and he appeals. Affirmed.

Thos. Ivy, Dave Derden, and C. F. Greenwood, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of the theft of cattle, and his punishment assessed at confinement in the penitentiary for a term of two years.

Appellant complains of the court overruling his motion for continuance for the want of the testimony of Berry and Palmer. The indictment was filed October 5, 1897, and October 20, 1897, subpoenas were issued for both of said witnesses, and returned properly served. Both witnesses were absent at the spring term, 1898, of the court. On August 16, 1898, alias subpoenas were issued, and returned "Not found" in Hill county; the witness Palmer being in Bosque county, and Berry's residence unknown. Defendant states that he expected to prove by the witness Palmer that when appellant was first approached with reference to the stolen property, and called upon to give an explanation of his possession, he stated to witness that he bought the property from one Dave McBride, who was then present attending court, and subpoenaed by defendant as a witness in his behalf, and, as he alleged, would testify that defendant did not buy said property from him; and that the state expects to show by some witness that at and about the time, or a little while previous to the explanation made to said Palmer, this appellant told said witness (whose name is John Doyle), and who is now present, that he (defendant) bought the property from one Franklin; that it is not true that he bought the property from such person, and not true that he did so tell said witness Doyle. By the witness Berry defendant expects to prove that said Berry was present when defendant bought the property from said McBride; that defendant paid said McBride for the same, as above stated; that said purchase was made in the southwest part of Hill county, 2½ months before defendant was arrested for the alleged offense with which he is charged. We do not think the application shows diligence to obtain the testimony of either of said witnesses. Nor is their testimony probably true, in the light of the record before us. Therefore we do not think the court erred in overruling the application for continuance. He also complains of the court excluding as evidence the subpoena issued on October 20, 1897, for the witnesses J. R. Palmer and M. B. Berry, and the return of the sheriff thereon, showing that said Berry was served on October 20, 1897; and said Palmer on October 25, 1897. There was no error on the part of the court in excluding this evidence.

Appellant complains of the court's charge

wherein he instructs the jury that, if they believe from the evidence defendant won the animal at a game of cards, then they must acquit him, because there was no evidence that defendant won said animal at a game of cards, and hence there was no such issue in the case, and the jury were not required, under the evidence, to believe that defendant won the animal at a game of cards. We think the evidence raised this issue; and the court, in a subsequent portion of the charge, instructed the jury on reasonable doubt, so the charge, taken as a whole, in this regard, was proper. He also complains of the refusal of the court to give his special charges to the effect that, if the jury believed defendant won the animal in question in a game of cards, or if, from the evidence, the jury have a reasonable doubt as to whether he so won the animal, they should acquit. This charge, in substance, was given in the court's main charge, and hence there was no error in refusing it.

He also complains of the refusal of the following special charge: "You are instructed that in this case the burden of proof is on the state to establish the guilt of the defendant beyond a reasonable doubt, and this burden of proof rests on the state throughout the entire trial, and does not shift from the state to the defendant; and unless, from the evidence, you are satisfied beyond a reasonable doubt that defendant is guilty as charged, you will acquit him." This charge was, in substance, given by the court in the main charge, and it was not necessary to repeat it.

Appellant complains of the court's charge on circumstantial evidence, and the refusal of the court to give his requested charge on that subject. The court's charge on circumstantial evidence is erroneous. *Henderson v. State*, 14 Tex. 514; *Smith v. State* (Tex. Cr. App.) 34 S. W. 960. But this case is not a case depending solely upon circumstantial evidence. In a theft case, where appellant swears, or proves by other witnesses, that he had possession of alleged stolen property, but claims that same was obtained in a manner that would not be a violation of the law, this character and kind of evidence relieves the court of the necessity of charging the law of circumstantial evidence; in other words, it ceases to be a case depending upon circumstantial evidence. In *Rodgers v. State*, 36 Tex. Cr. R. 564, 38 S. W. 184, the court said: "It is only in cases where the conviction is made to depend entirely upon circumstantial evidence that this phase of the law is required to be given. The facts adduced upon the trial show beyond any controversy that defendant killed the animal in question. This he admitted to the state's witness, and this he proved himself by his own witnesses, and there is no question of the fact that he was connected with the killing of the animal." *Hayes v. State*, 80 Tex. App. 404, 17 S. W. 940; *Adams v. State*, 34 Tex. Cr. R. 470, 31 S. W. 372. Therefore, although the court's

charge was erroneous, as contended by appellant, yet, this not being a case depending altogether upon circumstantial evidence, it was not incumbent on the court to charge thereon, and the error in the charge is thereby rendered harmless, and not calculated to prejudice the rights of appellant. The evidence amply supports the verdict of the jury, and, no reversible error appearing in the record, the judgment is in all things affirmed.

BRUCE v. STATE.

(Court of Criminal Appeals of Texas. June 14. 1899.)

HOMICIDE—SERIOUS BODILY INJURY—EVIDENCE—SELF-DEFENSE—INSTRUCTIONS—REVERSIBLE ERROR.

1. "Serious bodily injury," within Pen. Code. art. 679, providing that a homicide is justifiable when committed against an attack which produces a reasonable expectation or fear of death or some serious bodily injury, is not necessarily such as may eventuate in death.

2. On a trial for murder, a statement made to a witness by another of what a state's witness had told him as to the circumstances of the killing is hearsay and inadmissible.

3. The refusal of an instruction is not erroneous, where, in so far as applicable, it was given in the main charge.

4. A requested instruction is properly refused where it is not supported by the evidence.

5. An instruction limiting a defendant's right of self-defense to the greatly superior physical strength of deceased is not erroneous, though, if defendant was unlawfully attacked and was about to suffer serious bodily injury, his right of self-defense was complete regardless of the superior strength of deceased, where it was admitted that deceased was physically stronger than defendant, and the court only applied the law to that fact.

6. Such instruction, if erroneous, is not reversible error, under Code Cr. Proc. art. 723, providing that a judgment may be reversed when the trial court violates certain provisions governing instructions.

Appeal from district court, Ellis county; J. E. Dillard, Judge.

Will Bruce was convicted of manslaughter, and he appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

Appellant complains of the court's charge in the following particular, to wit: We quote: "It was in evidence that appellant and deceased met in the public road, and deceased assaulted appellant, and was choking him to an extent that appellant could not speak, and was about to force him to the ground, when appellant, who was much the smaller man, pulled his pistol, and killed deceased. The court charged the language of article 679, Pen. Code, to wit, that homicide is justifiable when committed against an attack which produces a reasonable expectation or fear of

death or of some serious bodily injury, but the court then instructed the jury that 'serious bodily injury' meant such injury as might eventuate in death or might probably cause death. Appellant submits that this definition is radically wrong, and was greatly to his prejudice." In connection with this charge, we make a short excerpt from the testimony of appellant as follows: "Finally deceased got me by the throat, and began choking me, until I was almost sinking down, and was holding to the top of the hind wheel with my left hand to keep from falling. Then I looked toward J. J. Crow, who was standing at the head of my team, with an appealing look that ought to have convinced any man that I needed help. I could not speak or relieve myself, and took out my pistol and shot Rone. This was all I could do to save myself."

Now, then, the question arises as to what are the rights of appellant on the question of self-defense. The statute says that he has a right to defend himself against reasonable expectation or fear of death or of some serious bodily injury. Does "serious bodily injury" mean necessarily contemplation of death, or any injury that will eventuate in death or might probably cause death? We do not think so. We think the word "serious" in said statute means what the word imports,—that is, grave; not trivial; not slight. Then "serious bodily injury" would be an injury that was not a trivial one; not a slight one. We know of no authority that says it means an injury that might eventuate in death or probably cause death. The record before us shows that appellant was being choked by deceased to such an extent as might indicate that he was being seriously injured, and to have his right of self-defense restricted in the manner as indicated in the court's charge we think was error. To be choked until one falls from lack of breath, or from injury inflicted, might be a serious injury; and we think, as contended by appellant, that he had a right to complain of the charge, and say that it greatly prejudiced his right of self-defense. We think the court erred in his definition of "serious bodily injury." We do not wish to be understood as holding that it is necessary to define the term "serious bodily injury," for we think the words carry upon their face their meaning; but we hold that "serious bodily injury" does not mean an injury that must necessarily or probably be fatal. We think the court's charge was erroneous.

Appellant complains that the court erred in refusing to permit John Ralston, Sr., to testify that J. G. Ralston had, in Waxahachie, on the day of the killing, told him that the state's witness J. J. Crow had admitted to him that deceased, T. S. Rone, had pulled appellant off his wagon and assaulted him. We do not think there was any error in the court's refusal to permit the witness to so

testify. It is clearly hearsay, and inadmissible. *Snell v. State*, 29 Tex. App. 236, 15 S. W. 722.

Appellant excepted to the refusal of the court to give the following special charge: "A 'mutual conflict,' as meant in the main charge, is when two parties voluntarily and willingly engage in a combat. If a contest is forced on a party, and, under all the circumstances, there is no volition on the part of the combatants, then the combat cannot be called 'mutual.' If you believe that Tom Rone intended, and it was his purpose, to fight defendant, and that he forced a fight upon defendant, and defendant did not willingly engage in a mutual combat, then defendant would have the complete right of self-defense. If Tom Rone assaulted defendant, and defendant, by reason of the superior strength of Tom Rone (if any), apprehended the infliction of a serious bodily injury from deceased, then defendant would have a right to act upon such appearances of danger, and if, doing so, he shot and killed deceased, then he would be justifiable under the law, and in such case you will so find." This charge, as far as we think the same was applicable, was given by the court in his main charge.

Appellant also excepted to the refusal of the court to give his special charge to the effect that, even if the jury believed that appellant and Rone mutually agreed to fight a fist fight, and that during the prosecution of the said fight Norris and Crow approached them in such manner as made it reasonably to appear to defendant that one or the other was about to aid Rone in his assault upon defendant, and that defendant upon such apprehension fired and killed Rone, then his right of self-defense would not be abridged. We have searched the record in vain for any testimony authorizing such a charge, and must say that the record does not disclose any such evidence. There was no error in the court refusing to give this charge.

Appellant contends that the court erred in its charge in effect limiting appellant's right of self-defense to greatly superior physical strength and manhood of deceased, T. S. Rone; for if appellant was unlawfully attacked, and was about to suffer serious bodily injury, his right of self-defense was complete, regardless of superior strength of Rone. The evidence shows that deceased was a man of greatly superior strength to appellant. There is no controversy whatever on this question, and, in view of this fact, we do not think there was any error in the court applying the law to the facts of the case as he did in this instance. At any rate, we cannot see that it was such error, if error, as would authorize a reversal of this case, under article 723 of the Code of Criminal Procedure.

In the view we take of this case, it is not necessary to discuss the sixth assignment of error, in reference to the misconduct of the jury, as it will not likely occur on another

trial. For the error in the charge above discussed the judgment is reversed, and the cause remanded.

GARRETT et al. v. CAMPBELL.

(Court of Appeals of Indian Territory. June 12, 1899.)

NOTE IN ESCROW—IMPROPER ISSUANCE—RIGHTS OF BONA FIDE HOLDER.

A note placed in escrow, to be delivered on conditions not apparent on its face is valid, as against the maker, in the hands of an innocent purchaser for value, though the terms of the escrow were violated.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, Dec. 20, 1897.

Action by Tom Campbell against C. W. Garrett and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

On December 4, 1893, the appellants executed the following instrument: "200. Muscogee, I. T., Dec. 4, 1893. On or before one year after date, we promise to pay to the order of W. H. Moore two hundred dollars, for value received, with interest at the rate of 10 per cent. per annum from maturity, payable at Muscogee, Ind. Ter. C. W. Garrett. W. C. Garrett. Per C. W. G." This note was deposited with one George Williams, in escrow, to be held by him until the expiration of one year; but, prior to such expiration, the note was, for reasons not shown by the record, assigned to the appellee for a valuable consideration. Appellee brought suit in the court below to recover the balance due on the note, there having been partial payments made thereon in the sum of \$33 by appellants to Moore, the original payee, before the transfer to appellee. On the trial the note above set out was offered in evidence by appellee, with the following indorsements thereon: "Please pay to Tom Campbell, or order, Sept. 17, 1894. W. H. Moore. Received of Garrett Bros. Dec. 6—93, \$11. Rec'd Jan. 7—94, \$11. Garrett Bros. 2—5—paid by Garrett, \$11." The record then states that "plaintiff further introduces testimony tending to prove that he had no knowledge or information of the said note having ever been placed in escrow, or of any agreement between defendants and W. H. Moore, the original payee, in said note, that plaintiff had purchased said note, for value, before maturity." The defendant introduced evidence showing that the note was never delivered to Moore, but was deposited in escrow with George H. Williams, and was merely a memorandum of the amount Moore should receive for a certain building at the end of the year, after deducting certain rents thereon, to be collected by Garrett Bros., as agents of Moore. The record then states: "Defendant further introduces evidence tending to show that plaintiff had knowledge of the arrangement between Moore

and the defendant." The case was submitted to the jury, who returned a verdict in favor of appellees, and the court entered judgment in his favor, from which defendants appeal.

Harrison O. Shepard, for appellants. N. B. Maxey, for appellee.

CLAYTON, J. (after stating the facts). The record discloses that the instrument sued on (upon its face, an ordinary promissory note) was placed in escrow with one Williams, to be held by him until the expiration of one year, at which time an accounting was to be had between the parties, and settlement made. It does not appear from whom, nor in what manner, the appellee procured the note, but it is properly indorsed to him by Moore, before maturity, for value, and the record discloses no fraud upon the part of any of the parties, or that Campbell had notice of any facts except those apparent upon the face of the instrument. It is true that the record states that "defendant further introduces evidence tending to show that plaintiff had knowledge of the arrangement between Moore and the defendant"; but the instructions of the court properly left the jury to determine the effect of this testimony, which they did in favor of appellee.

The only contention left for appellants is that the note was deposited in escrow, and, having been placed in circulation without the knowledge or consent of the makers, never had valid legal existence. This doctrine, to a limited extent, has been announced by some of the English courts, but has never been followed here, except where the instrument in question was under seal, and it was apparent from the paper itself that certain contingencies should happen in order to complete the transaction. The authorities relied upon by counsel for appellants, except, perhaps, the case of *Chipman v. Tucker*, 38 Wis. 43, which is not a parallel case, and differs very materially from the one under consideration, instead of supporting their contention, are strongly against him. Mr. Daniel, in his work on *Negotiable Instruments* (section 856), after stating the English rule, and declaring it to be against the weight of American authority, says: "It should be borne in mind that there is a cardinal distinction between the perversion of instruments in form negotiable, or capable and intended to be made so in a certain contingency, and that of instruments under seal. * * * But negotiable instruments stand on a different footing entirely. They are letters of credit, * * * and one who chooses to put his name on an instrument possessing these characteristics, instead of confining his liability by shaping it in a form expressive of his meaning, should not be permitted to ensnare others and escape himself unscathed."

So in the case of *Burson v. Huntington*, 21 Mich. 410, to which our attention is especially

directed by counsel for appellants, the court, after announcing the principle that, "as a general rule, a negotiable promissory note, like any other written contract, has no legal inception or valid existence as such until it has been delivered in accordance with the purpose and intents of the parties," say: "If the maker or indorser, before delivery to the payee, leave the note in the hands of a third person as an escrow, to be delivered upon certain conditions only, * * * to be used upon certain conditions not apparent upon the face of the paper, and the person to whom it is thus intrusted violate the confidence reposed in him, and put the note into circulation, this, though not a valid delivery as to the original parties, must, as between a bona fide holder for value and the maker or indorsers, be treated as a delivery, rendering the note or instrument valid in the hands of such bona fide holder, for value." The law of negotiable instruments is so well established that it seems to us useless to lengthen this opinion. The appellee is the innocent holder, for value, before maturity, of an ordinary promissory negotiable note. If the depository of the note violated the trust reposed in him by allowing it to go into circulation, it is to him, and not to the holder of the note, that the maker must look for his redress. If the note was merely intended as a memorandum between the parties, it was the negligence of the maker in not expressing its object on the face of the paper, and he, not the innocent holder, must suffer the result of his own negligence. Let the judgment of the lower court be affirmed.

THOMAS and TOWNSEND, Jr., concur.

WEBB v. McCAIN.

(Court of Appeals of Indian Territory. June 18, 1899.)

CHATTEL MORTGAGES—POSSESSION—PARTIAL PAYMENT.

Under Mansf. Dig. § 4754, giving a chattel mortgagee the right of possession, in the absence of a stipulation to the contrary, a mortgagee is entitled to such possession, in the absence of such stipulation, though the mortgagor has paid a large part of the mortgage.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, Nov. 7, 1896.

Replevin by Harry McCain against John B. Webb. Judgment for plaintiff, and defendant appeals. Reversed.

This was an action of replevin brought by the appellee, Harry McCain, to recover from the appellant, John B. Webb, the possession of 600 bushels of corn in the crib, of the alleged value of \$150, a span of mare mules, of the alleged value of \$75 each, and a set of harness, of the alleged value of \$12, and damages for their unlawful detention; the appellee alleging that he was the owner of all of

said property, and entitled to its immediate possession, and that appellant unlawfully detained the same. Appellant answered, specifically denying each of the allegations of the appellee's complaint, and alleging that he held and retained the corn sued for to secure the payment of an indebtedness due him from appellee in the sum of \$86.10, and which appellee had orally agreed with him should stand good for the payment of that debt; that the corn was grown and cultivated by appellee on a farm which was in the possession of the appellant, and upon which appellant resided; that appellant had boarded the appellee and fed his team of mules for a period of about six months, pursuant to said oral agreement that said corn should stand good for the same, and that the indebtedness was unpaid; and that he held and retained the mules and harness, by virtue of the terms of a written mortgage, to secure the payment of an indebtedness of \$358 and interest, which had not been paid. The appellee replied, denying the oral mortgage or conveyance of the corn, and alleging that the indebtedness secured by the mortgage of the mules and harness had been fully paid. Trial was had before a jury, which returned the following verdict: "We, the jury duly impaneled and sworn in the above-entitled action, find the issues in favor of the plaintiff, and find that the plaintiff is entitled to the possession of 500 bushels of corn mentioned in the complaint, and assess its value at 15 cents per bushel, making seventy-five dollars; and find that he is entitled to the possession of one iron gray mare mule, fifteen hands high, no brands, four years old, as described in the complaint, and assess the value thereof at seventy-five dollars, and assess his damage for the detention thereof at fifty dollars; and find that he is entitled to one bay mare mule, no brand, fifteen hands high, five years old, as described in the complaint, and assess its value at seventy dollars, and assess his damages for the detention thereof at fifty dollars. We further find that the harness replevined herein and described in plaintiff's complaint is the property of the plaintiff, and that its value is ten dollars, and the usable value thereof is two dollars. We further find that the defendant is entitled to a credit to the amount of one hundred and thirty-seven dollars. E. C. Strech, Foreman." The appellant filed a motion for a new trial, alleging that the verdict of the jury was not sustained by sufficient evidence, and that it was contrary to the law, and alleging other errors of law occurring at the trial, and excepted to by defendant. The motion for a new trial was overruled, and judgment entered for the plaintiff for the possession of said property, or its value, as found by the jury, also for \$102 damages awarded by the jury to the plaintiff, and the defendant was allowed an offset of \$137 against the value of said property and damages, and an appeal prayed and allowed to this court.

F. M. Smith, for appellant. W. H. Tibbils and G. B. Denison, for appellee.

THOMAS, J. (after stating the facts). The appellant contends that the verdict of the jury in this case is not sustained by sufficient evidence, and that it is contrary to the law; and these questions are properly presented for review here. The testimony of the appellee, Harry McCain, was:

That he had mortgaged the team of mules and the harness described in his complaint to the appellant to secure the payment of an indebtedness of	\$358 00
He claimed and testified that he had paid this as follows:	
By balance due him from appellant for work	\$ 18 00
By 120 tons of hay delivered by him to appellant, at an agreed price of \$4 per ton.....	480 00
By a hay press delivered by him to appellant, for which he was to be credited	130 00
That he had received in cash from appellant on the hay delivered the sum of	252 00
That the appellant had paid some debts due by him to other parties amounting to.....	56 00
	<hr/> \$323 00 \$366 00

—Which, under the testimony of the plaintiff himself, would have left a balance due upon the indebtedness secured by the mortgage upon the mules and harness of \$38, exclusive of interest.

Under our law (section 4754, Mansf. Dig.), "in the absence of stipulations to the contrary, the mortgagee of personal property shall have the legal title thereto, and the right of possession," and it nowhere appears in this case that there was a stipulation to the contrary; and it would be manifestly unjust to sustain a verdict assessing damages against the appellant for the retention of this property, which, under the evidence and the law, he had a legal right to retain until the mortgage upon it had been paid in full. The jury, in its verdict, found that there was due from appellee to appellant the sum of \$137, and, as appellant only claimed an indebtedness of \$66.10, secured by the alleged oral mortgage on the corn, the jury must have found that there was still due upon the mortgage of the mules and harness the sum of \$70.90.

In *Hudson v. Snipes*, 40 Ark. 77, the court, in delivering its opinion, said: "This is not a bill in chancery to ascertain the mortgaged debt and for decree of foreclosure, but an action of replevin by the mortgagee against the mortgagor for possession of the mortgaged property. After foreclosure, the mortgagee may bring replevin for the goods mortgaged, provided any portion of the indebtedness secured by the mortgage is still due and owing to him; and it is no defense to the action to show that a portion of the indebtedness has been paid before suit, but proof that the entire debt has been discharged is a good defense. *Jones, Chat. Mortg.* § 706; *Marks v. McGehee*, 35 Ark. 218. * * * Whether, on a bill in chancery by the mortgagee to foreclose or by the mortgagor to redeem, a set-

off may be allowed against the mortgage debt, need not be considered in this case (see *Nolly v. Rogers*, 22 Ark. 230), which is an action of replevin for the property embraced in the mortgage, brought after default and forfeiture, and in which a set-off is not a proper defense. *Gantt's Dig.* § 4572; *Wat. Set-Off*, 144; *Fairman v. Fluck*, 5 Watts, 516; *McMahan v. Tyson*, 23 Ga. 43; *Nutwell v. Tongue*, 22 Md. 419." And the converse of this proposition is true, that where the mortgagor of chattels brings a suit in replevin against the mortgagee for possession of the mortgaged goods, alleging that the mortgage indebtedness has been fully paid, nothing short of proof that he has fully discharged the mortgaged indebtedness will sustain a verdict or judgment in his behalf for possession of the goods and damages for their detention.

It appearing in this cause, from the testimony of the appellee, as well as from the verdict of the jury, that the appellee had not discharged in full the indebtedness secured by the mortgage upon the mules and harness, the verdict in his favor for their possession and damages for their detention is not sustained by sufficient evidence, and is contrary to the law. For the reasons stated, the judgment of the trial court is reversed, and the cause remanded. Reversed and remanded.

CLAYTON and TOWNSEND, JJ., concur.

CASE et al. v. INGLE.

(Court of Appeals of Indian Territory. June 12, 1899.)

APPEAL—FINAL JUDGMENT—ORDER SUSTAINING DEMURRER.

1. As an appeal lies only from a final judgment, no appeal can be taken from an order sustaining a demurrer.

2. On sustaining a demurrer to separate answers of defendants, judgment was entered as to only a part of them on their refusal to plead further. *Held*, that the judgment was not final, and appealable.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Constantine B. Kilgore, March 29, 1897.

Action by Ed. P. Ingle against S. S. Case and others. On sustaining demurrers to separate answers of defendants, judgment was rendered in favor of plaintiff as to defendants S. S. Case and W. H. Walker only, and defendants appeal. Dismissed.

The appellee, Ed. P. Ingle, brought this suit against the appellants, S. S. Case and W. H. Walker, as makers, and R. Y. Mangum, as indorser, of a promissory note for the sum of \$500, dated September 6, 1894, payable to R. Y. Mangum, or order, on or before the 1st day of September, 1896, and bearing interest after maturity at the rate of 10 per cent. per annum until paid, and indorsed in blank by R. Y. Mangum; and

also to foreclose the mortgage which had been executed by the makers of the note upon the entire newspaper plant of the Purcell Register. The appellants Case and Walker answered, denying that the plaintiff was the bona fide holder of the note sued upon for a valuable consideration, or that he had become possessed of the note in the usual course, and alleged and charged that the plaintiff had obtained possession of the note by fraud and misrepresentation, and denied that the note had been transferred by the original payee to the plaintiff, or that he had any interest in it, and alleged that it was the property of the original payee, that they had paid him in full, and that the mortgage securing the note had been satisfied of record by the original payee, and delivered up to them. The appellant R. Y. Mangum answered, admitting that he had transferred the note to plaintiff, alleging that he had done so as part of the consideration for the sale to him by the plaintiff of the newspaper plant as the Norman Transcript, of Norman, Okl. T., and alleging that the plaintiff had falsely represented to him that said Norman Transcript was doing a lucrative and paying business, when in fact it was not. The appellee demurred to the answer of Case and Walker, and also to the answer of R. Y. Mangum, and these demurrers were both sustained by the trial court, and, the appellants refusing to amend or plead further, a judgment was rendered in favor of the appellee and against the appellants Case and Walker for the amount of the note sued upon, and for foreclosure of the mortgage; but a judgment was not rendered against the appellant R. Y. Mangum, nor was the cause disposed of so far as he was concerned, either by judgment against him upon the sustaining of the demurrer to his answer or dismissing of the case as to him.

J. W. Hocker and Zöl J. Woods, for appellants. B. F. Williams, W. M. Newell, and J. W. Cherryhomes, for appellee.

THOMAS, J. (after stating the facts). In this case we are confronted by the preliminary inquiry, upon the motion of the appellee to dismiss the appeal, as to whether or not the judgment appealed from is a final judgment. In order that a judgment should be final, it should settle all the issues involved as to all of the parties. In the case of *Horne v. State*, 27 Ark. 113, the court, in passing upon the same question, among other things, said: "It has been so often decided and fully settled in this court that an appeal will lie only from a final order or judgment, that argument or reference to this is unnecessary; and to produce an argument to show that an order overruling a demurrer to the bill is not a final judgment in the case would not be expected. The chancellor should have proceeded to render a decree upon the whole case before him." So,

in the case at bar, when the demurrer of the plaintiff to the answer of the defendant R. Y. Mangum had been sustained, and he refused to answer further or to amend, the trial court should have proceeded to enter up a judgment against him for the amount of the note sued for and costs. If we should now determine whether or not the amended answer of Case and Walker stated facts sufficient to constitute a defense to the note and mortgage sued upon, the cause would even then have to go back to the trial court to be disposed of as to the other defendant and appellant, R. Y. Mangum, and this probably would necessitate a trial of this cause twice in this court. "The rule restricting appeals to cases where a final judgment has been rendered is necessary to prevent the division of a case into parts, and to prevent a multiplicity of actions. The rule is in direct harmony with the principle * * * that cases must be decided as an entirety, and by one tribunal." See Elliott, App. Proc. § 80. The motion to dismiss the appeal of R. Y. Mangum is sustained, and the court of its own motion dismisses the appeal of Case and Walker, for the reason that the cause has not been finally disposed of as to all the parties and all the issues involved in the trial court. Appeal dismissed, and case remanded.

SPRINGER, C. J., and CLAYTON and TOWNSEND, JJ., concur.

BELL v. EDDY et al.

(Court of Appeals of Indian Territory. June 10, 1899.)

APPEAL—NECESSITY OF BILL OF EXCEPTIONS—DEATH OF PARTIES—FAILURE TO REVIVE AGAINST SUCCESSOR—DISMISSAL.

1. A judgment dismissing a complaint on motion cannot be reviewed where no bill of exceptions was preserved, and no motion for new trial was made in the trial court.

2. Under Mansf. Dig. Ark. § 5246, providing that an order to revive an action against the successor of a defendant shall not be made without the consent of such successor unless within a year from the time when it could have been first made, a complaint is properly dismissed where complainant has failed to revive the action against defendant's successor within a year after his death was suggested of record.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, February 1, 1898.

Action by L. B. Bell against George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas & Texas Railway Company. From a judgment for defendants, plaintiff appeals. Affirmed.

This action was brought by the appellant on the 20th day of October, 1890, to recover from the defendants, George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas & Texas Railway, the possession of

lots Nos. 4 and 6, block 17, situate in what was formerly known as "Downingville," but now "Vinita," in the Cherokee Nation, Ind. T. On the 8th day of November, 1892, the defendants, Eddy and Cross, as such receivers, filed their answer to the plaintiff's complaint. On the 13th day of May, 1895, the death of both said George A. Eddy and H. C. Cross was suggested of record. On the 24th day of April, 1896, the plaintiff filed an amended complaint at law, making the Missouri, Kansas & Texas Railway Company a party defendant. On the 7th day of May, 1896, the Missouri, Kansas & Texas Railway Company appeared specially, and moved to quash the writ of summons which had been issued upon the plaintiff's amended complaint, and been served upon it. On the 29th day of January, 1898, the Missouri, Kansas & Texas Railway Company, and also one Henry C. Rouse, who claimed to be receiver de bonis non of the Missouri, Kansas & Texas Railway Company, appeared, and filed motion to dismiss the plaintiff's original and also his amended complaint. On the 1st day of February, 1898, the plaintiff filed a second amended complaint, and on that day this cause coming on to be heard on the motion to dismiss of the said H. C. Rouse, receiver de bonis non, and the motion to dismiss of the Missouri, Kansas & Texas Railway Company, and all parties being present, these motions to dismiss were sustained by the court, and the original complaint in this cause, and also the second amendment to the complaint, were ordered dismissed by the court. To this action of the court the plaintiff, L. B. Bell, excepted, and was granted 60 days in which to file a bill of exceptions, and an appeal to this court was prayed and allowed. The bill of exceptions was never prepared preserving the motions to dismiss of the Missouri, Kansas & Texas Railway Company or of H. C. Rouse, receiver de bonis non, nor was the ruling of the court thereon preserved by bill of exceptions, nor did the plaintiff file motion for a new trial.

Fears & Bailey, for appellant. Clifford L. Jackson, for appellees.

THOMAS, J. (after stating the facts). The only error assigned by the appellant in his brief in this case is as follows: "The court erred in sustaining appellees' motion to dismiss and in dismissing appellant's complaints." We are confronted with the preliminary inquiry whether the record in this cause is presented to us in such a way as to enable us to review the action of the trial court in sustaining the motions to dismiss of the Missouri, Kansas & Texas Railway Company and of H. C. Rouse, as receiver de bonis non of the Missouri, Kansas & Texas Railway Company, and in dismissing the original and second amended complaint of the appellant. This court, in the case of *Severs v. Trust Co.*, 35 S. W. 233, refused to review the

action of the trial court in sustaining the motion to dismiss, because the motion to dismiss and the ruling of the court thereon had not been preserved by bill of exceptions, and for the further reason that a motion for a new trial had not been made in that case and overruled. In that case, Judge Lewis, in delivering the opinion of the court, said: "It has been decided by the supreme court of Arkansas (whose decisions in the construction of statutes put in force in this jurisdiction are most persuasive, if not, indeed, conclusive, with us) that an error in law in the rendition of a judgment, perceptible from the record, without any reference to the proceedings on the trial as shown by the bill of exceptions, does not require a motion for new trial. *Percefull v. Platt*, 36 Ark. 461. What constitutes the record? Mr. Thompson, in his work on Trials (volume 2, § 2771), says: 'The record proper ordinarily embraces the original writ, the pleadings, and the entry of verdict and judgment. If error is exhibited on the face of the record proper, it may be corrected in a court of error, unless there are statutes changing the common-law rule, without the necessity of a bill of exceptions. Whenever it is desired to present for review in an appellate court a ruling of the trial court which does not appear upon the face of the record proper, an exception must be taken to the ruling at the time when it was made, and a bill of exceptions must be drawn up, embodying a statement of the ruling, and showing that an exception was reserved at the time when the rule was made.' The Arkansas decisions support the above definition of the 'record.' *Lenox v. Pike*, 2 Pike, 14. See, also, *Bateson v. Clark*, 37 Mo. 31. Whenever it is necessary to preserve, by a bill of exceptions, the ruling of the trial court, to secure a review thereof on appeal, it is necessary that a motion for new trial should be made in the court below. *Dunnington v. Frick Co.* (Ark.) 30 S. W. 212. In the case under consideration, the fact of the plaintiff's nonresidence appears in its pleadings, and is therefore apparent upon the face of the record. The fact that a bond was not filed is not shown. Both these facts must concur to authorize the dismissal of the suit. *Johnson v. Hoskins*, 12 Ark. 635. In the recitals of the judgment there are statements from which it may be clearly inferred that a bond for costs was not filed in the court below, but these statements are not properly a part of the judgment. A judgment, by the Arkansas Code (section 399), is 'a final determination of the rights of the parties in an action.' The reasons announced by the court to sustain its decision constitute no part of the judgment, and do not become such by reason of the fact that the clerk may enter them upon the minutes. Such matters are properly presented for review by bill of exceptions only. *Freem. Judgm.* §§ 2, 79; 2 *Thomp. Trials*, §§ 2773, 2776, 2781; *Elliott. App. Proc.* 814, 815. In the case of *Hall v.*

Bonville, 36 Ark. 495, the court said: 'It is true that in the judgment entry there is a statement of the evidence introduced on the trial or agreed on, and of the declaration of the law of the case made by the court; but it is the province of the bill of exceptions, and not of the judgment entry, to bring on the record facts proven or admitted on the trial, and the declarations of law made by the court upon them.' This must be a correct statement of the law, otherwise a judgment might become the vehicle for presenting upon appeal any ruling of the trial court at any stage of the trial. 'Nothing can be made a matter of record by calling it by that name, nor by inserting it among the proper matters of record.' *Freem. Judgm.* § 78. * * * Because the action of the trial court in the particulars complained of is not presented in such mode as authorizes this court to determine the same, the judgment of the court below is affirmed."

"Whenever it is desired to present for review in an appellate court a ruling of the trial court which does not appear from the face of the record proper, an exception must be taken to the ruling at the time when it was made, and a bill of exceptions must be drawn up embodying a statement of the rulings, and showing that an exception thereto was reserved at the time when the ruling was made." 2 *Thomp. Trials*, p. 2104, § 2771.

"Collateral motions, such as motions to make more specific, to separate, and the like, must be brought into the record by a bill of exceptions, or by a special order of the court making them a part of the record. To this class of motions belong motions to dismiss." *Elliott, App. Proc.* p. 766, § 814.

"Rulings upon motions are not deemed to be saved for review in an appellate court, unless the motion and rulings are exhibited in bill of exceptions. It is not sufficient that the clerk of the trial court has inserted in the transcript what purports to be a copy of the motion. The rule applies to motions which are dispositive of the proceedings,—such as motions to dismiss the appeal by which the cause has been brought from an inferior jurisdiction, or a motion in the court to which the cause has been taken by a change of venue to dismiss the cause; and the rule applies in criminal as well as civil cases." 2 *Thomp. Trials*, pp. 2107, 2108, § 2775.

"The clerk has copied into the transcript an entry showing that a motion was made to strike out a part of the amended complaint, and that the same was sustained. Said motion and the rulings of the court thereon are not made a part of the record by a bill of exceptions, and it has been uniformly held by this court that such motions and the ruling of the court thereon form no part of the record unless brought in by bill of excep-

51 S.W.—61

tions. *Dudley v. Pigg* (Ind. Sup.) 48 N. E. 642, and cases cited. Such motions and the ruling of the court thereon, although copied into the record by the clerk, form no part thereof, and cannot be considered by this court. *Dudley v. Pigg*, supra, and cases cited." *State v. Halter* (Ind. Sup.) 49 N. E. 7. See, also, 2 *Thomp. Trials*, p. 2107, § 2775.

"The record failing to set out any evidence whatever in support of the motion [motion to dismiss], the presumption is in favor of the decision of the court below." *Hickey v. Smith*, 6 Ark. 453. See, also, *Montgomery v. Carpenter*, 5 Pike, 264; *Cox v. Garvin*, 6 Ark. 431; *Dow v. U. S.*, 27 C. C. A. 42, 81 Fed. 1004.

"Did the court err in refusing to dismiss the suit on the motion of the defendant below? To enable this court to revise the judgment given upon this motion, all of the testimony before the court on the hearing of the motion should have been made of record in the case by a bill of exceptions or otherwise; or, if there was no testimony adduced, this fact should be made to appear, so as to avoid the effect of the presumption of law always indulged in in such cases where the adjudication must of necessity have depended upon facts to be established by testimony." *McQuaid v. Tait*, 5 Pike, 309.

We are therefore of the opinion that, the motion to dismiss and the rulings of the court thereon not having been preserved by a bill of exceptions, and no motion for a new trial having been filed or passed upon by the court, we are unable to review the judgment of the lower court dismissing the complaints of the appellant, and, in the absence of a bill of exceptions and motion for a new trial, the presumption is that the judgment of the lower court was correct. If these motions had been properly brought up on the record, and we could consider them, as well as the rulings of the court on them, as a part of the record, it would seem that the trial court did not commit an error in dismissing the complaint of the appellant, because he had failed to revive his action against the successor of the original defendants, Eddy and Cross, within a year after the date that their deaths were suggested of record. Section 5246, *Mansf. Dig. Ark.*, is as follows: "An order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor, unless within one year from the time when it could have been first made." Inasmuch as the action of the trial court in the particulars complained of is not presented in such a mode as authorizes this court to determine the same, the judgment of the court below is affirmed.

CLAYTON and TOWNSEND, JJ., concur.

GULF, C. & S. F. RY. CO. v. CLARK.

(Court of Appeals of Indian Territory. June 7, 1899.)

TRESPASS—TITLE—DAMAGES—PUBLIC LANDS—
HOMESTEAD—RIPARIAN RIGHTS
—NEGLIGENCE.

1. An action of trespass for causing land to be washed away through maintaining a dike in a river may be brought by one who has entered upon the land under the homestead laws of the United States, and obtained a receipt from the receiver of the land office.

2. The land ceased to be public domain when the receipt was given, and hence the measure of damages is the value of the property destroyed.

3. Where a riparian owner, by the erection of dikes, changes the natural channel of the stream, and deflects the current so as to throw the water upon an opposite owner's land, washing it away, he is liable for the damage done, regardless of any question of negligence in the construction or maintenance of the dikes.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Hosea Townsend, November 1, 1897.

This is a suit for damages by H. H. Clark, appellee, against the Gulf, Colorado & Santa Fe Railway Company, appellant, in which appellee charged that appellant, by the construction and maintenance by it of certain dikes in the South Canadian river, and nearly opposite the appellee's farm, which is located in the territory of Oklahoma, has so changed the current and channel of the river as to cause the water of the river to be thrown against and upon the appellee's land, entirely destroying and carrying away about 90 acres, and destroying about 65 acres of growing corn. The appellee recovered a judgment for the sum of \$2,000 in the court below. Appellant's motion for a new trial was overruled, and appeal was taken to this court. Affirmed.

The fourth assignment of error in part complains of that paragraph of the court's charge which directed the jury, in the event of a verdict for plaintiff, to assess his damages at what the proof might show was his actual damage, and instructed them that they might "arrive at that proposition by the value of the property shown by the testimony to be destroyed, or the diminution in the value of the property before and after the washing away of the same or the damage occurred."

J. R. Cottingham and Ledbetter & Bledsoe, for appellant. Eddleman & Kendrick, F. P. Cease, and J. F. Sharp, for appellee.

THOMAS, J. The first question presented by appellant in its brief is as to whether or not the title of the appellee was such that he could maintain this action. In the year 1893 he had entered upon and taken possession of this land by virtue of the homestead laws of the United States, and had obtained a duplicate receipt from the receiver of the land office at Oklahoma City. He had entered upon this land, cultivated it, improved it, and was in possession of it at the time the injury com-

plained of occurred. Appellant in its brief disputes the right of the appellee to maintain this action upon this receiver's certificate, and asks the question, on page 9, "If defendant had taken possession of this ninety acres of land and had fenced the same, and the plaintiff had sued for possession, would it have been incumbent upon him to prove title?" How can that be distinguished from a case where, instead of taking possession, the defendant is charged with having carried the land away, by means of the Canadian and connecting streams, into the Gulf of Mexico? Section 2628, Mansf. Dig., provides that "an action of ejectment may be maintained in all cases where the plaintiff claims the possession of the premises under or by virtue of: First. An entry made with the register and receiver of the proper land office of the United States. Second. A pre-emption right under the laws of the United States. Third. Where an improvement has been made by him on any of the public lands of the United States, whether the lands have been surveyed or not. And where any person other than those to whom the right of action is given by the preceding clauses of this section is in possession of such improvement." In the case of *Wilson v. Owens*, 38 S. W. 976, decided by this court, it was held that the chapter on ejectment of Mansfield's Digest was in force in the Indian Territory by act of congress of March 1, 1890, although not specifically enumerated in that act. The supreme court of Arkansas, in at least three cases which have been called to our attention, has held that the action of ejectment could be maintained upon a certificate of a homestead entry such as that offered in evidence by the appellee in this case. In the case of *Gaither v. Lawson*, 31 Ark. 279, Chief Justice English said upon this point, which was involved in the case: "A receipt of the receiver of the United States land office for the fees and commissions paid by an applicant for a homestead, under the provisions of the homestead act of congress, will entitle the holder to maintain the action of ejectment." See, also, cases of *Brummett v. Pearlie*, 36 Ark. 471, and *Hill v. Plunkett*, 41 Ark. 466. In all three of these cases the right to recover was based upon the receiver's certificate, as in the case at bar. In the case of *Railroad Co. v. Johnson*, 4 C. C. A. 452, 54 Fed. 479, Judge Caldwell, of the circuit court of appeals, in delivering the opinion of the court, said: "The number of cases coming from this territory in which this defense is sought to be set up by the wrongdoer against the plaintiff in possession will justify a reference to some of the authorities. In Com. Dig. tit. 'Trespass' (B2), it is said: 'So, an intruder on the king's possession may maintain trespass.' In *Wilbraham v. Snow*, 2 Saund. 47e, note f: 'So, possession with an assertion of title, or even possession alone, gives the possessor such a property as will enable him to maintain this action [trover] against the wrongdoer; for possession is prima facie evidence of property.'

In *Add. Torts*, 358, it is laid down that, 'as against the wrongdoer, possession is title, and the presumption of law is that the possession and ownership of chattels go together, and that presumption cannot be rebutted by evidence that the right of property was in a third person, offered as a defense by one who admits that he had no title, and was a wrongdoer, when he took or converted the goods. A wrongdoer, therefore, in actual possession of goods, the property of another, can recover their value in an action against another wrongdoer, who takes the goods from him.' And possession of land, without even a claim of title, vests a sufficient right of property in the person who has such possession to enable him to hold the land against all the world except the true owner. *Tied. Real Prop.* § 602. It is *prima facie* evidence of seisin in fee, which is the highest estate in land, and a prior possession is sufficient to entitle the party to recover in an action of ejectment against a mere intruder or wrongdoer. *Tyler*, *Ej.* 70, 72. And if the railroad company, instead of burning this property, had taken forcible possession of it, the plaintiff could have recovered the property without showing other right or title than his prior actual and peaceable possession. A leading case on this subject is *Graham v. Peat*, 1 *East*, 244. In that case Lord Kenyon, *O. J.*, said: 'There is no doubt but that the plaintiff's possession in this case was sufficient to maintain trespass against the wrongdoer, and, if he could not have maintained an ejectment upon such a demise, it is because that is a fictitious remedy, founded upon title. Any possession is a legal possession against the wrongdoer.' It would therefore seem that both under the statute of Arkansas and the decisions of the supreme court of Arkansas prior to the adoption of that statute, and which are binding upon this court, as well as under the above decision of Judge Caldwell in the case of *Railroad Co. v. Johnson*, the appellee had a sufficient title to maintain an action of ejectment against the appellant, and therefore could maintain this action of trespass against it for taking and carrying away land to which he was entitled.

The appellant also contends that, even though the appellee did have such a title that he could have maintained this action, yet the measure of damage as given by the presiding judge in his charge to the jury was incorrect. In the above case of *Railroad Co. v. Johnson*, Judge Caldwell further said, as relating to the measure of damage: "The court properly instructed the jury that the plaintiff's possession of the property was sufficient evidence of his title as against the defendant." The appellee in this case was not only in actual possession of this land, but had greatly improved it, and had taken steps to acquire a perfect title to it, when he charges that the appellant, by its wrongful action, deprived him of it. In the case of *Wisconsin Cent. R. Co. v. Price Co.*, 133 *U. S.* 496, 10 *Sup. Ct.* 344. *Mr. Justice Field*, in delivering the opinion of the court, in

substance stated: After public lands have been entered at the land office, and certificate of entry obtained, they are private property; the government agreeing to make a conveyance as soon as it can, and in the meantime holding the naked legal fee in trust for the purchaser, who has the equitable title. In that case he cited *Carroll v. Safford*, 3 *How.* 441, in which it was held that after the land was entered, and receipt of certificate given, the land so entered ceased to be public domain, and so taxable. Said the court: "When the land was purchased and paid for, it was no longer property of the United States, but of the purchaser." And again: "It is said the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not in equity. The land in the hands of the purchaser of real estate descends to his heirs, and does not go to his executors and administrators." See, also, the case of *Witherspoon v. Duncan*, 4 *Wall.* 210, in which the court said: "In no just sense can lands be said to be public lands after they have been entered at the land office and certificate of entry obtained. If public lands before the entry, after it they are private property. The contract of purchase is complete when the certificate is executed and delivered, and thereafter the land ceases to be a part of the public domain." See, also, *Railroad Co. v. Prescott*, 16 *Wall.* 603; *Railroad Co. v. McShane*, 22 *Wall.* 444. In the light of the foregoing, we are of the opinion that the contention of the appellant that the appellee did not have such a title to the land as to enable him to maintain an action of trespass or of ejectment is not well taken, and that the measure of damage, as given by the court to the jury, is correct.

The case of *Railroad Co. v. Ragsdale* (*Tex. Sup.*) 2 *S. W.* 515, is not, in our opinion, applicable to this case. In that the plaintiff had conveyed the land by absolute deed, and after conveying it remained in possession from the 1st day of May until the 1st day of November under a verbal agreement, and during that interval between May and November the grass and timber on this land which he had conveyed was set on fire and destroyed by a locomotive of the defendant Railroad Company. The court in that case held, and we think properly so, that he could only recover nominal damages. In the case of *Taylor v. Fickas*, 64 *Ind.* 167, cited by appellant, the owner of the land planted a row of trees on his own land, and along the division line between his land and that of an adjoining proprietor, the effect of which was to obstruct the passage of driftwood carried upon the land of the adjoining proprietor by the overflow of the Ohio river adjacent to the lands of both proprietors, to the injury of such adjacent land. It was held that no action would lie therefor. Judge Biddle, in delivering the opinion of the court in that case, among other things said: "In the complaint before us there is no averment of any water course, except, indeed, by way of parenthesis, that the place during floods

is a part of the Ohio river, but the facts averred clearly show that it is not upon the bed of the river, nor within its channel, nor between its banks; in short, that it is no part of the water course, but that the flow over the entire surface of the land is occasioned by temporary causes, and is not usually there. The rights of the appellee, therefore, are such as a proprietor may have in surface water, which, as we have seen, is a part of his land, and the injuries or inconveniences which the appellant is alleged to have suffered are such as arise from the changes, accidents, and vicissitudes of natural causes." That case, in our opinion, has no applicability to the case at bar, because in this case it is charged that the appellant, by the erection of its dykes, not only changed the natural channel of the Canadian river, but also deflected its current so as to throw the water upon the appellee's land. Judge Biddle further stated, in his opinion in the case of *Taylor v. Fickas*: "While the owners of land may not obstruct water courses to the injury of others, they must be permitted to fence and cultivate their fields and improve their land in the way which best subserves their interest, without being responsible for the accidents of floods or the shiftings of surface water occasioned thereby, although sometimes slight and temporary injuries may result therefrom to adjoining owners. These are accidents which must be borne alike by all." In the case of *Hoard v. City of Des Moines* (Iowa) 17 N. W. 527, also cited by appellant, the court stated: "It is not claimed that the city obstructed a natural stream by the erection of the levee. The most that can be claimed from the evidence is that, after the levee was constructed, the water in time of overflows was deeper on plaintiff's lands caused by the levee. It was not permitted to overflow that part of the city east of the levee, and pass off in that direction. * * * Every owner of land has a right to protect himself from overflow by water from a river, even though by excluding the water from his own premises he deepens it between his land and the river. It appears to us that what the plaintiff claims is that he has a right to plant himself on low ground next to the river, and insist that overflow water shall pass over his land onto the land of some other persons. That he has no such right requires no written argument nor authority to demonstrate." In the case of *Railway Co. v. Stephens*, 73 Ind. 278, Judge Woods, in delivering the opinion of the court, said: "With reasonably near approximation to accuracy it may be laid down as a general rule that upon the boundaries of his own land, and not interfering with any natural or prescriptive water course, the owner may erect such barriers as he may deem necessary to keep the surface water or overflowing floods coming from or across adjacent lands; and for any consequent repulsion, turning aside, or heaping up of these waters, to the injury of other lands, he will not be responsible; but such waters as fall in rain and snow on his

land, or come thereon by surface drainage from or over contiguous lands, he must keep within his boundaries, or permit them to flow off without artificial interference, unless, within the limits of his land, he can turn them into natural water courses. This is in accordance with the general principle that such waters are common enemies, which each proprietor may fight off as he will; but, once on his land, they become his property (in a qualified sense, of course), and the maxim applies, 'So use your own as not to injure the property of another.' " In the case of *Railroad Co. v. Henry*, 44 Ark. 363, cited by appellee, Judge Smith said: "So far as a diversion of the water of the running stream from its natural channel is concerned, the authorities are not in conflict, but some courts have taken a distinction between running water and surface water. However, the sound rule appears to be that whoever, by artificial means, changes the natural condition of another man's land, whereby he is damaged, ought to answer to him for the damage." As it was expressed by the supreme court of Texas in *Railway Co. v. Donahoo*, 59 Tex. 128: "If, by construction of the roadbed and ditches, the surface water is diverted from its usual and ordinary course, and by means of embankments or ditches such surface water is conveyed to any particular place, and thereby overflows land which, before the construction of the road, did not overflow, the company will be liable to the landowner for such injury." See, also, *Railroad Co. v. Chapman*, 39 Ark. 463. In that case, Judge Eakin, in delivering the opinion of the court, stated: "With regard to running streams, all the authorities, English and American, agree in holding that a riparian proprietor has no right to alter their usual flow in any manner injurious to others above or below him, under any circumstances, whatever may be his necessities, or whatever care he may exercise. The right of care to use the water as it is accustomed to run is absolute. He may not retain it upon his soil by dams and reservoirs, that it may not go on down in its usual course to his neighbor, except the variation be small, and not unreasonable. Nor can he so obstruct it as to flood the land of his neighbor above. Upon this point the authorities are numerous and uniform. They are to be found in all the text books upon the subject, and citations are unnecessary."

There was testimony tending to show that the building of these dykes by the appellant had not only changed the natural channel of the Canadian river from the side of the river on which these dykes were located to the opposite side of the river, where the appellee's land was located, but that the current of the river when it struck these dykes changed its course, and was forced directly against and upon the appellee's land; and as the jury in this case was permitted to view the place where the dykes were located, as well as the river bed and the appellee's lands, their finding as to whether or not these dykes had changed the channel and current of the river

to the appellee's damage should not be disturbed; and, as there was testimony to support the finding of the jury in that respect, the trial court properly refused to instruct the jury to return a verdict for the appellant. The trial court in its charge to the jury properly declared the law in this case, and in refusing to charge the jury as requested by the appellant no error was committed, because the court had already instructed the jury that the appellant had a right to erect and maintain the necessary dykes for the protection of its property against the encroachments of the river, but that it had no right to build or maintain dykes or other structures in said river which would change the current and channel of the river, to the injury of the plaintiff's property. The jury must have found that this dyke did change the natural channel of the river, as well as deflect its current, and throw the water over on plaintiff's land, so as to wash away and destroy some 90 acres of it, and, having found that, the question of negligence, as to the construction or maintenance of the dykes, was not involved in the case. We find no error in this record. On the contrary, the rulings of the trial court, the verdict of the jury, and the judgment in favor of appellee all appear to be regular, just, and lawful. The judgment of the court below is affirmed.

SPRINGER, C. J., and CLAYTON, J., concur.

BROWN v. WOOLSEY.

(Court of Appeals of Indian Territory. June 12, 1899.)

APPEAL RECORD—UNLAWFUL DETAINER—TITLE—EVIDENCE.

1. Evidence, though copied into the transcript, is not part of the record, not being incorporated in the bill of exceptions.
2. Evidence that plaintiff has the title of the original landlord, is admissible in action of unlawful detainer.
3. Refusal to admit in evidence the judgment in a prior action of unlawful detainer between parties different from those in the present suit cannot be held error, it being binding only in case the parties to the present action had succeeded those of the former action as to their title and interest to the premises sued for, and the bill of exceptions failing to show all the evidence relative thereto.
4. The bill of exceptions failing to present all the evidence, the presumption is that the judgment was supported by sufficient evidence.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Constantine B. Kilgore, February 19, 1897.

Action by N. B. Woolsey against T. P. Brown. Judgment for plaintiff, and defendant appeals. Affirmed.

The appellee, N. B. Woolsey, a citizen of the Chickasaw nation, brought this suit of unlawful detainer against the appellant, T. P. Brown, to recover the possession of about 150 acres of land situated in the Chickasaw

nation, alleging that he was the original owner of the premises sued for by purchase from the original landlord, and that the defendant and appellant, T. P. Brown, a citizen of the United States, held under the tenant of the original landlord, from whom he had purchased; that the term of the tenant through whom T. P. Brown, the appellant, held, had expired, and that the appellant, T. P. Brown, unlawfully detained the possession of the premises, to his damage in the sum of \$500, and prayed the judgment of the court against the appellant for the possession of the premises and \$500 damages. The defendant and appellant answered that he was a Choctaw Indian; that he held the premises sued for by purchase, and that he had been in the continual adverse possession of the premises sued for for more than three years prior to the institution of this suit. He denied that the plaintiff was the owner of the premises sued for, or entitled to their possession; denied that he (the appellant) had ever occupied the premises sued for as a tenant of the plaintiff, or any other person; and denied that he unlawfully detained the premises sued for. A trial was had before a jury, and a verdict was rendered for the plaintiff and appellee for the possession of the premises, without damages. Motion for new trial was made, and overruled, and judgment was entered in accordance with the verdict, from which an appeal was prayed and allowed to this court.

D. B. Trammell, for appellant. Gilbert & Gilbert, for appellee.

THOMAS, J. (after stating the facts). The record in this cause is presented to us by the appellant in such shape that we are unable to review the rulings of the trial court upon most of the propositions presented to us by his counsel, for the reason that these rulings of the trial court can only be reviewed in this court when it affirmatively appears that the bill of exceptions which is made a part of the record in the cause contained "all of the evidence given in the cause." The so-called "statement of facts" and judgment in the case of G. H. Gamblin and A. M. Gamblin against G. S. Brown, and a paper purporting to be a contract between T. P. Brown and G. S. Brown, although copied into the transcript, are not parts of the record in this case, and cannot be considered by this court, because they were not properly incorporated in the bill of exceptions.

1. The appellant has filed a motion in this court to "reverse the judgment of the lower court, with an order to the court below to dismiss this cause, because it is apparent from the face of the transcript that the lower court had no jurisdiction to try the cause because the plaintiff and defendant are both Indian citizens, one a Choctaw and the other a Chickasaw, and that neither were citi-

zens of the United States." The plaintiff's complaint alleges that he is a Chickasaw, and that the defendant is a citizen of the United States. The defendant, in his answer, alleges that he is a Choctaw. What the testimony was in this cause as to the citizenship of the parties we are unable to say with certainty, as it does not appear affirmatively from the bill of exceptions that all of the evidence given in this cause and before the trial court is presented to us in the bill of exceptions. It is, however, apparent that all of the testimony in this cause before the trial court is not presented to us in the bill of exceptions. Under section 36 of the act of congress approved May 2, 1890, jurisdiction was conferred upon the United States courts in the Indian Territory to hear and determine "all controversies arising between members or citizens of one tribe or nation of Indians and the members or citizens of other tribes or nations in the Indian Territory." If the record in this cause disclosed with certainty that the plaintiff was a Chickasaw Indian and that the defendant was a Choctaw Indian, the court, in that event, had jurisdiction of the parties to this action under the above section, and the appellant's motion in that respect is overruled.

2. The next alleged error urged by the appellant, and which is fairly well saved in his motion for new trial and bill of exceptions, is that the trial court erred in permitting the witness J. B. Nichols to testify that he bought the premises in controversy from J. H. Gamblin, and paid him \$1,100 for them. This testimony was properly admitted. The plaintiff alleged that he had purchased the premises from the original landlord, and it was sought to prove by this testimony that the original landlord, J. H. Gamblin, had sold these premises to the witness J. B. Nichols, and that the witness J. B. Nichols had transferred them to the plaintiff in this suit. This was denied by the defendant and appellant. This testimony was admissible to prove that the plaintiff had succeeded to the right of possession, title, and interest of the original landlord, J. H. Gamblin; and the objection of the appellant was properly overruled. The contention of counsel for the appellant that title to the premises in an action of unlawful detainer of this character cannot be admitted in evidence is incorrect, and the cases cited by him do not sustain that principle. He has failed to distinguish between the action of unlawful detainer and that of forcible entry or forcible detainer. If the court in this case had found that the plaintiff and appellee, Woolsey, was not the owner of the premises sued for, and had not succeeded to the title and interest of the original landlord, J. H. Gamblin, by purchase from the witness J. B. Nichols, the plaintiff and appellee could not have maintained this suit. In an action of forcible entry and forcible detainer it is true that the rights of property are not de-

termined. Judge Eakin, in the case of *Littell v. Grady*, 38 Ark. 587, says: "The special object of the summary remedy of forcible entry and detainer is to keep the peace; not to determine the rights of property. It is to prevent any and all persons, with or without title, from assuming to right themselves with strong hand, after the feudal fashion, when peaceable possession cannot be obtained, and to compel them to the more specific course of suits in court, where the weak and strong stand upon equal terms." The action of unlawful detainer is not designed for the purpose of preserving the peace, but is for the purpose of placing in the possession of property the landlord or his vendee who is kept out of possession by a tenant, or some one holding under a tenant, after the term of the tenant has expired. Section 4933 of *Mansfield's Digest* provides that "every action must be prosecuted in the name of the real party in interest," and this testimony was competent to show that the plaintiff was the owner of the premises in controversy, and the real party in interest.

3. The second alleged error urged by the appellant is that the court erred in refusing to permit the plaintiff and appellant to introduce in evidence a judgment recovered by George Brown against J. H. Gamblin and Ann Gamblin in an action for unlawfully detaining the same premises. The judgment is not properly incorporated in the bill of exceptions in this case, nor is all the evidence in this cause, which would have to be taken into consideration by this court in determining whether or not that record was admissible, presented to us. Every presumption is in favor of the correctness of the judgment of the lower court. There is copied in the transcript (but which is no part of the record) a paper which is marked "Judgment," and we can only presume that this is a copy of the judgment which the appellant claims the trial court would not permit him to introduce. If this is the judgment referred to, it would not be binding upon the parties in this suit, unless the testimony which was adduced before the trial court showed that the parties to the case at bar had succeeded the parties to that suit as to their title and interest to the premises sued for in this action, because a judgment is only binding upon those who are parties to it and those in privity with them. This paper, which is copied in the transcript, and which purports to be the judgment referred to by counsel for the appellant, as taken alone, would only prove that G. H. Gamblin and A. M. Gamblin had brought a suit against one G. S. Brown, and that a verdict and judgment had been returned against the plaintiffs for costs, and that the defendant in that case, G. S. Brown, was to remain in possession of the premises sued for until the 31st day of December, 1896. Inasmuch as the bill of exceptions in this case does not present to us all the testimony relating to this judgment record which was offered by the appellant, and

which was excluded by the trial court, we are unable to say that an error was committed, and presume that the ruling of the trial court was correct.

4. The third and last alleged error urged by the appellant is "that the verdict is not supported by the evidence, and is contrary to the law." Inasmuch as the appellant has not presented to us by his bill of exceptions all of the evidence given in this cause in the trial court, the presumption is that the judgment of the trial court was supported by sufficient evidence; and this principle is so universal that it is not necessary to cite authorities to sustain it. The judgment of the lower court is affirmed.

SPRINGER, C. J., and CLAYTON and TOWNSEND, JJ., concur.

HASTINGS v. WHITMER et al.

(Court of Appeals of Indian Territory. June 6, 1899.)

EXECUTION—SALE—TITLE—JUDGMENT— RES JUDICATA.

1. The law of the Cherokee nation (Comp. Laws 1892, art. 10, § 226), exempts improvements on the public domain of the nation, owned by a citizen thereof, from execution; and hence a judgment of the supreme court thereof affirming a judgment, dismissing an action against a sheriff to recover possession of such improvement on which he has made a levy, subject to said law, is not conclusive, as between the parties to the action and those claiming under them, as to the title to such property.

2. A sale of an improvement on the public domain, owned by a citizen of the Cherokee nation, by a sheriff, under an exemption issued on a judgment in a divorce suit awarding a wife alimony, is void, under Comp. Laws 1892, art. 10, § 226, prohibiting a levy on or sale of an improvement on the public domain owned by a citizen of the nation, and a purchaser at such sale acquires no title.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, Jan. 29, 1898.

Action by J. R. Hastings against Felix Whitmer and others. From a judgment in favor of defendants entered on sustaining demurrers, plaintiff appeals. Affirmed.

This was an action in ejectment brought by the plaintiff and appellant, J. R. Hastings, against the defendants and appellees, to recover "the possession of an improvement on the public domain of the Cherokee nation, consisting of about one hundred acres inclosed and improved land, with house and appurtenances thereon, located on Coal creek, near the crossing of the St. Louis & San Francisco Railway, in Cooweescoowee district, Cherokee nation," and for the sum of \$1,000, claimed as damages for the unlawful detention of said premises. The plaintiff and appellant, J. R. Hastings, claiming title to said improvements by virtue of a sale under writ of execution by Ed. Adair, sheriff of Cooweescoowee district, in the case of Melissa A. Dawson, as plaintiff,

against W. A. Dawson, as defendant. Melissa A. Dawson brought suit for a divorce in the district court of Delaware district, Cherokee nation, against W. A. Dawson, and in that cause a decree was entered dissolving the marital relations between her, the said Melissa A. Dawson, and the said defendant, W. A. Dawson, and judgment was also rendered in said action in favor of the plaintiff, Melissa A. Dawson, and against the defendant, W. A. Dawson, in the sum of \$1,500 for alimony. Upon this judgment there was issued a writ of execution, which was delivered to the sheriff of Cooweescoowee district, and under this writ the said sheriff levied upon the improvements above described, and sold the same at public sale to J. H. Aiken and E. C. Boudinot, who afterwards transferred whatever right they had to these improvements to one W. W. Hastings, and the plaintiff and appellant in this cause claims title under a conveyance executed by the said W. W. Hastings. The plaintiff's amended complaint in this cause sets out his title as above, and he also attached to his amended complaint the records of the Cherokee court in the suit of Melissa A. Dawson against W. A. Dawson. The defendants and appellees appeared by their counsel, and demurred to the plaintiff's complaint, alleging that his said amended complaint did not state facts sufficient to constitute a cause of action, nor did it state facts sufficient to entitle the plaintiff to the relief prayed for in this action. The defendant Dawson also excepted to the documentary evidence attached to the plaintiff's complaint, and demurred to the evidence of plaintiff's title as shown by the writings and documents attached to the plaintiff's amended complaint. The court below sustained defendant's demurrer to plaintiff's amended complaint, and also his exceptions to the documentary evidence attached to the plaintiff's amended complaint and his demurrer to the evidence of plaintiff's title, and, the plaintiff refusing to plead further or to amend his complaint, judgment was rendered in favor of the defendants and against the plaintiff, dismissing this cause, with costs. An appeal was prayed in the court below, and granted.

Thompson & Hastings, Geo. E. Nelson, and Fears & Bailey, for appellant. Wm. T. Hutchings and Preston C. West, for appellees.

THOMAS, J. (after stating the facts). The appellant's brief in this cause does not contain any assignment or assignments of error, as required by the rules of this court; but the two propositions or principles of law which seem to be involved are the following:

1. Did J. H. Aiken and E. C. Boudinot, who purchased the improvements in the suit at the sheriff's sale, obtain any title or right to the possession of the same which they

could legally transfer to the plaintiff and appellant in this action? It is conceded virtually by the counsel representing the respective parties to this action that the law of the Cherokee nation prohibits a levy upon, or sale of any improvement upon, the public domain of the Cherokee nation, owned by a citizen of that nation, under a writ of execution, and that such improvements are exempt from levy and sale under writ of execution. It appears from the record in this case that, after the writ of execution had issued out of the Cherokee court to enforce the payment of the sum of \$1,500 which had been adjudged to Mrs. Melissa A. Dawson, the sheriff levied the writ upon the improvements and premises in controversy in this suit, and advertised the same for sale. The execution debtor, W. A. Dawson, then instituted an independent suit in the Cherokee court against the sheriff to recover from him the possession of these same improvements which he had levied upon, alleging that the levy was illegal. The sheriff, having been served with process in this latter suit upon the day and at the time he was making the sale, returned the writ of execution, certifying that he had levied upon these improvements and sold them to J. H. Aiken and E. C. Boudinot for the sum of \$325; "but, as the said sale was being made, the said W. A. Dawson placed in my hands for service a citation and attachment for the possession of said place, which said citation and attachment were against me and in favor of said Dawson, * * * I therefore declined to receive the said money from the said J. H. Aiken and E. C. Boudinot, or to deliver over to them the possession of the said premises, until the determination of the said suit as aforesaid." In this case against the sheriff he appeared by his attorneys, Boudinot & Aiken, and moved to dismiss it for the following reasons: "First, that there is no legal service shown on the citation; second, that the record of the court will show that the improvement sued for was sold by the said defendant under an order of this court (an execution), and the verdict of this court could not set aside a former action by the same court, or suppress an execution therefrom." This motion to dismiss was sustained by the court, and an appeal was taken to the supreme court of the Cherokee nation, and that court sustained the judgment of the lower court in the following language: "This court sustains the ruling of the lower court, and the case is dismissed at the plaintiff's costs."

2. It is also contended by counsel for appellant that, inasmuch as the matter was litigated in the Cherokee courts between W. A. Dawson and the sheriff in the cause of Dawson against the sheriff, and the judgment of the Cooweescoowee circuit court in dismissing the action having been sustained

on appeal by the supreme court of the Cherokee nation, the judgment of that court, whether right or wrong, would be conclusive between the parties to that action and those claiming under them, and that the principle of *res adjudicata* would apply; the appellant here claiming under the sheriff, and the appellees, Felix Whitmer and George Ash, claiming under their co-defendant, W. A. Dawson. At the time this writ of execution was levied by the sheriff upon these improvements, and sold, the law of the Cherokee nation prohibited and made illegal such a levy and such a sale under a writ of execution. Compiled Laws of the Cherokee Nation 1892, art. 10, § 226, entitled "Execution." The law of the Cherokee nation at that time also provided that actions for divorce should be conducted in the same manner as other actions in courts, and the court shall have power to enforce its judgments as in other cases. *Id.* pp. 346, 347, entitled "Marriage and Divorce." The lawmaking power of the Cherokee nation had seen fit to prohibit the various courts of the nation from enforcing judgments of this character by levying upon improvements and selling them in order to satisfy a writ of execution which might be issued upon such a judgment, and this prohibition extended even to the supreme court of the Cherokee nation itself. Mr. Justice Field, in the case of *Windsor v. McVeigh*, 98 U. S. 274, among other things, said: "Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot, then, transcend the power conferred by law." See, also, 1 Black, *Judgm.* 242; *Ex parte Lange*, 18 Wall. 163; *Hall v. Melvin* (Ark.) 35 S. W. 1109; *Seamster v. Blackstock* (Va.) 2 S. E. 36; *Reynolds v. Stockton* (N. J. Err. & App.) 10 Atl. 385. The sheriff clearly did an illegal act and committed a trespass when he levied the writ of execution in the case of Melissa A. Dawson against W. A. Dawson upon the improvements sued for in the case at bar, and the conveyance executed by him under that writ of execution was absolutely void, and conferred no title upon Aiken & Boudinot, or to the plaintiff and appellant in this cause, who claimed under them. We are therefore of the opinion that the judgment of the trial court in sustaining the defendant's demurrer to the plaintiff's amended complaint, and in sustaining the appellee W. A. Dawson's exceptions to the documentary evidence attached to the plaintiff's complaint, and in sustaining his demurrer to the evidence of title of said plaintiff as pleaded by him and attached to his said amended complaint, and in entering judgment against the appellant dismissing his complaint, with costs, was proper, and is affirmed.

LEWIS et al. v. RICHARDSON.

(Court of Appeals of Indian Territory. June 6, 1897.)

LEASE—ASSIGNMENT—ESTOPPEL.

1. The contest was whether a sale of the remaining four years of a lease included a 120-acre tract held by the lessee under a different contract, but in the same inclosure. The entire tract embraced 310 acres. The bill of sale called for 310 acres, and stated it was the land leased from C., as administrator. The lease from B., which was also assigned, did not describe the land with particularity, or give the number of acres, but the assignment of it referred to the "N. field," which was the 120-acre tract. R., the transferee, testified the lessees told him the 120-acre tract was held by them under the same contract for the same term, but it was part of B.'s homestead. A witness testified one of the lessees told R. that this tract was included in the transfer. Another witness testified that when he went to take possession of this tract for R., B. refused to give it up; that one of the lessees told R., in his presence, to sue B. (the owner), and he would assist him. B. and his wife testified that the lessees denied including this tract in the transfer. One lessee testified he told R., "This piece of land, I want you to understand, while it is a part of the lease, it is not named in the lease, and, if you want it in, now is your time to put it in;" also that they had only agreed to transfer 200 acres. The other lessee testified he told R. the 120-acre tract was not included in the lease, though they held it the same as the other. The truth was they held it under a verbal lease, which was only valid for one year. Held, that the evidence showed the 120-acre tract was included, and R. had a right to rely on the statement that the lessees held it the same as the other land.

2. The lessees having told the owner it was not included, whereby he refused possession, they became liable to their vendees for its rental value for the four years.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, November 8, 1897.

Action by J. M. Lewis and C. W. Mabry against J. I. Richardson. There was a judgment for less than the relief demanded, and plaintiffs appeal. Affirmed.

This is an action by the appellants against the appellee upon two promissory notes for the sum of \$250 each and interest. The appellee answered, admitting the execution and delivery of the notes sued upon, but alleged that the consideration for their execution and delivery had failed. The allegations contained in appellee's answer and counterclaim are as follows: "Defendant admits the making of two notes for \$250 each, one of which was delivered to the plaintiff in this action, the other to C. W. Mabry; but defendant says that neither the plaintiff in this action nor the said C. W. Mabry is entitled to recover on said notes, because, on the 13th day of February, 1894, the plaintiff in this action, J. M. Lewis, and the said C. W. Mabry, by their certain written bill of sale, sold to this defendant the lease and improvements of the land then occupied by them. Said land had been leased from G. P. Bibbes, the administrator of the estate of S. Nicholson, deceased, consisting, as

the plaintiff, J. M. Lewis, and the said Mabry falsely and fraudulently represented to this defendant, of three hundred and ten acres of land, which the defendant believed, for the term of seven years from the 1st day of January, 1892, for the sum of one thousand dollars, one-half of which sum,—five hundred dollars,—to be paid on March 1, 1894, and the other five hundred dollars to be paid on February 1, 1895. That, upon the payment of the five hundred dollars in cash, appellants were to deliver to him ninety acres of the said land, and the balance of the land—about two hundred and twenty acres—was to be delivered to him as soon as the crop of wheat had been harvested and threshed. That the defendant made the first payment of five hundred dollars about March 1, 1894, and gave the two notes sued upon for the balance, due on February 1, 1895. The defendant further alleges that Lewis and Mabry failed to perform their part of the contract, in this: that they did not give him possession of three hundred ten acres of land, but that the land fell short one hundred and ten acres. He alleges that this one hundred and ten acres of land did not belong to the Nicholson estate, as the plaintiffs had falsely and fraudulently represented to him, and that said land, to wit, one hundred and twenty acres, was reasonably worth the sum of \$2.50 per acre per year, and that he has been damaged in the sum of twelve hundred dollars, and demands judgment against the plaintiffs in that sum, less the amount of these notes and interest." The plaintiffs replied, denying the false and fraudulent representations alleged by the defendant in his answer to have been made by them, and denied that the defendant believed such representation, or that he was in any way misled by any statement that had been made to him in regard to the amount of land; denied that they had failed to perform their part of the contract, and to give the defendant possession of the land they contracted to give him; denied that the land fell short 120 acres, or any other amount, and denied that the land was reasonably worth \$2.50 per acre per annum. From a verdict and judgment in the sum of \$53 in favor of the plaintiffs, they appealed to this court.

Preston O. West and Wm. T. Hutchings, for appellants. James M. Shackelford and Wm. R. Shackelford, for appellee.

THOMAS, J. (after stating the facts). From a close inspection of the record in this case it appears that on the 1st day of June, 1892, George Bibbes, as administrator of the estate of S. Nicholson, deceased, entered into a written contract with the appellant J. M. Lewis and with J. W. Bab, by the terms of which he leased and rented to them all the improvements located on the estate of S. Nicholson, deceased; "said improvements situated south of Talala creek and west of the Verdigris river, in Cooweescoowee district, Cherokee Nation and Indian Territory, for

seven years from the first of June, 1892. The said parties of the second part agree to break and fence two hundred acres of land or more on said claim, and are to have five crops off of the land that the said parties of the second part break and fence, and said parties of the second part agree to give the party of the first part one-third of all crops raised on what land is now in cultivation on said premises (about 20 or 30 acres). Said parties of the second part surrender to the party of the first part said premises above named in as good condition as use and wear will permit; and said party of the first part agrees that the said parties of the second part, doing as they agree, shall have possession and use of the said premises for the term of seven years from the date of this agreement." The appellant C. W. Mabry afterwards succeeded to the rights of J. W. Bab under this contract, and became the partner of J. M. Lewis, by consent of the landlord, G. P. Bibbes. On the 18th day of February, 1894, Lewis and Mabry executed and delivered to the appellee, J. I. Richardson, the following bill of sale or assignment of the foregoing contract as follows:

"Cherokee Nation, Indian Territory, February 13th, 1894. Know all men by these presents, we hereby sell to J. I. Richardson all of the lease and improvements of the land now occupied by us and leased from G. P. Bibbes, as administrator of the S. Nicholson estate, for the consideration of one thousand dollars, one-half to be paid by draft on the Kansas City Bank of Missouri on March 1st, 1894, and the balance, five hundred dollars, to be paid February 1st, 1895, and possession to be given to J. I. Richardson, on receipt of first payment, of premises, and all the land not now sown to wheat, which is ninety acres, more or less; and we further agree to give possession of wheat ground, two hundred and twenty acres, after the crop now in is harvested and stacked or threshed; and we further agree to give one-third of the wheat now sown next to the corn ground, about fifteen or eighteen acres. [Signed] J. M. Lewis. C. W. Mabry. Witness: V. Allyn."

The lease of G. P. Bibbes, administrator, to Lewis and Bab, was at about the same time of the execution of the above bill of sale assigned to the appellee, J. I. Richardson, by an indorsement upon the original lease, which was in words and figures as follows, to wit:

"Cooweescoowee District, Cherokee Nation, I. T. February 13th, 1894. The parties of the second part transfer all their right, title, and interest in the above-described property to J. I. Richardson for a fixed amount; the said Richardson is to put seven wires on the posts now set on the west side of the new Nicholson field, about 80 or 100 rods. [Signed] J. M. Lewis. Witness: G. P. Bibbes. V. Allyn."

"This lease or contract is not transferable until the last payment is made, which shall be February 1st, 1895, if the contract is fulfilled. [Signed] J. I. Richardson."

The testimony which in any wise refers to the issues made by the pleadings in this case, is briefly summed up as follows: First. The bill of sale from Lewis and Mabry called for 310 acres of land, and stated that it was the land leased from G. P. Bibbes, as administrator of the S. Nicholson estate. Second. The lease from George Bibbes, administrator, to J. M. Lewis and J. W. Bab, which was assigned to the appellee, J. I. Richardson, did not describe the land leased with any particularity, or by metes and bounds, or the number of acres; but the term was to be seven years from June 1, 1892, and the assignment of it to Richardson was dated February 13, 1894, and this assignment mentions "the new Nicholson field," which seems to have been the same tract of land that the appellee alleges the appellants failed to deliver him possession of. Third. The appellee, Richardson, testified that the appellants told him that this 120 acres of land was held by them under the same contract as the Nicholson estate, but that it was on Mr. Bibbes' homestead, and that Mr. Bibbes contracted the same number of years; that it was held on the same kind of a contract for the same number of years; that the appellants never delivered possession of it to him; that, as soon as the crops were gathered off of it, Bibbes took possession of it, commenced plowing it, and leased it out. Mr. Allyn, who was with the appellee at the time he bought the unexpired term of this lease, and witnessed the transfer, testified that he and Mr. Richardson and Mr. Mabry got into a spring wagon, and drove around the field; that when they came to this tract of land, containing about 120 acres, Mabry told them that it was included in the sale to Richardson, and that he and Lewis had it under lease, and that it was not mentioned that this 120 acres of land was not embraced in the original contract; that, after the transfer had been made to Mr. Richardson, he understood that this 120 acres had been rented at the same time as the Nicholson estate land, but from Mr. Bibbes individually. Witness Hoffman: That he went to take possession of this 120 acres of land for Richardson, but that Bibbes refused to give it up, stating that it did not belong to the lease, and that he was going to rent it. The appellant Lewis told Richardson, in the presence of witness, to bring suit against Bibbes for this land, and that he would assist him. Mr. George P. Bibbes, the landlord, testified that on the day before or the day after the transfer of the unexpired term from Lewis and Mabry to Richardson he asked Lewis if he had included this 120 acres of land in the transfer to Richardson, and Lewis said, "No." This testimony is uncontradicted. The witness Bibbes further testified that all of the 310 acres were in the same inclosure; that the 120 acres in dispute were south of the road from the other part of the tract, and that he never had had a contract of any kind with Lewis and Mabry on this 120 acres, and that Lewis and Mabry both

told him that this land was not included in their assignment or transfer to Richardson; that this land was worth two dollars per acre per annum. Mrs. Bibbes testified that the appellant Lewis told her husband, George Bibbes, in her presence, that he and Mr. Mabry did not include this 120 acres of land in the transfer or assignment to Mr. Richardson, and that Mr. Bibbes now had 100 acres more of land than he had before. The appellant J. M. Lewis testified that Richardson and Allyn came to his house, and proposed to buy the unexpired term of this lease; that they were both strangers to him; that, as he had taken in Mr. Mabry as a partner, he would have to consult him, and would also have to get the consent of his landlord; that he went over the land with Richardson and Mr. Allyn, in a buggy, and that when they came to this 120-acre tract he said to them: "Gentlemen, this piece of land, I want you to understand that while it is a part of the lease, it is not named in the lease, and if you want it in, now is your time to put it in." He also testified that after they had made this assignment to Richardson, and before the cash payment had been made, he and Mabry came to the conclusion they sold the land too cheap, and that when Richardson came down from Kansas City, about the 4th of March, 1894, they told him that they considered the contract was not binding upon them, because he was several days late in making his cash payment, which was to have been made on March 1st, and that they tried to talk Richardson out of it. He also testified that they only agreed to let Richardson have 200 acres. The other appellant, C. W. Mabry, testified that he also went with Richardson to see all the land, including this 120 acres; "explained to him how the lines ran, and told him that we had this one hundred and twenty acre tract the same as the other, although it was not named in the lease, and that we had also broken some of the Nicholson estate land that was named in the writing." Appellant J. M. Lewis was recalled, and in answer to the question of his counsel testified that this 120-acre tract of land belonged to both the Nicholson estate and to Bibbes individually. The foregoing is briefly all the testimony which has any bearing upon the issues in this case.

We have examined the authorities cited by counsel for appellants,—Wood, Landl. & Ten. § 320; 2 Am. & Eng. Enc. Law (2d Ed.) p. 1048, note 8; Craig v. Summers, 47 Minn. 189, 49 N. W. 742; and Sexton v. Storage Co. (Ill.) 21 N. E. 920,—all sustaining the principle contended for by appellants that "an assignment, as contradistinguished from a sublease, is a transfer of the whole term either of a part or all of the demised premises; but, when the lessee holds the demised premises for a less period than the time of his unexpired term, it is under a sublease." So that the instruments executed by Lewis and Mabry to Richardson are, in law, an assignment of the whole of their unexpired term. We have

also examined the authorities cited by appellants to sustain their contention that the maxim of caveat emptor would apply in this case, and that the appellee would be charged with knowledge that this 120 acres was simply held under a verbal lease of four years from Bibbes individually. Wood, Landl. & Ten. § 361, cited by appellants, reads as follows: "A lease is a purchase pro tanto, to whom the maxim caveat emptor applies. Therefore he must, at his peril, ascertain that the intended lessor has sufficient title to demise for the proposed term. * * * An under-lessee, who neglects to inquire into the provisions of the original lease, does so at his own risk. An assignment of a term for years is therefore governed generally by the rules applicable to the sale of personal property, while as to the quality of the thing sold caveat emptor is the general rule; the seller impliedly warrants the title." See Jeffers v. Easton, Eldridge & Co. (Cal.) 45 Pac. 660, cited by appellants. The preponderance of the testimony in this case shows, we think, that the appellants lead the appellee, Richardson, to believe that this 120-acre tract of land was held by them for a period of seven years—four years still remaining—under the same contract, or the same kind of a contract, as they held the lands of the Nicholson estate; and not only by their words did they lead him to believe that this tract was included in the transfer or assignment to him, but by their written assignment transferred it to him; and that they would be estopped by their deed from setting up that they only transferred him 200 acres. The testimony of Mr. and Mrs. Bibbes is to the effect that the appellants told the landlord, George P. Bibbes, that they had not included this 120 acres in their assignment to Richardson (when they really had); thus inducing the landlord to refuse Richardson possession of it, and to take possession of it himself, and rent it to another party. As the original lease from Bibbes to Lewis and Mabry, which was assigned to the appellee, did not describe with particularity the tract of land leased, or the number of acres, and as these two tracts of land were within the same inclosure, we do not think that the appellee, Richardson, was charged, in law, with knowledge as to the number of acres held by the appellants under this written lease; and that he had a right to rely upon the statements made by them to him that this 120-acre tract was a part of the same contract, or held by them under a like contract; and that when they induced the landlord, Bibbes, to take possession of this 120 acres, and to keep it from the appellee, Richardson, for the balance of the unexpired term, we think that the appellee, Richardson, was entitled to recover from the appellants the rental value of this 120 acres for the balance of the unexpired term of four years.

The instructions of the trial court to the jury in this case, on the whole, were, in our opinion, most favorable to the appellants.

The instruction complained of by the appellants is as follows: "Ninth. The court further instructs the jury that if you shall believe from the evidence that the plaintiffs, after they had made the bill of sale in question, falsely and fraudulently induced George P. Bibbes to believe that he was entitled thereafter to the possession of the one hundred and twenty acres of land mentioned in the evidence, and, relying upon such false and fraudulent representations, he was induced to take possession of the said one hundred and twenty acre tract of land, and to withhold the possession thereof from the defendant, and that he did so take possession thereof in consequence of such false and fraudulent representations, the plaintiffs in this case are estopped from saying that they gave the defendant possession of said one hundred and twenty acre tract of land; and if you should so find from all the evidence in the case, you may further find that the defendant is entitled to credit upon the notes in question to the amount of the rental value of said one hundred and twenty acre tract of land for the term of four years." We are of the opinion that there is no error in this instruction prejudicial to the appellants, and that the appellee, as against the appellants, had the right to the possession of said tract of land for the remaining four years; and when, by their own acts and false representations made to the landlord, in which they stated that they had not transferred this 120-acre tract of land, they caused the appellee to be deprived of the land, we are of the opinion that he was entitled to recover the rental value of the tract for the term of four years, and to have a credit upon the notes sued upon for that amount, as determined by the jury. "Nemo contra factum suum venire potest,"—no man can contradict his own deed. 2 Coke, Inst. 66. "No man should be permitted to take advantage of his own wrongdoing." No error appearing in the record in this case, the judgment of the lower court is affirmed.

CLAYTON and TOWNSEND, JJ., concur.

WILLEY et al. v. REYNOLDS et al.

(Court of Appeals of Indian Territory. June 12, 1899.)

ASSIGNMENTS FOR BENEFIT OF CREDITORS—OMISSION OF DEBTS—VALIDITY.

The failure of an assignor to state the amount of his indebtedness to each preferred creditor mentioned in the deed will not, of itself, invalidate the assignment.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, October 10, 1896.

Action by attachment by Reynolds, Davis & Co. against C. E. Willey and another, in which Herbert Kneeland interpleaded for the property attached. From a judgment for plain-

tiffs, defendants and interpleader appeal. Reversed.

C. E. Willey and O. W. Willey were merchants doing business under the firm name of C. E. Willey & Son at Ft. Gibson, Indian Territory, and on the 21st day of December, 1894, executed and delivered to Herbert Kneeland (interpleader, and one of the appellants here) their certain deed, by the terms of which they transferred to him "all of the stock of merchandise, goods, wares, and fixtures of every description in the storehouse used and occupied by us at Ft. Gibson, Indian Territory, including show cases, counters, shelving, safe, scales, lamps, etc.; also, all notes and accounts and other evidences of indebtedness due us from any persons whatsoever, and all personal property," etc., not exempt by law; and out of the proceeds of sales and collections the assignee was directed to pay creditors as follows: "First. He shall pay to Hutchings & English the sum of one hundred dollars, their fee for services in preparing and perfecting this assignment,—same not being for any future services,—and the claim of J. Foster & Son, of Ft. Smith, Ark., and Shibley-Wood Grocer Company, of Van Buren, Ark. These are to be paid in full. Second. The residue, if any, shall be paid to Fannie Willey, as her interest may appear, towards the settlement of her claim, and to the Bloch Queensware Co., of Ft. Smith, Ark., as their interest may appear, in settlement of their claim. Third. The residue, if any, shall be paid towards the satisfaction of the claim of Reynolds, Davis & Co., of Ft. Smith, Ark., as their interest may appear. Fourth. The residue, if any, shall be paid to all the balance of our creditors, share and share alike." Reynolds, Davis & Co., the appellees, and some of the creditors of C. E. Willey & Son, sued out a writ of attachment in an action brought by them upon their account in the sum of \$250 against C. E. Willey & Son, and caused the writ to be levied by the United States marshal upon the property transferred by C. E. Willey & Son to the interpleader, Herbert Kneeland; alleging in the affidavit for attachment "that defendants have sold, conveyed, or otherwise disposed of their property, or suffered or permitted it to be sold, with the fraudulent intention to cheat, hinder, or delay their creditors; are about to sell, convey, or otherwise dispose of their property with such intent." The assignee, Herbert Kneeland, interpleaded for the goods attached, and by agreement of all the parties the issues between the plaintiffs, Reynolds, Davis & Co., and the defendants, C. E. Willey & Son, and between the plaintiffs and Herbert Kneeland, the interpleader, were submitted to the trial court upon one proposition,—the validity or invalidity of the deed of assignment, upon its face, as to Reynolds, Davis & Co., creditors. The trial court held that the deed of assignment was void on its face, sustained the plaintiffs' attachment, and rendered judgment in their favor. A motion for

a new trial was made and overruled, and an appeal prayed and allowed to this court.

William T. Hutchings and Albert Z. English, for appellants. C. E. Warner, N. B. Maxey, and J. P. Clayton, for appellees.

THOMAS, J. (after stating the facts). The sole question to be determined here is whether or not the deed of assignment executed and delivered by C. E. Willey & Son to Herbert Kneeland, interpleader, is fraudulent and void upon its face as to Reynolds, Davis & Co., attaching creditors. If it is, the plaintiffs and appellees will have judgment for their debt, and sustaining the attachment, against the defendants, C. E. Willey & Son, and also in their favor and against the interpleader upon his interplea. If it is not, the defendants will have judgment against the plaintiffs upon the attachment issue, and the interpleader will have judgment for the goods attached or their proceeds.

It is contended by appellees that the deed of assignment was void as to them because it did not fix the amount due any of the creditors, except to the attorneys who drew the deed; and the case of *Waples-Platter Co. v. Low*, 4 C. C. A. 205, 54 Fed. 93,—apparently the authority upon which the judgment of the trial court was based,—is cited to sustain this contention. That was an Indian Territory case, decided by the United States circuit court of appeals for the Eighth circuit, and the issues involved were similar to those involved in this cause, but the facts were different. In that case *Low* executed a deed of assignment to one Hancock, as assignee, in which he preferred Colbert La Flore for the sum of \$1,500, when he was only indebted to him in the sum of \$500, and at the trial *Low* testified that he knew at the time he preferred Colbert that he only owed him \$500, and his only excuse was that he secretly intended thereby to secure the payment, not only of the \$500 he owed Colbert La Flore, but also of \$1,000 that he owed to one William La Flore, who was in no way connected in business with Colbert; and Judge Sanborn, in delivering the opinion of the court, said: "There were three questions that, under some phases of this case, it might be necessary for the jury to determine in this action. They were: (1) Was the defendant, *Low*, about to sell, convey, or otherwise dispose of his property with the fraudulent intent to cheat, hinder, or delay his creditors, at the commencement of the action? (2) Was the order of attachment delivered to the deputy marshal before or after the assignment to the interpleader was delivered and accepted? (3) Did the interpleader have any knowledge of or part in the defendant's scheme to cheat, hinder, or delay his creditors (if he had any such scheme) before he accepted the assignment? If the jury answered the first question in the affirmative, the plaintiff would be entitled to a verdict against the defendant, regardless of

either of the others; but an affirmative answer to this question would not authorize a verdict or judgment against the interpleader, unless an affirmative answer was also given to one of the two other questions presented. In other words, to warrant a verdict against the interpleader, the jury must have found, not only that the defendant was about to sell, convey, or otherwise dispose of his property with the fraudulent intent to cheat, hinder, or delay his creditors, when the action was commenced, but they must have also found either that the order of attachment was delivered to the marshal before the delivery and acceptance of the assignment had been completed, or that the interpleader, before or at the time of his acceptance of it, participated in, or was aware of, the intended fraud. Thus, it will be seen that the issues between the plaintiff and the defendant and those between the plaintiff and the interpleader were not identical, and, to prevent confusion and error, it was imperatively necessary that the court should keep the broad distinction between them clearly in mind, and should carefully and distinctly present it to the jury in its charge.

* * * The fact that the defendant in his assignment preferred Colbert La Flore for \$1,500, when he knew he owed him but \$500, with the intent to subsequently direct the application of the surplus, \$1,000, to the payment of another debt, not preferred by the assignment, was conclusive evidence against *Low* of the fraudulent character of this assignment. It may be admitted that where an assignor, by mistake, or through ignorance or uncertainty as to his liability, erroneously but in good faith states the amount of his liability to some creditor too high, the assignment may yet be sustained (*Farwell v. Maxwell*, 34 Fed. 727), though it will be noticed that the assignment in this case just cited was not one giving preferences, and stands upon a very different ground from a preferential assignment like that in the case at bar, where the assignee is required by statute to give a bond conditioned that he will 'sell the property to the best advantage, and pay the proceeds thereof to the creditors mentioned in said assignment according to the terms thereof.' *Mansf. Dig. § 305; Rice v. Frayser*, 24 Fed. 460, 464. * * * If upon such a state of facts such a preference is a lawful exercise of the power of the assignor, no reason is perceived why a preferential assignment securing a single creditor, to whom the defendant owes but a dollar, for an amount equal to the entire value of his assets, might not be sustained upon the testimony of the assignor, subsequently given, declaring to what creditors, and to what amounts, he intended to apply the proceeds of his property. * * * It is sufficient to say that the assignment is not void upon its face, since its vice does not there appear, and hence the assignee may have received and accepted it in good faith, without notice of the intended fraud of the assignor; but, so far as the assignor is concerned, when he

knowingly prefers a creditor in his assignment for an amount far in excess of the debt he actually owes him, for the express purpose of creating a secret trust in the surplus above his debt, to the end that he may subsequently dispose of it according to his own secret intention, which he may change at any moment, he thereby presents conclusive evidence of his fraudulent intent in making the assignment, upon every principle applicable to such instruments. Nothing is better settled than that the assignment in this class of cases, where preferences are permitted, as at common law, and by the statutes of Arkansas, must definitely fix the rights of the parties beneficially interested, and that nothing shall be left to the discretion or further control of the assignor. In *Averill v. Loucks*, 6 Barb. 470, where a preferential assignment provided that the debts should be paid in the order provided in schedules to be filed within 60 days after its date, Judge Paige declared it void because it did not fix definitely the rights of the parties, but reserved to the assignor the control over the proceeds of his property. To the same effect are *Pierson v. Manning*, 2 Mich. 444, 450; *Grover v. Wakeman*, 11 Wend. 187; *Lukins v. Aird*, 6 Wall. 78; *Mackie v. Cairns*, 5 Cow. 547; *Seaving v. Brinkerhoff*, 5 Johns. Ch. 329; *Barney v. Griffin*, 2 N. Y. 365; *Gazam v. Poyntz*, 4 Ala. 374; *Wiswall v. Ticknor*, 6 Ala. 179. To give judicial sanction to an assignment making such a preference as this in question would enable assignors to force compromises with their unpreferred creditors by presenting exaggerated statements of their preferred liabilities, would permit the creation and execution of secret trusts, and would enable assignors to control at will the proceeds of their property after assignments had been made; and these are the very vices in assignments against which courts have constantly guarded, and must continue to guard, the public. It is plain, therefore, that, so far as the issue between the plaintiff and defendant was concerned, there was error in the fifth instruction, which charged the jury that, before they could render a verdict for the plaintiff, they must find that the interpleader was aware of, or participated in, the defendant's fraud. No such finding was required to warrant a verdict upon that issue.

* * * The result is that upon the trial of an issue between the plaintiff and defendant, raised by the denial by the latter of the plaintiff's allegation in his affidavit for attachment that the defendant was at the commencement of the action about to sell, convey, or otherwise dispose of his property with the fraudulent intention to cheat, hinder, or delay his creditors, the knowledge or participation of the assignee of the defendant for the benefit of his creditors in his fraud is not material. An assignment whereby an insolvent assignor knowingly prefers a creditor for an amount in excess of his indebtedness to him, with the secret intent to cause the surplus above his actual indebtedness to such creditor to be subse-

quently applied to the payment of a debt he owes to another creditor, who is not secured by the assignment, is conclusive evidence of the assignor's intent thereby to cheat, hinder, or delay his unsecured creditors."

Counsel for appellees also cite the case of *Caton v. Mosely*, 25 Tex. 374, and in the opinion of the court in that case we find the following: When the assignment recited that the assignor was indebted to sundry persons, but did not name them, nor specify the amount of the assignor's indebtedness, but directed the assignee to hold said property, and dispose of the same as soon as he could do so to the best advantage, for the benefit of any creditors generally, the assignment was held invalid, for uncertainty in not furnishing some means of ascertaining who were the creditors. But in many of the states a method for ascertaining the debts to be paid is provided, and this objection would not, in these states, be of the same force. And in the case of *Hudson v. Revett*, 5 Bing. 368, also cited by appellees to sustain the judgment of the trial court, a blank was left in the deed for one of the principal debts, the precise amount of which was not ascertained until after its execution by the debtor, when it was inserted, in his presence and with his assent. It was held that by reason of such assent the deed was valid from that time, but the court laid it down clearly that it was not a complete deed until then.

On the other hand, appellants cite us to the following: Mr. Burrill, in his work upon Assignments (5th Ed.; § 146), says, "It has been held that a debt, to secure which a deed of trust has been executed, may be described by the name of the debtor, and its amount be left to be ascertained"; citing *Platt v. Hedge*, 8 Iowa, 386; *Van Hook v. Walton*, 28 Tex. 59; *England v. Reynolds*, 38 Ala. 370; *Brown v. Knox*, 6 Mo. 302; *Bank v. Huth*, 4 B. Mon. 423; *Butt v. Peck*, 1 Daly, 83; *Halsey v. Fairbanks*, 4 Mason, 206, Fed. Cas. No. 5964; *Layson v. Rowan*, 7 Rob. (La.) 1. And to the case of *Sanger v. Flow*, 1 C. C. A. 56, 48 Fed. 153, which was an Indian Territory case, and the opinion was delivered by Judge Caldwell. The court said, among other things: "The names and amounts due the unpreferred creditors are not given in the deed, or in any schedule attached thereto. It is claimed that the failure to attach such a schedule avoids the deed. The law is otherwise. Burrill, Assignm. pp. 186, 205. Such a schedule, if filed, would not be conclusive as to who were creditors, or the amount of their debts. If any surplus remains to be distributed to such creditors, and there is any doubt as to who they are, or the amount of their debts, the assignee should refer the matter to the court of chancery administering the trust; and that court will by some appropriate proceeding determine these questions, and order the fund distributed accordingly."

We are of the opinion that the authorities cited by appellees do not sustain their conten-

tion. In the case of Waples-Platter Co. v. Low, the court simply held that Low, in preferring Colbert La Flore for \$1,500, when he only owed him \$500, with the intent to subsequently direct the application of the surplus \$1,000 to the payment of another debt, was conclusive evidence against Low of the fraudulent character of the assignment, and would sustain the attachment, but, in order to defeat the interpleader, it would be incumbent for the attaching creditor to establish that he (the assignee) was aware of or participated in this fraudulent scheme of Low. This is not the case at bar. It is true that Judge Sanborn, in the opinion of the court in that case, stated that nothing is better settled than that the rights of parties beneficially interested in preferential deeds of assignment must be definitely fixed, and that nothing shall be left to the discretion or further control of the assignor. We believe that the deed in this case fixed with sufficient certainty the rights of the parties interested. Hutchings & English were to be paid the sum of \$100, and J. Foster & Son and the Shibley-Wood Grocer Company were to be paid in full the amount of the indebtedness due them from C. E. Willey & Son, and the residue applied upon the indebtedness due Fannie Willey. There was nothing left to the discretion or control of the assignor, other than there would have been if he had named the amount he believed to be due each; and, as we have seen, that would not be conclusive, and, if not conclusive, it seems to us to be immaterial. In *Caton v. Mosely* the assignor did not name his creditors, or state the amounts due them; and the assignment was held invalid, because in Texas there was no way of ascertaining who the creditors were, or the amounts due them. And even in that case it was stated that, in states where a method is provided for ascertaining the names of the creditors and amounts due, this objection would not be tenable. We have seen, from the opinion of the United States court of appeals in *Sanger v. Flow*, supra, that there is a method of ascertaining in the Indian Territory, by reference of the matter to the court, which will by some appropriate proceeding determine the amounts due each of the creditors of C. E. Willey & Son, whether mentioned in the deed or not. This will not be necessary as to the amount for which Hutchings & English are preferred, as the indebtedness and the creditor in that case could not be better described, unless this indebtedness is questioned by the assignee or some creditor.

We are of the opinion that the omission of the assignor to state the amount due from him to each of the creditors mentioned in the deed would not of itself render the deed of assignment void upon its face, and the judgment of the trial court in that respect is therefore reversed, and the cause remanded. Reversed and remanded.

CLAYTON and TOWNSEND, JJ., concur.

ROBINSON et al. v. BELT et al.

(Court of Appeals of Indian Territory. June 3, 1899.)

ASSIGNMENT FOR BENEFIT OF CREDITORS— VALIDITY—STIPULATION.

1. A deed of assignment for benefit of creditors, which recites an intention to convey all the assignor's property except such as is exempt under the law, and which sets out a schedule claimed by him to be exempt, passes title to property in such schedule which is not exempt, and is not fraudulent because of such claim of exemption.

2. A deed of assignment for benefit of creditors is not invalidated by a stipulation therein requiring releases from creditors as a condition of their receiving preferences.

3. An assignment for benefit of creditors that conveys all the assignor's property is not a partial assignment because it then, by mistake, exempts property not belonging to him, and which he could not convey.

4. Under stipulation filed in attachment suit by creditors against an assignor, in which the assignee intervenes, "that the said attaching creditors will file no answer nor interpose any defense to the claim of the intervener excepting as to matters of law arising on the pleadings," said creditors cannot amend their answer to show distribution to them of the proceeds of the attached property subsequent to the interplea.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice W. M. Springer, September 19, 1895.

In an action by J. M. Robinson & Co. against J. C. Belt, O. M. King interpleaded, seeking to recover the value of property attached and sold by Robinson & Co., which had been conveyed to King, as assignee for benefit of creditors, by Belt. From an adverse judgment, Robinson & Co. appeal. Affirmed.

John C. Belt, a resident of Arkansas, and a licensed trader at Eufaula, Ind. T., on the 20th of December, 1891, made an assignment for the benefit of his creditors to C. M. King, as his assignee. On the following day the appellants brought suit against Belt, and sued out an attachment and levied upon the property assigned. Belt failed to plead, and judgment by default was taken against him, and attachment was sustained. On May 31, 1892, King filed his amended interplea, setting out deed of assignment, and claimed the property levied upon as his by virtue of said deed. King filed his bond as assignee and inventory of the property with the clerk of the court. The property attached was sold by order of court, and proceeds paid into court, before the interplea was filed. At the May term, 1892, a demurrer to the interplea was filed, and sustained by the court, from which order King sued out a writ of error to the United States court of appeals. King gave no supersedeas bond, and the fund was, by order of court, distributed pro rata to the attaching creditors, according to their priorities. The fund had been deposited in a bank designated as a United States depository. The bank failed, and only 87 per cent. of the fund was recovered and dis-

tributed. The fund amounted to \$7,900. The court of appeals reversed the judgment on the demurrer (11 C. C. A. 39, 63 Fed. 90), and on September 19, 1895, the appellants filed their answer to the interplea, denying that King was owner by virtue of the deed of assignment, and alleging that the deed of assignment was fraudulent and void; denying that King filed a complete inventory; denying that certain personal property described in the deed of assignment was the property of the wife of John C. Belt; and admitting that the property described in the deed was levied upon by the United States marshal under the attachment. On December 15, 1893, an agreement and stipulation was made and entered into, which, among other provisions, contained the following: "That the said attaching creditors will file no answer nor interpose no (any) defense to the claim of the intervenor excepting as to matters of law arising upon the pleadings, and no issues of fact as to the value of the property in suit, for the conversion and value of which intervenor seeks to recover in this suit and other suits, as per agreement on file in this cause by and between all the parties interested herein; and that this agreement be made a part of the record in this and all other causes similarly situated as per agreement herein heretofore filed." Several suits had been instituted, and attachments issued and levied, and an agreement had been entered into on May 12, 1892, that they should all abide the results of this case. Said agreement contains the following stipulations, after giving the style of the different suits, viz.: " * * * And in all of which it is proposed to file an interplea on the part of C. M. King, as assignee of John C. Belt; that the pleadings filed in said cause No. 1,285, and those filed with reference to any interplea growing out of said suit shall be adopted and considered as filed in all of the other above-mentioned cases, and that similar orders shall be considered as entered in all of said above-mentioned causes; and a judgment similar to the judgment entered in said cause No. 1,285, or upon any interplea growing out of said cause, shall be entered in all the other of said above mentioned and numbered causes; and that, in the event of any writ of error or appeal being sued out or taken for a review of any judgment entered in said cause No. 1,285 or the interplea growing out thereof, that such writ of error or appeal shall be considered as applying to all judgments entered in the other of the above numbered and mentioned causes, and the judgments in all of such causes shall be held subject to the order or judgment that may be rendered by any appellate tribunal upon any such writ of error or appeal in said cause first above mentioned." This agreement is in part the agreement mentioned in the above quotation from the agreement made December 15, 1893. The case was tried upon the issues made by the pleadings and during

the trial, and before the same was submitted to the jury, on, to wit, September 23, 1895, the plaintiffs below and appellants here asked to amend their answer, setting up the fact that the fund had been distributed by the former order of the court to the various attaching creditors: "And there is now no fund or proceeds in court which the interpleader can recover in this action, or to or in which the interpleader had any right." Defendants excepted to the allowance of said amendment by the court for the reason that it would be in violation of the stipulation of December 15, 1893, and demurred also to the said amended answer, "because said plea sets up no defense to interpleader's cause of action, and constitutes no defense to his right to recover." The court sustained the demurrer in the following opinion, to which plaintiffs excepted: "As this is a legal question to be decided by the court, the question may be decided now that this amendment to the answer does not set forth, in the opinion of the court, a legal defense to the interplea of King in this case; that the rights of King as an interpleader at this time relate to the time of his filing his interplea, and that, he himself having done nothing between that time and this to forfeit his right to that claim, he stands there now as he stood upon the day of filing his interplea, and is entitled to all the rights he had then to this property, or to the proceeds thereof; and that nothing but the decision of the courts in the final adjudication of this case can determine what his rights are, but, when they are decided, that it will be decided as of that day, and not of to-day. Therefore the court holds that the amended answer in this particular does not present a legal defense to the interplea in this case." The case was thereupon submitted to the jury under the charge of the court, which was as follows, to wit: "First. That the interplea filed in this case by C. M. King states a good cause of action for the recovery of the attached property or its proceeds, and, if the jury believe from the evidence that the averments in said interplea are substantially true, they will find for the interpleader, C. M. King. But, if they believe from the evidence that said averments are not substantially true, they will find for the plaintiffs, J. M. Robinson & Co. Second. That the reservation to the assignor, in his deed of assignment in this case, as exempt, of property which he did not own or control, by mistake of the assignor, does not make the assignment void if in fact he conveys, regardless of such reservation, all the property of the assignor not exempt from execution sale; and the assignee, who is the interpleader in this case, may prove by oral evidence that any portion of the property mentioned in the deed of assignment was not the property of the assignor, but was inserted in the deed by mistake. Third. That the only substantial question presented in this case at this time is whether certain house-

hold furniture situated in Enfaula, and a pair of mares, a buggy, and a harness which were set forth in Schedule C, which is a part of the said deed of assignment, were at the time of executing said deed the property of the assignor, J. C. Belt, or were the property of his wife, and were inserted in said deed by mistake; and if the jury believe from the evidence that said property was at the time of executing said deed the property of the wife of J. C. Belt, and was inserted in said deed by mistake, they will find for the interpleader, C. M. King. Fourth. That the claim by the assignor, J. C. Belt, in his deed of assignment, as exempt from execution sale, of certain items of personal property of inconsiderable value,—such as wearing apparel, valued at \$40, a gold watch, valued at \$25, two lamps, valued at \$1.50, a chair, valued at \$3, and a trunk, valued at \$5,—when in fact such articles, by reason of their location in the Indian Territory, were not exempt from execution sale, such claim, if not made for the purpose of defrauding creditors, will not render the assignment void." The jury found the issues for the interpleader, C. M. King, and that the proceeds of the sale of the attached property were \$7,900. The plaintiffs moved for a new trial, which motion was overruled by the court. Judgment was entered upon the verdict, and plaintiffs appealed to this court.

N. B. Maxey, O. L. Jackson, and Wm. T. Hutchings, for appellants. Wm. H. H. Clayton, James Brizzolari, Jas. B. Forrester, J. C. Hodges, A. J. Nichols, and J. H. Koogler, for appellees.

TOWNSEND, J. (after stating the facts). The appellants, in their brief, have stated four objections to the deed of assignment in this case, as showing upon its face that it is fraudulent in law: First. "For the reason that it fails to convey all the debtor's property, and at the same time makes several classes of preferred creditors, who in each instance are compelled to give a full release of their indebtedness as a condition of sharing the benefits of such preferences." Second. "If the property, or any part of it, described in Schedule C, does not pass, under the terms of the deed, to the assignee, and Belt cannot claim it under the homestead or exemption laws, the deed is void." Third. "Belt chose to make his assignment in the Indian Territory, and the execution, interpretation, and validity of it must be determined by its laws." Fourth. "Belt decided for himself that he was entitled to the benefits of the exemption laws of both Arkansas and the Indian Territory. He did not leave it—as he might appropriately have done—to the law to determine for him what property he was entitled to exempt, if any, nor in what jurisdiction he might assert the right. It was his plain intention to reserve to himself all the property set forth in Schedule C, and not to con-

vey the title to it to his assignee, and he could not have used plainer or more appropriate language to effect this purpose. He might have made any disposition of property thus excepted, no matter how much, or how valuable; and his assignee could never have claimed any right or title to the same, or recovered it under the deed for the creditors, for no such rights passed to him by the deed." The law regulating "assignment for the benefit of creditors" in force in the Indian Territory at the date of the execution of the deed of assignment in this case is chapter 8 of Mansfield's Digest of the Statutes of Arkansas, which was adopted and extended over the Indian Territory by the act of congress approved May 2, 1890, and in construing that statute the circuit court of appeals of the Eighth circuit has said: "When called upon to construe the sections of the statutes thus adopted, we deem it our duty to follow the construction given thereto by the supreme court of Arkansas. The adoption of this course as the settled rule to be followed by this court and the court of original jurisdiction in the Indian Territory must commend itself to all interested." *Appolos v. Brady*, 1 C. C. A. 209, 49 Fed. 401. Applying the rule of construction thus laid down to the objections of appellant, it becomes necessary to examine the decisions of the supreme court of Arkansas. It will first be observed that the deed of assignment in this case, after describing specifically the property conveyed to the assignee, contains the following: "And I, the said John C. Belt, hereby intending to convey unto the said C. M. King, for the purpose and trust as aforesaid, all of my effects of every kind and description, wherever situated, both real, personal, and mixed, all notes, book accounts, and choses in action, whether described in this deed or not, save and except only such real and personal property as is exempt under the law from forced sale, a schedule of the property so claimed by the said John C. Belt, to be exempt from force sale, is hereto attached, marked 'Schedule C,' and made a part hereof." In *Baker v. Baer*, 59 Ark. 503, 28 S. W. 28, a deed of assignment conveyed all the lands and other property of the assignor, "except what are exempt to him by the laws of the state," the exemptions being fully described in a schedule attached. The lands claimed as exempt had never been impressed as a homestead. The court held that, since exempt property was only reserved, the title passed to assignee. The court observe: "The law, upon the evidence of the assignor, determines that the lands claimed as a homestead were never so impressed, and therefore are not exempt. Hence the title passed absolutely to the assignee. The language of the granting clause is unambiguous, and should be held to mean what it says. Only property 'exempt' was reserved. This property was not reserved. This is not a case of conveying all in the deed, and at the same time

secretly or intentionally withholding a portion for the debtor's benefit. All was conveyed by the definite description; and this, so far as the deed itself and the claim of exemptions thereto attached is concerned, argues most strongly the good faith and honesty of the transaction." But, if the grantor knew that the lands were not exempt, it was pointed out to his creditors, and is reason for saying there was no fraudulent withholding. "A reservation of the kind mentioned would not invalidate the assignment." An instruction to the effect that such a reservation would render the assignment fraudulent and void was erroneous. This is directly applicable to this case. In *King v. Dry-Goods Co.*, 60 Ark. 1, 28 S. W. 514, heard on demurrer, the identical deed of assignment in this case was passed upon by the supreme court of Arkansas, and, after quoting the clause in the deed hereinbefore set out, the court said: "Is the deed void upon its face? Is the question in the case. Such deeds of assignment have been upheld by the decisions of this court holding that the debtor, in making assignment of his property for the benefit of creditors, may exact releases from creditors as a condition of preference under the deed, where he dedicates 'all of his property not exempt by law to the payment of all of his creditors; not necessarily to the payment of all in equal proportions.' *McReynolds v. Dedman*, 47 Ark. 351, 1 S. W. 552." The court say further: "As to the claim of exemption in the deed, there is no difference in principle between the deed of assignment in this case and the deed in the case of *Baker v. Baer*, 59 Ark. 503, 28 S. W. 28, which was held not objectionable; the ruling in which case as to this question is approved and adopted in this." The court further say that the act of congress of May 2, 1890, putting in force chapter 8 of Mansfield's Digest, title "Assignments for the Benefit of Creditors," and chapter 60 of said Digest, title "Executions," that "the assignor had the right to claim his exemptions as under the laws of the state of Arkansas." It is declared to be the established law of Arkansas, in accord with much authority elsewhere, "that a stipulation for a release in a general assignment, which is made only as a condition of preference, does not invalidate the instrument." *Wolf v. Gray*, 58 Ark. 79, 13 S. W. 512. It was said by the circuit court of appeals, when the demurrer in this case was disposed of by that court, that "an assignment that conveys all the debtor's property is not a partial assignment; and one that conveys all his property, and then, by mistake, reserves or exempts from the conveyance the property of another that the assignor could not in any way convey, none the less conveys his entire property, and cannot be obnoxious to the objection that it is a partial assignment, * * * and the assignee may plead and prove the ownership of the property described in the assignment to establish this fact, and to maintain his right to

the property assigned. * * * In our opinion, the interplea stated a good cause of action for the recovery of the attached property, and the demurrer should have been overruled." *Belt v. Robinson*, 11 C. C. A. 39, 63 Fed. 92. The court below followed this decision in its first, second, and third instructions to the jury, and the jury, by its verdict, found for the appellees. The fourth instruction is the law as declared by the supreme court of Arkansas in *Lowenstein v. Finney*, 54 Ark. 128, 15 S. W. 153.

The statement at close of appellants' brief that they should have been permitted to show that only 87 per cent. of the fund was distributed, as we view it, was simply an effort to violate the agreement and stipulation of record made on the 15th of December, 1893, and the court below was correct in holding that whatever rights the appellee King has as assignee were fixed by the conditions existing at the date of his filing his intervention. The counsel have been diligent in citing authorities, but the rule of construction stated in *Appollos v. Brady*, supra, together with the ruling by the Arkansas supreme court in the hearing, involving this same assignment, in *King v. Dry-Goods Co.*, supra, and the decision of the court of appeals of the Eighth circuit in disposing of the demurrer in this case,—*Belt v. Robinson*, supra,—has left but little for this court to do except to cite the Arkansas decisions construing deeds of assignment in the various cases that have received the consideration of that court. We think the assignment in this case was good, and the judgment of the court below was correct, and it is therefore affirmed.

THOMAS, J., concurs.

WESTCHESTER FIRE INS. CO. v. BLACKFORD.

(Court of Appeals of Indian Territory. June 8, 1899.)

ASSIGNMENT FOR BENEFIT OF CREDITORS— ACTION BY ASSIGNEE.

1. An instrument by which D. assigns to B. as trustee, interest in loss under fire policies, authorizes him to collect same, and out of the proceeds to pay equally and proportionately certain enumerated debts of D., any residue to be paid D., is a general assignment for creditors.

2. An assignee for the benefit of creditors cannot maintain an action without giving the bond and filing the inventory required by the assignment law.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, Jan. 26, 1898.

Action by G. L. Blackford, trustee, against the Westchester Fire Insurance Company. Judgment for plaintiff. Defendant appeals. Reversed.

This action was brought by the appellee, G. L. Blackford, as trustee, to recover of the appellant, the Westchester Fire Insurance

Company, upon a certain policy of insurance executed by the insurance company to Mrs. M. G. Dane on the 14th day of February, 1893, by the terms of which said policy the insurance company insured the said Mrs. M. G. Dane against loss by fire of a certain storehouse or stock of goods located at Colbert, in the Choctaw nation, Ind. T., for the period of one year, and on the 15th day of April, 1893, the said building, fixtures, and stock of merchandise covered by said policy of insurance were totally destroyed by fire. On the 24th day of April following, the insured, Mrs. M. G. Dane, transferred the policy of insurance to the appellee, G. L. Blackford, by the following indorsement written upon the policy of insurance: "For value received, I hereby transfer, assign, and set over unto G. L. Blackford, trustee, and his assigns, all my title and interest in this policy and all advantage to be derived therefrom. Witness my hand and seal, this 24th day of April, 1893. [Signed] M. G. Dane. Witness: R. C. Shearman." On the 5th day of May, 1893, she also executed to the appellee the following instrument, which was offered in evidence as a part of the record in this case: "I, M. G. Dane, of Colbert, Ind. T., for and in consideration of one dollar to me in hand paid, receipt of which is hereby acknowledged, and the uses and purposes hereinafter mentioned, I hereby assign and set over unto G. L. Blackford, trustee, of Denison, Tex., all interest and benefit in and to the loss under policies 348,638, Westchester Fire Insurance Company of New York, in my favor, \$833; 212,545, the State Investment & Insurance Company, San Francisco, Cal., in my favor, \$833; 112,601, Crescent Insurance Company of New Orleans, in my favor, \$834,—which accrue to me by virtue of loss by fire of the stock of merchandise belonging to me, and owned by me, and situated at Colbert, Ind. T., under date of April 10, 1893: First. The said G. L. Blackford, trustee, shall for me and in my name cause said loss to be adjusted, or, should said companies fail or refuse to adjust and settle said loss, to proceed by law to make proofs of loss necessary, and collect said loss from the several companies above named. Second. Upon the payment of said sums by said companies, or upon the collection of said amounts by process of law, the said G. L. Blackford, trustee, is hereby authorized to pay costs of collection, including a reasonable attorney's fee and such other costs incident to said collection, which shall include the usual fee of trustee, as allowed by law in the Choctaw nation, for such services, and out of the remainder shall pay equally and proportionately the following accounts and notes: To the State National Bank of Denison a note due for the sum of \$250 (two hundred and fifty dollars) at 10 per cent. interest from maturity; the Waples-Platter Grocery Company of Denison, Tex., an account of \$523.77 (five hundred and twenty-three $\frac{77}{100}$ dollars); Robert Willis Taylor

Company, of Sherman, Tex., an account for \$395.03 (three hundred and ninety-five dollars and three cents); Leeper Hardware Company, \$262.78, Denison, Tex., an account of two hundred and sixty-two $\frac{78}{100}$ dollars; the Alliance Mill Company of Sherman, Tex., an account of four hundred and thirty-four and $\frac{75}{100}$ dollars (\$434.75); T. C. Horan, of Denison, Tex., an account of \$29.01 (twenty-nine and $\frac{1}{100}$ dollars); Noyes, Norman & Co., of St. Joseph, Mo., an account of \$114.40 (one hundred fourteen dollars and forty cents); A. N. Schuster & Co., of St. Joseph, Mo., an account of \$252.71 (two hundred and fifty-two and $\frac{71}{100}$ dollars); and residue to be paid to me. Witness my hand, the 5th day of May, 1893. [Signed] M. G. Dane. Witness: R. C. Shearman." The appellee, G. L. Blackford, testified that he had never qualified as assignee or trustee under these instruments executed to him by Mrs. Dane; that he did not know that it was necessary; that he had never filed an inventory or bond as required by the assignment law. A verdict was rendered by the jury in favor of the appellee, as trustee, in the sum of \$833 and interest. Motion for a new trial was overruled, and judgment entered for that amount, from which the insurance company prayed and was granted an appeal to this court.

Wm. T. Hutchings, for appellant. Maxey & Martin, for appellee.

THOMAS, J. (after stating the facts). The first error assigned by the appellant is that the court erred in admitting in evidence the assignments executed by Mrs. Dane to the appellee, the appellee testifying that he had not qualified as required by the assignment law in force in the Indian Territory; and also that the court erred in refusing to direct the jury to return a verdict for the appellant, as requested by the appellant at the close of the testimony, as follows: "First, because this plaintiff has no right to maintain this cause of action; second, because there is not sufficient proof to entitle the plaintiff to recover."

The appellant contends in its brief and argument that the instruments offered in evidence in this case by which the policy of insurance sued upon was transferred by Mrs. Dane to G. L. Blackford, as trustee, was a general assignment for creditors, and that the appellee, not having qualified as required by the law of the Indian Territory, has not the legal capacity to maintain this action.

In the case of *Richmond v. Mississippi Mills*, 52 Ark. 41, 11 S. W. 962, where the question as to what constitutes an assignment was directly passed upon, Judge Sandels, in delivering the opinion of the court, stated: "A deed of assignment contemplates the intervention and agency of a trustee, though none need be named in the deed. *Burrill*, Assignm. § 3; *Burrows v. Lehnendorff*, 8 Iowa, 96. Hence conveyances directly to

creditors, in payment or by way of security for their own debts solely, are not generally assignments for the benefit of creditors. *Bouchaud v. Dias*, 1 N. Y. 201, 204; *U. S. v. McLellan*, 3 Sumn. 345, Fed. Cas. No. 15,698. Nowhere is the essential character of an assignment (trust deed), as contrasted with that of a mortgage, better stated than by Mr. Justice Walker in *Turner v. Watkins*, 31 Ark. 437. He says: "The conclusion reached is that, when the grantor parts with his title, giving it to the trustee absolutely, for the purpose of raising a fund to pay debts, this is, properly speaking, a deed of trust; but when a conveyance is to secure a debt, in case of default, thus assimilating the transaction to a mortgage, and where the intent of the grantor, instead of parting with his estate, is to retain it, in case he performs his obligation according to its terms, instruments of this class are also, but less technically, called 'deeds of trust,' but in substance they are mortgages." See, also, *Hoffman, Burneston & Co. v. Mackall*, 5 Ohio St. 124. An assignment, then, as Burrill says, is a transfer by a debtor, without compulsion of law, of some or all of his property to an assignee or assignees, in trust, to apply the same or the proceeds thereof to the payment of some or all of his debts, and to return the surplus, if any, to the debtor. A mortgage is a security against the default of a debtor in the payment of his debts. * * * We do not hold that the giving of one or more mortgages, the confession of judgments, or other means adopted to give security or preference constitute necessarily, or even ordinarily, an assignment. But we do hold that where one or more instruments are executed by a debtor, in whatsoever form, or by whatsoever name, with the intention of having them operate as an assignment, and with the intention of granting the property conveyed absolutely to the trustee to raise a fund to pay debts, the transaction constitutes an assignment." In the case of *Appolos v. Brady*, 1 C. C. A. 301, 49 Fed. 402, Judge Shiras, in delivering the opinion of the circuit court of appeals for the Eighth circuit, stated: "The rule to be followed in determining whether a given instrument is to be deemed a mortgage or a deed of assignment is fully stated by the supreme court of Arkansas in the cases of *Richmond v. Mississippi Mills*, 52 Ark. 30, 11 S. W. 960; *State v. Dupuy*, 52 Ark. 48, 11 S. W. 964; *Robson v. Tomlinson*, 54 Ark. 229, 15 S. W. 456; *Penzel Co. v. Jett*, 54 Ark. 428, 16 S. W. 120. These cases declare the test to be, has the party made an absolute appropriation of property as a means for raising a fund to pay debts, without reserving to himself, in good faith, an equity of redemption in the property conveyed? In *Robson v. Tomlinson*, supra, the rule is stated as follows: "The controlling guide, according to the previous decisions of this court, is, was it the intention of the parties, at the time the instrument was executed, to divest the debtor

of the title, and to make an appropriation of the property to raise a fund to pay debts? In *Richmond v. Mississippi Mills*, supra, it is held that, while the meaning of the instrument is ordinarily to be derived from the language used therein, yet parol evidence may be admitted showing the collateral facts surrounding the transaction, for the purpose of enabling the court to determine the actual intention of the parties in the execution of the instrument; but that if, from the entire evidence, it appears that the debtor executed a conveyance with the intention of conveying the property absolutely, and without the reservation of the right to redeem, in order that the property may be appropriated to raising a fund for the payment of debts, then the transaction constitutes an assignment." The case of *Goodbar v. Locke*, 56 Ark. 314, 19 S. W. 924, which is cited by the appellee to sustain his contention that these instruments did not constitute a deed of assignment, in our opinion does not apply, nor is it in any wise a parallel case to the one at bar. In that case there was no trustee, and a part of the property was conveyed directly from the debtor to the creditor in payment of, or as security for, the indebtedness due, and the choses in action were transferred "as collateral to secure." The court in that case said: "The first three instruments purport to convey property direct from the debtor to the creditor in payment of valid debts, and, if they were in fact what they purported to be, they do not constitute an assignment in whole or in part. * * * It is next insisted that the transfer of the choses in action was upon its face an assignment for the benefit of creditors, and for that reason, the attachment should have been sustained. It purported to transfer to L. C. Locke certain choses in action 'as collateral to secure.' If the choses were transferred as collateral security, the legal consequence was that the equitable ownership remained in the assignors, while the assignees held them in pledge." Under the test as laid down by the supreme court of Arkansas and the United States circuit court of appeals for the Eighth circuit in the cases above cited, it is our opinion that the instruments in this case executed by Mrs. Dane to the appellee, G. L. Blackford, as trustee, constitute an assignment for the benefit of creditors, as this insurance policy and other insurance policies had been assigned by her to the appellee as a means for raising a fund to pay the debts enumerated in the deed of assignment, without reserving to herself an equity of redemption in the property conveyed. In the case of *Richmond v. Mississippi Mills*, above cited, the court further said: "This and a multitude of other decisions emphasize the statement often made that the law will not be blinded by forms or names, but will look beyond to the substance of the transaction under consideration, and fix its character according to the intention of the parties. *Jones, Chat. Mortg.* § 24; *Horne v. Puckett*,

22 Tex. 201; *Hopkins v. Thompson*, 2 Port. (Ala.) 433."

The next question to be considered is, if these instruments did constitute a deed of assignment, can the appellee, the assignee, maintain this action without having given the bond and filed the inventory required by the assignment law? In other words, has the appellee the legal capacity to sue? In the case of *Falconer v. Hunt*, 39 Ark. 68, it was held that the assignee in a deed of assignment could not maintain an action against an officer for taking the assigned goods under a writ of attachment against the assignor until he had filed the inventory in the probate court and given the bond required by the statute. Justice Smith, in delivering the opinion of the court in that case, said: "On the trial it was proved that the plaintiffs had not complied with the requirements of the law in the above-mentioned particulars, and the defendant requested a direction to the jury practically to the effect that, until they had done so, they had no standing in court. His prayer was denied, the plaintiffs obtained a verdict and judgment for \$1,000, and the refusal of the court to charge as prayed was one of the grounds of the motion for a new trial. This instruction was proper. *Clayton v. Johnson*, 36 Ark. 406; *Raleigh v. Griffith*, 37 Ark. 150. In the case last cited it was ruled that the assignee could not maintain replevin until he had filed his schedule and bond. No more can he support trespass or trover. For both of these actions are based upon a right of possession in the plaintiff at the time of the injury or of the conversion. Reversed and remanded for a new trial." In the case of *Thatcher v. Franklin*, 37 Ark. 64, the court held, Chief Justice English delivering the opinion, that an assignee for the benefit of creditors could not maintain an action of replevin to recover the possession of any of the property assigned to him, unless he had executed and filed the bond and filed the schedule required by law. The court in that case said: "2. The deed was an absolute conveyance, and not a mortgage or ordinary trust deed, with a defeasance, and the title to the goods vested in the trustee, not only as against the assignors, but also as against the execution creditors, without registration, and the court so rightly charged the jury. 3. But, though the deed vested the legal title to the goods in the trustee, yet by the express language of the statute regulating assignments (*Gantt's Dig.* §§ 385, 387), before he was entitled to take possession, sell, or in any way manage or control the property assigned, he was obliged to file the schedule, and execute the bond required by the act. *Clayton v. Johnson*, 36 Ark. 406. * * * The court below erred in refusing to charge the jury as moved by appellants, in effect, that plaintiff, having failed to file the schedule, and give bond as required by the statute, could not maintain replevin for the goods."

It is claimed by the appellee in his brief that the insurance company cannot question the validity of the assignment, and the case of *Railway Co. v. Fuller*, 18 C. C. A. 641, 72 Fed. 467, is cited to sustain that contention. In that case, Fuller, who was the assignee of Butler Bros., had filed the schedule and given the bond required by law; but the objection made by the railway company was that the deed of assignment on its face was fraudulent as to creditors. And the court in that case properly held that a debtor of the assignors could not assail the deed of assignment in that case for that reason. But there is a different principle involved in the case at bar, and that is whether or not the trustee, G. L. Blackford, had the legal capacity to maintain this suit. We are of the opinion that under every rule of reason, as well as under the foregoing decisions of the supreme court of the state of Arkansas, he clearly has not. We are therefore of the opinion that the court below erred in refusing to direct a verdict for appellant, as requested by the appellant, that the plaintiff, G. L. Blackford, trustee, had no right to maintain this cause of action.

There are other questions raised by the appellant in his brief in this case, but it will not be necessary to consider them. The judgment of the lower court is reversed, and, by agreement of parties, judgment is rendered here, and this cause dismissed.

CLAYTON and TOWNSEND, JJ., concur.

CHANDLER v. RUTHERFORD et al.
(Court of Appeals of Indian Territory. June 7, 1899.)

UNITED STATES MARSHALS—LIABILITY FOR DEPUTY'S ACTS.

A United States marshal and the sureties on his bond are not liable for the acts of a deputy and posse, where they, without authority or knowledge of the marshal, started, without a writ, in search of a horse thief, and shot an innocent, whom they mistook for him.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, November 16, 1897.

Action by James Chandler against Samuel M. Rutherford and others. Judgment for defendants. Plaintiff appeals. Affirmed.

This action was begun at the May term, 1896, of the United States district court for the Northern district of the Indian Territory, by James Chandler, plaintiff, hereinafter called "appellant," against Samuel M. Rutherford, as the United States marshal for the Indian Territory, and George F. Sparks, John F. Williams, Clarence W. Turner, Andrew W. Robb, Pleasant N. Blackstone, and James D. Lankford, the sureties on his official bond, defendants, hereinafter called "appellees," to recover damages alleged to have been sus-

tained by appellant resulting from gunshot wounds inflicted upon him by a deputy of said marshal and certain possemen acting with and under the direction of said deputy marshal. The case, as stated by counsel for appellant, is as follows:

The facts upon which the appellant relies for recovery are fully set out in the second paragraph of his complaint.

On the 24th day of December, 1895, the appellant filed the following complaint:

"United States of America, Indian Territory, Northern District—ss.: Pleas in the United States court in the Indian Territory, Northern district, at Muskogee, in the cause numbered 2,910, and entitled 'James Chandler, Plaintiff, and Samuel M. Rutherford et al., Defendants.' Hon. Wm. M. Springer, judge of said court. On the 24th day of December, A. D. 1897, there was filed in the office of the clerk of said court the complaint in the above numbered and entitled cause, which is in words and figures as follows:

"No. 2,910. In the United States Court in the Indian Territory, Northern District, at Muskogee. Complaint. James Chandler, Plaintiff, vs. Samuel M. Rutherford, George F. Sparks, John F. Williams, Clarence W. Turner, Andrew W. Robb, Pleasant N. Blackstone, and James D. Lankford, Defendants. The plaintiff, James Chandler, who is a citizen of the United States and a resident of the Northern district of the Indian Territory, complains of the defendant Samuel M. Rutherford, United States marshal for the Northern district in the Indian Territory, and George F. Sparks, John F. Williams, Clarence W. Turner, Andrew W. Robb, Pleasant N. Blackstone, and James D. Lankford, sureties on the official bond of the said marshal, and all of whom are residents of the Northern district of the Indian Territory except George F. Sparks and John F. Williams, who are residents of the State of Arkansas, and James D. Lankford, who is a citizen of the Central district of the Indian Territory, and for cause of complaint the plaintiff states: First. That the defendant Samuel M. Rutherford is and was, at the time of the wrongs hereinafter complained of, the regularly appointed and acting United States marshal for the Northern district of the Indian Territory, and that the defendants George F. Sparks, John F. Williams, Clarence W. Turner, Andrew W. Robb, Pleasant N. Blackstone, and James D. Lankford were the sureties upon the official bond of the said Samuel M. Rutherford, as United States marshal for the Northern district of the Indian Territory, a copy of the said bond being hereto attached, marked 'Exhibit A.' Second. That on or about the 8th day of August, 1895, the plaintiff was walking upon the streets of the town of Muskogee, in said territory, in company with a young lady, when David Adams, — Walker, — Hayes, — Brame, and — Purty or Purdy, who were the duly-authorized deputies, agents, or posse of the said United

States marshal for the Northern district, and who were under the instructions and orders of the said United States marshal, searching for one Flave Carver, for whom a warrant had been issued for horse stealing or some other crime, the exact nature of which to the plaintiff is unknown, and that while plaintiff and said young lady were walking along the streets of the town of Muskogee, and said agents, deputies, or possemen of the said United States marshal were in search of the said Carver, said deputies, agents, or possemen, or some one or more of them, without any just cause, fired in and upon the plaintiff, and severely wounded him in the left side of the head and face, left shoulder, left arm, and back; said deputies, agents, or possemen supposing plaintiff was said Carver. Third. That, by reason of said wounds, plaintiff was confined to his bed for a long space of time, to wit, in the space of six weeks, and while he was so confined to his bed, on account of the said wounds, he suffered great bodily pain and great mental anguish, and was compelled to and did pay out large sums of money in nursing, doctor's bill, and medicine in attempting to heal and cure himself of the said wounds; in, to wit, the sum of two hundred fifty-seven and $\frac{50}{100}$ dollars. Fourth. Plaintiff further states that a large number of the shot or leaden bullets with which he was wounded are still in his body, and have permanently and irreparably injured the plaintiff; that there are at least two of the shot or leaden bullets in plaintiff's head, which plaintiff is informed by his medical adviser may cause him serious trouble at any time, and that his left arm has become paralyzed, and almost entirely useless, from the effect of the said wounds, and that there are other of the said shot or leaden bullets in his body, which plaintiff is informed by his medical adviser may cause him serious trouble at any time; by reason of which plaintiff says he has been permanently and irreparably injured, to his damage of twenty-five thousand dollars (\$25,000). Fifth. Plaintiff further states that he had no connection with Flave Carver, the person for whom the said deputies, agents, or possemen of the said marshal were in search, and knew nothing of his whereabouts, or that said deputies, agents, or possemen of the said marshal were in search of him, but that he was simply exercising his right as a citizen to pass along the streets of said town of Muskogee. Wherefore plaintiff prays judgment against the said Samuel M. Rutherford, United States marshal for the Northern district of the Indian Territory, and against the said sureties on his official bond, for the sum of twenty-five thousand two hundred fifty-seven and $\frac{50}{100}$ dollars, and the costs of this suit, and all other proper relief. Denison & Maxey, Attorneys for Plaintiff."

To which complaint appellees filed the following answer: "The defendants, for answer to complaint of the plaintiff, state:

First. That they admit that the defendant Rutherford is, and was at the time of the alleged wrong complained of in plaintiff's complaint, United States marshal for the Northern district of the Indian Territory, and that his co-defendants were sureties upon his official bond. Second. That as to whether or not on the 8th day of August, 1895, plaintiff was walking upon the streets of the town of Muskogee, Indian Territory, with a young lady, they are not sufficiently informed to base a belief, and therefore deny the same, and ask that strict proof be required as to that allegation. Defendants deny that David Adams, — Walker, — Hayes, — Brame, — Purdy, were the duly-authorized deputies, agents, and possemen of the United States marshal for the Northern district of the Indian Territory, and that they were under instructions and orders of said marshal in searching for and attempting to arrest one Flave Carver. The defendants especially deny that any deputies, agents, or possemen, or any one under the instructions and orders of the said United States marshal at the time, and in the manner, alleged in said complaint, or at any time or in any manner, fired in and upon the plaintiff, as alleged in said complaint, and severely wounded him in the left side of the head and face, left shoulder, left arm, and back. On the contrary, defendants allege that the person who fired upon the plaintiff, as alleged in his complaint, was neither a deputy, agent, nor posseman of the said United States marshal for the Northern district of the Indian Territory, neither was he under the instructions and orders of the said United States marshal, nor his duly-authorized deputies. Third. As to whether or not the plaintiff was confined to his bed, and suffered great pain, and paid out the sum of money as alleged in his complaint, and as to whether or not he was injured in the manner and form as set forth in his complaint, and is at present suffering from said effects of said injury as alleged in said complaint, these defendants have not had sufficient information to form a belief, and therefore deny the same, and ask for strict proof as to said allegation. Defendants deny that plaintiff has been permanently and irreparably injured, to his damage in any sum, through the fault or negligence of the United States Marshal for the Northern District of the Indian Territory, or his duly-authorized deputies, agents, or possemen, or by any person, under the instructions and orders of said United States marshal. Wherefore, having fully answered, defendants pray to be hence dismissed without day, together with all their costs in this behalf laid out and expended. Chas. B. Stuart, Hutchings & English, Attorneys for Defendants."

On the 1st day of December, 1896, there was filed in said case, by leave of the court, an amended complaint, denominated "Second Paragraph of Plaintiff's Complaint," as follows: "The plaintiff, James Chandler,

after leave of the court first had and obtained to file the same, for a further and second paragraph of his complaint herein says: First. That he is a resident of the Northern district of the Indian Territory, and that he is not a citizen or member of any nation or tribe of Indiana. Second. That the defendants Samuel M. Rutherford, Clarence W. Turner, Andrew W. Robb, Pleasant N. Blackstone, are all residents of the Northern district of the Indian Territory, and that the defendant James D. Lankford is a resident of the Central district of the Indian Territory, and the defendants George F. Sparks and John F. Williams are residents of the state of Arkansas. Third. The plaintiff, James Chandler, complains of the defendants, and says that, prior to and at the time of the commission of the wrongs and injuries hereinafter set forth, the defendant Samuel M. Rutherford was the duly appointed and acting United States marshal in and for the Northern district of the Indian Territory, and that the defendants George F. Sparks, John F. Williams, Clarence W. Turner, Andrew W. Robb, Pleasant N. Blackstone, and James D. Lankford were the sureties upon the official bond of said Samuel M. Rutherford, as such United States marshal in and for the Northern district of the Indian Territory. A copy of said bond is attached to the original complaint herein, marked 'Exhibit A,' and made a part hereof. Fourth. The plaintiff says that on or about the 8th day of August, 1895, said defendant Samuel M. Rutherford, United States marshal as aforesaid, had in his office in the town of Muskogee, in said Northern district of the Indian Territory, A. A. McDonald, his duly appointed and acting chief deputy marshal, who was, in the absence of said United States marshal from his office, fully authorized to act for and in the room and stead of said United States marshal, Rutherford, and to do and perform all the duties pertaining to the office of United States marshal. That on the day and date last aforesaid, in the absence of said defendant Samuel M. Rutherford, United States marshal as aforesaid, from his office in said town of Muskogee, complaint was made to his said chief deputy marshal, A. A. McDonald, at his office in said town of Muskogee, by Dave Purty, of said Northern district of the Indian Territory, of his having had some horses stolen from him by a man by the name of Flave Carver, and that said horse thief was then in the vicinity of said town of Muskogee; and thereupon said chief deputy marshal, A. A. McDonald, went to the office of the United States commissioner in said town of Muskogee to obtain a writ for the arrest of said horse thief, Flave Carver, but the commissioner was absent from his office, and no writ was obtained; and thereupon, on the same day, said chief deputy marshal, A. A. McDonald, at the suggestion and request of James M. Givens, the assistant United

States attorney in and for said Northern district of the Indian Territory, sought for Dave Adams, a duly appointed and acting deputy marshal in and for said Northern district, Indian Territory, and found him at his house in said town of Muskogee, and then and there made known to him that there was reasonable ground to believe that Flave Carver had committed the crime of 'horse larceny' (a high felony), and it was believed the horse thief, Flave Carver, was then in the vicinity of the town of Muskogee, and he, the said chief deputy marshal aforesaid, wanted said deputy marshal, Adams, to go with said Dave Purty and arrest said horse thief, Flave Carver; and said chief deputy marshal, A. A. McDonald, then and there requested the said deputy marshal, Adams, to meet him and Purty on that evening at a storeroom next door to the post office, in said town of Muskogee. After leaving Deputy Marshal Adams' residence, and before the meeting at the store, said chief deputy marshal, A. A. McDonald, furnished said Purty with a double-barrel shotgun, and also loaded shells, loaded with BB shot, or small-sized buckshot; and then, on their meeting said deputy marshal, Adams, about 8 o'clock on the evening of the same day, at said store next door to the post office, the said deputy marshal, Adams, refused to go or to undertake to arrest the horse thief, Flave Carver, with no one but Purty to go with him; and thereupon said chief deputy marshal, A. A. McDonald, got Joseph N. Walker to get his gun and go with said deputy marshal, Adams, and said Purty, to arrest said horse thief, Flave Carver; and immediately thereafter, to wit, about 8 o'clock on the evening of August 8, 1895, said deputy marshal, Adams, with the said Walker and Purty, started from said store, which was on Main street, in said town of Muskogee, to try to find and arrest said horse thief, Flave Carver. They went from said store up to the Missouri, Kansas & Texas Stock Yards, in said town of Muskogee, and there the said deputy marshal, Adams, got two other possemen, namely, Joseph Hayes and Richard Brame, to go with him, and assist in finding and arresting said horse thief, Flave Carver. From said stock yards said deputy marshal, Adams, and his then posse of four men, started and went on the west side of a switch of the Missouri, Kansas & Texas Railway Company, and, when they had reached the north part of the said town of Muskogee, they crossed from the west side to the east side of said switch, and just at that time, to wit, between 8 and 9 o'clock, in the evening of the 8th day of August, 1895, the plaintiff was walking with a lady in the north end of Cherokee street, in said town of Muskogee, and while so walking the said deputy marshal, Dave Adams, and his posse of four men, all of whom were seeking the horse thief, Flave Carver, came up stealthily within some 20 or 30 steps of the

plaintiff and the lady with whom he was walking, and without making any proclamation of their character and their purpose, and without the exercise of reasonable diligence, or any diligence whatever, to ascertain whether or not the plaintiff was the horse thief, Flave Carver, they were seeking to arrest, some one of them simply called out, 'Hey, there!' and the plaintiff and the lady stopped for a moment, and, in answer to an inquiry made by the lady, the plaintiff expressed it as his opinion that they were boys in the grass; and, when the plaintiff and the lady had walked but a few steps further on, the same call 'Hey, there!' was made by some one of said deputy marshal's posse, and the plaintiff then stopped, and as he was turning around said deputy marshal or his posseman, or some one of them, fired upon, shot, and severely wounded the plaintiff with leaden bullets or shot in the left side of his head and face, also in his left shoulder, left arm, and in his back; they supposing him to be the horse thief, Flave Carver. Fifth. That, by reason of said wounds, the plaintiff was sick and confined to his bed for a long space of time, to wit, some seventeen or twenty days, and while he was so sick and confined to his bed by reason of said wounds he suffered great bodily pain and mental anguish, and he was compelled to and did pay out large sums of money for nursing, doctor's bills, and medicines in attempting to heal and cure himself of said wounds and injuries, to wit, the sum of two hundred and fifty-seven and $\frac{50}{100}$ dollars. Sixth. He says that quite a number of said shot and leaden bullets with which he was shot and wounded are still in his body, and that he is thereby permanently injured; that there are at least two of said shot or leaden bullets still in plaintiff's head, which the plaintiff's surgeon was unable to extract, and which may, as the plaintiff is advised by his surgeon, cause him serious trouble in the future; that, by reason of the wounds and injuries in the plaintiff's left arm as aforesaid, the same has become and is paralyzed to such an extent that it is almost useless; that there are others of said shot or leaden bullets in plaintiff's body, which may, as he is informed by his medical adviser, give him serious trouble in the future. By reason of all which the plaintiff says he has been permanently injured, to his damage twenty-five thousand dollars. Wherefore he prays judgment for twenty-five thousand two hundred and fifty-seven and $\frac{50}{100}$ dollars; and all other proper relief. Denison & Maxey and Shackelford & Shackelford, Attorneys for Plaintiff."

To which said amended complaint appellees filed a demurrer as follows: "Come now the defendants, and file this their demurrer to the second paragraph of plaintiff's complaint, and for ground for said demurrer say that the same does not constitute a cause of action against these defendants or either of

them. Stuart, Lewis & Gordon, Hutchings & English, Attorneys for Defendants."

On the 16th day of November, 1897, said demurrer to said amended answer was sustained by the court.

On the 16th day of November, 1897, by leave of the court, the answer filed to the first paragraph of the complaint was withdrawn, and the demurrer heretofore filed as to the second paragraph of the complaint was filed as to the entire complaint, and sustained by the court. A motion for a new trial was filed by appellant, and overruled by the court. Whereupon the court gave judgment in favor of the appellees against the appellant for costs, etc.

Appellant assigns as error the following: "(1) The court erred in sustaining the demurrer to the second paragraph of the plaintiff's complaint. (2) The court erred in permitting defendants to withdraw their answer to the first paragraph or original complaint, and file their demurrer thereto. (3) The court erred in sustaining said demurrer to the first paragraph of the plaintiff's complaint. (4) The court erred in overruling plaintiff's motion for a new trial."

N. B. Maxey and J. M. Shackelford, for appellant. C. B. Stuart and Wm. T. Hutchings, for appellees.

THOMAS, J. (after stating the facts). The facts set out in the complaint being admitted by the demurrer, the only question of importance in this case is, do the facts entitle the appellant to recover? The other assignments of error will be disposed of by the decision of this one question.

The whole case is stated in the amended or second paragraph of the complaint, and is substantially as follows: First. That appellant was a resident of the Northern district of the Indian Territory, and not a member of any nation or tribe of Indians. Second. That the appellees Rutherford, Turner, Robb, and Blackstone are residents of the Northern district of the Indian Territory, that Lankford is a resident of the Central district of the Indian Territory, and that Sparks and Williams are residents of the state of Arkansas. Third. That Rutherford was the duly appointed, qualified, and acting United States marshal for the Northern district of the Indian Territory, and that the other appellees were the sureties upon the official bond of the said Rutherford, as United States marshal aforesaid. Fourth. That on the 8th day of August, 1895, said United States marshal had in his office in the town of Muskogee, Indian Territory, one A. A. McDonald, as his duly appointed and acting chief deputy marshal, who, in the absence of said marshal, was fully authorized to act for and instead of Rutherford, the marshal, and to do and perform all the duties pertaining to the office of United States marshal. That on the 8th day of August, 1895, Rutherford, the marshal,

was absent from his office in the town of Muskogee. That during his absence complaint was made by one Dave Purty to Chief Deputy Marshal McDonald of his (Purty) having had some horses stolen from him by one Flave Carver, and that said horse thief was then in said town of Muskogee. That Deputy Marshal McDonald went to the office of the United States commissioner in Muskogee for the purpose of obtaining a writ for said Carver, but, the commissioner being absent, no writ was obtained. That thereupon Chief Deputy Marshal McDonald, at the suggestion of the assistant United States district attorney for the Northern district of the Indian Territory, informed Dave Adams, one of Marshal Rutherford's deputy marshals, that there was reasonable ground to believe that Flave Carver had committed the crime of "horse larceny," and that it was believed that said Carver was then in the vicinity of the town of Muskogee. That Chief Deputy Marshal McDonald requested Deputy Marshal Adams to go with Dave Purty and arrest said horse thief, Carver. That Deputy McDonald arranged with Adams to meet him that night at a point near the post office in Muskogee. That Chief Deputy Marshal McDonald furnished Purty with a double-barrel shotgun, and shells loaded with BB or small-sized buckshot. That, upon Adams meeting the chief deputy marshal near the post office at the time appointed, Adams refused to undertake the arrest of Carver with Purty alone to assist him. That thereupon Deputy Marshal McDonald "got Joseph N. Walker to get his gun and go with said deputy marshal and said Purty to arrest said Carver." That neither the said deputy marshals nor the possemen had either a writ or other process for the said alleged horse thief. A start was made from the store near the post office in Muskogee, the searching party going up to the Missouri, Kansas & Texas Stock Yards in Muskogee, and there Deputy Marshal Adams secured two other possemen, Joseph Hayes and Richard Brams, to go with him and assist in finding and arresting said Carver. That Adams, with his then posse of four men, crossed over the said Missouri, Kansas & Texas Railroad to the north end of Cherokee street, in Muskogee, where the appellant was walking along said street with a young lady. That Adams and his four possemen slipped stealthily up to within 20 or 30 steps of appellant and the lady with whom he was walking, and that without making announcement or proclamation of their character and purpose, without using reasonable diligence or any diligence whatever to ascertain whether or not the appellant was or was not Flave Carver, whom they were seeking to arrest, some one of the party called out, "Hey, there!" whereupon the appellant and the lady stopped for a moment, but, hearing no further call, proceeded on their way for a few steps, when some one of Deputy Marshal Adams' party again called out, "Hey, there!"

The appellant stopped, and as he was turning around to see who it was, or for what purpose he was being called, not knowing whether or not he was the party challenged, some one of Deputy Marshal Adams' party fired upon and severely wounded the appellant with leaden bullets or shot, the appellant being wounded in the head, face, left shoulder, left arm, and back. That appellant was fired upon by Deputy Marshal Adams or some one of his posse while under the impression that appellant was the alleged horse thief, Carver. That by reason of the wounds appellant was confined to his bed from 17 to 20 days. That during such confinement he suffered great bodily pain and mental anguish from said wounds. That he was compelled to pay out and expend large sums of money for nursing, doctor's bills, and medicines in attempting to heal and cure himself of said wounds and injuries, and that the money so laid out and expended amounted to \$257.50. That quite a number of the shot or bullets with which he was wounded are still in his body, and that he is thereby permanently injured. That two of said bullets are still in the appellant's head, so lodged as to make it impossible to extract them, causing appellant to not only suffer seriously at present, but to apprehend serious trouble in future. That, by reason of the wounds so received, the left arm of the appellant has become and is paralyzed to such an extent as to be practically useless. That the leaden shot or bullets still in appellant's body are liable to give him serious trouble in future,—by reason of all of which appellant claims to have been damaged in the sum of \$25,000.

There is no allegation in the complaint that Rutherford, the marshal, was present, knew of the expedition, or had in any way authorized it. The complaint does not allege that the possemen, or either of them, were ordered by Dave Adams, the deputy marshal, to fire upon appellant, nor is there any allegation that the firing upon the appellant was by the direction or under the authority of said Deputy Marshal Adams. The record in this case shows that the appellant was in no way connected with said larceny or said alleged horse thief, Carver, nor was he at the time charged with the commission of any crime, but, being a resident of Muskogee, was walking along the streets in company with a lady, as he might lawfully do.

That the appellant was wrongfully and unlawfully assaulted and wounded by some one, and that he suffered most grievous injuries by reason of such wrongful and unlawful assault, cannot be questioned, and, if the law does not furnish him a complete remedy for his injuries and damages, it is woefully lacking in that protection which is constitutionally guaranteed to every citizen of the United States. But the innocent may not be made to suffer for the wrongs of the negligent and guilty. "It is unquestionably true," as declared by the supreme court of the United

States in the case of *Rogers v. Marshal*, 1 Wall. 644-654, "that a marshal is answerable for the misconduct of his deputy." Still he cannot be held responsible for the illegal acts of said deputy, or of possemen acting under a deputy, unless such acts are performed at his instance or by his direction. The complaint shows that Marshal Rutherford was neither present at the time complaint was made by Purty to Chief Deputy McDonald that his horses had been stolen, nor did he know of or direct the organization of the posse, the search for the alleged horse thief, Carver, nor the shooting of the appellant.

In a well-considered opinion by Justice Burford, of the supreme court of Oklahoma, in the case of *Dysart v. Lurty*, 41 Pac. 724 et seq., it is held that "where an officer, while doing an act within the limits of his official authority, exercises such authority improperly, or exceeds his official powers, or abuses an official discretion vested in him, he becomes liable on his official bond to the person injured; but where he acts without any process, and without the authority of his office, in doing such act, he is not to be considered an officer, but a personal trespasser. The weight of authority seems to support the doctrine that sureties on an official bond are only answerable for the acts of their principal while engaged in the performance of some duty imposed upon him by law, or for an omission to perform such duty." Difficulty often arises in determining whether the officer acting officially exceeds his authority, or whether his acts must be regarded as those of an individual.

In the case of *Lammon v. Feunier*, 111 U. S. 17, 4 Sup. Ct. 286, the supreme court of the United States held the United States marshal liable on his bond upon seizing the property of one upon a writ of attachment issued against the property of another. This case would seem to support the doctrine that an officer will be held liable for acts done colore officii, but the case only follows the weight of authority, which is practically unanimous that an officer who, in attempting to execute a valid writ, levies upon the property of a third person, will be held liable for his acts. He is then acting officially, under process apparently valid, and exceeding his authority, rather than acting without any authority. This case is not in conflict with the ruling of the supreme court of Kentucky in *Com. v. Cole*, 7 B. Mon. 250, wherein it was held that sureties on a constable's bond could not be held liable for money collected under false pretense of having executions in his hands, when in fact he had no such executions. In the latter case the officer was not acting officially, nor within the authority of his office, and his bondsmen had not undertaken to be responsible for his personal conduct.

The general rule seems to be that if a deputy is acting under a writ of process, and while attempting to execute the process he exceeds his authority and commits a wrong,

or fails to perform the duty imposed upon him, his principal and the principal's sureties shall be liable for any damages arising from such acts or omissions, or if he is acting without process, and under the orders or instructions or with the assent of his superior, then the principal and sureties are liable. On the other hand, if the deputy assumes to act without process or without the knowledge or assent of his principal, and performs unauthorized acts or commits a wrong, whether negligently or maliciously, he will be liable for a personal trespass, but his principal and the bondsmen of the principal are not liable. There are some exceptions to, and modifications of, these general rules, but, as general principles, they are in harmony with the weight of adjudicated cases. Where an officer, though he assumed to act as such, commits a wrong under circumstances where the law does not impose upon him any duty to act at all, the wrong is not a violation of any official duty, and consequently is not embraced within the sponsorship of the surety. See *Hawkins v. Thomas* (Ind. App.) 29 N. E. 157.

The search for the alleged horse thief, Carver, by Deputy Adams and his possemen, was without a writ, and without any instruction from, or knowledge of, his principal, Rutherford, and the shooting and wounding of the appellant by the deputy marshal or one of his possemen was not in the discharge of any duty imposed upon them by law, and was simply a most flagrant and outrageous personal trespass, for which the assailant or assailants should have been indicted and punished; but Marshal Rutherford and the sureties on his bond are not, under the law, responsible for such unlawful and unwarranted assault made by Deputy Adams and his possemen upon the appellant. The demurrer to said complaint was properly sustained, and the decision of the lower court is therefore affirmed.

CLAYTON and TOWNSEND, JJ., concur.

FISHER et al. v. FISHER et al.

(Court of Chancery Appeals of Tennessee.
Dec. 13, 1898.)

FINALITY OF DECREE—PREMATURE APPEAL.

In a suit to set aside proceedings by which property of minors was sold, a decree was rendered declaring the proceedings and sale thereunder void, and establishing the liability of the purchaser for rents while the land was in his possession, and the cause was referred to the master to determine what the reasonable rental would be, and what improvements were made and taxes paid by the purchaser. The decree stated that it made no adjudication as to the purchaser's claim for the price paid by him, nor of his liability for anything, and granted an appeal from so much of its provisions as affected his rights. The master afterwards reported, and a decree was entered, providing for a sale if the purchaser abandoned his appeal. *Held*, that the first decree was not final as to the purchaser, and hence not appealable.

Appeal from chancery court, Dekalb county; George H. Morgan, Chancellor.

Suit by J. M. Fisher and others against Osa Ann Fisher and others. There was a decree for complainants, and defendant W. C. Avant appeals. Dismissed.

Webb & Cantrell and W. G. Crowley, for appellant Avant. Robinson & Son, for appellees.

BARTON, J. The appeal in this case is premature, and the cause must be stricken from the docket for that reason. The appellant, W. C. Avant, and his sureties will pay the cost of the appeal.

The bill in this case is filed by Jerre Fisher and Daisy J. Fisher, a daughter, against two minor defendants, Osa Ann and Artemesia Fisher, and against B. B. Taylor, W. C. Avant, and A. Avant, attacking certain proceedings previously had in the chancery court of Smith county to sell for reinvestment lands belonging to certain minor heirs; and it is also part of the relief sought in this bill, after having set aside the former proceedings, under which a small tract of land was sold, to have the two tracts described in the bill—one for 8 and one for 15 acres—sold for partition and for reinvestment. The facts presented by this record are that Daisy J. Fisher, Osa Ann Fisher, and Artemesia Fisher were the owners in fee of two small tracts of land, described in the bill, one containing 8 and the other 15 or 16 acres, situated in Dekalb county, Tenn. It is alleged in this bill, and also in the former proceedings, that Jerre Fisher, the father of these children, owned a life estate, as tenant by the curtesy, in the land in question. Shortly prior to October 10, 1891, the complainant J. M. Fisher, the father, employed the defendant A. or Alvin Avant to begin and conduct proceedings in the chancery court in Dekalb county for the purpose of selling these lands belonging to his children, all of whom were then minors. Avant agreed to attend to the business, and procure the sale and reinvestment, etc., of the land for a fee of \$25, and on October 19, 1891, he filed in the chancery court at Smithville a bill in the name of J. M. Fisher, as the next friend of his three minor children. B. B. Taylor was alone made a defendant to this bill. Prior to this Jerre Fisher had made a written contract, dated January 4, 1889, by which he agreed to lease these two small lots of land to Taylor for a term of 14 years, for which Taylor agreed to pay \$315. There were some other details in this contract, not necessary to mention. So to the bill filed by Avant to sell this land the minors were not made parties defendant, but Taylor was, and in the bill it was shown that these children were all minors, that the father sued as next friend, that the land had descended to the minors from their mother, that the defendant Taylor claimed to own Fisher's tenancy by the curtesy or life estate in the land until the

youngest child became 21 years old, and as to whether he did or not was submitted to the chancery court for adjudication. It was averred that Taylor was willing to surrender his claim upon the land on receiving a reasonable compensation. It was alleged that the children were receiving no benefits from the land, and that it was to their interest that the land be sold, and the proceeds invested in a more suitable place for them. The prayer of the bill was that this should be done, that Taylor should be paid a reasonable compensation, etc. This bill was signed by Avant & Robinson, solicitors for complainant, Robinson being a partner of Avant. But the proof shows that the entire proceedings in the case were all the work of the defendant A. Avant. We find in the record of this case, which was copied into this transcript, an order reciting that "Daisy J. Fisher, Osa Ann Fisher, and Artemesia Fisher were minors, without regular guardian," and that they were regularly before the court by next friend, and it was decreed that L. C. Young, a solicitor of the bar, be appointed guardian ad litem for them to represent their interests for them, and defend their interests in the cause. We also find in the transcript an answer purporting to be filed by this guardian ad litem, which is simply formal, and submits the interests of the minors to the protection of the court. Some proof was taken in the case tending to show that it would be to the interest of the minors to have the land sold, and placing a minimum value on both tracts. Taylor's deposition was taken, in which he stated that he thought his interest was worth about \$200. A decree was entered in the case referring the cause to the clerk and master to report what estate the minors possessed, its kind and value, whether or not it was manifestly to their interest that the lands be sold and the proceeds reinvested, and a reasonable minimum price for the lands. The clerk and master reported that the minors inherited the lands from their mother, and that they were incumbered with the life estate of their father, J. M. Fisher, he being a tenant by the curtesy. The character of the land was reported, and he reported it to be manifestly to the interest of the minors that the lands should be sold, and the proceeds invested. He reported that \$15 per acre would be a fair minimum value for the eight-acre tract, and \$45 per acre for the other tract. The report was confirmed. It was ordered that the land be sold, 20 per cent. cash, the balance on a credit of 6 and 12 months. The cause was further referred to the master to report what claim the defendant B. B. Taylor had to the land, and the value of it. It was further recited and decreed that it appeared that the next friend of the minors was not a proper or suitable person to invest or control the proceeds of the minors, and that W. C. Avant was a proper and suitable person to control and invest the funds in other lands for the benefit of the

minors. W. C. Avant was therefore appointed a commissioner to receive the funds arising from the sale of the land, and invest them in a small and more suitable home for the minors. This decree further recites that: "It appearing that \$75 would be a reasonable fee for Avant & Robinson for services rendered in this cause, it is ordered that the clerk and master pay them that amount out of the cash payment on the day of sale, and that \$10 be paid to L. O. Young, guardian ad litem, out of the cash payment on the day of sale." The land was offered for sale, and the clerk and master reported that W. C. Avant became the purchaser of the eight-acre tract at the price of \$120, that there were no bidders for the other tract at the price fixed, that W. C. Avant paid in cash \$24, and gave his notes for the balance. This sale was confirmed, and title divested out of the minors and vested in W. C. Avant. The decree further reduces the minimum price of the other tract of land to \$40, and orders a resale. Another decree was entered in the case, reciting that W. C. Avant held the receipt of A. Avant's share of the fee allowed to Avant & Robinson. W. C. Avant's notes were directed to be credited with this amount. Subsequently another decree was entered. The dates of these decrees are not given in the transcript. It was decreed that the defendant B. B. Taylor be allowed and paid \$200 out of the first proceeds of the sale. In this decree the minimum price of the 15-acre tract of land was further reduced to \$30 per acre. At subsequent terms further reports of no sales of the 15-acre tract were made, and order of sale revived; the last report of no sale being made on July 23, 1894.

Such is the record of the proceedings in the former case, which it is the main purpose of the bill filed in this case to have declared fraudulent, void, and vacated. We omitted to state that the defendant B. B. Taylor did not file an answer in the case attacked, nor was any judgment pro confesso ever taken against him, nor were the minors ever made parties defendant by service of process in the former case, though a guardian ad litem was appointed for them. However, it appears that an effort was made to cure defects in the former proceedings in this way: In the decree which was rendered after the sale and confirmation of the eight-acre tract, and which directed the payment of \$200 to Taylor, it is recited that, "It is agreed that the defendant B. B. Taylor is regularly before the court, and that the cause was at issue when the decree of sale was made." This recital is shown to now appear added on to this decree on the minutes of the court in the handwriting of A. Avant. To the bill filed in the case now before us the defendants Avants and Taylor filed demurrers, which were overruled, and they filed answers. The defendant W. C. Avant denies that he was ever appointed commissioner, as recited by the record, on behalf of the minors, and says, if he was, he knew

nothing about it, and never accepted the trust. He claims to have considered the proceedings regular, and to have bought and paid for the land in good faith, and claims the right to have his title perfected and declared valid, and that, if this cannot be done, to have his purchase money refunded, and to be allowed for betterments and improvements. He claims to have made certain improvements on the land, which he says enhance its value, for which he should be allowed. The defendant Avant filed an answer, saying that he does not admit any fact tending to show any liability against him, denies irregularity in the proceedings attacked, says that he only got a fee of \$37.50 in the case, makes no reference to the allegation in the bill that he had contracted to attend to the entire matter for \$25, and naively says that the amount of \$75 allowed was reasonable, and that the court's action was not excepted to. Under the bill filed in this case proof was taken from which it clearly and affirmatively appears that the defendant A. Avant agreed and contracted to attend to this matter for these parties for the sum of \$25, \$20 of which was to be paid by Fisher and \$5 by the defendant B. B. Taylor. It further appears from the proof of B. B. Taylor that after the eight-acre tract had sold for the sum of \$120, and was bid in by W. C. Avant, the father of A. Avant, he (A. Avant) agreed to have the biddings opened, in order that Taylor might raise the bid, but afterwards refused to do so. On the record presented, we think the chancellor, as he did, was clearly justified in setting the entire proceedings attacked aside, both because irregular and not in compliance with the law, and because fraudulent throughout. In cases of sale of the property of persons under disability the law requires that the persons under disability be made parties defendant, and they can only be made so by service of process; and, if the infant is over 14 years of age,—as one of them was in this case,—such infant shall answer in person. But, entirely aside from the irregularities of the proceedings, it is clear that an effort has been made here to absorb the property of these minors under the cloak and protection of the chancery court, whose sacred duty it is to defend their interest. The bill is filed by an old man, their father, purporting to act as next friend, in which he sets out, to begin with, that the defendant B. B. Taylor claimed to be the owner of his life estate, which was not true as a fact, although Taylor claimed to own the lease on the land for 14 years. There is a decree entered in the case without an answer on Taylor's part allowing him \$200 out of the proceeds of the land sold and to be sold. There is really no proof to show that the father had a life estate. If he had, and was entitled to the possession of the land, and had leased it, it is absurd to suppose that his life estate in these two tracts of land, worth not exceeding \$600, could have been worth \$200. It is apparent from the whole

proceeding that, if allowed to stand, the fee claimed and allowed, the cost of the cause, and the \$200 to be paid Taylor would absorb every cent of the proceeds of the property, and leave these minor children nothing. The connection of W. C. Avant with the fraud of this proceeding is not as clear as it might have been, but, inasmuch as he was the father of the defendant A. Avant, and as the fee was adjusted with him as part of the purchase money, we assume, in the absence of his testimony, and because he failed to come on the stand as a witness and explain his connection with the matter, and inasmuch as the entire matter, as well as his defense in this cause, is conducted by his son, A. Avant, that he knew of and participated in the fraud. We think a clear purpose is shown to absorb the property of these minors, while assuming to represent them, without allowing them any compensation, and we think the entire proceedings should have been set aside and vacated, both for irregularity and for fraud; and that the defendant W. C. Avant is not and will not be entitled to any compensation, either for improvements on the land or for purchase money paid as against the rents and interest of the complainants in this cause. If he has any right of action, it must be against the parties who have received the benefits of the money paid by him. But, as stated at the outset of this opinion, the appeal will be dismissed as premature, and the decree entered here will only so adjudge.

After proof taken in this case, and after the cause was heard by the chancellor, he rendered a decree in which he adjudicated that the proceedings in the case of J. M. Fisher against B. B. Taylor were irregular, and void, and against the interest of the children, and were vacated and set aside, and he further decreed that the sale in that case of the eight-acre tract of land to W. C. Avant was null and void, and that the owners of said eight-acre tract were entitled to recover of the defendant W. C. Avant reasonable rents for the eight-acre tract during the time the same had been in his possession, and it was ordered that the cause be referred to the clerk and master to report instant: (1) Whether or not the land involved was of such description that it could be advantageously partitioned in kind; (2) whether or not it was to the interest of the parties that the same be sold for distribution among the parties, and why; (3) what would be a fair minimum price per acre for the land; (4) what taxes were due and unpaid on the land; (5) what would be a reasonable rent for the 8-acre tract during the time W. C. Avant had it in his possession, and what permanent improvements had been made by W. C. Avant, and what taxes paid by him; (6) what interest Jerre Fisher had in the lands, and what would be a reasonable valuation of his interest; (7) what interest defendant B. B. Taylor had in the 15-acre tract, and what would be a fair valuation of his interest.

He decreed the cost of the cause of J. M. Fisher, next friend, against B. B. Taylor against J. M. Fisher, and that the cost of this cause be paid out of the proceeds arising from the sale of the lands. The decree further proceeds: "The court makes no adjudication as to defendant W. C. Avant's claim for anything for purchase price paid by him on his land purchase made by him; makes no adjudication as to the liability of A. Avant for anything." The decree then provides that defendant W. C. Avant excepts, and prays an appeal to the next term of the supreme court at Nashville, Tenn., from so much of the foregoing decree as affects his rights, which is granted upon the execution of bond for cost, which is done. After this decree it appears that the clerk and master made a report, in which he reported the land should be sold as a whole, reported the minimum value, and that he was unable to report on the other items referred to him, and a decree of sale was rendered. The decree, however, provided the eight-acre tract should not be sold if the defendant W. C. Avant did not abandon his appeal. W. C. Avant perfected the appeal thus allowed by giving bond. We assume that the chancellor granted the appeal under section 4889, Shannon's Code, where it is provided that an appeal may be allowed, in the discretion of the chancellor, from a decree determining the principles involved, and ordering an account or a sale for partition before the account is taken, or the sale or partition made, or he may allow such appeal on overruling a demurrer, or he may allow any party to appeal from a decree which settles his right. The appeal by Avant here is special, and is from so much of the decree as affects his rights. But it is evident that the decree rendered was not final as to him, because it was expressly provided that the court made no adjudication as to his claim for anything for the purchase price paid by him, so the case was not finally disposed of by the chancellor as to his rights. The matters referred to did not affect his interest, and it is obvious that he did not appeal therefrom, except that part of the decree which directed the master to report what would be reasonable rentals for the eight-acre tract during the time W. C. Avant had it in his possession, and what permanent improvements had been made by W. C. Avant. This decree settles no principle on the account, and does not finally dispose of nor settle the case as to the defendant W. C. Avant. For these reasons the appeal was premature, and the case must be dismissed.

But it has been our purpose in the foregoing observations to express our disapproval of the conduct of the officers of the court, such as here shown when first presented, and to express the hope that in the further proceedings in this case, as well as other cases, the interests of the minors will be more carefully looked after and protected. This case will be remanded for further proceedings under the bill for partition and reinvestment.

It is clear that the complainant Daisy J. Fisher, being a tenant in common, and now 21 years of age, is entitled to a sale of the land for partition, but the chancellor should satisfy himself that the claim of Jerre Fisher to a life estate in the land is well founded, and should require a production of the deed, and proof of the fact showing this; and the interest of the defendant Taylor should also be carefully ascertained and adjudicated. We have too many incidents coming before us where the interests of minor defendants and persons under disability have been grossly neglected or fraudulently injured, and it is incumbent upon the courts to look more carefully after the interests of those who are peculiarly the wards of the court, and unable to protect themselves; and all persons asserting rights against them should be required to make their rights and interests clear. The case will be stricken from the docket, the appeal dismissed as premature, and the defendant W. C. Avant will pay the cost of the appeal. The other judges concur.

Affirmed orally by supreme court, December 20, 1898.

JOHNSON v. PHILLIPS.

(Court of Chancery Appeals of Tennessee.
Nov. 26, 1898.)

REFORMATION OF INSTRUMENTS—MUTUAL MISTAKE.

Vendor having promised to make a relative a gift of a lot, the latter made an agreement with the vendee to sell it to him, and pursuant thereto the vendor executed a bond for deed to the vendee. The bond was prepared by the relative, and by mistake described the lot as including a strip not owned by the vendor; and the vendor signed, and the vendee accepted it, supposing it to include only the premises owned by the vendor. *Held*, that the vendor was entitled to a reformation of the bond so as to exclude therefrom the strip not owned by him.

Appeal from chancery court of Dekalb county; T. J. Fisher, Chancellor.

Bill by J. H. Johnson against J. D. Phillips. There was a decree for complainant, and defendant appeals. Affirmed.

Eaton & Crowley, for appellant. T. W. Wade, for appellee.

BARTON, J. The original bill in this case is filed in two aspects: First, to compel a specific performance on the part of the defendant of an agreement expressed in a title bond, to convey a certain town lot described in the bond to the complainant; and, second, in the event that the complainant was unable to make a good title to the lot in question, that the trade be rescinded,—the bill alleging that the defendant had sold on December 31, 1896, a town lot to the complainant for the sum of \$150, and had agreed, by title bond in the penalty of \$300, to make him a deed to said lot, the description given in the title bond, as set out in the bill, being as follows: "A

certain town lot in Smithville, Tennessee, in the 9th civil district of Dekalb county, and bounded as follows: On the north by the lands of G. R. Smith and son, on the east by Hooper, on the south by the Sparat road, and on the west by Capshaw." It is alleged in the bill that although the complainant had paid the contract price of \$150, as set out in the title bond, the defendant failed and refused to make title. The defendant answered, and admitted that he had sold the town lot to the complainant, for which the complainant had paid, but that by mistake and inadvertence of the draftsman of the title bond the lot had not been correctly described, but by mistake a small strip of land, to which the defendant had no title, had been included within the boundaries, and that the defendant did not own up to the lands of G. R. Smith, as called for in the title bond, but that there was between Smith's line and his own a small strip of land not owned by him (the defendant); that the property sold consisted of a house and lot, all of which was under one fence; and that the complainant obtained exactly what he thought he was buying in the trade. The answer is filed as a cross bill, and it is asked that the title bond be reformed so as to conform to the trade and understanding of the parties; and the defendant tenders a deed, which he asks that the complainant be compelled to accept. Such is the case presented in the pleadings.

The facts are that about the date mentioned (about the last of December, 1896) the defendant was the owner of the town lot in Smithville which is the subject of this litigation. He had agreed to give it to his daughter and son-in-law, P. C. Shields. The lot, as owned by defendant, had a house on it, and was all under one fence. The son-in-law, Shields, negotiated a trade with the complainant for the lot; the complainant agreeing to give \$150 for the lot, a horse being taken as part payment. Shields and the complainant agreed on the trade, and the defendant, Phillips, agreed to make the deed. Shields drew the title bond, and from the calls of the title bond the complainant had another party to draw the note which was given for the balance of the purchase money. Shields erroneously supposed that his father-in-law's line went up to what was known as the Smith line or property, and, in drawing the title bond, so described the property. As a matter of fact, the true line did not go to the Smith line, but there was a small strip between, probably worth \$10 or \$20, not owned by the defendant, and to which he could not make title. This was erroneously and by the mistake of Shields included within the calls of the title bond. We are satisfied that at the time of the trade, and the execution and delivery of the papers, neither Shields nor the complainant knew of the mistake. Both fully and clearly understood, we are satisfied, that the property sold and conveyed was the lot under fence. When the defendant signed the

title bond and accepted the note, he supposed his son-in-law, Shields, had drawn the papers, and that they were correct, and signed them without knowing of the mistake, or having his attention called to it. The result was that he agreed to convey a small strip of land which he did not own, and which none of the parties understood was included in the trade. On this state of facts and pleadings, we are of opinion that the defendant, under his cross bill, was entitled to the reformation of the title bond on the ground of the mistake, and that the complainant will be and should be compelled to accept the deed offered, which covers the land really sold, and that complainant's bill is without merit, and that the chancellor's decree dismissing the same should be affirmed, with costs. All concur.

Affirmed orally by supreme court January 10, 1899.

BROWN et al. v. DANIELS et al.

(Court of Chancery Appeals of Tennessee.
Dec. 3, 1898.)

INJUNCTION—WITNESSES—PARTITION—SALE.

1. Where a verified injunction bill is met by a sworn answer, at least one witness is required to sustain the bill.

2. Where a verified bill to enjoin sale under partition decree is confessed by the partition plaintiff, the sale will be enjoined, though as to partition defendants the bill fails because not supported by proof, but without prejudice to defendants instituting proceedings for the division of the property.

Appeal from chancery court of Davidson county; H. H. Cook, Chancellor.

Bill by Mary Brown and others against R. H. Daniels and others. Injunction granted as to part of the defendants, and dismissed in part as to others.

M. W. Allen and Baxter Smith, for complainants. Cooper & Cooper, for defendants Cooper.

NEIL, J. The bill in this case was filed by Mary Brown, Hattie Brown, and Sallie A. King against R. H. Daniels, Noah W. Cooper, W. H. Cooper, W. F. Lewis, and Maggie Lewis, wife of the said W. F., and Frank King. Mary Brown seeks relief against R. H. Daniels on the ground that he fraudulently procured from her a deed to her undivided fourth interest in the real estate described in the bill. Her charge is that he made her drunk on beer, and while in that condition, when she was unable to protect her rights, procured the deed from her. He submits to an order pro confesso. Hattie Brown and Sallie A. King seek to recover from W. H. Cooper their one-fourth undivided interest each in the same realty. It appears from the bill and answer that W. H. Cooper purchased this property under a trust sale made by Noah W. Cooper under a trust deed executed by Sallie A. King and Hattie Brown to him.

The validity of this trust deed is attacked in the bill. The charges upon this subject in the bill are: "Said Sallie King and said Hattie Brown (or Burke) charge that they executed a mortgage or deed of trust to their interest in said lot to secure a fee which said Sallie King owed said Noah W. Cooper, as an attorney, for defending her in the federal court; that said Hattie King was a minor at the time she executed said mortgage or deed of trust, June 3, 1893; that she has only been of age for a few months, and has come of age since this bill was filed in the county court; that it appears from the bill and answer of the two Coopers, who are brothers, and the deposition of — Cooper, that he had sold the interest of said Hattie and the said Sallie, the interest of Hattie for \$10, and of Sallie King for \$5, under the deed of trust, to his brother and co-defendant, W. H. Cooper, who claims in said case the interest of both of them. Said Hattie charges that she disaffirms said deed of trust; that she got no benefit or money under the same; that she prays to have the same set aside, and that it was fraudulent and void as to her; that the deed was made and the land pretended to be sold by Cooper to his brother while she still was a minor; and that the deed of trust as to said Hattie is void. The sale under the deed and the deed made by him to his said brother was void, and the claim in said land by said W. H. Cooper to her interest is fraudulent. And said Sallie King would show that it is untrue, as recited in said deed of trust, that she was long since abandoned by her husband, and charges that her acknowledgment to the same before a circuit judge was void. She charges that she had no notice, nor did her sister Hattie, of the sale by Cooper, as provided in said deed of trust, being lawful notice; that they did not know when it was sold; that the price it brought was wholly inadequate to its value. * * * The complainant Sallie King alleges that her husband is in Memphis, Tenn. He left her, not to abandon her, but because of trouble of some kind; and, not having authority direct from him to use his name in this suit, she makes him a defendant."

All of the equities in these charges are denied by the answers of Noah W. Cooper and W. H. Cooper, and the bill is unsustainable by any proof. The bill was sworn to for the purpose of securing an injunction against the sale of this property in the county court under a proceeding there instituted by R. H. Daniels to sell the property in controversy for division of proceeds. It is insisted that, inasmuch as the bill is sworn to, it must be taken as evidence of the facts charged therein. This is only true in a qualified sense. The limits of the doctrine are set forth in the case of *Trabue v. Turner*, 10 Helsk. 447-449. It is there stated, in substance, that when the bill is such as the law requires to be sworn to, as an injunction bill, and it re-

quires an answer under oath, the oath to the bill stands against the oath to the answer, and a mere issue is made, and the rule does not apply that requires two witnesses, or one witness with corroborating circumstances, to overturn the contents of a sworn answer. But in that case it still requires, as stated in the authority above referred to, at least one witness to sustain the bill. In the present case the complainants have no testimony at all, and their case against the Coopers must fail.

But it is conceded in the pleadings on both sides that R. H. Daniels had filed a bill in the county court against W. H. Cooper and the other co-tenants to sell the real estate in controversy for a division. Now, inasmuch as we have held that Mary Brown is entitled to relief against R. H. Daniels, he cannot be permitted to proceed with the execution of the decree of sale he has procured in that case. The complainant Mary Brown is entitled to a perpetual injunction against that proceeding. A decree will also be entered in her behalf setting aside the deed heretofore made by her to R. H. Daniels of her undivided one-fourth interest in the said real estate. But inasmuch as she concedes that he paid her \$50, and offers in her bill, and asks, that the sale be set aside, subject to the payment of said \$50, the same is declared a lien upon her interest in the property. A decree will also be entered dismissing the bill as to W. H. and Noah W. Cooper, except in so far as an injunction is sought against the sale in the county court of Davidson county under the proceedings before referred to; but the decree shall further contain the provision that it shall not interfere with W. H. Cooper's right to hereafter institute proceedings for the sale or division of said property in such court as he may be advised. The costs of this court and of the court below will be paid one-half by Sallie A. King and Hattie Brown or Burke, and the other half by the defendant R. H. Daniels. All the judges concur.

Affirmed orally by supreme court January 13, 1899.

STATE ex rel. ADCOCK v. ADCOCK et al.
(Court of Chancery Appeals of Tennessee.
Nov. 26, 1898.)

INJUNCTION—VIOLATION—CONTEMPT— EVIDENCE.

Violation of an injunction restraining defendant from bringing a certain suit is not shown by proof that defendant did commence the suit, where the bill in that suit was filed on the day on which the bill of injunction was filed; it not appearing which was filed first, or that defendant filed her bill after knowledge of the injunction.

Appeal from chancery court of Dekalb county; T. J. Fisher, Chancellor.

Contempt proceedings by the state, on the relation of W. H. Adcock, against Emaline

Adcock and another. The bill was dismissed, and relator appeals. Affirmed.

Webb & Cantrell, for appellant. A. Avant, for appellee.

NEIL, J. This is a contempt proceeding. On the 19th of March, 1898, W. H. Adcock filed a pleading in the chancery court at Smithville, in the name of W. H. Adcock and others, complainants, in the case of W. H. Adcock et al. v. Emaline Adcock et al.,—sought to be filed as a petition in the case just named, and, if that could not be done, then as an original bill. No other petitioner, however, is named in this petition, except W. H. Adcock himself. This bill or petition charges that, at the last term next before the filing thereof in the chancery court at Smithville, a final decree was made in the case just named, which decreed to the complainant \$300 as a resulting trust in the lands described in said cause, and also decreed to complainant five-ninths in the remaining four-sevenths interest, from which decree both complainants and defendants asked an appeal, which was granted, and said cause was at the time of filing said bill or petition pending in the supreme court. It is further charged that, after said final decree, defendants and complainants entered into a compromise of said litigation, in writing; that this compromise had been agreed to by all the parties except W. H. Adcock, to whom it had been sent to sign, and who, no doubt, would have signed it, or recelpted therefor, but that the paper had been delayed in the mail; that by said compromise petitioner conceded to defendant Emaline 43½ acres of land, and that petitioners were to have the residue; that the same had been surveyed off and agreed to, and that defendants had got possession of the 43½ acres; that by the terms of the compromise the appeal was abandoned, and the cause was to be reinstated upon the docket for the purpose of having the compromise ratified by the court and carried out; that it was agreed that in the meantime each should take possession of the portions conceded under the terms; that petitioner should take all except that which was conceded to the defendant; that, since said compromise was signed by defendants, defendant Emaline had put one Stanton Cantrell in possession of the land conceded to the complainants under said compromise, and had rented to him for the year 1898, which it is charged was a violation of the agreement; that both said Stanton Cantrell and defendant Emaline were insolvent. The petition asks that it be filed as a petition in the original cause, and, if this cannot be done, that it be filed as an original bill; that a receiver be appointed to take charge and rent out the two parts of said land, allowing the complainants to have possession of the part conceded to them, and the defendant's 43½ acres conceded to them; that, if this cannot be done, it go into the

hands of a receiver, who shall rent to the highest bidder; that an injunction issue, without bond, restraining defendant and Stanton Cantrell from using, controlling, occupying, or receiving rents of said lands conceded to petitioners under said compromise, and enjoining them from interfering with petitioners in any manner whatever in the use, occupation, and management of said land. It was further prayed that defendants Emaline Adcock and Stanton Cantrell should be made defendants. An affidavit in due form was attached to the bill. After this an addendum was put to the bill, stating that Adcock had agreed to the compromise and had signed the writing, and that defendant Emaline had refused to give up possession; that said Emaline was threatening to bring suit to further harass petitioners. Upon this it was prayed that she be enjoined from bringing any suit about the land. On the 17th of March, 1898, Chancellor Gribble, by fiat issued at chambers, directed the writ of injunction to issue as prayed for. On March 19, 1898, an injunction was issued under this bill, and served on the defendants, Emaline Adcock and Stanton Cantrell and others. On the 30th of March, 1898, the petition for contempt was presented. After reciting the proceedings already stated, this petition charges: "Your petitioners charge that defendant Emaline Adcock has willfully violated said injunction, and is in contempt, in filing her bill in the chancery court at Smithville about said land on the 19th of March, 1898, by which she enjoins petitioners from taking any steps whatever towards having a receiver appointed, and enjoining petitioners from in any manner interfering with complainant's absolute possession and control of said land, which bill was filed after process and injunction had been issued and served on her, and notice of the same had been given A. Avant, her attorney. Petitioners charge that defendant Stanton Cantrell has willfully violated said injunction, and is in contempt of same, by using, occupying, and controlling said land conceded to petitioners, and by interfering with petitioners in the use, control, and occupation of said land, and he is now doing so with full knowledge of said injunction duly served upon him." The prayer of the petition was for an attachment to be issued against Emaline Adcock and Stanton Cantrell, to the end that they might be brought before the court and punished for the alleged contempt.

It is observed that the violation of the injunction charged against Emaline Adcock was that she had brought her bill against the petitioner after having been enjoined from so doing, and the charge against defendant Cantrell was that he continued to occupy the land after having been enjoined from so doing. The only proof adduced as to the contempt, further than is evidenced by the recitals with regard to the filing of the bill and the service

of the injunction, is contained in the answer of Emaline Adcock and Stanton Cantrell. In this answer it is denied that the compromise had ever been made effective by the signatures of the parties and the ratification of the court. With regard to the filing of the bill, it is said that on the 28th day of February, 1898, defendant Emaline Adcock had a bill of review prepared and sworn to, and that her solicitor sent it to Chancellor Fisher, seeking to enjoin petitioners from in any manner interfering with respondent's use, possession, and control of the land in controversy, and that Chancellor Fisher on the 5th day of March granted the injunction as asked for in said bill, and that petitioner J. S. Adcock had full knowledge of said injunction before he filed his petition of March 19th, in which he petitioned for said injunction, and which he now alleges defendants violated, and for which he is now seeking to have them punished. It is further stated in the answer that respondent Emaline was not at Smithville after she made affidavit to her bill until some time after it was filed, and was not at Smithville when said bill was filed, and gave no directions about it. Both defendants denied that they violated the injunction, or that they had any desire to do so. They state in their answer that they had no purpose of committing contempt of the court, and were willing to make any amends the court should think proper. Stanton Cantrell answered that he never was a party to the cause of *W. H. Adcock v. Emaline Adcock*, and hence cannot in any way be affected by any injunction granted in said cause, or be liable for any breach of said injunction.

While it is true that Stanton Cantrell was a party to the petition or bill for an injunction, and was served with the injunction writ, as already stated, it is nowhere proven that he was in possession of the land, or that he had in any way violated the injunction. The chancellor's decree was therefore correct, as to him, in dismissing the bill.

The only semblance of proof of a violation of the injunction against Emaline Adcock is that she filed her bill in the chancery court at Smithville, enjoining petitioners from interfering with the land, on the 19th of March, 1898. The filing of this bill is admitted in her answer to the petition for contempt, but it is not admitted that this bill was filed subsequent to the service or knowledge of the injunction. Both were filed on the same day. Emaline Adcock neither admits nor denies that her bill was filed subsequent to that of the petitioner, or after knowledge of the injunction granted. It may be stated that all through the answer the matter is treated as if she had filed her bill subsequent to such knowledge; that is, that this is assumed in making her defenses. This is true. But, as already stated, there is no admission of the fact, and no proof of it. From this record it is impossible for the court to say which bill was first filed. When citizens are brought

before the court, charged with contempt, the fact on which the contempt is alleged to rest should be made clear, and not be left to vague inference. On this ground, we think the proceeding for contempt was not sustained.

We think, therefore, there was no error in the chancellor's decree dismissing the bill for contempt both as to Stanton Cantrell and Emaline Adcock. His decree will be confirmed, and the petitioners taxed with the costs of this court and of the court below. All the judges concur.

Affirmed orally by supreme court, December 20, 1898.

DRIVER et ux. v. WHITE et al.

(Court of Chancery Appeals of Tennessee. Dec. 8, 1898.)

EJECTMENT—DISMISSAL AS ADJUDICATION—HOMESTEAD—FRAUD IN OBTAINING DEED—DECREE—EFFECT ON NONANSWERING DEFENDANTS.

1. A decree in ejectment, which dismisses suit as to certain tracts sought to be recovered, is not an adjudication of title to such lands.

2. That a wife did not join in the execution of a deed is not material where, outside of the land conveyed, grantor had real estate amounting in value to more than \$1,000, upon which he was living and occupying as a home.

3. A deed will not be set aside as having been obtained by fraud and misrepresentation where the parties dealt at arm's length, and the representations, if conceded to have been made, were that grantees had a better title, and that by reason of their infancy occupancy by grantor would not avail, as the statute of limitations was suspended, and this particularly where grantor, with others, had investigated the court records as to the sources of grantees' title, and obtained the advice of friends, and grantor's title rested merely on a color of title, which had not been perfected by an adverse holding for a sufficient length of time.

4. Where there is unity of interest between defendants, an answer and successful defense on the part of one defendant inures to the benefit of others not answering.

Appeal from chancery court, Macon county: T. J. Fisher, Chancellor.

Bill by Alvin Driver and wife against J. O. White and others to vacate deed. Decree for defendants, and complainants appeal. Affirmed.

John S. McMurray, for appellants. Mr. Roark and T. L. Pendleton, for appellee White.

BARTON, J. This appears to be a bill filed to have vacated and set aside a deed for a tract of land in the Ninth civil district of Macon county which Alvin Driver made about the year 1890 to Laura Holbert and Tabitha Satterfield, the heirs of one B. M. Satterfield, on the ground that the complainant was induced to make the deed by fraud and misrepresentation. The complainant Alvin Driver held in 1875, and procured a grant from the state of Kentucky to, a tract of land

of 195 acres in the Ninth civil district of Macon county, Tenn., which tract was part of a large tract that had been embraced in grant to one Samuel Pipkin, of an older date than the complainant's grant. B. M. Satterfield had, about 1860, obtained a judgment against Samuel Pipkin, on which judgment an execution had been levied on the land of Pipkin, which included this land. The papers had been returned to the circuit court of Macon county, and the land was condemned, and ordered sold, and was sold, and bid in by B. M. Satterfield. It is alleged in the bill (though upon this point there is no proof) that the sheriff who made the sale of the land never made a deed to Satterfield, and that neither Satterfield nor his heirs ever obtained a deed. It appears that complainant had been claiming his 195 acres from the date of his grant, in 1875, and for more than seven years prior to making the deed in question had had possession within the boundaries of his grant. About this time—that is, shortly before the deed in question was made—one Holbert, the husband of the defendant Laura M. Holbert, appeared, and claimed the land as agent of his wife, Laura M. Holbert, and her sister, Tabitha E. Satterfield, who he claimed were the only heirs at law of B. M. Satterfield, and in whose behalf he claimed the land. After some negotiation and controversy, the complainant Alvin Driver, for the consideration of \$30, which was paid, and which is expressed in the deed, conveyed all of his interest in this tract to these defendants Laura M. Holbert and Tabitha E. Satterfield, and this is the deed he desires now to set aside. Subsequent to this, the heirs of Samuel Pipkin brought an ejectment suit in the circuit court of Macon county against complainant Holbert and wife and Satterfield and others for a tract containing some 900 acres, including this tract of 195 acres. In that case a judgment and decree was rendered on November 23, 1893, in which it was adjudged that the plaintiff agreed to relinquish all claim, title, and interest "to the tracts of land granted to Asa W. Roark of 257 acres and Alvin Driver of 195 acres, and one-half in the tract of land conveyed to the widow Ragland by Samuel Pipkin, and agreed to take their judgment for the balance of the lands inside of the Samuel Pipkin grant, which is not in possession of persons who are not parties to this suit. Plaintiffs are to pay all the cost that has accrued in the cause by reason of making Asa W. Roark, Alvin Driver, and N. B. Freeman parties to the suit, for which execution will issue in favor of said defendants Roark, Driver, and Freeman. It is further adjudged that plaintiff will recover of defendants Anderson Swindle, Laura Holbert, and Tabitha Satterfield the balance of the land and the remainder of the cost, for which execution is awarded." It appears that execution was issued on this judgment for these costs, and was levied upon this tract of 195 acres as the land of Laura Hol-

bert and Tabitha Satterfield. The bill in this case was filed on June 1, 1900, and as ground for relief complains that he had title to this land by reason of possession for more than seven years, and that the grant from the state of Kentucky he was induced to make this deed to Satterfield heirs by fraud and misrepresentation in that it was represented to him that Satterfield heirs had a good title, and he was led to believe that the Satterfield heirs had a better title than he, because he represented that Satterfield had bought at this execution sale, and had a deed, or that one could be procured, and that the heirs had been minors, and that the statute of limitation did not run against them, and that the land was worth some \$300 or more, and he was induced to part with his title for the sum of \$30, by reason of the false representations; and that this price—\$30—was inadequate, and that the deed was obtained through fraud. It is further alleged that, in any event, the deed was not signed by his wife, who joins in this bill, and she did not sign it, and as she was entitled to a homestead. It was further averred that the proceedings brought in the case by the heirs of Samuel Pipkin amounted to an attempt to defeat the title of the complainant against these heirs; that the question was his, and was, therefore, subject to a levy by them.

This last question may be first disposed of by saying that we have only the deed in that case, and this decree does not adjudicate that the land was the property of Alvin Driver, but simply dismisses the plaintiff's suit as to that land. It does not prevent him from recovering it. There was no issue presented in that case as between the Satterfield heirs and the Pipkin heirs, and there was, therefore, no adjudication on this point.

As to the question of homestead, it appears that the complainant's wife does not join in the deed in question; but it appears that, outside of this land, he has an estate amounting in value to more than \$1,000, upon which he was living, and he was occupying as a home. We think it clear that the complainant is not entitled to no relief on this ground.

This brings us to the principal question in the case on the merits,—as to whether the complainant is entitled to a rescission or cancellation of the deed made by him. In the first place, it is somewhat doubtful whether the allegations in the bill itself, taken to the full extent, are sufficiently strong to entitle the complainant to any relief. But, even if they are, we think that the complainant's case wholly fails on the proper facts, as we gather them from the bill. The facts are that complainant had, in 1875, obtained a grant from the state of Kentucky for a tract of land in question. This land was a part of a larger tract, for which Samuel Pipkin many years before, obtained a grant, and which he had owned. It had been l-

as above stated, and bid in by Satterfield. After the obtaining of this grant, according to the testimony of complainant, he had been claiming it, and had made some clearings on part of it, and had at this time about 18 acres in cultivation. He said he had been cultivating it some 17 or 18 years, when, in 1890, the agent for the Satterfield heirs appeared, a lawsuit was threatened, and finally, after consulting friends, and for the purpose, as he expressed it at the time, of avoiding a lawsuit, he agreed to take \$30 for his interest in the land. Thirty dollars was paid, and the deed was made. He insists in his bill, as in his testimony, that it was represented to him that the heirs of Satterfield had been minors, and were not barred by the statute of limitation. From the proof there is doubt as to what was said and as to what did occur. Complainant says that they told him that the minor heirs could hold the land from 1 year up to 24 years, and that they told him that the oldest one was not yet 24 years of age. The attorney who represented the Satterfield heirs, and who declined to give Mr. Driver advice because he was employed by them, does not recollect anything of these representations. But, conceding that they were made, still the complainant's case is not made out, because it is not shown that these representations were false. Indeed, we are inclined to the opinion that they were probably true. There is an agreement in the record that B. M. Satterfield, the father of the defendants Tabitha Satterfield and Laura Holbert, was married in the fall of 1867. When Satterfield died is not shown, and it is not shown that complainant's possession commenced before his death. And, conceding that the oldest child was born in the fall or summer of 1868, the limitation would not expire until 1892, and this deed was made in 1890. So, while the representations may have been made as claimed, it does not appear that they were false. But, even if untrue, we think that the complainant would not be entitled to recover, nor would any sufficient ground be shown for setting aside complainant's deed. The parties were dealing at arm's length; a lawsuit was threatened; the Satterfield heirs presented their claim, and it appears there was discussion. The complainant, with others, investigated the circuit court records as to the sale, took the advice of friends, and then, by way of compromise and settlement, and for the purpose of avoiding a lawsuit, agreed to take \$30 for his interest in the land. If the representations as to the ages and minority of the Satterfield heirs were untrue, they were not such misrepresentations as would suffice to set aside a deed of this kind, where the parties were dealing at arm's length; and complainant does not aver nor does he show that he did not at that time have the same means of information that he has now. It is simply a case where the parties were dealing at arm's length, and, after some investi-

gation, preferred to take \$30 rather than have a lawsuit. The complainant assented to the proposition made to compromise, and made the deed, and it is binding on him. Aside from this, complainant does not show in this suit that he has a good title to the land. He shows that the land had been previously granted before he had obtained his grant, and at the very most his grant from the state of Kentucky would simply constitute a color of title, and, as we say, it does not appear that he held the land for a sufficient length of time against these heirs to perfect his title. The weight of the evidence would be and is that on account of their infancy they were not barred by the statute of limitations. It is stated in the bill, and also by the complainant in his deposition, that there was an agreement that the deed he made should not be binding unless the Satterfield heirs showed they had a good title; but the proof does not sustain this, but to the contrary. He made and delivered the deed and received the money. And, even if his statements were competent, they are met and overcome by the testimony of the agent and attorney for the Satterfield heirs.

The last insistence on behalf of complainant is that he is entitled to a decree because in this case the Satterfield heirs did not answer, and he obtained a judgment pro confesso against them, and that, in any event, he is entitled to a decree on this judgment pro confesso as to them. The other defendants who had levied on the land as the property of the Satterfield heirs did answer, and denied all the material allegations of the bill. On the merits of this case the interests of the defendants are identical. The simple question in the case is whether the property in question is the property of the Satterfield heirs or of the complainant. The defendants who have answered are insisting, as they have acquired an interest in the matter by a levy of their executions, that it is the property of the Satterfield heirs, and they have answered and present this issue; and it is a principle well settled by the courts that if a joint defendant answer the bill, and removes the equity set up against himself and the other defendant who does not answer, no decree can be rendered against the defendant failing to answer. Such is not the case, of course, when the interests of the defendants are distinct. But, where there is a unity of interest, an answer and successful defense on the part of one defendant inures to the benefit of the other. See *Butler v. Kinzie*, 90 Tenn. 31, 15 S. W. 1068; *Hennessee v. Ford*, 8 Humph. 500; *Cherry v. Clements*, 10 Humph. 552; *McDaniel v. Goodall*, 2 Cold. 395; *Caldwell v. McFarland*, 11 Lea. 467; *Smith v. Cunningham*, 2 Tenn. Ch. 573; *Phillips v. Hollister*, 2 Cold. 271; *Petty v. Hanum*, 2 Humph. 102; *Clason v. Morris*, 10 Johns. 524. The result is that we see no error in the decree of the chancellor, and the same will be affirmed. Complainant and his

sureties will pay all the cost of the cause. All concur.

Affirmed orally by supreme court, December 17, 1898.

SPRINGS et al. v. COOPER et al.
(Court of Chancery Appeals of Tennessee. Dec. 3, 1898.)

SEWER CONTRACTS—CLAIMS OF LABORERS—EXPRESS TRUSTS—JUDGMENTS.

1. A sewer contractor gave a written order on the city to a material man for a certain sum, conditioned that the material man would settle all claims for labor furnished the contractor on the sewer. The money was accordingly received, and the written receipt signed expressly accepted the terms as to paying laborers. *Held*, that the money received is impressed with an express trust for the benefit of the laborers, which they may enforce.

2. The fact that laborers sue and obtain judgment against the contractor for their claims does not, of itself, bar them from afterwards suing to enforce an express trust to pay their claims.

Appeal from chancery court, Davidson county.

Bill in equity by T. L. Springs and others against Cooper & Co. From a decree for complainants, defendants appeal. Affirmed.

Barthell & Keeble, for appellants. Thos. A. Kucheval, for appellees.

WILSON, J. This bill was filed November 24, 1894, by T. L. Springs and J. T. Rhine, in behalf of themselves and six other parties named in the caption, to recover from the defendant certain sums alleged to be due the six parties mentioned in the caption of the bill. The facts appearing in the record necessary to be stated are these: January 31, 1894, the city of Nashville, through its proper officials, awarded to Springs a contract to build a sewer in a certain alley in the city of Nashville for the sum of \$400. Springs entered into a bond, with complainant Rhine as a surety, to the city, for the faithful performance of the work necessary in constructing said sewer. In doing the work on the sewer, they employed certain laborers, and among them the six parties named in the caption of the bill, and for whose benefit the suit is brought. Pending the completion of the sewer, Springs bought material from Cooper & Co., and, it appears, gave them certain orders on the board of public works of the city of Nashville. Among these orders was one of March 28, 1894, for \$212. This order is in the following form: "Nashville, Tenn., March 28, 1894. Hon. Board of Public Works, City: Please give to Cooper & Co. \$212, the balance due me on sewer in alley 147, with the understanding that they (C. & Co.) are to settle all account for labor on that sewer. T. H. Springs. J. T. Rhine, Bondsman." Cooper & Co. accepted the order, and receipted for

the money as follows: "We have the money mentioned in the writ and accept the conditions on it to paying laborers. April 3, 1894 Cooper & Co." At the time this given, Springs was indebted to the mentioned in the caption of the bill and labor performed by them on Cooper & Co., April 3, 1894, paid laborers about 30 per cent. of the amount they by Springs for work done on the sewer. He took their receipt in the following form: "Nashville April 3, 1894. Received of Cooper amount opposite our names in full on sewer in alley 147, of which T. is the contractor." Before Cooper received this order on the city for had received two orders from Springs, to wit, one March 24, 1894, for one for \$132.45. It seems that they received the order for \$212 they these two orders. In other words, for \$212 seemed to be taken in lieu of two previous orders. These laborers having received in full the sums due from Springs for the labor, sued him, Rhine, before a justice of the peace, and recovered judgment against him for the balance due them, respectively. Executions were issued on their judgments, but returned nulla bona. After which, a garnishment was served on Cooper & Co. to appear and answer as to their indebtedness to Springs. They appeared and answered that they were not indebted in any sum. But, under the facts appearing to the justice, he rendered judgment against Cooper & Co. for the balance due these laborers. From that judgment, the justice, Cooper & Co. appealed to the circuit court, and the case was pending in the circuit court when this bill was filed. The fact of the pendency of the suit in the circuit court, and its result, are averred in the bill. A demurrer was interposed by the defendants, based on the ground that the bill showed on its face the pendency of a former suit between the parties, and over the same subject-matter in another court. This demurrer was overruled. It appears that February 22, 1895, the cause came on to be heard before Chancellor Malone upon a motion to dismiss the bill for want of a prosecution bond; and a decree of Chancellor Malone recites that it appeared to the satisfaction of the court that complainants T. L. Springs and J. T. Rhine are the real as well as the legal complainants in this cause. It is then ordered, adjudged, and decreed by the court," says the decree, "that unless complainants Springs and Rhine give execution bond, or take the pauper's oath, within ten days from the date of the filing of the bill will be dismissed." March 1, 1895, by consent of parties, it appears, the bill was ordered and directed, upon compl

giving a good and sufficient cost bond, the decree of February 22, 1895, to be set aside, and the cause reinstated on the docket. The defendants, in their answer, deny owing the complainants anything. They deny all fraud or wrongdoing in connection with the complainants, who are laborers, and who did work on the sewer. They admit receiving the order on the city for \$212, and the receipt they gave, hereinbefore quoted. They say that the receipt they gave to the laborers was fully explained to them before the receipts were signed by them, and that the laborers fully understood that the sum received at that time was all that was to be paid by the defendants. Evidence was adduced in the cause, and the chancellor heard it December 15, 1897. He gave a decree against the defendants for the amount of their judgments against Springs before the justice of the peace, with interest. These judgments were six in number, and the decree of the chancellor in favor of these several parties aggregated \$94.28.

From this decree the defendants prayed an appeal to the supreme court and have assigned the following errors: First. Error in overruling the demurrer, raising the ground that the bill itself disclosed that there was a former suit pending covering the same subject. Second. The court below held that Springs and Rhine were the real as well as the nominal complainants in the case, and this holding was acquiesced in by complainants, and thereafter Springs and Rhine gave security for the cost of the cause; and the insistence of this error is that there is no pretense that defendants owed Springs and Rhine anything, and, this being so, the court erred in giving any recovery against defendants in favor of the other parties named in the caption, to wit, the laborers who had worked for Springs in the construction of the sewer. Third. The court erred in giving decree against defendants in favor of the laborers, because defendants did not owe these laborers anything, and, in addition, the laborers had judgments against Springs and Rhine. Fourth. The court erred in giving decree against defendants, inasmuch as the laborers who are complainants could not recover in this suit, except through complainant Springs, and, as there was no contention that the defendants owed Springs anything, the court should have rendered no judgment against defendants. The fifth error is the same as the fourth, except that it raises the question that the complainants, who are laborers, had sued Springs before a justice, had obtained judgments, had issued garnishments against defendant, and judgment had been rendered against defendant on the garnishment process, that an appeal had been taken to the circuit court, and that that court had reversed the judgment of the justice, and dismissed the garnishment proceeding against him;

and on these facts the defense of res adjudicata is relied upon, and it is insisted that the court below erred in not sustaining it Sixth. The court erred in not holding that the acceptance by the defendants of the order on the city, with the conditions attached, that they should settle all accounts for labor on that sewer, was without consideration, and therefore nudum pactum. Seventh. The court below erred in not holding that the complainants the laborers for Springs on the sewer were bound by their receipts.

The central question in the case is as to the character and relation under which Cooper & Co. received the order on the city for \$212, and accepted payment thereof. There is no pretense in the evidence that these laborers received in full what was due them for labor done on the sewer. The proof is clear that they received only 30 per cent. of what was due them. Of course, their contract was with Springs, and Springs owed them for their labor. He gave the order in question to Cooper & Co. Its terms are clear and unambiguous. Cooper & Co. took it and received the money upon the condition that they were to pay the account for labor done on the particular sewer. The money they received was more than sufficient for that purpose. Instead of paying the account for labor out of the proceeds of the order, they paid only 30 per cent. The writer is of opinion that, under the terms of the order, they received the money thereon impressed with the trust to pay the laborers, and that they had no right to retain it and to refuse to execute the trust. If correct in this view, the laborers have the right, nothing further appearing, to enforce the trust in their favor. Unless there is some obstacle or difficulty in the way of the enforcement of the trust in their favor, growing out of their suits against Springs for the balance due them, and the obtaining of judgments before the magistrate in these suits, their road to a recovery against defendants, in the opinion of the writer, is clear. We do not believe that they are estopped or concluded by the proceedings taken before the magistrate. The ultimate and controlling fact in the case is that the fund that went into the hands of Cooper & Co. by virtue of this order upon the city went into their hands as the money of these laborers, so far as it was needed for the payment of what was due them. In other words, the defendants held it under an express trust to pay them what was due them, and the subsequent effort of these laborers to collect what was due them from Springs did not destroy or wipe out the trust imposed on the fund in the hands of the defendants. There is no error in the decree of the chancellor, and it will be affirmed, with costs. The other judges concur.

Affirmed orally by supreme court, January 19, 1899.

are: (1) That the property is worth from \$1,800 to \$2,000, instead of \$1,000, the price paid by Taylor; (2) that there was some sort of collusion or fraudulent arrangement between Taylor and Daniels in the sale to the former, and its confirmation, and that Daniels was paid a sum in addition to the bid reported to the court and ratified by it; (3) that the minor and her guardian ad litem in the partition case had no notice of the bid Taylor reported to the court, and of the evidence produced, upon which its ratification by the court was secured; (4) that the evidence was manipulated in some way by Daniel and Taylor in furtherance of the collusion and fraudulent arrangement between them; (5) that if the decree confirming the sale is set aside, and the property resold, the parties will bid from \$1,800 to \$2,000. There is an abundance of other material details in the bill and amended bill, and her pleadings filed by complainants appear in the record. But the five propositions before stated present the real ground of averred. They were all denied in terms, except that the guardian ad litem of the minor in the partition case was notified of the bid of Taylor, and of the evidence adduced before the master upon its submission to him, to report whether the bid was accepted and ratified, and was not afforded opportunity to cross-examine the witnesses, and, as to this matter, defendants admit, as the guardian ad litem lived in another county, no notice was required; the price bid for the property was a fair price, and the best that could be obtained, and that, therefore, the minor was not defrauded. Taylor put in the defense of an innocent purchaser; that he paid the full sum into court, which had been claimed by the parties entitled to all or a part of the property, except 4 out of the 18, and had no interest in the title, and had been put in

entirely gone through this very case, and having all of the 50-odd depositions in the record in the partition case, and the record in the partition case, about two-thirds of the record in our opinion, is absolute probative value in reference to the case. We have reviewed the pages of typewritten briefs and the oral argument. After doing so, we are of the opinion that there is no merit in the case on the merits, but on the standpoint of law. The facts are few, plain, and for the most part certain as facts can be ascertained in a lawsuit. In stating the facts for the sake of brevity, except where necessary, we say that Daniel Smith died the owner of the real estate. His wife was the sole heir. After the death of Daniel Smith, owning an undi-

vided interest in the real estate, filed a bill in the chancery court at Nashville to have it sold for partition among those entitled, if it were ascertained that it could not be divided in kind. The style of this case was, "J. B. Daniels v. R. J. Miller et al." All other parties interested were made defendants in that case,—among them, Mrs. De Ford and the minor, Clara Miller. Mrs. De Ford, with other adults, was represented by counsel,—Judge Matt Allen. Some other adult defendant was represented by Hon. Eli T. Morris, of the Nashville bar. The minor defendant was represented by guardian ad litem, John D. Brien. It was ascertained in that case that the property was not susceptible of partition in kind, and thereupon there was a decree for its sale. Parts of the property, after considerable trouble, were sold; one or more parcels being sold by private bids, which were reported to the court, and, upon proof, confirmed by it. The house and lot in question were not sold at the time the other parcels of real estate were disposed of. This particular piece of property, it seems, was very difficult to be sold. It was offered for sale by the master, and bid in by a party at the price of \$2,000. He failed to comply with his bid, and, on account of his insolvency, nothing could be done with him. And in consequence of this failure it was again offered for sale by the master, and a bid of \$1,050 was made. This bidder failed to comply with his bid, and, being insolvent, it resulted in nothing. The terms of the sale, by decree of the court, were so modified as to require only 15 per cent. cash, with the balance on time, divided into different payments. It was offered for sale by the master under this modified decree, and no bid at all was received. By this time, if not before, Mr. Daniels had become the owner of quite a majority of the interests in the property. He owned $\frac{14}{18}$ of the interests, Mrs. De Ford owned $\frac{2}{18}$, and the minor $\frac{1}{18}$. It appears that Mr. Daniels and one of the adult heirs did all they could to find a purchaser for this property. It was placed in the hands of one or more real-estate agents to sell, with the understanding that any purchaser who could be secured could submit his bid, which would be reported to the chancery court for confirmation or approval. Finally a real-estate agent secured a bid of \$1,000 from the defendant Tom Taylor, who is a colored man. In addition to the \$1,000, he was to pay the commission of the real-estate agent, and the taxes on the property for the year 1897. His written bid, embracing his proposition to pay \$1,000,—\$800 cash, and the balance in one and two years, with interest,—and the taxes for 1897, was submitted to the court. The court referred it to the master to take proof, and report whether or not it was a fair and proper bid, and one that should be ratified. Four or five depositions were taken upon this reference to the master. Judge Allen, representing Mrs. De Ford, was cognizant of these

steps. So was Mr. Morris, representing other parties, defendants in the case. The guardian ad litem appointed to represent the minor, Clara Miller, had in the meantime moved to Williamson county. No notice of this bid and of the proof taken in reference to it before the master was served upon the guardian ad litem. Mr. Morris cross-examined the witnesses whose evidence was taken before the master. The proof before the master was all in favor of the fairness of the price bid, and its ratification by the court. The master so reported, and, there being no exceptions to his report, it was confirmed, and the master directed to make Taylor a deed to the property. Taylor paid the \$800 cash, and a few days thereafter the remaining \$200 due under his bid for the property. Some month or more after the confirmation of this sale to Taylor, the complainants Mrs. De Ford and Mrs. House, who is a daughter of Mrs. De Ford (the latter acting as next friend for the minor, Clara Miller), filed a petition in this case of Daniels against Miller et al., seeking to set aside the confirmation of this sale to Taylor on substantially the same ground as alleged in this bill. This petition was answered by Daniels and Taylor, and was dismissed by the chancellor on the ground, it seems, that it was not presented within time; the chancellor stating, in connection with his action dismissing it, that, if complainants had any remedy, it was by bill of review. His term at which the sale was confirmed had adjourned before this petition was filed, and more than 30 days had elapsed. Complainants appealed from this action of the chancellor dismissing their petition to the supreme court, which appeal was granted. After this, by permission of the court, they filed this bill of review, and were permitted to withdraw their appeal from his action dismissing their petition.

Dealing with the grounds of complaint separately, it is claimed that this property is worth from \$1,800 to \$2,500, and that, therefore, it would be a great hardship to deprive the complainants of its real value. The proof shows that it is exceedingly doubtful whether, if the property was put upon the market again, it would bring more than the bid of Taylor, which was confirmed by the court. As a matter of fact, it is undisputed in this record that the clerk and master had offered this property for sale at three separate and distinct times. It is an undisputed fact that Mr. Daniels, who owned a large majority of the interests in the place, had tried, personally and through the agency of real-estate agents, for over a year, to get a purchaser for this property, and had failed. This bid was secured through the agency of a real-estate agent. The property is not desirably located,—it is in a part of the city occupied largely by colored people; and, under the proof, there are other features and incidents connected with its location which render it not readily salable.

ble on the market. The best test of the "value" of property, as that term is known in the law, is what it will bring when put up and sold in the open market, after being properly advertised, and the public given a fair opportunity to know it and its surroundings. The public had a full and fair opportunity to know the location of this property, its situation and condition, and, after labored efforts, the bid made by Taylor, reported to the court, and confirmed by it, was the best that could be secured. In addition, as above stated, we are of opinion that, if put on the market again, it would be kept in court, probably, for years, without any better bid. It is true that the guardian ad litem of the minor was not notified of this bid, and was not notified of the taking of the depositions of witnesses for the purpose of ascertaining whether it was one that should be accepted by the court. Aside from the question of notice to him being necessary, it is sufficient to say that, under the proof, no injury resulted therefrom to the minor.

The charge in the bill of collusion between Daniels and Taylor is utterly without proof of any material importance in the record. The theory of the bill and of some of the proof seems to be that Taylor, in addition to the \$1,000 bid and paid into court, agreed to, and did, pay Daniels \$100; and this seems to be the basis of the charge of fraud and collusion between them, and that Daniels was willing for this property to be sold for \$800 to \$1,000 less than its value, in order to secure this outside \$100 from Taylor. Under the proof, there is nothing in the charge. In addition, it is contradictory to the essential interests of Daniels, as they appear in this record. As stated, he owned $\frac{14}{18}$ of the interests in this property, and it seems absurd, on the face of it, to say and believe that he would give up $\frac{14}{18}$ of \$800 or \$1,000 for the sake of this alleged bribe of \$100 from this purchaser. In other words, it does not appear reasonable that he would sacrifice from \$500 to \$600 in order to secure \$100. The truth is, as appears from the record, Daniels did not know who the purchaser was, until he was brought to him by the real-estate agent. The purchaser was represented by Hon. Geo. B. Guild in the matter. The property, in addition to being located in the settlement stated, surrounded largely by colored people, was very much out of repair. After his purchase of the property, and the confirmation of the sale to him, Taylor expended some \$275 or \$300 in repairing it.

Mrs. House seems to have considerable feeling in the case, and a good deal of sentiment. We need not question the propriety of the sentiment she seems to entertain. We are inclined to find, from the evidence, that she is very much averse to this family property, and the home of her grandfather, going into the possession of a negro. We

suppose that it will be conceded that the fact that this purchaser is a negro does not change the rules or principles of law governing in such matters. His rights are just the rights belonging in such cases to any other citizen, whether white or black,—no more, no less. It is to be said, however, to his credit, that he appears to be a quiet, peaceable, industrious, sober, and honest citizen, who works, attends to his own business, and makes a decent living for those dependent upon him. It seems, also, that a good deal of sentiment exists in the case because this property at one time belonged to Maj. Lewis, who was the warm personal friend of Gen. Andrew Jackson, and that Gen. Jackson and his immediate friends on one or more occasions held a caucus on the premises of Maj. Lewis, looking to the interests of the general in his political contests. This may be interesting as a matter of sentiment and political history. But we are unable to see that it at all affects the application of legal or equitable principles in the determination of this case.

The above facts present all that is pertinent in the case. There is no merit, from a legal or equitable standpoint, in the bill; and it results that there is no error in the decree of the chancellor in dismissing it, unless he committed error in a matter now to be stated. Upon the hearing of this case, and after the chancellor had given his opinion, and stated that he could not see that the minor had been injured, or that the property would bring a greater price if put upon the market again, Mrs. House stated that she would give \$1,500 in cash for the property, or secure that amount to be paid for it, if decreed by the court. The chancellor declined the proposition, and thereupon the appeal was taken to the supreme court. The action of the chancellor in declining to set aside the confirmation of the sale, and put the property upon the market again, upon the proposition of Mrs. House to pay \$1,500 cash, or secure that sum to be paid by note, is assigned as error; and really this error is the only one assigned to the action of the chancellor in this case. All the others seem to be directed to his action in dismissing the petition of complainants filed in the partition case. We see no error in the action of the chancellor in the matter indicated. Mrs. House did not tender the money in court, in the first place; nor, in the second place, did she tender any obligation binding her to comply with her proposition made through her counsel, when the chancellor stated, in his opinion, that he could not set the sale aside, and that he was not at all satisfied that if he did a better price would be realized. This bill, however it may be designated, is in effect a bill to set aside this decree confirming the sale to Taylor on the ground that it was fraudulently procured. The evidence wholly fails to sustain the essential averments of the bill.

We need not cite authorities in support of the various propositions assumed by us to be true. The facts of the case so clearly control its proper disposition that it is utterly useless to go into a discussion of the propositions of law. The decree of the chancellor will be affirmed, with costs, and the cause will be remanded to the court below for a discharge and settlement with the receiver appointed in the case. The other judges concur.

Affirmed orally by supreme court, January 18, 1899.

NATIONAL WALL-PAPER CO. v. FOURTH NAT. BANK et al.

(Court of Chancery Appeals of Tennessee. Dec. 24, 1898.)

ATTACHMENT—SUCCESSIVE LEVIES—SUFFICIENCY—APPEAL—HARMLESS ERROR.

1. The custom of officers at the place where an attachment was levied was that, when they made levies on a stock of goods subject to previous levies, and notified the officer first levying, it was understood, unless objection was made at the time, that the first officer would hold for the officer making the subsequent levy. An officer making a first levy on a stock of goods put an agent in possession, and, on being told by another officer that he would levy on the goods subject to the first levy, replied, "All right." The agent then agreed with the officer making the junior levy to also hold the goods for him. *Held*, that the second levy was valid.

2. The erroneous admission of evidence is harmless, where the result would be the same if the evidence was rejected.

3. In a contest between attachment creditors, the correctness of the return of the officer making the first levy, showing that it was levied on a stock of goods, may be attacked by showing that it was not levied on all the goods or on any of them; and hence the return of an officer making a subsequent levy that it was made on the stock of goods, subject to the rights of the first attachment, is not equivalent to saying that the first attachment was levied on the entire stock of goods.

Appeal from chancery court of Davidson county; H. H. Cook, Chancellor.

Bill by the National Wall-Paper Company against the Fourth National Bank and others to vacate a decree awarding priorities in attachment. From a decree for defendants, complainant appeals. Affirmed.

Albert D. Marks, for appellant. Steger, Maddin, Price, Nolen, Slemons & Howell, for appellees.

BARTON, J. This is a contest between certain attaching creditors of one C. Larson, an absconding debtor, as to their rights and priorities under their several attachments. C. Larson had prior to April 15, 1893, been engaged in the wall-paper business in the city of Nashville, had become largely indebted, and absconded. On April 15, 1893, Warren Bros. filed an original attachment bill in the chancery court at Nashville against C. Larson to

collect an indebtedness of some \$255.76, which bill alleged that the defendant had absconded, etc., and that he was owner of a stock of goods in a storehouse at 216 North Summer street. Upon this bill a writ of attachment issued, which came into the hands of one T. G. McCampbell, a deputy sheriff of Davidson county, who made a levy on part of the goods in the storehouse in question by taking the same into his possession, and appointing one Hobson as agent, and placing him in charge of the goods levied on. The deputy sheriff made his return on the attachment in the following words: "Came to hand the same day issued, and returned executed by levying this attachment upon all the right, title, claim, and interest that the defendant, Christian Larson, has in and to a stock of goods at house No. 216 on the east side of North Summer street, between Union and Church streets, to wit, wall papers, picture frames, and designs, or so much thereof as shall be of value sufficient to satisfy complainant's debt, besides cost and interest. Levied on as the property of Christian Larson at 2:20 p. m., April 15, 1893."

The attachments of other creditors rapidly followed, and were levied as follows: One in favor of the First National Bank for \$150, issued by Glenn, justice of the peace, levied April 15, 1898, at 4 p. m.; one in favor of the Fourth National Bank for \$115, issued by the same justice, levied April 17, 1893, at 8:15 a. m.; one in favor of Beasley & Sons for \$17, issued by the same justice, levied April 17, 1893, at 9 a. m.; one in favor of Vaughn & Moody for \$16.75, issued by same justice, levied April 17, 1893, at 10:45 a. m.; one in favor of the Nashville Frame Company, same justice, for \$160, levied April 17, 1893, at 11:35 a. m.; one in favor of the Nashville Chemical Company for \$30.34, levied April 18, 1893, at 5:10 p. m.; one in favor of George Moore & Son for \$146.22, levied April 17, 1893, at 10 a. m.; one in favor of Davis, Webster & Co. for \$210, levied April 18, 1893, at 11:45 a. m.; one in favor of W. L. Nichol for \$166.70, levied April 17, 1893, at 5 p. m.; one in favor of Norvell & Wallace for \$10.80, levied April 18, 1893, at 5 p. m.; one in favor of Webb, Stevenson & Co. for \$23.15, levied April 19, 1893, at 3:10 p. m.; one in favor of the complainant in this case, the National Wall-Paper Company, for \$799.30, levied May 1, 1893; one in favor of B. L. Nichol for \$864.64, levied May 1, 1893, at 4:15 p. m. The cases of Warren Bros., Louis Voigt, Son & Co., National Wall-Paper Company, and W. L. Nichol were brought in the chancery court; the other suits were brought before magistrates. It will be noted that the levy of the attachment of the complainant, the National Wall-Paper Company, was made subsequent to 13 others, or it was No. 14 in the order of time.

To its original attachment bill filed on May 1, 1893, the complainant, the National Wall-Paper Company, made defendants Christian

Larson and all the other prior attaching creditors. That bill set out the indebtedness due complainant, and alleged that the defendant was absconding, concealing himself, etc. As to the other defendants, it was stated that the stock of goods sought to be attached was then in possession of T. G. McCampbell, the deputy sheriff of Davidson county, having been seized by him under the writ of attachment sued out in the chancery court at the suit of Warren Bros., and that the other defendants had likewise sued out attachments for various amounts before magistrates and in the chancery court, which had been attempted to be levied on said stock of goods by various constables and other officers of the county. It was said that the complainant had not had an opportunity of examining the levies so made in the attachment writs sued out; that the complainant did not admit that said writs were valid; and called on each of the defendants to file with its answer to the bill the writ issued in its favor, and the levy made thereon. It is alleged to be necessary that a receiver be appointed, and one was asked for. The bill also sought to reach certain interest in the real estate, not necessary to further mention; also asks for the issuance of an attachment, and its levy on the stock of goods subject to valid prior levies. All of the attaching creditors filed answers, setting out their debts, relying on their attachments, and filing copies of the same or of the returns, or offering to do so, on or before the trial.

It will be noted that four of the attaching creditors had filed their bills in the chancery court, as above stated. There was no formal order consolidating these causes, and some confusion and misunderstanding arose from this fact, and from the fact that orders appear to have been inadvertently entered in the cases without considering this fact. The following steps were taken in the case of Warren Bros. against Larson, which was the first attachment bill: As stated, the bill was filed April 15, 1893, and levy made as above shown. On May 5, 1893, there was an order made in this case appointing G. K. Whitworth receiver, and he was ordered to sell the goods attached, and did so, realizing thereon the sum of \$——. On May 1, 1893, a decree was entered in this case rendering judgment in favor of Warren Bros., sustaining their attachment and the right to sell the goods, ordering the clerk and master to make sale, and referring the case to the master to report as to priorities of the various attaching creditors; the decree reciting that it had been suggested to the court that some time after the filing of the complainant's bill in that case, which had been filed on April 15, 1893, the National Wall-Paper Company filed its bill on May 1, 1893, attaching said property, and making other defendants parties. The decree further recites that complainant's attachment was prior, but that the court was unadvised as to the rights of the other at-

taching creditors, and the clerk and master was therefore directed to make his report as to this.

Returning to the case of the National Wall-Paper Company, we find that its bill was filed and attachment levied as above stated; that decree was entered in this case appointing Whitworth receiver, and ordering sale of the goods attached May 5, 1893; that the goods were sold June 9, 1893; that the clerk and master filed his report of sale on June 21, 1893, reporting that he had received \$1,280, paid by the execution of three notes, for \$426.66 each, due at 30, 60, and 90 days. This report was confirmed on June 23, 1893, by decree entered in the National Wall-Paper Company against C. Larson. On October 18, 1893, a notice was issued by the clerk and master to various attorneys interested in the case of the taking of account as to priorities. This notice appears on the face styled "National Wall-Paper Co. vs. C. Larson," and was indorsed on the back "Warren Bros. vs. C. Larson and others." This notice was not served on the attorneys for the complainant, the National Wall-Paper Company. A report as to priorities was made by the clerk and master on February 14, 1894, and was confirmed by the decree of the court entered on February 16, 1894. This decree is headed:

"Warren Bros.	National Wall-Paper Co.
vs.	vs.
Christian Larson.	Do et al."

The report confirmed showed priorities in the order we have above set them out, according to the dates of the levies of the several attachments, the complainant, the National Wall-Paper Company, being placed 14 in the list. This decree appears to have been entered in both cases, as shown above. Under this decree, the funds in court were paid out in the order of the attachments shown in the report and decree until the fund was exhausted. The claim of Warren Bros. & Co. was paid on February 19, 1894, and amounted to \$218.50. On February 21st, \$15.67 was paid to Vaughn & Moody. On February 27th, the amount due the Fourth National Bank, \$121, was paid to its attorney. On April 26th, \$17.85 was paid to the attorneys of Beasley & Sons. On May 24th, \$163.50 was paid to the attorney of the First National Bank. On July 23d, \$112.69 was paid to the Nashville Frame Company. The balance of the fund was consumed in cost and expenses; and thus the entire fund received from the sale of the goods was exhausted.

It appears that the attorneys of the National Wall-Paper Company did not know of the report as to priorities, nor of the decree concerning the same. And it is further agreed in this case that the attorneys for the First and Fourth National Banks, Mr. Steger and Mr. Maddin, had nothing to do with the taking of the report of the clerk and master as to priorities in the case of Warren Bros. against Larson, nor of the filing of the report in the cases of Warren Bros. against Larson

and National Wall-Paper Company against Larson, nor did either of them have anything to do with the entry of the decree of February 16, 1894, nor did either of them know that the decree was in any way objectionable to the National Wall-Paper Company, nor that there was anything improper or irregular about the entry of the decree, and that they did not know that the decree was objectionable for more than a year after it had been entered, and until they had paid their clients the sums collected for them.

Returning to the case of the National Wall-Paper Company against Larson, a decree was entered on March 31, 1894, which recites that it appears to the court that there is a large number of defendants in that suit whose interests are identical with each other, and that it is inconvenient and expensive to give notice to each defendant of the taking of testimony, and it is ordered that the complainant may be allowed to take testimony on its behalf after giving notice to the Nashville Frame Company, George Moore & Sons and Louis Voigt & Co. The parties then proceeded to take proof. On May 9th seven depositions were taken, and on May 16th the deposition of Mr. Marks was taken. These depositions were all taken without any notice to, or knowledge of, defendant banks or their attorneys. In this case, on February 23, 1895, a decree was entered sustaining the attachment of the complainant, and decreeing all other attachments, except that of Warren Bros., void. This entry was had without the knowledge of either the defendant banks or their attorneys. On March 16, 1895, a decree was entered in this case setting aside the last-named decree, and ordering that all parties take proof. On June 7, 1895, a decree was entered in the case of the National Wall-Paper Company against Larson, which adjudicated that of a former term of the court, viz. February 16, 1894, the rights of the parties to the proceeds of the sale of the stock of goods of C. Larson attached had been adjudicated by a final decree, and the proceeds of the sale had been paid out by the clerk and master under the decree to the parties entitled thereto, respectively, and that the court was of the opinion and adjudicated that said decree was conclusive of the rights of the parties in the cause, and that the complainant was not entitled to reopen in that case the questions adjudicated by said decree, and the complainant's bill as to the First National and Fourth National Banks was dismissed. Thereupon, on August 20, 1895, the bill in this case was filed by the National Wall-Paper Company against the Fourth National Bank, the First National Bank, Beasley & Sons, and the Nashville Frame Company, setting out and reciting the foregoing proceedings as we have stated them, and further alleging that all the attachments levied prior to the complainant's attachment, except that of Warren Bros., were void. It was averred that the attachments in favor of the several

creditors who were made parties to this last-named bill were void, because the officer, one John B. Talbot, a constable, did not take possession of the goods; that the goods at the time were held under the attachment levied by McCampbell at the suit of Warren Bros., and that they were in the possession of George M. Hobson, the agent of said McCampbell, and that they were not levied on by the consent of McCampbell. Complainant avers the ignorance of itself and its attorneys of the decrees and report as to priorities as to the time of its entry and at the time the report was made; that it had no notice of the taking of the account and making of the report; and that the report and entry of the decrees were a fraud on the complainant's rights, and were not binding on the complainant. It was alleged that the decrees entered were erroneous, and were improperly entered, and should be vacated, and the bill prayed accordingly. Proof was taken, and on the record in the other cases, the proof there taken, and that taken in this case, the chancellor heard the cause.

The defendants moved to strike the bill from the files—First, because the bill was filed as an amended and supplemental bill in the nature of a bill of review in the cause of the National Wall-Paper Company against C. Larson and others, and that this was done without leave of the court, and that no right or authority was given by the court to authorize the filing of such a bill; second, because the proper parties were not brought before the court. On August 22, 1895, the chancellor heard the cause on the entire record, and decreed and held that the levies of the several constables which were made subject to the levy of the attachment in the case of Warren Bros. against Larson, and prior to the levy and attachment of the National Wall-Paper Company, whose dividends were paid by the clerk and master out of the proceeds of the sale, were valid levies, and were entitled to payment in the order in which they were so paid, and the bill of complainant was dismissed. He adjudged the cost of the original attachment bill, in the National Wall-Paper Co. against Larson, against the defendant, Larson, and the cost accruing out of the litigation growing out of the wrongful entry of the decree in the case of the National Wall-Paper Company to be paid one-half by the National Wall-Paper Company and the other half by the defendants in this case. From this decree the complainant prayed an appeal to the supreme court, and has assigned errors.

The only point on which it becomes necessary for us to make a statement of facts grows out of the insistence of complainant's counsel that all the levies previous to that of complainant, except that of Warren Bros., was void, because, it is said, they were not actual levies, inasmuch as the goods levied on were in the hands of Deputy Sheriff McCampbell under the Warren Bros. attach-

ment, and that the levies were not made under an agreement with him, and that there was no agreement on his part to hold the goods levied on for the benefit of the officers who made the subsequent levies. It therefore becomes necessary for us to find and state just what did occur, necessarily repeating, for the sake of clearness, some of our previous statements.

The Warren Bros. attachment was in the hands of Deputy Sheriff T. G. McCampbell, and was by him, on April 15, 1893, at 2:20 p. m., levied on the stock of goods of the defendant, C. Larson, located in a storehouse No. 216 North Summer street, or rather upon a portion of stock there located. The return of the sheriff, as above quoted, is somewhat vague, it being to the effect that he levied on the stock of goods, or so much thereof as shall be of value sufficient to satisfy complainant's debt, with cost and interest. The proof shows that, as a matter of fact, he only took possession of a part of the goods in the store, and placed in charge, as a guard and as his agent, one George Hobson, stating at the time to Hobson that he only levied on the goods in the store back to a certain point, which he designated; stating at the time that the amount called for in the attachment was not sufficient to justify him in taking charge of the whole stock. McCampbell, through his agent, Hobson, remained in possession of these goods until May 1, 1893, when he received the attachment issued under the first bill of the complainant in this case, and until a receiver was appointed to take charge of it. On April 15th, Dr. John B. Talbot, a constable, having an attachment writ in favor of the First National Bank of Nashville issued by Glenn, a justice of the peace, for \$150, went to this store, and levied on all of the goods not previously levied on by McCampbell, and on those that had been levied on by McCampbell, subject to McCampbell's levy. The return made by him on the attachment was as follows: "Came to hand same day issued, and executed by levying this attachment on stock of wall paper, pictures, lookingglasses, frames, and fixtures, moldings, etc., in storehouse No. 216 North Summer street, Nashville, Tenn. This levy is made subject to a levy made by T. G. McCampbell, D. S., in favor of Warren Bros. The attachment made 4 p. m., April 15, 1893." On April 17th the same constable levied on the same stock of goods the attachment of the Fourth National Bank, making practically the same return, but also showing that that attachment was levied subject to the attachment of the First National Bank. The same constable, 15 minutes later, levied the attachment in favor of Beasley & Sons for \$17, on the same stock of goods, making substantially the same return, showing, in addition, that the levy was subject also to the previous levies made by him. At 10:45 a. m. one E. A. Dodd, a constable, levied an attachment in favor of

Vaughn & Moody on the same stock. His return shows that the levy was made subject to the levy made by T. G. McCampbell, D. S., in favor of Warren Bros., and the levies made by John B. Talbot in favor of the First National Bank, Fourth National Bank, and one for Beasley & Sons. At 11:55 Constable Talbot levied an attachment in favor of the Nashville Frame Company on the same stock, and the return shows that it was made subject to the levy of McCampbell for Warren Bros., the levy in favor of the First National Bank, one in favor of Beasley & Sons, and one in favor of Vaughn & Moody, by Constable Dodd. On April 17, 1893, the same constable levied an attachment in favor of the Nashville Chemical Company, the return showing that it was made subject to the previous levies above mentioned, and to one made by him in favor of George Moore & Son, which we have omitted to mention in its proper order, and which was made on April 17th, at 10 a. m. Other levies of substantially the same character were made in the order hereinbefore set out.

According to the testimony of Talbot, what really occurred and was said and done at the time of these levies was substantially as follows: When he went to the store to make his first levy, he found Deputy Sheriff McCampbell there. McCampbell said to him that he did not have enough in his attachment to attach the whole stock, but marked off certain portions of it on the wall, but he had his man, Hobson, there in charge of them. Talbot then marked his levy on the whole stock, making the return above stated, and notified McCampbell that he levied subject to the attachment McCampbell had. McCampbell had pointed out to him part of the stock he had levied on, saying it went back to a partition that was in the store, about 14 or 16 feet back from the front; that in that part of the store about two-thirds of the stock was located. Talbot told McCampbell that he would levy on the balance of the stock, and also that which McCampbell had levied on subject to his (McCampbell's) levy, and McCampbell agreed to it, or said, "All right." His exact statement upon this point is: "He said that was all right, and I told George Hobson to take charge for me as well as for Mr. McCampbell, and Hobson said, 'All right.' Mr. Hobson remained in charge for both of us, and continued so until the receiver took possession in this cause. When I made the second levy for Fourth National Bank, I found McCampbell there, and Mr. Hobson was also there. I told McCampbell I had another attachment, and he said, 'All right.' I levied this subject to my former levy, and subject to McCampbell's, and I notified Hobson of the hour, and the name of the person for whom this attachment was levied, and left him in charge for me as before. McCampbell and Mr. Hobson were both present, and

both agreed to it, and Mr. McCampbell remarked to me, after I made the Fourth National Bank levy, 'You have got more in here now than I have; you ought to whack up with me,'—meaning I ought to divide commissions with him." As to subsequent levies he says: "I went to the store, and notified Hobson of such levy, and noted the hour, and asked him if anybody else was ahead of me, and he would inform me, and I would also find McCampbell, and tell him, and he invariably agreed to my making such levies, and I made them subject to my former levies and to McCampbell's." He further states in his testimony that he had been an officer here for six years, and had made many levies subject to other officers, and others had made levies subject to him, and that it was universally understood between them that, where one officer consents and agrees to let another levy subject to him, the first levying officer will hold for both, and after the first gets his money he will turn over the surplus, if any, to the next levying officer; that this has been the usual custom, and was understood by all the officers. Mr. McCampbell was an officer of long experience, and familiar with this custom. This witness produces several orders directed to Hobson, the guard, authorizing him to turn over certain pictures to different individuals. Two of these orders are signed by both McCampbell and Talbot. Further testifying as to the custom among officers here, he stated that it was the custom here to go to the place where the articles were, and levy on them, seek the officer, tell him what had been done, and get his consent to the levy; and it was the understanding, whenever a man told him he had made a levy subject to his, that he would say, "All right, sir," and that he had, and that, if the officer in charge made no reply, he would get another man, and put him in there.

McCampbell, the deputy sheriff, testifies that after his first levy he put George Hobson in there, and that he staid all the time, holding the stock for him. In his original examination he says: "When the subsequent levies were made by the other officers, they would make and notify him that they had levied subject to his levy," and that would be about all that passed between them. He says he was never asked to hold the goods in possession for Talbot or the other officers as well as himself; that he has no recollection of making such an agreement; that there was simply nothing said about it. On cross-examination, he was asked, "What occurred between you and Talbot when he made his levies?" He said, "Nothing, except he levied subject to mine." "Q. Did you agree to his doing this? A. Yes, sir; I made no objection to it. Q. Did you not understand from this that after you got your money out of the levy he would get the surplus? A. O, yes, sir; it was generally intended that whatever was left, he would get it if there was any-

thing left." He says that was the way officers usually levied, subject to the levies of other officers, and that he had always made his levies in the same way. He always levied, and notified the levying officer that he had levied subject to his, and got his consent to it; that his impression was that it was understood that, after the first levy was satisfied, the first officers would turn the surplus over to the next levying officer, and so on; that he always expected the officer with the prior levy to turn the surplus over to him after his writ was satisfied; that this was the understanding among all the officers and the practice with them. He further testified as follows: "Q. Did you not expect in their cases, after you had satisfied the Warren Bros. attachment, to turn the surplus over to Dr. Talbot to pay his levies, made immediately after your Warren Bros. levy? A. I did not expect to turn the surplus over to him after I made my debt. I expected to pay no attention to him. I do not swear I paid no further attention to him, but paid more to the stock of goods." In another answer he says: "If I had sold the goods, I would have sold enough to have made my money, and then stopped." It is apparent that there is some little confusion in this officer's testimony, but, on the whole, we think it does not materially differ from that of Constable Talbot.

Hobson, the agent and guard left in charge, testifies substantially as follows: That he was placed in charge of the goods by McCampbell, the first officer to levy, who was to hold the goods for him; that Talbot and the other officers holding attachments would come in, and tell him they had attached subject to former levies, and he would say, "All right." In his original examination he says that he did not in positive terms say that he would hold possession for them as well as for Mr. McCampbell; that he would just say, "All right." He further testified that McCampbell levied back to a partition that divided the store, and put him in charge of these goods. Talbot subsequently came in, and told him he had an attachment; that he then showed him how far back McCampbell had levied, and told him that he was in charge for Mr. McCampbell back to that point. Talbot then told him he would levy on all that was not levied on, and then on what McCampbell had levied on subject to McCampbell, and he (Talbot) told him (Hobson) to take charge for him too, and he then says, "I remarked to him, 'All right,' and did take charge for him too." He then explains his statement made in his original examination by saying that he understood it to refer to the matter of his charging for his services; that he meant that he had no such agreement that he was to get pay from both of them, but that he certainly understood he was holding for McCampbell, and what McCampbell had levied on first, and then for Dr. Talbot after him, and also on the things McCampbell had not levied on. He says that McCampbell

agreed for Talbot to levy the First and Fourth National Banks attachments subject to his, and he says that he held the goods as well for Talbot as McCampbell from the time he went there until the receiver took charge; that he kept an account, or kept in his mind the levies as they were made, and would tell the officers who had levied ahead of them. Dodd, another one of the levying constables, testified when he made his levy that he showed his attachment to Mr. Hobson, and then would go and find McCampbell, and notify him, and that McCampbell said it was all right; said, "That is the way officers generally do; we waived all formalities as to each other."

This is substantially the testimony on this point. From it we conclude, in the first place, that, in accordance with the custom of officers here at Nashville, it was understood by them that when they made levies subject to previous levies, and notified the officer first levying, that, unless there was objection made at the time, it was understood that the first officer would hold for the officer making subsequent levies. In addition, as we understand this testimony, there was a positive assent to these subsequent levies by McCampbell, the officer making the first levy, and that there was, in effect, an express agreement on his part to hold the goods for the benefit of the subsequent levies. It is clear, from the testimony of Hobson, who was placed in charge, that he so understood it, that Talbot so understood it, and that the possession was, as a matter of fact, held for all of the officers who made levies. This being so, we are of opinion that the levies attacked were valid. See *Tyler v. Dunton*, 1 Tenn. Ch. 361, and *Nighbert v. Hornsby* (Tenn. Sup.) 42 S. W. 1090.

It is true that the supreme court on appeal reversed the decision of the chancellor in the case of *Tyler v. Dunton*, and we have been favored with a copy of the written opinion of the court delivered by Judge McFarland. But we do not understand this opinion to dissent from the law as laid down by the learned Chancellor Cooper in his opinion published in 1 Tenn. Ch. In his statement of the facts, Judge McFarland says that the stock of goods in question had been levied on by one Jones, a constable; that Losey, a deputy sheriff, came to the storehouse with an execution from the circuit court of Davidson county against Dunton in favor of Cheatham & Co.; that, on being admitted, he was informed of the previous levies; that he inquired about the amount of the previous executions, and made a memorandum of them, saying he would levy subject to these levies. No reply of any sort was made to this. He did not take, or attempt to take, any possession or control of any of them. He remained a few minutes, and left. Judge McFarland says: "One of the witnesses of Dunton proves that Losey, as he started to go out, said to Jones,

'I suppose you will let me have what is left,' but he does not remember that Jones made any reply. If Morgan & Steel, who also had levies, but subject to that of Jones, said anything, they said, 'All right,' or something to that effect, but he does not know that they said anything. This was all that occurred. Losey indorsed on his execution a levy on the goods subject to the previous levies." Judge McFarland then goes on to discuss the law in much the same manner, and to the same effect, as was done by Chancellor Cooper. And, among other things, he says, after stating that, in order to make valid a levy, an officer must exercise and assume some dominion and control over the goods: "In a case where one officer has control and possession of the property under his levy, how can another officer obtain any possession and control of the goods without the first officer's consent? * * * He has no control of the goods, unless the first officer agrees to hold for him. It may be conceded that, if the first officer agree to hold the surplus goods or money for the second levy, the levy would be good, for, constructively, the possession is joint. But is the first officer bound to do this upon simply being notified?" He holds that he would not be. He further says, when no consent is given by the first officer, the rights of others would have to await the sale under the first execution. It is clear that the decision of that case was placed on the finding of the court that there had been no agreement, no assent to the levy by Losey, and no agreement, express or implied, to hold for him. But in this case we find that there was an understanding that the subsequent levies were valid, and that the goods would be held subject to them. We think that, under the principles announced by Judge Cooper and assented to in the opinion of Judge McFarland, above, that the levies were clearly valid. Having reached this conclusion, it results that the decree of the chancellor dismissing the complainant's bill was correct, and should be affirmed.

There are other points raised by defendants which we deem it unnecessary to further pass upon, because the conclusions reached dispose of the case. But we will simply state them, in order to have the entire case made before the supreme court in this opinion, in the event of an appeal. .

It is first insisted that complainant's bill in this case cannot be maintained because filed without leave of court; second, because it does not bring the necessary parties before the court,—that it is filed against only six parties, while the decree is sought to be set aside to determine the rights of fifteen parties; third, it is insisted that complainant can get no benefit, even if it succeeds, because the sums paid back by the defendant herein would go to the next attaching creditors, as to whom the decree of February 16, 1894, is unimpeached.

On this point it is only necessary to state that the first six attachments consumed the entire fund. After this followed attachments Nos. 7, 8, 9, 10, 11, and 12, which are not attacked in this case, which in the decree mentioned were held to be prior to the complainant's, and which would exhaust the fund paid into court, even if the attachments of the parties defendant to this bill were vacated and declared void. So it follows that the complainant would derive no benefit from this proceeding, unless those attachments could likewise be set aside and vacated, and declared not prior to complainant's.

The fourth ground of defense is that complainant was guilty of laches in going to trial in its original suit with full knowledge of all the facts, and without any effort to set that decree aside. It does appear that the facts on which it is now proposed to attack these proceedings were known to counsel of complainant before the final decree in the previous case. As stated, however, we do not deem it necessary to pass on these points.

On behalf of the complainant, it is urged that the chancellor erroneously admitted certain testimony over the objection of complainant's counsel, viz. the testimony of Dr. Talbot, set out in full in the bill of exceptions. The ground of exception to this testimony is that the witness J. B. Talbot undertakes to contradict the written return made by him, and the testimony of George M. Hobson also goes to establish the same fact. It is obvious, from what we have above said, that if this testimony were rejected, and the exceptions of complainant sustained, the result would be in no wise changed.

It was also objected that this testimony also contradicted the return of McCampbell, the deputy sheriff. But we do not agree with either contention. The return of McCampbell was, as above shown, somewhat vague, in that it showed it was levied on the stock of goods, or on a sufficient amount of it, and we take it, in any event, that it would be perfectly competent to show, in a contest between creditors, that the return was false, and to show that, as a matter of fact, McCampbell's attachment was not levied upon all the property or any of it. If that had been true, the mere fact that Talbot had returned that his levy was made on the stock of goods subject to the rights of McCampbell's attachment, we do not think is equivalent to saying that McCampbell's attachment was levied on the entire stock of goods. But, as we say, in any event this point is not material, inasmuch as we would reach the same conclusion if the testimony was excluded. The decree of the chancellor will be affirmed, with costs. All concur.

Affirmed orally by supreme court, January 13, 1899.

TAYLOR et ux. v. FARMERS' SAVINGS & BUILDING & LOAN ASS'N.

(Court of Chancery Appeals of Tennessee. Nov. 5, 1898.)

BUILDING AND LOAN ASSOCIATIONS—CANCELLATION FEES—PAYMENT OF MORTGAGE—FRAUD ON BORROWER.

1. Formal tender of the fee for cancellation of a building association mortgage need not be shown in an action for cancellation, where there is an absolute denial by defendant of the right, on the ground that the debt has not been paid.

2. A contention that a building association mortgage was to be discharged by the payment of a fixed amount for a specified time is not sustained, where the borrower is unable to tell who the agent was who deceived him by making such a representation, and he had notice that no agent had any authority to make such representation, and the pamphlet outlining the methods of business showed that the reference to the payments as working a discharge of the mortgage were merely estimates of the time required, and the contract signed by the borrower showed on its face that payments should continue until such time as the dues and profits on the stock should equal the amount loaned.

3. That a building association had intended to practice fraud on borrowers by ordering the destruction of all old pamphlets, thus destroying evidence of representations to former borrowers, is not sustained, where the change by the substitution of new pamphlets was for the purpose of notifying the public of changes in the methods of business, which were more favorable to borrowers than under the older pamphlets.

Appeal from chancery court of Franklin county; T. M. McConnell, Chancellor.

Bill by Dick Taylor and wife against the Farmers' Savings & Building & Loan Association. From a decree for complainants, defendant appeals. Reversed, and bill dismissed.

Lynch & Lynch and J. C. Bradford, for appellant. Turney & Turney and Banks & Embrey, for appellees.

NEIL, J. The bill in this cause was filed to have a debt declared settled by payment, and the trust deed made to secure it discharged. The defendant denies that the debt has been paid, and that the complainant is entitled to a discharge of the security. There is no serious dispute as to the amount paid, but the difference between the parties depends rather upon diverse views now entertained as to the nature and duration of the contract. The facts are as follows: The defendant is a building and loan association organized under the laws of Tennessee, and was doing business, as such, in the state in the year 1890, and has since continued. On the 2d of April, 1890, complainant Dick Taylor applied for membership in the association, and subscribed for five shares of stock, and a certificate for these shares was issued to him on the 15th of the same month. On the 10th of August, 1890, he borrowed from the association \$500, and, to secure the repayment of this sum, pledged his stock, and also for the same purpose, on September 9, 1890, executed a trust deed upon the real estate described in the bill. A note or obligation was given for

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and the profits apportioned to each share) equals \$100. While it cannot be stated with absolute certainty what time it will require for the stock of this association to mature, yet the experience of building and loan associations and reliable and safe mathematical calculations make seven years a conservative estimate for the maturing of shares under the plan of this association. The complainants undertake to explain this passage from the prospectus by saying the context shows that it applies only to investment stock. This is not the correct view. The statement is general, applying to all stock. The next paragraph, it is true, contains an illustration of the rule stated, as applied to investment stock; but the prospectus nowhere limits it to that stock. On the contrary, a comparison of that table with the one appearing on page 11 (already copied above), setting forth how the rule applies to a borrowing stockholder, will show that it is the same, with the exception of the "semi-annual payment of dues, premium, and interest deducted from the amount of the loan and credited on the indebtedness, \$86.00," and "thirteen semiannual payments of \$86.00,—\$1,118.00." On page 10 of the same pamphlet the following occurs: "All applications for loans must be made on blanks furnished for that purpose by the association, and no loans will be made for a longer time than seven years, or until the maturity of the stock of the borrower." On page 12 the following occurs: "Agents have no authority to alter, cancel, or waive any of the terms and conditions contained in the printed matter issued by the association. They have no authority to promise loans as to time or amount, nor to make any contract in reference to loans, as all negotiations regarding loans must be made from the home office." In addition to this, it will be noted that the note itself or contract which the complainant executed for the money borrowed contains the agreement, signed by him, that "said payments shall be continued until the sum so credited on said stock, together with the profits thereon, shall equal the amount loaned."

In view of these facts, we cannot find that the complainant Dick Taylor was misled as to the true nature of the contract. In the first place, he is unable to tell who the agent was that so deceived him; in the second place, he had notice that no agent had had any authority to make such representations as shown by the language above quoted from the pamphlet Exhibit A; in the third place, the pamphlet shows that the seven-years limit was but an estimate, and that no one could state with absolute certainty when the stock of the association would mature; and, in the fourth place, the contract which he signed when he borrowed the money showed on its face that payment should continue until such time as the dues and the profits on the stock should equal the amount loaned.

From the testimony of Mr. Taylor, we cannot doubt that he believed, and we find that he did believe, that his contract would be canceled by 14 semiannual payments of \$43 each,—that is, by paying for seven years; but we further find that this belief on his part was wholly unwarranted by the facts before him when he borrowed the money, and that it was not justified by anything said to him by any agent of the defendant lawfully authorized thereto, or by anything done by the defendant, or by any breach of duty on its part, and, further, that such belief was induced wholly by defendant's negligent failure to make himself familiar with the terms of the contract executed by him. We further find that, when complainant filed his bill, the loan had not been repaid; neither had his stock matured. At the date just mentioned, the complainant owed upon the loan the sum of \$148.26. It is true that the complainant had been paying for the period of seven years, and had made 14 payments, and, if the duration of the contract were such as insisted by complainant in his bill, these payments would entitle him to the cancellation sought; but, under the contract as it really existed when the bill was filed, the complainant had not satisfied it, but owed then the aforesaid sum of \$148.26.

It is insisted by complainant that the proof shows that the defendant intended to practice a fraud upon the complainant, and that this is shown by the fact that on September 17, 1890, the defendant wrote to the complainant, as its agent, to destroy all the old pamphlets issued prior to that time, and use, instead, a new issue forwarded to him. The argument is that the defendant thereby sought to destroy the evidence existing against it concerning the aforesaid alleged representations as to the seven-years payments. This surmise is without foundation, however, in the proof. The change was made with no such sinister purpose, but merely to notify the public that the business would in future be conducted upon a new basis in these particulars: (1) In the allowance of more liberal terms of withdrawal; (2) that, in making loans thereafter, 50 per cent. would be allowed upon the valuation of property, instead of 40 per cent., as theretofore; (3) that interest would be charged at the rate of 6 per cent., instead of 5 per cent., as before. These reasons were communicated to complainant, as the agent of defendant, in a letter of date September 17, 1890, urging upon him to push the defendant's interests under the new terms, which it regarded as more liberal than the old. The letter bears on its face evidence of its entire good faith, and we have no doubt of the fact. The direction to destroy all of the old pamphlets was natural and wholly proper, because the subsequent issuance of the old and the new, differing in important particulars, would have been sure to create confusion and probably litigation in the conduct

It is a canon of construction that, where a number of exceptions are made, all other exceptions are absolutely prohibited or disallowed. It seems to me that a court should never construe a constitutional provision contrary to the express language thereof. For the reasons given, and others not necessary to mention, I respectfully dissent from all that part of the opinion which holds the so-called "Parole Law" to be valid or constitutional.

LOUISVILLE & N. R. CO. v. COMMON-WEALTH.

(Court of Appeals of Kentucky. June 17, 1899.)

"Not to be officially reported."

Dissenting opinion. For majority opinion, see 51 S. W. 164.

HAZELRIGG, C. J. It is not disputed that, at the time of the incorporation of the long and short haul clause of the act of congress into the Kentucky constitution of 1891, the settled construction of the clause by the tribunals charged with its enforcement, as well as the construction of the same clause by the federal courts theretofore called on to construe it, was the same as was subsequently adopted by the supreme court of the United States. When this court, therefore, came to construe the clause, it had before it the decision of the question at issue by the supreme court of the United States and the decisions of numerous federal courts, all agreeing that competition was a controlling factor in the adjustment and regulation of rates, and that its presence and influence conspired to make the "circumstances and conditions" of shipments substantially dissimilar from shipments where such competition did not exist. I insisted then, as I do now, that it ought to have been assumed as indisputable that, when the framers of our constitution took the pains to copy the federal law on the subject involved, they expected the same construction to be put on the borrowed language as had theretofore been put on the law from which they borrowed. Indeed, the ordinary rules of construction required the adoption of the views of those courts which had already construed the law when we incorporated it into our law. This court has again and again announced the principle that, by borrowing the law from a given source, we borrow its construction as well. Instead of departing from this settled rule, there are controlling and peculiar reasons affecting the regulation of common carriers why the principle adverted to should be adhered to. The carriers to whom the law was to be applied were in the main interstate carriers, and were making their shipments into and out of the state under traffic rates adjusted to meet the construction of the long and short haul clause by the federal courts. Our lawmakers must have foreseen

that the same law should control all classes of shipments, else there was danger of gross discrimination against the interests of our own people. The question concretely put before them was, shall the mine owners of Jellico, Tenn., have access to the trade centers of the state of Kentucky at the cheap competition rate, while the output of mines at Jellico, Ky., a few hundred yards off, shall be limited to the local demand, and be shut out of the larger market, because of the higher and noncompetitive rates? The answer was such as it ought to have been. The lawmakers agreed to adopt even the ambiguous and awkward phraseology of the federal (the interstate) law, to the end that, whatever might be the construction of the law, at least it must, according to well-settled rules, be the same construction, whether applied by the state or by the federal tribunals. I venture to say that it never entered the minds of our lawmakers that this law would receive a construction radically different from the construction put on it by the federal courts, certainly not if this different construction must result to the disadvantage of intrastate traffic. It is not amiss to say here that a departure from this well-settled rule has already inflicted irreparable loss on the coal interests of the state in the locality where the question has arisen. And the construction will continue to embarrass and delay development of the great forests and mines of Eastern and Southeastern Kentucky. Aside from all this, there is a more serious question involved. Under the law as construed by the majority opinion, the company must (1) increase its rates from the Kentucky mines to Louisville beyond the rates fixed to Lebanon, or (2) decrease the rates from the mines to Lebanon below those charged to Louisville, or (3) depend upon the arbitrary will of the railroad commissioners to adjust the rates as to them may seem proper. If the first alternative is forced on the company, the result is a prohibition of the carriage of coal from the mines to Louisville, as none could be sold there. This result would be confessedly an unwarrantable interference with the reasonable use of the company's property. If the second, then the company is forced to furnish the use of its property at a price below that which is reasonable, and at rates below those which afford a fair and just return on the capital invested. This is true, because it is to be assumed that the rates from the mines to Lebanon are already reasonable and just. The proof offered is conclusive on this point. The only remaining refuge of the company is to submit its management to the arbitrary will of the commissioners. And this say the court, in effect, is better than to leave the matter at issue to a jury. I think the court overlooks the fact that a jury must act within the rules of law. A trial before a jury is had under the ordinary forms of law. The judge and jury are at least controlled and bound by legal principles and

precedents. I think, in the first place, neither congress nor the constitutional convention ever intended to vest their respective boards of commissioners with such extraordinary power; and, in the second place, I think the law so construed would result in an unwarrantable interference with the reasonable use of the appellants' property, and to an extent not permissible under either the state or federal constitution.

In the recent case of *Railway Co. v. Smith* (April 17, 1899) 19 Sup. Ct. 565, the principle is emphasized that the power of the state, in the matter of regulating railroads, is to be exercised in subordination to the federal constitution, and that railway companies have a constitutional right to manage their own properties, subject only to the exercise by the state of a reasonable supervision. To say that as yet the company is not hurt, because the commission will "do right," is but begging the question. Such a construction results in the substitution of a tribunal to try the property rights of the company which is restricted by no legal safeguards. The statute so construed is clearly in conflict with the constitution of the United States. In *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702, the supreme court said: "This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice." Without elaboration, I respectfully dissent from the opinion of the majority, and refer to the former dissenting opinion in the same matter as indicating my view in detail of the real meaning and purpose of the statute.

BURNAM and DU RELLE, JJ., concur.

**McDOWELL v. COLUMBIA BUILDING,
LOAN & SAVINGS ASS'N'S
ASSIGNEE.¹**

(Court of Appeals of Kentucky. June 17, 1899.)

**ASSIGNMENTS FOR CREDITORS—ATTORNEY'S
FEES.**

In an action by the assignee to settle the assigned estate, a creditor who has been appointed to represent all creditors of the class to which he belongs is not entitled to the allow-

ance of an attorney's fee to be paid coming to such creditors. conflicting rights of the different classes have been presented by the petition.

"Not to be officially reported.
Petition for rehearing. Denied.
For former report, see 50 S.

HAZELRIGG, C. J. We regard the opinion of the learned chancellor, James, as fully meeting the contention of the appellant, and present it as a response to the petition for a rehearing. It is as follows:

"This case is submitted on the petition of C. R. McDowell, the owner of a share of stock in the insolvent defendant, now in the hands of the assignee, for an order allowing him \$2,500 on fees for services rendered by him in this case, and for leave to withdraw the sum from the fund in court, to be paid to the class of stockholders or to the defendant association before the same class with himself, the said assignee. In support of this motion, McDowell has filed his own affidavit and affidavit of his counsel, on whose affidavits said motion is made, and the three eminent members of the bar at this point that such an allowance would be reasonable; it being stated in two affidavits that, in the belief of the said assignee, \$2,500 would be a fair and reasonable allowance. The responsibility of such a decision wholly upon the judge, whose duty it is to determine the merits of the case as well as the intrinsic merits of such a motion. With the utmost deference and respect for the opinion of my distinguished colleagues on the bar, whose affidavits are filed in support of said motion, it will not, I deem, be deemed arrogance in the court, to say that it is to pass upon the said motion, which has considered the case in all its aspects from the filing of the petition to the filing of this motion, to say that the court, in passing upon this motion, exercises judgment, based upon its own knowledge of the case as it is disclosed by the record, in passing upon said motion, is not improper to make an epitome of this case, as it appears in the record, to illustrate the correctness of its view. Columbia Building, Loan & Savings Association is a corporation created under the laws of this state (chapter 56 of the Statutes) by filing articles of incorporation in the county clerk's office of Jefferson County. Its general nature and character are set forth in its said articles, and are as those of all such associations, and are too well known to require repetition of opinion. It was empowered in the articles of incorporation to adopt by the proper conduct of its business, and to do so. Under the decision of the court in *Simpson v. Assignee*, 41 S. W. 570, holding that the cha-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

assessments made by such association are usury, most of such institutions have been forced into liquidation. On the 30th day of June, 1897, the defendant the Columbia Building, Loan & Savings Association, being insolvent and unable to pay its stockholders and creditors, executed to the plaintiff, the Columbia Finance & Trust Company, its general deed of assignment, whereby it assigned and conveyed to said assignee all of its property, real, personal, and mixed, whether in possession or in action, and wherever situated, together with its books, accounts, and records, notes, mortgages, and choses in action, etc. The Columbia Finance & Trust Company accepted the deed of assignment, and thereby, as assignee, assumed the duties of the trust, and qualified as said assignee on the same day, to wit, on the 30th of June, 1897. On August 6, 1897,—a month and six days after the said assignment,—the assignee, the Columbia Finance & Trust Company, filed its petition in equity for a settlement of its accounts, and for advice and instructions by the court in the administration of said trust, and for a distribution of the money, the proceeds of the assets of the insolvent estate, to and among those entitled thereto, and prayed that it be allowed reasonable compensation for its services. In its petition the assignee made its assignor, the Columbia Building, Loan & Savings Association, and several named stockholders, to wit, J. C. Hughes, Leslie G. Pearce, C. R. McDowell, and George Kilvington, defendants in said suit, and made the following averments: 'That the assets of the insolvent assignor coming to its hands under the said deed of assignment amounted in all to about \$140,000; that the shares of stock which the insolvent association had issued were of the par value of \$100 each; that there were outstanding in the hands of divers and sundry persons many shares of stock in said insolvent association upon which the holders had paid about \$135,000 in the aggregate; and that the outstanding stock consisted of paid-up stock and installment stock.'

"The assignee in its petition further alleged, and brought prominently to the notice of the court, by specific allegations, 'that in accordance with the by-laws of the assigned association, and under the statute laws of this state relating to the building and loan associations, many stockholders in the said defendant association holding shares of stock in different classes therein had duly filed with the said association notices of withdrawal therefrom, with the intent and purpose of withdrawing from the said association and ceasing to be stockholders thereof, and of receiving from said association, in cash, the net withdrawal value of their stock, as defined in section 860 of the Kentucky Statutes; that many of said notices of withdrawal had been filed by stockholders in the said insolvent association prior to its said assignment; that the aggregate withdrawal

value of said stocks, notices of which withdrawal had been given to the said defendant association before the time of its said assignment, was about \$25,000; that many difficulties had arisen touching the administration of said assigned estate, and that it, the plaintiff assignee, needed and desired the advice and direction of the court in the proper administration, settlement, and distribution of said estate; that it would be necessary for the court to determine what were the respective rights of the stockholders of both classes of stock,—that is, of the paid-up stockholders and of the installment stockholders, and particularly whether any right or advantage accrued to the stockholders who had filed with the insolvent association notices of withdrawal before the said assignment, and whether priority in time of filing such notices of withdrawal created a difference in the rights of such withdrawing creditors, as among themselves.'

"The plaintiff further alleged that these questions and many others were necessary to be decided by the court, and 'that the defendant J. C. Hughes owned sundry shares of installment stock in said association, and that it would be difficult and impracticable to make all of those holding stock of similar character parties defendant to the petition; that the defendant George Kilvington, at the time of said assignment, owned sundry shares of paid-up stock in the said association, and that there were numerous other holders of such stock, and that it would be difficult and impracticable to make all of them parties defendant to the action; that the defendant Leslie G. Pearce owned sundry shares of installment stock not paid up, and that he was a borrower of money from said corporation, with his stock put up as collateral security for the same, in addition to a mortgage on real estate, to said association; and it asked for advice and directions by the court as to whether such stock held by Leslie G. Pearce and those similarly situated conflicted with holders of other installment stock in said association who were not borrowers of money from it; that the borrowing stockholders like said Pearce were numerous; that it would be impracticable to make all of them parties defendant; and it asked the direction and advice of the court as to whether it was necessary that there should be made separate classes of defendants.'

"The assignee in its petition further alleged that the defendant C. R. McDowell owned, at the time of said assignment, sundry shares of stock in the defendant corporation, notice of the withdrawal of which had been filed by the said McDowell with the defendant association before said assignment, and that there were numerous holders of said stock who had given like notice of withdrawal, whom it would be difficult or impracticable to make parties defendant to the action, and that it was necessary, in order to be a proper settlement and distribution of the as-

signed estate, that all of the creditors and stockholders of the defendant corporation should present and prove their claims and demands in this suit, and not otherwise; wherefore it prayed that all of the creditors and stockholders of the insolvent association be required, by proper order of court, to present, file, and prove their claims and demands in this suit, and that they be enjoined from instituting any separate or independent suits against the plaintiff; and it prayed for a final adjudication of the respective rights of all the parties and classes of stockholders concerned in said estate, and that the court should from time to time advise and direct the plaintiff assignee in the administration of the said assigned estate; and prayed that this action be referred to the commissioner of this court under such orders and directions by the court as might be needful and proper to the final settlement and distribution of the estate, and for all general and equitable relief.

"It will thus be seen that every question of law involved in the adjustment of the conflicting rights of the various classes of stockholders of the said insolvent association were presented to the court for its decision by the plaintiff assignee in its said petition. It is not alleged in the assignee's petition, nor in any other pleading in this case, how many stockholders there are in the insolvent association, nor how many shares of stock are held by each. But the books and accounts of said insolvent association will undoubtedly disclose these facts. They are in the possession of the assignee. On August 23, 1897, a stockholder, Miss Rasalie Schana, came in and filed her answer, counterclaim, and cross petition, setting up that she owned five shares of stock in the said insolvent association, and that hers was installment stock, and that there were various classes of installment stockholders in said association; that in her class there were many persons owning stock similar to hers, and that they were entitled to advantages over other classes of installment stockholders known as 'paid-up stockholders.' She therefore asked, and on her said motion an order was entered without objection, that she be appointed to defend for all holders of stock of the class to which she belonged. On December 4, 1897, F. W. Schafer, another stockholder, filed his answer, counterclaim, and cross petition as a withdrawing stockholder, and prayed to be allowed to represent and defend for all withdrawing stockholders of his class, which was called class B of the withdrawing stockholders. On October 2, 1897, Leslie Pearce filed his answer, counterclaim, and cross petition, setting up that he belonged to a certain class of stockholders or creditors of the defunct association. He denies that the withdrawing stockholders were entitled to any preference by reason of their filing, with the insolvent association before the assignment, their notices of withdrawal; that the

parties similarly situated with himself were numerous, and he asked to be allowed to defend for all similarly situated with himself, and for a reasonable attorney's fee for defending for such parties. On October 2, 1897, the defendant C. R. McDowell filed his answer, counterclaim, and cross petition, setting up that he owned sundry shares of stock in the defendant company, and that he, with many others too numerous to mention, had given notice of their withdrawal, and he asked to be appointed to defend for all similarly situated with himself; and such order, like all others of like character, was made without objection and as a matter of course. On December 17, 1897, Claude Paxton and Ed. C. O'Rear, borrowing members, filed their answer, counterclaim, and cross petition, and asked to be allowed to represent and defend for all borrowing members not otherwise represented; which order, on said motion, was likewise made without objection and as a matter of course. On October 2, 1897, Edward O'Brien filed his answer, counterclaim, and cross petition, stating that he was a borrowing stockholder and owned 20 shares (\$2,000 worth of stock), and that there were many others like himself, and he asked to be appointed to represent and to defend for all borrowing stockholders, irrespective of any classes; and the said order, like the others of same nature, was entered without objection and as a matter of course. On January 3, 1898, J. C. Hughes filed his answer, counterclaim, and cross petition, averring that he was a holder of installment stock in said corporation, and he asked to be appointed to defend for all holders of installment stock; which order, like the others, went without objection and as a matter of course. The estate of the insolvent association vested in the assignee by virtue of the deed of assignment. By the express terms of the statute (Ky. St. § 74), the assignment is for the benefit of all the creditors of the assignor in proportion to their respective claims after the payment of the expenses of the trust. It will be observed that the assignee, who in law represents all of the creditors of the insolvent assigned estate, in its petition for a settlement of its administration thereof pointed out to the court the conflicting claims of the various classes of stockholders as they appear by the books and records of said association, and invoked the decision of the court upon these very questions in order to a proper settlement and payment of their said claims. The articles of incorporation, by-laws, books, and records of the insolvent association, as shown by the pleadings, were and are all in the hands of the assignee, and filed as exhibits with its petition. They clearly set forth and show all of these various classes of claimant shareholders, and to which class each and every one of these various defendants and all other members belong; and the certificates of membership or shares of stock owned by the various stockholders, all of which are before the

assignee and are shown by the books in his possession, clearly show every fact alleged by the various defendants in their various answers, counterclaims, and cross petitions. The record shows that up to this day not a syllable of proof has been taken in this case. The truth is there are no issues of fact in the case calling for proof, as far as the pleadings show. There are voluminous, repeated averments of legal conclusions as to the legal rights of the various shareholders who have pleaded in this action, but not a single allegation of fact is alleged which the by-laws, books, and records of the corporation in the hands of the assignee do not clearly show, and which has not been alleged in the plaintiff's petition. Up to this date there has never been a motion for an order of reference in this case, nor has an order of reference to the commissioner of this court been made, as should have been done in order that he (the commissioner) might, under specific directions of the court, ascertain and report the numbers of the various classes of shareholders or creditors of the defunct concern, and the members of each, and their respective claims, and the equities and priorities, if any, existing between the said classes and the members thereof. It was no part of the duty of the court, without a motion to that effect, to have directed an order of reference in this case. In suits of this character for the settlement of insolvent estates, the questions of law presented in the petition by the fiduciary and upon which the decision of the court is invoked, and all other questions of law raised by the pleadings touching the conflicting rights of the claimants, should first be settled by the court, and then a judgment *quod computet*, followed by an order of reference, based upon the said decision of the court, with directions to the commissioner to adjust and report upon the claims, equities, and priorities of the several classes of stockholders and creditors in accordance with the principles of law thus settled by the court. *Story, Eq. Pl. § 90.* The duty of a commissioner, under such an order of reference, is to advertise for all stockholders, claimants, and creditors of the defunct assigned estate to appear before him, and to present, file, and prove their claims within a reasonable time (the particular time to be fixed in such notice), or thereafter to be forever barred. In accordance with such an order of reference and notice, after the expiration of the period therein named, it is the duty of the commissioner to make up his report, and file it in the court with as little delay as possible. Had such a course (which is the only proper course) been pursued in this case, doubtless this insolvent assigned estate would be almost ready to be wound up and settled, and the money realized from the assets distributed among those entitled thereto. It is now over 16 months since the petition was filed, on August 6, 1897, in this case. If the attorneys become impatient for their fees in

such cases of long delay in the settlement of such estates, what may justly be the feelings of creditors and stockholders to whom the assets belong, and who of right are entitled to a distribution of the proceeds thereof? It will not be denied that judicial proceedings in winding up insolvent estates and the estates of decedents ought to be as inexpensive and as expeditious as possible. No costs should be incurred that are not reasonably necessary to a full, legal, and equitable settlement of such estates. It was proper that the assignee should file its petition for the settlement of this estate as soon as it did, in order that it might not be harassed by a multiplicity of suits involving a race of diligence between the different creditors in the various classes striving for an undue preference. This is not a suit instituted by a stockholder or any class of stockholders against the assignee to compel it to settle this estate. In such a case it would be admissible, undoubtedly, for the requisite statutory number of creditors in interest under the statute to file a suit in their own behalf and in behalf of all other creditors to compel a derelict or defaulting fiduciary to settle and distribute the estate, and to have a reasonable allowance for themselves and their attorney for the institution and prosecution of the suit. On the petition, however, of an assignee or other fiduciary for a settlement of an estate in his hands, setting out in said petition the conflicting equities, rights, liens, or preferences of different classes of creditors or claimants, the court will distinguish between such conflicting classes, and settle the law between them, and direct the commissioner, in an order of reference, to ascertain and report upon the claims of the various classes in accordance with its rulings thereon. Where there are conflicting claims which it is difficult to adjust, or where there are difficulties in determining the proper mode or order of payment or distribution, it is the duty of the assignee to file his bill in equity for advice and directions in the premises. *Burrill, Assignm. p. 533, § 384.* The assignee should settle the estate and close his trust within the shortest reasonable time. Diligence and good faith are strictly required of the assignee in the execution of his trust. Without such diligence in the execution of the trust, the assignments, instead of being for the benefit of creditors, will be made the means of hindering and delaying them, in which latter event the assignee is liable in damages and subject to removal. *Elicks v. Copeland, 53 Tex. 581; Abercrombie v. Bradford, 16 Ala. 560; Cunningham v. Freeborn, 11 Wend. 241.* Under section 82 of the Kentucky Statutes, the assignee in a voluntary deed of assignment is subject to the orders and jurisdiction of the county court in the administration and management of the assigned estate. By section 96, *Id.*, the assignee or a creditor or creditors representing one-fourth of the liabilities may file a suit in

equity in the circuit court for the settlement of the estate. When this is done, the jurisdiction of the county court over the assignee and the assigned estate ceases eo instante, and thenceforward the assignee and the assigned estate are exclusively subject to the control and jurisdiction of the circuit court in equity. Thenceforward the methods of procedure upon the accounting and settlement are regulated by the practice and rules of courts of chancery in accordance with the general jurisdiction of such courts over trusts and trustees. It is the duty of the fiduciary—and such duty has been performed by the assignee in this case—to set up in his petition for a settlement the controverted questions of law and conflicting claims of creditors as they appear before him. We have seen that the assignee in this case, in its petition filed on the 6th day of August, 1897, pointedly called the court's attention to, and invoked its decision upon, the question of law whether or not the withdrawing creditors, in the final settlement and distribution which it was seeking to make, should be allowed any preference over other creditors and stockholders of the said insolvent association who had not withdrawn. And so, in regard to other questions of preference and conflicting claims between the several classes of creditors owning stock in the said insolvent association, the assignee in its petition, by proper averments, raised the questions of law affecting the same, and invoked the court's decision thereon, in order that the order of reference and the report of the commissioner might be in accordance therewith.

"This brings us to consider the court's duty on the motion before it. On the 2d day of October, 1898, as we have seen, C. R. McDowell, whose motion we are considering, filed his answer, counterclaim, and cross petition in this case, in which he states, among other things, that there are numerous stockholders or creditors of the class to which he belongs whose names are not known to him, and who duly gave to the defendant association, more than 30 days before the assignment, as set out in the plaintiff's petition, notices of their withdrawal of stock, and that they surrendered to the defendant association their certificate of stock held by them, respectively, on which was indorsed the following: 'For value received, I hereby assign, transfer, sell, and set over all my rights, interest, and title in and to the shares of stock mentioned in the within certificate to the Columbia Building, Loan & Savings Association, of Jefferson county, state of Kentucky.' This allegation is not controverted, and, if true, which it must be assumed to be, then all the certificates of stock of the withdrawing members whom he claims to represent had been delivered, and were turned over to, and were in possession of, the insolvent association, with the said indorsements thereon, and per consequence within the knowledge and in the possession of the

assignee. No proof, therefore, was necessary to be taken upon this question, and, indeed, none ever has been taken in this case in support of that or any other allegation in any pleading filed by any of the parties to the record. The statute cited supra, under which this class of creditors claimed this preference, need not and should not be pleaded; therefore the answer, counterclaim, and cross petition of defendant McDowell alleged no fact which was not known to the assignee and which was not a matter of law as well as a matter of record in and among the papers, books, and records of the insolvent concern in the possession of the said assignee, and would necessarily have to be produced before the commissioner under the order of reference, and passed on by him in accordance with the rulings and directions by the court set out in the order of reference. Whether, therefore, the defendant McDowell represented the other withdrawing shareholders similarly situated with himself or not is a matter of no concern or interest whatever to the class he sought to represent, and could be of no advantage or disadvantage to them one way or the other. He could not benefit them by being appointed to defend for them, nor would they have been prejudiced by having no one appointed to represent them, because the assignee represented them, and their legal rights, whatever they might be, appeared by the books, records, and papers and certificates of membership delivered to the assignee, and filed by him in this case, and which had necessarily, under the petition, to be passed upon by the court before an order of reference could be made, and reported on by the commissioner before a final settlement could be had. His appointment could not and in no wise has benefited the assigned estate. It did not prevent a multiplicity of suits, nor has it facilitated or expedited the settlement of the estate, nor hastened the closing of the trust. Its only effect, if this motion is sustained, is to lessen, pro tanto, the distribution among creditors by burdening the assigned estate with unnecessary costs in the way of attorney's fees which should not be allowed. This observation applies with equal force to the other different classes of shareholders or creditors whom the several separate defendants in this case have sought through similar orders of the court to represent. In his answer, counterclaim, and cross petition, the defendant McDowell makes the following allegation: 'Defendant does not know the exact amount due to him, or to other members of his class as aforesaid, but that said sums are peculiarly within the knowledge of the plaintiff, the assignee, and are shown by the books of said association now in the plaintiff's [assignee's] possession.' The assignee has never disputed the rights of any creditor or class of creditors; but in its petition, as I have shown, raised the very questions which these several defendants

have sought to raise, viz. whether they or any of them were entitled to any preference or priority among and between themselves. And upon these questions the assignee, in its petition, invoked the decision of the court. The defendant McDowell, in his answer, further states 'that the said association, prior to its assignment, became indebted to him and to all others of his class in the sums and amounts that will be shown to be due them by the books of the company upon their notice of withdrawal, and the sale and assignment of their stock to the defendant corporation as herein set out, and that said demands became due within thirty days, respectively, from the date of said surrender of said stock, and prior to the date of the assignment of the defendant corporation to the plaintiff, and that demand for payment had been refused.' If this averment be true (which it must be assumed it is) that the facts stated in his answer appear from the books of the corporation in possession of the assignee, what necessity could there be for this class of creditors and the other classes to have a nominal party to represent them, any more than there would be for the general creditors of any insolvent estate or of a decedent's estate and the different classes of such creditors to have some one represent them in a suit where the administrator or executor files his petition to settle the same? This is substantially all that is stated in the answer, counterclaim, and cross petition of the claimant C. R. McDowell, filed October 2, 1897. For the purpose of again raising the question of law which it had raised in its original petition, viz. whether the withdrawing creditors were entitled to a preference, the assignee, on November 20, 1897, filed its demurrer to the answer, counterclaim, and cross petition of C. R. McDowell, and filed its reply, reaffirming the facts set up in its original petition as to the withdrawal and claims of McDowell and the class of creditors to which he belonged; to which reply McDowell demurred; thus, for the third time, raising the same question of law which had been raised by the original petition and by the demurrer of the plaintiff to McDowell's answer, counterclaim, and cross petition. These demurrers were submitted, and on January 29, 1898, Judge Fontaine Fox, associate counsel for McDowell as shown by the record, filed a short brief of a page in length, and James Quarles, also counsel for McDowell, filed an extended and able brief in the case. At the close of this brief, Judge Fox referred to and sent out with it a brief of Mr. W. W. Watts filed in a case in the common pleas court, in which the same questions were involved, and in which case Mr. Watts was of counsel. Mr. Watts' brief was a painstaking exposition of the law and reviews of the authorities in England and in this country on the legal questions involved, and, with a frankness highly creditable to him, he cited all the cases pro and con in

England on the question, where undoubtedly the weight of authority is in favor of the claim to a preference by the withdrawing stockholders. He also cited all the cases in this country bearing on the point, where there is a decided diversity of judicial opinion on the subject, but where, as he frankly admitted, the weight of judicial authority is against the contention of the withdrawing shareholders. This brief of Mr. Watts was read with interest and profit by the court, and, if the court had entertained any doubt of the reason and justice in law or equity of his contention in favor of the withdrawing creditors, this brief of Mr. Watts would have removed it. On February 5, 1898, the court passed on the demurrer of the assignee to the answer, counterclaim, and cross petition of C. R. McDowell and the withdrawing creditors, and held, as will appear by memoranda upon the wrapper of that date, that the withdrawing creditors had a contract right to withdraw from the association, fixed and vested in them by their certificate of membership, by the statute law of the state, and by the by-laws of said association, and that they were entitled to have said contract right enforced, notwithstanding an advantage would thereby be obtained by them over those members of the association who did not avail themselves of their contract right to withdraw. It has not been made to appear by allegation or proof how many withdrawing stockholders there are, or who they are, or how much they are entitled to apiece or in the aggregate. Thus stands their case as it appears from the record now before the court. It seems that the assignee has from time to time paid money into court and procured orders for the custody and preservation of the property, and since this submission has filed an extended report of its acts and doings for the past year, and that at this time there is over \$12,000 to the credit of the assignee in court for the benefit of creditors or members of the association.

"The questions raised by the other six defendant creditors who filed their answers and counterclaims and cross petitions, and who were on their respective motions appointed to represent the members of the association belonging to their respective classes, have not been passed upon by the court. These other six defendant members, belonging to as many different classes, who have come into the court to assert their individual rights, and at the same time, by motion, have obtained orders appointing themselves to represent the said several respective classes of shareholders or creditors holding similar claims, are self-constituted subassignees or deputy assignees undertaking to represent the rights of said classes, and thereby to perform the duties to that extent which the law imposed on the original assignee under the deed of assignment. They occupy the same relation to their respective classes which McDowell does to the class he claims to represent, and, if any

one of them is entitled to an allowance as a fee on account for his attorney against the insolvent association, to be charged against the fund coming to his particular class, such undoubtedly is equally the right of each and every other one of these self-constituted sub-assignees or deputy assignees. The carcass or corpus of the estate is upon the judicial table. In law and equity it belongs to the creditors and shareholders of the insolvent concern whose assets are under the administration of the original assignee in this court of equity. Shall it be consumed in unnecessary attorney's fees, or shall it be divided among those to whom it belongs? Lord Sherbrooke, in attacking a vicious system of costs and expenses which had been permitted to go, for a long time, unchecked and unrebuked in England, in the settlement of insolvent estates, used the following apt language, which is peculiarly appropriate to a kindred procedure which has crept into our courts in the settlement of insolvent estates and the estates of dead men: 'It is,' said his lordship, 'a complicated and ponderous system of machinery for grinding up insolvent estates, in which the whole of the product is taken up to pay the toll. It is an illusory equity which eats the oyster up in fees and costs, and presents the creditors with the melancholy equality of the shells.' A similar allowance to that claimed by McDowell, if allowed to the other six self-constituted deputy assignees, defendant shareholders, representing the other six classes of creditors, would not only consume the \$12,000, the fund in court,—the oyster,—but would even deny to the unhappy creditors 'the melancholy equality of the shells.' No one will question the right of any single creditor or any number of creditors to employ his or their own counsel to represent him or them, and to pay or contract to pay such counsel anything he or they see fit to pay him as their lawyer; but the question presented on this hearing is whether a class of creditors or shareholders of an insolvent assigned corporation whose claims and shares of stock are before the assignee and the court, and whose rights it is necessary to a final settlement shall be adjudicated, can be made to pay the fees of attorneys whom they have never employed, and who perhaps, it may be, they even do not know claim to represent them; and this, too, where the facts upon which their rights are based appear on the records of the assigned association in the possession of the assignee, and must be passed on by the court, and consequently where it is wholly unnecessary to have any one appointed to represent them. Every claimant or shareholder of every class in this insolvent association has an inchoate right in this suit. Indeed, it may not improperly be said that each and every one of them had a vested right in this suit, and that the rights of no single creditor or shareholder, as the plaintiff's petition is framed, can be adjusted with-

out deciding upon and adjusting the conflicting rights and principles of all the creditors and claimants of every class as they appear upon the books and records of the insolvent association. The assignee found the affairs of the insolvent estate so involved and complicated that it could not safely administer the same, except under the direction of a court of equity. It instituted this suit for a full and final settlement and distribution of the insolvent estate, and prayed for an order of reference. This case should be referred on motion to the commissioner of this court in accordance with the prayer of the petition, with directions to cause all the shareholders and creditors of the insolvent estate, upon due public notice to be given by the commissioner, to come before him, and present and prove their debts or claims within a reasonable time fixed in the said notice, and such order of reference should direct the commissioner in what manner and upon what principles of law he should make up his report among these conflicting claimants and classes. Under such an order of reference, all of the said creditors and shareholders would be compelled to come in and file and prove up their claims within a reasonable time (the period to be fixed by the commissioner in said notice), or be forever barred, and the duty of the commissioner would be to speedily make his report after the expiration of such time, to the end that the court, by final judgment of settlement, could direct a distribution of the fund in court to and among those entitled thereto. This was and is the plain, simple duty of this assignee and of every assignee, according to all the authorities and principles of equity jurisprudence governing the administration of insolvent estates. For a perfect form of the order of reference in such cases, see *Pratt v. Adams*, 7 Paige, 615. The jurisdiction of courts of equity in the administration of the assets of insolvent estates and of estates of decedents is founded upon the principle that it is the duty of the court to compel the fiduciary to execute and perform the duties of his trust equitably and speedily, to the end that the trust fund may be distributed among those entitled thereto.

"In section 554, 1 Story, Eq. Jur., in speaking of suits by executors or administrators, which, of course, applies with equal force to assignees in the settlement of estates under their administration, the learned author says: 'It is competent for him [the fiduciary] to institute a suit against the creditors generally for the purpose of having all these claims adjusted, and a final decree settling the order and payment of the assets. * * * But it has been said that these bills in equity may be made use of by executors and administrators to keep creditors out of their money longer than they otherwise would be.' Speaking of such suits by such fiduciaries, the learned author, at section 545, uses the following language: 'But upon such a bill

brought by an executor or administrator the court will not interpose, by way of injunction, to prohibit creditors proceeding at law, until there has been a decree against the executor or administrator (or fiduciary) to account in that suit; for otherwise the latter might without reason make it a ground of undue delay of the creditors.' The author goes on to say, at section 546, 'But the more ordinary case of relief sought in equity cases of administration is by creditors, which may either be by a single creditor for himself alone against the fiduciary, or on behalf of all other creditors.' The object of this suit by the assignee is to compel all of the creditors to come in and prove their claims, and to have the legal disputes between their conflicting rights adjusted by the court, to the end that there may be a final settlement of its administration, and a distribution of the assets to and among those entitled thereto. Whether this suit has been fruitful of the delay of which the learned author speaks, and, if so, who is to blame therefor, it is not necessary to decide on this hearing. If, in the settlement of insolvent estates and the estates of decedents under process of administration in the hands of assignees or personal representatives or other fiduciaries, it is competent, where a suit is brought by such a fiduciary for a settlement of the estate, for a creditor or for several creditors belonging to any class or classes of claimants against the estate to come in and have himself or themselves appointed in invitum to represent all other creditors having interests or claims against the estate like his or theirs, and because the decision of his or their claim involves a decision of the claims of all creditors of the same class with him or them, to claim an allowance for his or their attorneys, to be taxed upon and paid out of the fund coming to such creditors, it is plain to be seen that where there are numerous classes of creditors, as there are apt to be in every decedent's estate and in every insolvent estate of any magnitude, the assets will be devoured and consumed in the payment of such attorney's fees. In every assigned estate there are apt to be different classes of creditors. See section 74, Ky. St. If the assignor were a trustee of an express trust, either by will or deed, or a personal representative, executor, or administrator of a decedent's estate, or guardian of infant wards, or a committee of a lunatic, or suppose he stood in every one of these fiducial relations, and owed debts in his said various fiducial capacities as guardian, committee, trustee under an express trust created by deed or will, or administrator of one man's estate, and executor of another's, such debts, under the statute cited supra, would have precedence and be prior in equity to general creditors; and

the assets of his estate in the hands of his assignee would be subject to the payment of such debts before general creditors could get a cent. Let us suppose that such an assignor, in addition to these various fiducial liabilities, had liens by contract or by operation of law as by mortgage or vendor's lien, or mechanics' and material men's liens on his real estate, such liens would have precedence over the fiducial liabilities so far as the estate in lien is concerned; that is, over his debts as guardian, committee, trustee, or personal representative, and over his general creditors. Suppose such an assignor, being the owner of a large estate, had made a deed of assignment, and his assignee had filed his petition in equity for a final administration of the assigned estate, and alleged in his petition that the assignor had been a guardian, committee, trustee, and personal representative, and that there were various and divers creditors of his growing out of these various fiducial relations, and that his real estate was subject to a mortgage lien and to a vendor's lien and a mechanic's and material man's lien, and that there were general creditors, and should pray in his petition for an order of reference to the commissioner, with proper instructions to report upon the various conflicting claims; in such a suit would it be competent or permissible for a single creditor from each one of these various classes, amounting to a dozen or more in number, to come in, and, by answer, counterclaim, and cross petition, set up his individual claims, and have himself appointed to represent the creditors of the respective class to which he belonged, and raise the very questions which the assignee in his petition had raised, and which, on an order of reference, the commissioner would be bound to decide and report upon, and for so doing have an allowance for a fee made in each case to him, the said creditor, to be taxed and paid out of the funds coming to those having similar claims of equal rank and dignity with his own? I apprehend not. The law would not tolerate a dead man's estate to be thus mangled and devoured in costs. The principle and practice are the same in the settlement of an insolvent estate. Such a procedure in a suit by an administrator or an executor for the settlement of a decedent's estate would not be tolerated for a moment. Neither my recollection nor research furnishes a single case authorizing such a proceeding. It follows that the motion of the creditor McDowell for an allowance against the insolvent estate of \$2,500, on account for an attorney's fee to be taxed upon and paid out of the fund coming to the withdrawing creditors, cannot be granted upon the plainest principle of equity procedure." Wherefore the petition is overruled.

MCCORMICK HARVESTING MACH. CO. v. MARTIN et al.¹

(Court of Appeals of Kentucky. June 17, 1899.)

APPEAL—NECESSITY OF MOTION FOR NEW TRIAL.

A judgment in an action in equity, though upon legal issues, may be reviewed on appeal, without a motion for new trial.

"Not to be officially reported."

Opinion modified on its face, and judgment affirmed.

For former report, see 51 S. W. 315.

DU RELLE, J. Appellant brought suit against appellees upon their note for \$630, upon which were credits amounting to nearly \$200. In their answer and counterclaim, appellees pleaded—First, a special plea of non est factum, alleging that the words, "This note is secured by the book acct. notes transferred and assigned this day as collateral security," were not in the note when it was executed and delivered, and were inserted in the face thereof after its execution and delivery, without the knowledge or consent of either of them; second, that the note was given as evidence of a full settlement as of its date, and that at the same time, in full accord and satisfaction thereof, they assigned and transferred notes and accounts aggregating in face value \$1,002.63, of which at least \$850 were at that time good and collectible, and that appellant agreed to collect them, and apply the proceeds in discharge of the indebtedness of \$630, and to return whatever notes and accounts remained uncollected after the discharge of such indebtedness, but that appellant did not collect, or use any diligence to collect, the greater part of such notes and accounts, and that by reason of such failure appellees had been damaged in the sum of \$200. A demurrer to the first paragraph was sustained. Appellant replied to the second paragraph of the answer and counterclaim, denying the accord and satisfaction, or that it had received the notes or accounts in satisfaction of the note or any part thereof. It further pleaded that the assignment indorsed upon the notes and accounts was, through mistake, made as in part payment, but that they were only assigned as collateral security; denied that \$850 of them were collectible; denied that it had not used diligence in collecting the notes and accounts; and averred that it had used diligence, had given credit for all the sums collected, and that none of the uncollected ones "are collectible by law." In their rejoinder appellees denied the affirmative averments of the reply, and again pleaded the alteration averred in the answer. The surrejoinder put in issue the alleged alteration. After a jury had been sworn, the appellant moved to set aside the swearing, and transfer the cause to equity. The motion was sus-

tained, the cause submitted, and judgment rendered against appellant dismissing its petition.

Appellant cannot complain that the court determined the issues of fact, for it was upon its motion that the transfer was made. It is unnecessary to consider the plea as to the alteration of the note, for there is no evidence to sustain the plea that the assignment indorsed upon the individual notes and accounts assigned by appellees was made to read in part payment of the note sued on through mistake. On the contrary, it appears from the evidence of the agent who made the settlement that the form of the assignment was prepared for him by an attorney, and he nowhere states that it was done by mistake. The evidence, giving due weight to the finding of the chancellor, seems to us to sustain the plea that the notes and accounts were received in payment of the indebtedness. There is not, in our judgment, any sufficient evidence to sustain the claim for damages in the counterclaim. No damage is shown to have occurred.

It is claimed for appellee that the judgment of the chancellor upon the question of fact is conclusive, for the reason that no motion for new trial was made, and the cases of *Helm v. Coffey*, 80 Ky. 176, and *Henderson v. Dupree*, 82 Ky. 678, are relied upon. In those cases it was held that in a common-law action, where the law and facts were submitted to the court, and in an equity cause, where an issue out of chancery, triable by a jury, was tried by the court on agreement of the parties, motion and grounds for new trial were necessary to obtain a review of the judgment by this court. In the case of *Simms v. Lanehart*, 38 S. W. 490, we felt bound to follow the doctrine laid down in those cases, but it is certainly not our purpose to carry the doctrine further, and apply it to an action in equity. As there was no testimony showing damage, the transfer of the whole cause to equity did not prejudice appellees. For the reasons stated, the judgment is affirmed.

MOORE v. NEW YORK LIFE INS. CO.

(Court of Chancery Appeals of Tennessee. Dec. 3, 1898.)

LIFE INSURANCE—AGENT—SUBAGENT—BILL AGAINST COMPANY FOR SERVICES.

A general agent of a life insurance company employed a subagent, under a contract by which he was to act exclusively for the general agent, and to canvass and perform such duties as he might require, for a percentage on policies secured. He was to have no authority in relation to insurance contracts or policies, was to receive no money except on conditions specified, was to deliver all applications to the general agent, and moneys collected for the general agent were to be held in trust, and paid to him, or to the company, if notified by it before they were paid to the general agent, who was responsible therefor. All premiums collected were to be paid the general agent, unless the company notified him to pay directly to it. By withholding

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

funds, policies, or receipts after reported, or funds after demanded, by the general agent, he forfeited all claims under the agreement. It was agreed, also, that the subagent should have no claims against the company for commissions or other services. The general agent was given the right to set off, against claims under the agreement, debts due by the subagent to him, and the subagent was to make no charge for extra services, unless ordered by the general agent and the compensation agreed on. *Held*, that a bill against the company, based on this agreement, for services in securing a policy while acting as such subagent, was demurrable.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Bill by L. B. Moore against the New York Life Insurance Company and R. H. Plant. The bill was dismissed as to defendant Plant. The defendant company demurred. Its demurrer was sustained, and complainant appeals. Affirmed.

Jeff McCarn and M. W. Allen, for appellant. J. C. McReynolds, for appellee.

WILSON, J. This bill was filed January 20, 1898, against the defendant insurance company and R. H. Plant to recover the sum of \$685.30, alleged to be due the complainant from the defendant insurance company for services as agent in soliciting insurance. Defendant Plant was made defendant by publication, and put in a plea to the jurisdiction of the court over him, and the bill was dismissed as to him. The insurance company demurred to the bill, and its demurrer was sustained. Complainant prayed an appeal, and has assigned errors.

The bill avers, in substance, that complainant, in April, 1897, was employed by the defendant insurance company to solicit life insurance for it, and that the contract under which he was employed was entered into between him and defendant Plant, but that, while his contract was with Plant, his services were to be for the defendant insurance company, and he was to be paid by it. A copy of his contract with Plant is exhibited with, and made a part of, his bill. It is alleged that Plant is a general agent of the company, and resides in the state of Georgia, and that it was under his immediate direction and supervision complainant was employed, but that some of his dealings were directly with the home office of the company, and he was recognized by it in the dealing; that complainant remained in the service of the company until the last of December, 1897, complying with its rules and rendering it faithful services; that about the last of December, 1897, his services for the company were discontinued under the following facts: Complainant solicited Dr. W. G. Ewing, of Nashville, to take out a policy in the company; that, after seeing him several times, he induced him to be favorably inclined to taking out a policy, but he urged, as an objection to applying, that he had been previously refused insurance by this company, and that, therefore, he thought it would be use-

less to apply; that complainant overcame this objection, and he was induced to apply for a policy in the company, upon a hypothetical case, giving his family history and the facts connected with his application. The bill avers that the company returned this application with the statement that under no circumstances would they issue a policy on the life of Dr. Ewing. It further avers that soon thereafter the company sent a special agent to Nashville, who saw Dr. Ewing, and after making an examination, based upon the hypothetical case that he had previously submitted to the company, issued a policy on his life for \$20,000, and that the company, having accepted his work and issued a policy on the life of Dr. Ewing, was bound to pay him the stipulated per cent. agreed to be paid under its rules for a policy of this amount, and that under the arrangement and contract he was entitled to recover the sums sued for.

The question in the case turns upon the point of whether or not, under the facts averred in the bill, taken in connection with the contract entered into between the complainant and Plant, the complainant is entitled to recover from the defendant company. An examination of the contract entered into between complainant and Plant will show very clearly, we think, that, under no circumstances, was the company to be bound to complainant for anything. So far as we can see, it was purely a personal contract between complainant and Mr. Plant, and that, if he has any right of action, it is against Plant, and not the insurance company. If correct in this view, it, of course, ends the case, and results in sustaining the decree of the chancellor sustaining the demurrer and dismissing the bill.

There are certain averments in the bill which, disconnected from the provisions of the contract alleged in the bill, would seem to sustain the contention of the complainant that the defendant company was liable for whatever services he rendered. But when the allegations of the bill are taken in connection with the terms of the contract, which is made a part of the bill, it seems clear to us that the complainant has no claim against the company. As we understand, there is no complaint before us in respect to the action of the chancellor dismissing the bill as to Plant. The fight here is made over the action of the chancellor sustaining the demurrer of the insurance company and dismissing the bill as to it. We need not lengthen this opinion by stating the grounds of the demurrer. The substance of the demurrer is that, under the bill taken as a whole, it shows no ground of action against the insurance company. There are 10 formal errors assigned to the action of the chancellor sustaining the demurrer. All these errors may be treated under the general head that the chancellor erred in sustaining the demurrer, and thereby, in effect, holding that the complainant had no contract with the insurance company, and

therefore was not entitled to recover anything from it. The contract of complainant with defendant Plant is quite lengthy, and we deem it unnecessary to copy it in full in this opinion. The contract appears to have been entered into at Nashville, April 23, 1897. It starts out thus: "This agreement, made this 23d day of April, 1897, between R. H. Plant, general agent, of Macon, county of Bibb, state of Georgia, party of the first part, and L. B. Moore, of Nashville, county of Davidson, state of Tennessee, party of the second part, witnesseth that said parties, in consideration of the mutual covenants and agreements hereinafter mentioned, hereby mutually covenant and agree, each with the other, as follows, to wit: That said party of the first part doth hereby appoint said party of the second part, as agent of said party of the first part, for the purpose of canvassing for applications to the New York Life Insurance Company, for assurance on the lives of individuals, and of performing such other duties in connection therewith as may be required by said party of the first part, and that this appointment is made on the following terms and conditions." The contract then provides that the complainant shall have no authority, in so far as Plant or the insurance company are concerned, to alter, make, or discharge any contract of insurance in said company, or to waive any provisions to any policies, or to receive any money due, or to become due, from the party of the first part, except upon certain conditions specified in the contract. It is provided, in the second paragraph of the contract, that the complainant shall act exclusively as agent for said party of the first part. It provides, however, that, in thus acting, he shall submit to, and abide by, all rules and regulations provided by said party of the first part, from time to time, and by said company in its instructions to agents, the receipt of a copy of which is hereby acknowledged by the complainant. The third paragraph provides that the complainant shall exercise proper care in securing applicants, shall see that they undergo a medical examination within a fixed time, and that all applications taken by complainant shall be delivered to the party of the first part, whether the same have been reported on favorably or unfavorably by the medical examiner. The fifth section provides that all moneys or securities received or collected by the complainant, for or on behalf of said party of the first part, shall be held by him as a fiduciary trust, and shall be paid over by him to the party of the first part, or the defendant company, should said company notify him to do so before he shall have paid them over to the party of the first part, inasmuch as is stated in the contract the party of the first part is personally responsible to the company which he represents for all the collections made by subagents appointed by him. The contract also provides that all moneys collected for premiums under this agreement are due and payable to the

party of the first part at his office in the city of Macon, Ga., unless the defendant insurance company shall have notified the party of the second part, to wit, complainant, to pay directly to it, prior to his payment thereof to Plant. The contract further stipulates that it is agreed between the parties that, in case the complainant shall withhold any funds, policies, or receipts after they shall have been reported upon, or if he shall withhold any funds after they have been demanded from him in writing by the party of the first part, such action shall work a forfeiture to the party of the first part unconditionally of all claims whatsoever accrued or to accrue under this agreement to complainant. The seventh section provides for the compensation or per cent. that complainant is to receive for policies taken during his continuance as agent of the party of the first part. Section or paragraph 9 of the agreement is as follows: "It is agreed that said party of the second part shall have under this agreement no claims whatever for commissions or other services against the New York Life Insurance Company, and that said party of the first part may offset against any claims, under this agreement, any debt or debts due by said party of the second part to said party of the first part." Paragraph 10 provides that no charge shall be made by the complainant for any extra services, unless such services have been ordered in writing by the party of the first part and such compensation agreed upon. There are other provisions in the contract looking to, and providing for, paramount rights of the New York Life Insurance Company to any funds in the hands of the complainant. But there are no provisions in it, that we have been able to find, that make the insurance company responsible to the complainant for any services rendered by him. In other words, under the contract entered into by complainant, he must look to Plant, his employer, for whatever compensation he may earn. Under this view of the contract, it seems clear to us that complainant has no claim against the insurance company. The chancellor manifestly so held in sustaining the demurrer, and we see no way, under the law, of reversing his action in respect thereto, and his decree will be affirmed, with costs. The other judges concur.

Affirmed orally by supreme court, January 13, 1899.

FORD v. LAWRENCE et al.

(Court of Chancery Appeals of Tennessee. Nov. 26, 1898.)

PAYMENT—PROOF OF—BURDEN—REVIEW—
FAILURE OF PROOF.

1. A party pleading payment on an admitted debt has the burden of proving it, and hence the pleading is not sustained where payment is explicitly denied, both parties being equally truthful.

2. Where the proof as to a material point is not clear and satisfactory, and leaves it in very grave doubt, the court will be inclined to affirm a decree assuming that it had not been proved, where, under the findings of the chancellor and the evidence, it appears that no injustice has been done appellant.

Appeal from chancery court, Dekalb county; T. J. Fisher, Chancellor.

Bill by J. J. Ford against Lawrence & Jones. From decree in favor of defendants, complainant appeals. Affirmed.

J. J. Ford, in pro. per. D. O. Williams, for appellees.

WILSON, J. This is a singular, as well as a complicated, case. It bristles with injunctions. The record embraces a cross bill, called a "cross bill in the nature of a bill of review," to review a decree of the chancery court of Dekalb county in the case in which the cross bill was filed, and to enjoin further proceedings in the supreme court by appeal on the part of complainant, and to set aside a judgment at law on which the decree in the chancery court appealed from was founded, and also a bill of review, and an amended bill of review filed, it appears, for the same ends sought under the cross bill.

The facts averred in the pleadings, and admitted and disputed, necessary to be stated, in order to present the case and the issues between the parties, are these: We state them without incumbering this opinion with dates and amounts: Lawrence and Jones were partners in the mercantile business in Alexandria, Tenn. Complainant, at different times, executed to them two notes in settlement of his accounts with the firm. The firm sued him on these notes. At the time the warrant in this case was served on him, complainant was in the act of leaving the county to go to Alabama to attend to some legal business he had in hand, and, being unable to prevail on the serving officer to set the case for trial at a future day when he could be present, he left an appeal bond with the magistrate before whom the case was returned, appealing the case to the circuit court. Judgment was rendered against him for the amount of the notes and interest by the magistrate, and, under his appeal bond, the case was carried up to the circuit court. In that court, a motion supported by affidavit was made to compel the complainant to justify, or give other security for the appeal, on or before the case was called for hearing. It seems that no justification of the sureties on this appeal bond or other sureties on his appeal were given, and thereupon the circuit court rendered judgment against the complainant for the amount of the notes, interest, and costs. An execution issued on this judgment from the circuit court, and was levied upon a piano, as the property of complainant. After this levy, the complainant paid \$40 on the judgment, and by an agreement further proceedings under the execution were held up. The balance of the exe-

cution not having been paid, an alias execution issued therefor from the circuit court, and this execution was levied upon about 15 acres of land belonging to complainant, known in the record as the "Walker Tract," or a part thereof. This land, at the sale thereof under the second execution, was bid in by Lawrence & Jones. After the period for redemption expired, Lawrence & Jones filed their bill in the chancery court against the complainant to get possession of the land. This bill was answered, and the case was decided against the complainant, and he appealed to the supreme court. After his appeal to the supreme court, he filed what is known in this record as a cross bill in that case, seeking to set aside the decree rendered against him, and to enjoin further proceedings in the case in the supreme court on his appeal to it. He obtained an injunction under this cross bill. Upon motion before the chancellor at chambers, this injunction was dissolved, and the bill dismissed. Thereupon the complainant filed what is known in the record as a "bill of review to set aside the decree and to enjoin further proceedings in the original case in the supreme court." He also filed what is known as an "amended bill of review." It appears that a receiver was appointed to take charge of and rent out the land in the original chancery court case pending the appeal to the supreme court. Before the receiver was appointed, it appears that complainant had some crops growing on the land. A lot of wheat maturing on it after the appointment of the receiver was sold by Ford to a roller-mill company in Alexandria. The receiver sued this mill company for the value of the wheat, and the bill of review and the amended bill of review seek to enjoin the prosecution of that suit. The chancellor held that the bill and amended bill of review could be maintained only for the purpose of showing whether or not Lawrence & Jones were indebted to the complainant in any sum at the time they obtained their judgment against him and for which he had not received credit. Lawrence & Jones answered these various bills of review, and denied all of their material averments. Proof was heard, and the chancellor dismissed them. From all of his decrees rendered in these various bills of review, in which it was sought to set aside his decree in the case appealed from and pending in the supreme court, complainant prayed and was granted an appeal.

The foregoing presents a general outline of the main feature of the case. Coming to the precise grounds of complaint presented by complainant, we find them to be these: He insists, in the first place, that when he was sued before the magistrate he was on the eve of leaving the state for Alabama to attend to important legal business entrusted to him; that he tried to get the officer to set the case for trial at a future day, when he could be present; that the officer refused to do so, saying that his instructions were to

return the process at once; that thereupon he left an appeal bond with the magistrate for the purpose of appealing the case to the circuit court; that he had credits which were just offsets against the notes sued on; that the case was taken to the circuit court; that he saw the magistrate, who was the attorney of Lawrence & Jones, in the circuit court, and that, on account of serious sickness in the family, said attorney agreed to get the bar at Smithville to let his cases go over to the second week of the court, and that this request was readily granted; that he started to court on the Monday of the second week, and got a part of the way, when he was informed that the court had adjourned, and the judge had left and gone home; that he thereupon felt easy, believing that the case against him of Lawrence & Jones had gone over until the next term of the court; that, instead of this, Williams, the attorney of Lawrence & Jones, made a motion in the circuit court calling upon him to justify the sureties on his appeal bond, or give other and additional surety on his appeal, on or before the calling of the case; that he had no notice of this motion; that the case was reached and called on the docket, and, not having justified his securities, a judgment was taken against him in the circuit court; that he knew nothing of this for some time afterwards; that he had been called off to Cincinnati to look after important legal business in connection with a case involving over \$100,000, and that when he returned from Cincinnati he learned that the officer had levied upon his property; that he thereupon saw Mr. Lawrence, of the firm, who was an intimate friend of his, and paid him a part of the judgment, and there was an agreement between them to settle without further proceedings; that he labored under the impression, induced by Lawrence, that this promise was to be carried out; that Lawrence told him that this claim, in the settlement of the partnership matters, belonged to him (Lawrence); that he was kept under the delusion that this promise would be carried out until the time for the redemption of the land, levied on and sold, had expired, and that this promise of settlement was kept alive in his mind for the fraudulent purpose of keeping him quiet until the period for redeeming the land expired; that, after the period for redemption expired, Lawrence & Jones filed a bill in the chancery court to oust him of his possession of this land, 12 or 15 acres of the Walker tract, levied upon and sold. His complaint of the judgment against him is that he was entitled to a credit of forty dollars, of seventy-odd dollars, and of eighty-odd dollars which had not been given; and that if these credits had been given him, with interest thereon from the time the payments were made, he would have fully paid the claim or notes of Lawrence & Jones sued upon, and constituting the basis of the judgment against

him before the magistrate and in the circuit court.

He further insists that his land levied upon was situated in Wilson county, and not in Dekalb county, and that, therefore, the levy and sale were absolutely void. A further contention made by him is that the levy was void because of its vagueness in the description of the land. As before stated, Lawrence & Jones denied all the material averments of complainant with respect to the credits he claimed. It appears that complainant was given a credit for \$40 on the execution docket of the circuit court, and this credit, it seems, was based upon the payment that the complainant made after the first execution issued on the judgment from the circuit court. Lawrence and Jones both explicitly deny ever receiving any payments from complainant except those for which he was given credit. In this state of the proof, it is manifest that there is no error in the decree of the chancellor. The authorities are uniform that, where a party pleads payment upon an admitted indebtedness, the burden of proving the same is upon him. Here complainant avers payment upon notes, admittedly executed by him. Lawrence & Jones deny that any such payments were made. Assuming both parties to be equally truthful and entitled to equal credit, he has failed to make out his case of payment.

The only other question in the case, as presented, is as to whether or not the land levied upon is in Wilson or Dekalb county. Under the state of the proof, this matter is left in very grave doubt. But as, under the findings of the chancellor and the evidence in the case, no injustice has been done the complainant, and as the proof is not clear and satisfactory that the land in dispute is in Wilson county, we are inclined to hold that there is no error in the decree of the chancellor, and the same will be affirmed, with costs. The other judges concur.

Affirmed orally by supreme court, December 20, 1898.

NANCE v. CALLENDER et al.

(Court of Chancery Appeals of Tennessee. Dec 24, 1898.)

APPEAL — FINDINGS—WITNESSES — TRANSACTIONS WITH DECEDENT—MEMORANDA IN DIARY.

1. A concurrent finding of a master and chancellor on an accounting is conclusive, if there is material evidence to support it.

2. Under Acts 1869-70, c. 78, § 2 (Mill. & V. Code, § 4565; Shannon's Code, § 5598), prohibiting either party in actions by or against an executor, in which a judgment may be rendered for or against him, to testify against the other as to transactions with the testator, a complainant's diary or memorandum of an account with a person subsequently deceased is inadmissible against his executor.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Bill by W. L. Nance against Thomas Callender and W. H. Nance, executors of the estate of C. W. Nance, deceased. Decree for defendants, and complainant appeals. Affirmed.

Colyar, Williamson & Colyar, for appellant. N. D. Malone and M. B. Howell, for appellees.

WILSON, J. This bill was filed April 13, 1894, for a settlement and adjustment of accounts between complainant and the estate of his deceased brother, C. W. Nance. It avers, in substance, that these brothers had been on the most intimate and friendly terms all their lives, and that, covering a period of over 50 years, they had many large business transactions, and that while they had a partial settlement July 24, 1893, there had never been any final settlement between them, and that there were many items of account that ought to be considered in arriving at a just result in the adjustment of their affairs, taking said partial settlement as a basis for the account. It also avers that complainant was equally interested with his deceased brother in a large body of land in Cheatham county, and that his rights in connection with this land ought to be ascertained and reported. The further averment is made that each was entitled to what is called in the record the "W. L. Nance Home Place," or the "Mansfield Land," in the proportion that each had paid in securing the title to it. The defendants, executors of C. W. Nance, answered the bill, admitting some of its averments and denying others. They say that they are willing for an account to be taken and stated between complainant and the estate of their testator, but are not willing for one on the unlimited basis insisted for in the bill. The parties, it seems, agreed that the case was one proper for an account; and the cause was referred to the master to take and state an account, using the partial settlement between the brothers of July 24, 1893, as a basis. He was directed to report any item of account between the parties, evidenced by note, account, or judgment, not embraced in said partial settlement, without reference to time, as the parties, in said settlement, had agreed not to plead the statute of limitations. He was further directed to report the agreement between the two brothers in respect to the W. L. Nance or Mansfield land, how much each had paid thereon, and also any agreement in reference to the Cheatham county lands mentioned in the bill and answer. The deposition of complainant was, it appears, taken three times in the case. Many of the questions put to him, and the answers thereto, were excepted to by the defendants. Some of the exceptions were sustained by the master, and some overruled, and from his action on this evidence there was an appeal

to the chancellor. The master made his report, and it was re-referred to him upon application of complainant, supported by affidavit. It appears that this reference was made in order to enable the complainant to produce before the master his daily journals or diaries, in which he claimed that he at the close of each day had entered his daily transactions. The court, however, reserved the question of the admissibility as evidence of these books or diaries. The master submitted an elaborate report in the case. This report states the amount due complainant from the estate of C. W. Nance, excluding the Mansfield land, to be \$31,441.69, and that W. L. Nance owed the estate of his brother \$30,418.21. This leaves the estate of the deceased brother indebted to complainant, leaving out their matters connected with the Mansfield land, in the sum of \$1,023.48. He reports that the estate of C. W. Nance has a lien on the Mansfield land for \$10,213.41, with interest thereon amounting to \$1,824.79, and further sums paid out by C. W. Nance or his executors in litigation over the title to said lands; the sums so paid being set out, and all aggregating \$14,159.22. He reported that the Mansfield land had been sold under proceedings in the chancery court, and had been bid in by C. W. Nance, but with the understanding that each party should be interested to the extent that each paid for it, and that W. L. Nance had paid (with interest) on said land the sum of \$4,978.63. He reports that W. L. Nance was to be an equal partner in the Cheatham county lands, but that W. L., failing to realize money to pay his part therefor, had abandoned any further claim to partnership in these lands. The complainant filed 12 exceptions to this report before the master. The master overruled all these exceptions, except the fourth, and that was sustained in part. The result of this action of the master was to increase the balance reported in favor of W. L. Nance on the second page of his report of \$1,023.48 by \$950.21. The chancellor sustained the report, and overruled all exceptions, except as sustained by the master. The result of his decree was that complainant was indebted to the estate of his brother on account of the Mansfield place, as of November 1, 1895, in the sum of \$14,189.22, and that the sum due W. L. Nance from the estate of his brother, as of the same date, on the general account, was \$1,973.70, leaving the net amount due the estate of C. W. Nance, the sum of \$12,315.52; and this sum was decreed to be a lien on the Mansfield place, described in the pleading. For this sum, with interest from November 1, 1895, to the date of the decree, making together the sum of \$13,799.52, the executors were given a decree against complainant. He held that the complainant was entitled to share in the proceeds of the Cheatham county land, after the estate of C. W. Nance was repaid therefrom what he had paid out in connection with them. Thomas Callender, one of the executors of C.

W. Nance, was appointed special commissioner to sell the Mansfield and the Cheatham county lands, under the terms and conditions set forth in the decree of the court.

January 21, 1898, complainant filed a petition to rehear the case, and defendants were given leave to answer the same. This petition asked the court to review the report of the master in the following particulars: Complainant asks that he be given a decree for one-third of what is styled the "Castelman Debt," amounting to \$563.91, with interest thereon from 1847. It is said in the petition that complainant paid the C. W. Nance part of this debt or note; that complainant is in the possession of the note, and offered it to the court as evidence, with his agreement with his brother in reference thereto; and that it was one of the money obligations not entering into their partial settlements of 1886, and which, under their agreement of April 26, 1893, should be allowed him as a credit. Another item of credit of \$5.30, with interest thereon from 1844, is claimed in the petition. It is said that this was for sugar furnished C. W. Nance in 1844, and was an item coming under the terms of the agreement with his brother, it being a money obligation, as was shown in his books or diaries filed with the clerk. It is next claimed in the petition that the master failed to credit complainant with cash items appearing on his journal, marked "E," charged up to C. W. Nance in June, July, August, September, and December, 1853, aggregating \$1,266.79, and for items charged up to C. W. Nance in January and February, 1854, in the same book, aggregating \$159.60, and that all these items are established as a matter of evidence, by his books aforesaid, where they are charged. It is claimed in the fourth place that the master failed to give complainant credit for his half of the profits arising from the purchase and sale of the Kimbrough land, amounting to \$1,140.05, with interest thereon from 1859. It is next claimed that the master failed to give him credit for three cash items in 1857 aggregating \$12, with interest. It is said in the petition that these items are a part of Exhibit F in the record, and are upon the back of an account used in the partial settlement of 1896. In other words, it is insisted that instead of an item being \$380.45, as treated in their settlement of 1886, the true amount is \$392.45; the latter sum being upon the book account which is on file in the record in this case. It is next claimed that the master failed to give him credit for four cash items in 1859 amounting to \$78, with interest. It is insisted that these items are shown by an account filed with the papers, and that they were not included in the settlement. It is next claimed that the master failed to give him a credit for an item of \$2.25 in 1865. It is said that this item appears regularly on the cash book of complainant for that year, which is on file, and constitutes proof, *per se*, of the item. It is said

that the master refused to consider the books filed by complainant as evidence, and, acting on the belief that his said books would be considered as evidence, caused him to overlook, in his deposition, many other credits to which he was entitled. The petition then sets out charges aggregating \$910.27. Complainant next insists that the master erred in respect to the Billings debt, in putting it in the assets of the estate of C. W. Nance, and thus neutralizing it as a credit to him. It is next contended that the master erred in charging him with all the costs and attorneys' fees in the litigation with Cooper over the Mansfield land. He insists that, at most, he should be charged with only half of these, inasmuch as this litigation was not prosecuted for perfecting the title to the land. He next insists in the petition that the master erred in charging against him interest on the sum paid by his brother on the Mansfield land to a certain date, and thence with interest on the combined sum, thus giving his brother interest on interest, contrary to their agreement. He further complains that the master reports that the Mansfield land should be divided into lots, and thus sold, until C. W. Nance was paid, and the decree so orders; and the insistence is that this should not be so done, under his contract with his brother of 1886 and 1893. The petition closes with the general statement that his books should be treated as evidence; that the executors should produce the books of their testator, and the account should be adjudicated upon the basis of what the books of both show, read and considered in the light of their contracts of 1886 and 1893. The further insistence is made that he should be credited with two United States bonds of his used in paying for the Cheatham county lands, with interest thereon. The defendants answered this petition January 25, 1898. They insist that each item set forth in the petition was presented to the master, reported upon by him, and, upon exceptions by complainant, overruled by him and the court, and that, therefore, the petition simply asks for the whole case to be gone over again on the same evidence.

The chancellor dismissed the petition to rehear. Complainant appealed, and has assigned errors. The errors assigned are: First, the report of the master and the action of the chancellor deny to complainant many credits to which he is entitled (these credits claimed are set out in detail in the brief accompanying the errors assigned); second, the master and the chancellor excluded as evidence certain books and papers filed by complainant, which establish his claim to the numerous credits he contends for, and this was error.

The complainant and his deceased brother were quite intimate, and they had many joint business transactions extending over a period of 50 years or more. In July, 1886, they had a partial settlement. They signed the following paper:

"Whereas, we, C. W. and W. L. Nance, have had mutual dealings, extending through a period of more than forty years, without having ever made a full and final settlement, and are now desirous to make and complete such a settlement of all our former dealings, and have gone back and estimated all balances due from C. W. Nance, with legal interest on them, as well as all moneys advanced or loaned for services performed by W. L. Nance to or for C. W. Nance, as shown on a paper marked 'A,' and mutually signed by us, amounting in the aggregate to \$17,034.03, and we have in like manner estimated all moneys paid by C. W. Nance for W. L. Nance, and all balances due for money loaned by C. W. Nance to W. L. Nance, for a period of over forty years, with legal interest on them, as shown on a paper marked 'B,' and also mutually signed by both of us, amounting to \$——. B. Billings' debt is, we think, entitled to a credit of \$555, and interest from June 30, 1861. And whereas, W. L. Nance's home place was divided into six lots and sold by the clerk and master of the chancery court at Nashville about the 24th day of Sept., 1870, and C. W. Nance at said sale became the purchaser of all the lots except the lot on which the residence stands, #2, and gave his four notes, each for \$925, payable in 6, 12, 18, and 24 months, with interest from date, and he paid off the first, second, and third, and the fourth was paid by Wm. L. Nance, and he (said W. L. Nance) has continued to reside on it and use the entire original tract ever since said sale, as though no division or sale had been made. Any taxes paid on said land since said sale by C. W. Nance are to be refunded to him on final settlement, and we hereby mutually agree that we will, as soon as we can conveniently settle up this land matter, do so. And we hereby solemnly agree to waive all statutes of limitation and claims by reason of occupation or possession, and to settle off this matter, as soon as it may be conveniently done, fairly and justly between us. And whereas, C. W. Nance became the purchaser of the tract of 5.010 acres of land in Cheatham county, and a certain lot on College street, in Nashville, at the sale by the clerk and master of the chancery court at Nashville in the case of James M. Murrell vs. S. Watson et al. on the 29th day of September, 1877, and, by a paper writing, soon after said purchase agreed to let W. L. Nance into said purchase as a full and equal partner, and said 5.010 acres were purchased at the price of \$6.035, on a credit of one and two years, and said lot at the price of \$1,200, on the same credits, and on the 5.010-acre tract of land W. L. Nance has made the following payments, to wit:

Oct. 9, 1878.....	\$1,052 50
April 2, 1880.....	1,018 50
Total	\$2,080 00
And half money from sales of land to Glover, Binkley, and Tyson....	704 40
Shows W. L. Nance's payments	\$2,774 40

"And C. W. Nance has made the following payments, to wit:

Feb. 10, 1879.....	\$ 500 00
April 6, 1890.....	596 76
Cost of first judgment.....	2 50
(Which paid off first judgment.)	
And C. W. Nance paid on last note, Oct. 22, 1880.....	300 00
And on February, 1885.....	1,231 72
And half of money from sale of lands to Glover	880 00
Binkley	170 00
And Tyson	704 40

Shows C. W. Nance's total payments \$3,335 38

"This calculation was made up to Jan. 15, 1885, and lacked \$950.06 of paying the whole debt. And W. L. Nance had paid taxes on the land for seven years before the sale to C. W. Nance, while it belonged to Murrell, amounting Jan. 15, 1885, to \$950, and claimed credit for the same, which was not allowed by the chancellor, and stands on an appeal to the supreme court. There are two other notes, one dated December 2, 1876, for \$200, at six months, interest from date at 10%, and one note dated Dec. 18, 1876, for \$162.57, at one day after date, with a credit of \$10 April 23, 1877, paid to Mrs. Kent by C. W. Nance for W. L. Nance. They belonged to W. L. Nance, and are made by C. W. Nance. There are several loans of recent date by C. W. Nance to W. L. Nance overlooked, all of which are to be hereafter settled, when we settle our land transaction, and several sums of interest paid by C. W. Nance to Mount Olivet Cemetery, and for insurance on W. L. Nance's home, to be settled hereafter. And we do hereby agree that any other matter or claim herein omitted by either of us, and hereafter discovered, shall be brought into our final settlement, the above being all we are able to settle in the time now allowed us, as W. L. Nance leaves for San Francisco at 6 a. m. in the morning. The small sums in C. W. Nance's summary are shown in three papers, X, Y, Z, hereby inclosed.

"This agreement made between us. Witness our hands this 24th day of July, 1886.

"[Signed]

C. W. Nance.

"Wm. L. Nance.

"In presence of

"W. L. McKay.

"Hiram Harley.

"Isaac Litton."

April 20, 1893, these brothers entered into the following agreement, or signed the following paper:

"The following agreement is made and entered into between Wm. L. Nance and C. W. Nance in and about the tract of land in Davidson county known as the 'Wm. L. Nance Home Place,' and now in litigation with John L. Cooper. In that case the depositions of both C. W. Nance and Wm. Nance have been given, and which show how much money the said C. W. Nance has paid in perfecting the

title; the same being now in said C. W. Nance. But, while the title is in him, there has at all times been an understanding that after the said C. W. Nance is paid his money (that is, the money paid by him in procuring the title), with interest at lawful rate, the balance is to go to Wm. L. Nance; and we now make this understanding a matter of contract to be carried out by us, or by our executors in case either of us should die,—the land to be divided into lots, and sold to the best advantage, until C. W. Nance is paid his money, with interest; the balance of the land to belong to the said Wm. L. Nance. It is further agreed between us that an equitable and just settlement shall be made by us, or by our executors, of all our matters, especially our notes or money obligations which each may hold against the other, and we agree with each other that each is not to plead or rely on the statute of limitation. The settlement is to be made by us, or by our executors, as becomes two brothers having full confidence in each other's honesty and willingness to do right. It is further agreed that in said settlement embracing our transactions relating to the Watson lands, of \$5,010 acres, in Cheatham county, that the profit arising therefrom shall be equally divided between us, or our estates, including attorney's fees in each case.

"This 26th day of April, 1893.

"[Signed] Wm. L. Nance.
"C. W. Nance."

It will thus be seen that the account between these two brothers necessarily, under the terms of these papers, covered a wide field, and a long period of time. The master, in his elaborate report, seems to have covered the whole field. The exceptions filed thereto by complainant presented the specific defenses to the report now urged upon our attention. These exceptions thus directly called to the attention of the master and the chancellor were overruled by the master and the chancellor, and the report of the master was confirmed by the chancellor. This, of course, presents a case of concurrent finding of the master and the chancellor, and, if there is material evidence to support it, their finding is conclusive and binding upon us.

The main question argued before us is that the master and the chancellor rejected the daily journals or diaries of complainant offered as evidence, the defendants having objected thereto on the ground that under the statute they were inadmissible; and the insistence is that the rejection of this evidence was manifestly error, and that, with this evidence admitted and considered, the items of credit claimed by complainant are established. Under the act of our legislature (Acts 1869-70, c. 78, § 2; Mill. & V. Code, § 4565; Shannon's Code, § 5598), it is provided that

"in actions or proceedings by or against the executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transactions with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party." It is clear, under this statute, that the complainant was incompetent to testify with respect to the transactions between him and his deceased brother, unless called to testify thereto by the defendants. This is not disputed. It is insisted, however, that the books kept by the complainant, showing the alleged transactions between him and his brother, are competent. It is to be noticed that these books are simply diaries or memoranda kept by the complainant. Our supreme court has held that under this statute the disqualification extends to and embraces every transaction with or statement by the deceased, whatever be its nature, and whether oral or in writing; the principal object being to put litigant parties upon an equal footing in the courts, and prevent the living from testifying against the dead. *Montague v. Thomson*, 91 Tenn. 168, 18 S. W. 264 et seq. In the case cited it was offered to prove that the witness extinguished the note sued on by the execution and delivery of another note in its stead; and the supreme court said that, if this was not a transaction, it would indeed be impossible to state what would constitute a transaction. It further said that, having been participated in by both of them as parties in interest, it was manifestly a transaction by the witness with the deceased, and vice versa. The court in that case also said: "To limit the disqualification to verbal transactions and statements would do the greatest violence to both the letter and spirit of the statute, and place the estates of dead persons, which it was designed to protect, at the mercy of corrupt parties. Even doubtful language would be so construed as to avoid such a result." Under this authority, and others that might be cited, we are of the opinion that these private books and memoranda made by the complainant are not competent and admissible as evidence to charge the estate of his deceased brother. Confessedly, we think, under the evidence in the record, the contentions of complainant are not sustained, if the evidence of these private memoranda and diaries be excluded. With them out of the record as evidence, the findings of the master, concurred in by the chancellor, are abundantly sustained. The result is that upon the whole case we see no reversible error in the decree of the chancellor, and it must be affirmed, with costs. The other judges concur.

Affirmed orally by supreme court, January 16, 1899.

ST. LOUIS & K. C. RY. CO. v. RUSSELL
et al.

(Supreme Court of Missouri, Division No. 1.
June 14, 1899.)

APPEAL—EMINENT DOMAIN—AWARD OF COMMISSIONERS—JUDGMENT.

Where the only reference in the record, on appeal in condemnation proceedings, to the fact that the amount of the commissioners' award was deposited in court and received by defendant, was in a motion to overrule defendant's exceptions to the commissioners' report, and in the motion for new trial, as error in the court to hear the exceptions without first requiring defendant to refund the money, and counsel only assumed it as a fact, and that the court knew it, and it did not appear that it was a matter of record, so that the trial court could take cognizance of it, or that there was proof of it offered to the court, or that it was brought to the trial court's attention at the time of entering judgment, the court's error in entering judgment for the full amount of the jury's verdict, without deducting the amount of the award, cannot be reviewed.

Appeal from circuit court, Johnson county; George F. Longan, Special Judge.

Action by the St. Louis & Kansas City Railway Company against James H. Russell and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Geo. P. B. Jackson, for appellant. O. L. Houts, for respondents.

VALLIANT, J. This is a proceeding to condemn a right of way for plaintiff's railroad through defendants' farm. Upon the filing of the petition in the office of the circuit clerk of Johnson county in vacation, the clerk issued a summons to the defendants to appear before the judge of that court on August 8, 1895, which was duly served, and the defendants appeared as required. Thereupon the judge of that circuit heard the petition, and, after finding the facts on which to base his order, appointed commissioners as the statute requires; who filed their report, showing that they had performed the duty imposed on them, and assessed the defendants' damages, by reason of the appropriation of their land and the operation and maintenance of plaintiff's railroad thereon, at \$4,007. The sum was deposited by the plaintiff with the clerk of the court, the plaintiff took possession of the land, and the defendants received the money from the clerk. Both parties filed exceptions to the report, and demanded a jury to assess the damages. Plaintiff afterwards withdrew its demand for a jury, but insisted on its exception to the commissioners' award, on the ground that it was excessive. At the October term, 1895, the court made an order sustaining the exceptions, setting aside the report of commissioners, and directing a reassessment of damages to be made by a jury. Accordingly a jury was impaneled and the inquiry had, which resulted in awarding the defendants \$5,500 damages. Thereupon a judgment in the usual form was entered for that sum in favor of defendants against the plaintiff, and a decree

vesting the title to the land condemned in plaintiff for the purpose of a right of way, to take effect on the payment of the money judgment. The cause is here on plaintiff's appeal. The facts shown by the record in this case are in all respects similar to those which passed under our judgment at this term of court in the case of *Railway Co. v. Donovan* (Mo. Sup.) 50 S. W. 286, with only the difference that in that case there was nothing to show that the defendants had withdrawn from the clerk the amount of the commissioners' award, and there was nothing in the judgment vesting the title to the land condemned in the plaintiff. The consideration of this case has necessarily brought up for reconsideration the propositions involved in the case above mentioned; and, as we are satisfied that the conclusions reached in that case were correct, there is no necessity for a further discussion of those propositions, except in the light of the difference in the facts, as above noted. It was urged in the *Donovan* Case, and is urged with renewed force here, that the defendants were not entitled to a judgment for the full amount of the jury's verdict when it appeared that they had already received a large part of the amount in the form of the commissioners' award.

The principle contended for by the plaintiff's counsel is correct; and if the facts in the case are as claimed, and if they had been brought to the attention of the trial court at the time, the judgment should have contained a recital of those facts, and should have been rendered for only the difference between the award of the jury and the amount already received by the defendants. But it does not appear that the matter was brought to the attention of the court in any form in which it could be so treated. The record on this point, although not entirely barren, as in the *Donovan* Case, is yet very meager. We infer from the recital in the record that the money was deposited with the clerk in vacation, and by him, in vacation, delivered to defendants. At the trial the plaintiff's counsel referred to this fact as a ground for an oral motion to overrule the defendants' exceptions to the commissioners' report. And again in the motion for a new trial it is referred to, not as entitling the plaintiff to a reduction of the judgment, but as error in the court to hear the exceptions without first requiring the defendants to refund the money received from the clerk. It was only in that connection and for those purposes that the matter was brought to the attention of the court, or that the court was asked to predicate any action upon it. And even then the counsel seem to have only assumed that it was a fact, and that the court knew it. But it does not appear in the record here that it was a matter of record in such shape as that the trial court could take cognizance of it; nor was there any proof of it offered to the court; nor does it appear that it was brought to

the trial court's attention at the only juncture in the proceedings in which it was proper to be taken into consideration. If the fact that the defendants withdrew from the clerk the amount of the commissioners' award is in such shape on the record of the circuit court as would entitle the plaintiff to a judgment here correcting the judgment of that court, or remanding it to be corrected, a transcript of that part of the record ought to be here. In its absence, we cannot assume that the circuit court erred in the form of the judgment it rendered. There is nothing in this record on that point but a recital, which is meager and unsatisfactory, and not sufficient to authorize this court to pronounce the judgment of the circuit court incorrect. The matter, for the purpose of giving the plaintiff credit for any payment to which the record in the circuit court may show him entitled, is still in the hands of that court. We perceive no error in the record, and therefore the judgment is affirmed. All concur.

NICHOLS & SHEPARD CO. v. HUBERT
et al.

(Supreme Court of Missouri, Division No. 1.
June 14, 1899.)

CREDITORS' SUIT—ALLEGATIONS OF INFORMATION AND BELIEF.

A petition in a creditors' suit, which avers that plaintiff is informed and believes certain facts, thereafter recited, which are essential to plaintiff's case, is demurrable, as it does not allege the existence of the facts.

Appeal from circuit court, Clark county; E. R. McKee, Judge.

Action by the Nichols & Shepard Company against John A. Hubert and others. From a judgment sustaining a demurrer to the complaint, plaintiff appealed. Affirmed.

Hughes & Roberts and O. S. Callihan, for appellant. Berkhelmer & Dawson and Blair & Marchand, for respondents.

BRACE, P. J. This is an appeal from the judgment of the circuit court of Clark county sustaining a general demurrer to the following petition: "Now comes plaintiff, and, for its third amended petition, by leave of court, states and avers: First. Plaintiff is a private corporation organized and existing under and by virtue of the laws of the state of Michigan, and was such at the dates hereinafter mentioned. Second. On or about the 10th day of April, 1894, plaintiff duly recovered in this court a judgment against the defendant John A. Hubert for the sum of \$635.42, together with 8 per cent. per annum interest from said date until paid, which judgment is duly entered of record in the records of this court in Record Book Q, at page 155. Third. No part of the judgment aforesaid has ever been paid. John A. Hubert is insolvent, and has no property subject to seizure and sale upon execution. Fourth. On or about the 19th day of Novem-

ber, 1894, the said defendant John A. Hubert was the owner of the following described tracts of land, to wit: The north two-thirds of the northeast fourth of the northwest quarter, and the north two-thirds of the northeast quarter of section thirty-two, and the north two-thirds of the northwest fourth of section thirty-three, and the southwest fourth of the northeast quarter of section thirty, all in township sixty-four, range six west, in the county of Clark, and state of Missouri, subject to a deed of trust duly executed and delivered to one Charles Hiller, as trustee, to secure to one James W. Summers the payment of \$2,800, which said deed of trust is duly recorded in Book O, at page 529, of the records of trust deeds in the office of the recorder of deeds in and for Clark county, Missouri. On said date, to wit, November 19, 1894, pursuant to notice as provided by said deed of trust, said Charles Hiller, as trustee, duly sold the real estate aforesaid at public sale to one H. M. Hiller, one of the original defendants in this suit, for the sum of \$3,280, and the said H. M. Hiller became the absolute and unqualified owner of said real estate, so far as appears from the records of deeds and titles of Clark county, Missouri. Fifth. Plaintiff is informed and believes that the defendant John A. Hubert has some interest in equity in and to the real estate aforesaid, but the extent of such interest plaintiff cannot state. Plaintiff is informed and believes that the said H. M. Hiller, although apparently the absolute and unqualified owner of same, is merely a trustee holding the legal title of said real estate for the benefit of himself and the defendant John A. Hubert; that at the time of the sale and purchase by him as aforesaid he and the defendant John A. Hubert entered into a written contract, which will disclose the extent of their respective interests in said land; that said written contract was duly acknowledged, and could have been filed for record, but that same was held from record, and kept secret and concealed, for the purpose of hindering, delaying, and defrauding the creditors of the defendant John A. Hubert, and especially this plaintiff. Sixth. Since the commencement of this suit the said H. M. Hiller departed this life testate, leaving as his sole heirs at law his widow, the said Sarah F. Hiller, and his children, the said Charles, Hiram, Samuel S., and George Hiller, and Hattie Lapsley. Said Sarah F. Hiller is the duly-appointed executrix of the estate of said H. M. Hiller. Seventh. Plaintiff has no adequate remedy at law in the premises, wherefore it prays the court that the defendants be required to answer touching the matters set forth in this petition, and disclose the contract existing between the defendant John A. Hubert and the said H. M. Hiller, deceased, in the matter of the real estate aforesaid; that upon such disclosure the right of the said Hubert and the defendant heirs of said H. M. Hiller be es-

established and defined by a decree of this court; that it be decreed that plaintiff is entitled to subject the interest, if any, of the defendant Hubert in said land, to the payment of its judgment aforesaid; that the court, in case it shall find that the defendant heirs of the said H. M. Hiller, deceased, have any interest in and to said real estate, that said interest be determined both as to the defendant John A. Hubert and this plaintiff; and prays the court for such other and further relief as to equity and good conscience belongs. And plaintiff further prays that it have and receive from the defendants the costs of this suit."

Counsel for plaintiff contends that the court committed error in sustaining the demurrer to the plaintiff's petition, because "a creditor having reduced his demand to judgment may bring a suit in equity to disclose the debtor's interest in property held in the name of another without first selling the land on execution." We are not advised by the record what view the court below took of this proposition. It is evidently sound, supported by authority (*Woodard v. Mastin*, 106 Mo. 324, 17 S. W. 308; *Bank v. Doran*, 100 Mo. 40, 18 S. W. 836; *Hardware Co. v. Horn* [Mo. Sup.] 47 S. W. 957), and is not disputed by counsel for the defendants, whose contention is that the petition is defective in that it does not charge as a fact that Hubert has any equity in the land, nor that Hiller and Hubert had a written contract that would disclose that fact, and their respective interests in the land, etc., but only that the plaintiff is informed and believes such to be the facts. It is apparent upon the face of the petition that this contention is well grounded. While the first four paragraphs of the petition state and aver facts, the form of averment is changed in the fifth, and the pleader then alleges that he is informed and believes the facts therein recited, and, as these recited facts are essential to plaintiff's cause of action, the defect is fatal, unless this form of averment is permissible under the Code. The statute requires in a petition a plain and concise statement of the facts constituting the cause of action. Rev. St. 1889, § 2039. A statement of information and belief as to facts is not within the meaning of this statute. "Facts should be stated, alleged, averred, and not given by way of recital." Bliss, Code Pl. (3d Ed.) § 318. "Every substantive fact should, under the practice act, be alleged, so that an issue can be made thereon." *Lanitz v. King*, 93 Mo., loc. cit., 519, 6 S. W. 265. The issue tendered here is not as to the existence of these facts essential to plaintiff's cause of action, but as to the plaintiff's information and belief of their existence as facts. The statute makes no provision for charging facts on information and belief in a petition, except in alternative pleading, and then the fact must be positively alleged, coupled with an averment of the plaintiff's

belief in the one or the other alternative so alleged. Rev. St. 1889, § 2071. Even if such provision had been made, this form would not be sufficient. The facts would have to be charged as facts on information and belief, so that an issue could be joined on them. The petition did not state facts sufficient to constitute a cause of action, and the court did not err in sustaining the demurrer. Judgment is therefore affirmed. All concur.)

STAPLES v. SHACKLEFORD et al.

(Supreme Court of Missouri. Division No. 1.
June 14, 1890.)

ACTION TO REDEEM—PARTIES—PETITION—SUFFICIENCY—TRUST DEED—TRUSTEES' AGREEMENT WITH MORTGAGOR—RIGHT TO SUE—DEEDS—DEFECTIVE ACKNOWLEDGMENT—EFFECT.

1. It appeared by the petition in an action to redeem that the land in controversy had been sold under a trust deed given to a guardian to secure a loan from his ward's estate. The ward was of age. The guardian was discharged, and had no interest in the land. He was not in a position to afford plaintiff the relief sought, and no personal judgment was asked against him. No claim was made that the land had been obtained through his misconduct, but execution of the trustee's deed to his ward had been acknowledged before him as notary public. *Hdd*, that he was not a necessary or proper party.

2. A faulty acknowledgment only affects the registration of a deed and notice thereunder, and it does not affect the conveyance between the parties themselves.

3. A petition to redeem from a sale under a trust deed showing, as to the beneficiary and her husband, that she had done nothing more than receive what was due her from sales made by the trustee, and that he had no interest in the matter except as her husband, and that neither had nor claimed any further interest in the property, and complaining only of acts of the trustee in violating an agreement made with the plaintiff contrary to the terms of the deed, and without the beneficiary's knowledge, and calling on the trustee to account, states no cause of action against the beneficiary or her husband.

4. Conceding that a mortgagor under a trust deed may enforce the trustee's agreement to so handle the property as to control the title in case it should not bring sufficient at public sale to satisfy the debt, and to sell the same at private sale, and account to the mortgagor for the surplus, the trustee's liability thereunder is not shown in an action by the mortgagor against him by a petition showing that only a portion of the land has been sold, and not alleging that there is any surplus to which plaintiff is entitled.

Error to circuit court, Cooper county; George F. Longan, Special Judge.

Action by Thomas E. Staples against D. W. Shackelford and others to set aside a conveyance, for an accounting, and for redemption from a sale under a trust deed. From a judgment of dismissal entered on sustaining demurrers to the petition, plaintiff brings error. Affirmed.

E. R. Hayden and W. D. Bush, for plaintiff in error. W. M. Williams, for defendants in error.

ROBINSON, J. Plaintiff commenced this action in the Cooper county circuit court on

the 19th day of April, 1895, and afterwards, on the 14th day of June, filed an amended petition, which is the basis of this controversy. Defendant D. W. Shackelford filed an answer. Defendant W. Speed Stephens demurred on the grounds: First, that he was not a necessary or proper party defendant; second, because the petition failed to state facts sufficient to constitute a cause of action against him; third, because the allegations of the petition showed that he had no connection with, or personal interest in, any of the matters or things mentioned in the complaint, or the subject of the litigation; fourth, that the petition showed that at the time of the matters complained of he was guardian of defendant Rhoda E. Johnson, that he has no personal interest in the subject-matter of the controversy, and was not sued in his trust capacity. Defendants Rhoda E. Johnson and Wilbur T. Johnson filed their separate demurrer upon the ground that the petition failed to state facts sufficient to constitute a cause of action against them. Both of these demurrers were sustained by the trial court, whereupon, the plaintiff declining to plead further, a judgment of dismissal was entered against him and in favor of all defendants, and plaintiff brings the case to this court by writ of error.

This amended petition is an extremely voluminous document, very inartfully and awkwardly prepared, and replete with unnecessary and useless verbiage. The grounds of plaintiff's cause of action are not succinctly or clearly set forth, but are arrived at by much circumlocution and indefinite phrases. The substantial averments are as follows: That Rhoda E. Johnson and Wilbur Johnson are husband and wife, the former's name prior to their marriage being Rhoda E. Stephens; that during her minority her estate was in the hands of her brother, W. Speed Stephens, as her guardian; and that she subsequently became of age, and her brother's guardianship ceased to exist. It is then alleged that on the 19th day of August, 1886, plaintiff, being seised in fee of certain real estate situate in Cooper county, Mo., containing 120 acres, borrowed from the estate of Rhoda E. Stephens, through her guardian, W. Speed Stephens, the sum of \$1,250, and gave his note therefor, payable one year after date, with compound interest thereon at the rate of 9 per cent. per annum, and secured the same by deed of trust on said real estate; and in the deed of trust above mentioned defendant Shackelford was named as trustee, and vested with power to sell the mortgaged premises upon the failure of plaintiff to pay the note at maturity. It is then further alleged "that the defendant D. W. Shackelford well knew of the financial distress in which plaintiff was involved at the time he executed the said deed of trust to secure the payment of the promissory note, and said defendant also well knew of the fears felt and expressed by the plaintiff that, in the

event of the sale of his said lands under the said deed of trust, and the purchase of them by a stranger at a price greatly below their value, plaintiff's right of redemption would be lost, and a greater part of his said indebtedness would remain unpaid, etc.; that, to allay plaintiff's fears, the defendant Shackelford, knowing said lands to be of greater value than the said indebtedness, assured him that his fears were groundless, for that all the defendant Stephens, the guardian, etc., desired, was the payment of said indebtedness; and that he (defendant Shackelford), in making sale of said lands under the deed of trust, would use his best endeavors to accomplish that end, and no more, and, if it sold for more than sufficient, he would account to the plaintiff for the same, and it was then and there further understood by and between plaintiff and defendant that if said lands, when sold as aforesaid, should not sell for a sum sufficient to pay said indebtedness, then, and in that event, the said lands should be sold at private sale, if a purchaser could be found within a reasonable time willing to pay more than the sum realized by public sale under said deed of trust, and the plaintiff should have whatever benefits should or might result from such resale at private sale; that, plaintiff having failed to pay the said promissory note when it fell due, the said Shackelford, as trustee, so plaintiff has been informed, advertised said lands for sale on the 3d day of January, 1891, under the said deed of trust, at public vendue, at the place named in the said deed, and that at said sale said lands had been 'knocked off in a lump' to Rhoda E. Stephens, the ward of the defendant W. Speed Stephens, now the defendant Rhoda E. Johnson, for the greatly inadequate sum of \$700; and that on the same day the said defendant D. W. Shackelford, as trustee, executed and delivered to her his deed in fee to said lands." The petition then avers "that plaintiff, not being possessed of sufficient means to pay off the indebtedness and redeem the lands, failed to attend the sale, or have any other person do so for him; that the lands were worth \$20 per acre, and the indebtedness secured by the deed of trust in question did not exceed the sum of \$1,600; that the plaintiff relied upon the protestations of friendliness of the trustee, Shackelford, and believed that the above-mentioned sale was made for the purpose of a private sale, to carry out the understanding had between plaintiff and the trustee; that as soon as plaintiff learned of the trustee's sale and purchase by defendant Rhoda E. Johnson he at once, with the knowledge, approbation, and encouragement of defendant Shackelford, made diligent efforts to secure a purchaser for the land. Failing to find such a purchaser, he learned in the latter part of 1891, or the early part of 1892, that defendant Shackelford had secured a buyer for eighty acres of the said lands in the person

of Joseph Dietmaring, who had agreed to pay the sum of \$20 per acre, and that a deed had been executed to him therefor." The amended petition then sets out "that on the 2d day of January, 1890, plaintiff had paid to the trustee, defendant Shackelford (as attorney for the defendant Stephens and his ward), the sum of \$175, which was credited on his note, and that he believed the sum of \$175, together with the sum realized from Dietmaring, who had purchased the eighty acres above described, would be sufficient to wipe out the indebtedness on account of his note, and also pay the costs and expenses attending the trustee's sale of the land securing the same; and that he demanded of defendant Shackelford an accounting of his indebtedness, and alleged his willingness to pay any sum that might be found to be due on account thereof, and demanded that upon such payment he be entitled to redeem the remaining portion of the one hundred and twenty acres conveyed in the deed of trust; that in response to this demand he was informed by defendant Shackelford that the entire tract, including the forty acres in question, had been sold by defendant Rhoda E. Johnson, and that plaintiff had no further interest or right of redemption therein." The petition contained the further averment that on the 29th day of January, 1892, the land in question had been conveyed to defendant Shackelford, and that he, together with his wife, who joined in the deed, on the 10th day of February, 1892, conveyed the 80 acres above described to Dietmaring, and applied the money so received from the sale thereof upon plaintiff's indebtedness. It is then alleged that on the date of the execution of the deed of trust the note secured thereby was placed in the hands of defendant Shackelford, as attorney, for collection, with authority to take such action as he might deem necessary to protect the interest of the beneficiary in said deed of trust, after which time defendant Stephens, it is stated, paid no further attention to the matter other than to receive the money paid to him, and failed to attend the sale on the 3d day of January, 1891; that at the sale by the trustee, Shackelford, the lands mentioned in the deed of trust were offered for sale in a lump; and that defendant Shackelford, as attorney for the ward of defendant Stephens, bid for said ward, and knocked the same off to her, and on the same day executed his trustee's deed to the ward, now defendant Rhoda E. Johnson, and acknowledged such deed before W. Speed Stephens, notary public, who was at the time guardian of Rhoda E. Stephens. The petition also complained that defendant Shackelford has committed waste on the 40 acres obtained by him by cutting down trees, to the plaintiff's damages in the sum of \$150, and that he has collected rents, for which he asks an accounting. The petition then asks for an accounting of plaintiff's indebtedness, and offers to pay any sum which

may be found to be due, and prays that the conveyance from defendant Rhoda E. Johnson to defendant Shackelford be set aside, and, upon the payment of all the sums found to be due and owing from plaintiff, that the land be vested in him, and satisfaction entered of the deed of trust first mentioned.

The first point for consideration is the action of the trial court in sustaining the separate demurrer of W. Speed Stephens. The record shows that he was guardian of his sister, Rhoda E. Stephens, now Rhoda E. Johnson, and in that capacity loaned \$1,250 belonging to his ward's estate, which was secured by deed of trust upon plaintiff's land in controversy. After this transaction the ward became of age, and the guardianship of Stephens ceased to exist, all of which occurred prior to the commencement of this action. As shown, defendant Stephens is not the owner of the debt, has no interest in the land sought to be redeemed, and claims no title thereto. He occupies no relation towards plaintiff, and is not in a position with reference to other parties to the action or the land in controversy whereby he could afford plaintiff the relief sought. No personal judgment is asked against him, and he has no title or interest in the real estate described in the petition of which he could be divested to plaintiff's benefit, and, should the judgment prayed for in the petition be entered of record, it could in no wise affect this defendant. His sole and only connection with the matters litigated was in the capacity of guardian, and, having been discharged from such duties, he is no longer a necessary party to a determination of the things complained of in the petition now before the court. Necessarily, whatever action he could have taken to plaintiff's harm must have been acting for his ward and in her behalf, and now, that such representative capacity has ceased to exist, the ward is qualified to appear in court, and answer for herself, and it is not contended that she obtained any property of the plaintiff through the wrongful conduct of her guardian; but, even though she had, it is not necessary, in order to redress such a wrong, that the defendant W. Speed Stephens be made a party to the action. Neither does the mere fact that the acknowledgment of the trustee's deed was taken before defendant W. Speed Stephens as notary public subject him to any liability in the circumstances of this case. The authorities cited by counsel for appellant in support of his contention upon this point are not pertinent. A faulty acknowledgment affects only the registration of the deed and notice thereunder. An acknowledgment, however defective, does not affect the conveyance between the parties themselves. And we do not understand that the acknowledgment of the trustee's deed taken before the defendant Stephens in the capacity of notary public makes him answerable to an action by a mortgagor whose

rights are not affected or changed thereby. In view of these considerations we think the action of the trial court in sustaining the demurrer of defendant Stephens was proper.

Neither can we find, after a careful reading of the amended petition, that it states any cause of action against Rhoda E. Johnson, nor her husband Wilbur Johnson. The only possible interest the latter-named defendant ever had, under the facts stated, was that resulting from his marriage with Rhoda E. Stephens. As to her, the petition sets out that she had conveyed to defendant Shackleford, before the commencement of this action, whatever title she had to the real estate in controversy. This, and the further fact that all of the indebtedness from plaintiff to her had been fully paid and discharged, is settled in the petition. Neither she nor her husband have the slightest interest whatever in the subject-matter of the controversy, and it is not charged that either of them have been guilty of any conduct whereby they should be made to answer to plaintiff, and no judgment is asked to be rendered against them. The trustee, acting alone, and without the knowledge of the beneficiary, could not make an agreement with the mortgagor contrary to the terms contained in the deed of trust, so as to bind the beneficiary; and it would not make any difference whether his attempt to do so was made at the time of the execution of the deed of trust or subsequent thereto. Moreover, the petition in the case does not charge any agreement with the Johnsons whereby they should permit plaintiff, after the trustee's sale, to find a purchaser for a portion of the land at a price equal to the whole amount of the debt, and a right of redemption of the balance. Besides, no wrongful conduct on their part is alleged since the execution and delivery of the deed of trust. The gist of the petition is that defendant Shackleford holds title to 40 acres of land that plaintiff should have the benefit of, and that he has and now refuses to sell same, or to suffer it to be sold by plaintiff, and to account to him for the excess over and above the amount necessary to pay off the debt of Rhoda E. Stephens, now Rhoda E. Johnson, as under the terms of his agreement he was to do. Even though the land may have passed through the hands of the defendant Rhoda E. Johnson, and been acquired by defendant Shackleford through her, yet, under the circumstances set out in the petition, plaintiff cannot obtain the relief he prays by a decree against the Johnsons. In fact, the petition in substance alleges that the defendant Rhoda E. Johnson has done nothing more than to receive the full amount of the debt, which she was clearly entitled to do independent of the matters with respect to which complaint is made. It follows that the separate demurrer of the defendants Johnson was properly sustained.

Defendant Shackleford filed an answer,

but the court below, however, of its own motion, dismissed the petition as to all the defendants, holding that it failed to set forth any facts upon which a judgment could be based against Shackleford as well as the other defendants. A most liberal construction of the petition in favor of the plaintiff is that the agreement and understanding between plaintiff and Shackleford was to the effect that, should the land at the sale under the deed of trust not bring a sum sufficient to pay the mortgage indebtedness, then the property should be so held and manipulated by the trustee that it should again be sold at private sale, provided a purchaser could be found within a reasonable time to whom the property might be disposed of at a greater sum than the amount bid at the trustee's sale; and that the proceeds of such private sale, after paying the note secured by the deed of trust, together with the costs and expenses attending the sale by the trustee, should be turned over to plaintiff. The petition then charges that Shackleford advertised the land under the provisions of the deed of trust, and that the same was sold to defendant Rhoda E. Johnson, after which he procured the land to be conveyed to himself, and, finding a purchaser for 80 acres of the land at a sum equal to the whole amount of the mortgage indebtedness, deeded the same to such purchaser, and still retains the remaining 40 acres for himself. While it is not necessary to pass upon the question whether the trustee could bind the beneficiaries by his agreement with plaintiff that he might redeem after sale under the deed of trust, still the trustee himself might, perhaps, be bound by whatever contract he may have made. And if, as alleged in the petition, it is true that such an understanding was had between the trustee, Shackleford, and plaintiff, as that in accordance with the terms of such agreement the trustee so handled the property as to control the title, and, in order to carry out such agreement, did eventually have the property conveyed to himself, and then sold the same (at best, with every intendment in his favor), plaintiff would only be entitled to whatever proceeds might remain after payment of his indebtedness and the costs and expenses attending trustee's sale. But, unfortunately for plaintiff's contention, it appears that only a portion of the lands have been sold, and it is not alleged that there is any surplus to which the plaintiff would be entitled. Therefore no right of action has accrued up to that time under the allegations of his petition.

We have examined the authorities cited by counsel for plaintiff enunciating the doctrine that the trustee, Shackleford, by reason of his position, could not purchase at his own sale, or acquire any benefits to himself which rightfully belonged to plaintiff, but fail to see in what manner they could be applied to the facts of this case. We understand the rule to be, as laid down in those decisions,

that the trustee cannot be permitted to purchase at his own sale, and that it makes no difference whether he does so directly or through the interposition of a third party; but that proposition is not involved in the record here. The circuit court therefore committed no error in dismissing plaintiff's bill, and its judgment is affirmed. All concur.

COATNEY v. ST. LOUIS & S. F. RY. CO.

(Supreme Court of Missouri. June 19, 1899.)
APPEALABLE ORDERS—SETTING ASIDE A NON-
SUIT—RAILROADS—KILLING PER-
SONS ON BRIDGE.

1. An order setting aside a nonsuit is appealable under Rev. St. 1889, § 2246, authorizing an appeal from "an order granting a new trial," under section 2130, defining a "trial" as "a judicial examination of the issues between the parties, whether they be issues of law or fact."

2. A man, partly intoxicated, attempted to cross a railroad bridge which foot passengers had been using for many years. It was misty and dark, and the track curved, so that a headlight of an approaching locomotive would not throw light on the bridge until the train had nearly reached it. A train crossed the bridge, after giving the proper signals of its approach, and struck the man, and killed him. *Held*, in an action by the man's wife, that a demurrer to the evidence should be sustained, as no negligence of the railroad company was shown.

Gantt, C. J., and Burgess, J., dissenting.

In banc. Appeal from circuit court, Lawrence county; J. C. Lamson, Judge.

Action by Martha A. Coatney against the St. Louis & San Francisco Railway Company. From an order setting aside a nonsuit, defendant appeals. Reversed.

L. F. Parker and J. T. Woodruff, for appellant. Cloud & Davis, for respondent.

BRACE, J. This is an action brought by the plaintiff, the widow of James Coatney, deceased, to recover \$5,000 damages for the death of her husband, which she alleges, in her petition, was caused by the negligence of the defendant. On the trial, at the close of plaintiff's evidence, the court instructed the jury that, under the pleadings and evidence, the plaintiff was not entitled to recover. Thereupon the plaintiff took a nonsuit with leave, and judgment was rendered in favor of the defendant for costs. In due time plaintiff filed her motion to set aside the nonsuit, on the ground that the court erred in sustaining the defendant's demurrer to plaintiff's evidence, which motion, coming on to be heard, was by the court sustained, the nonsuit set aside, and "plaintiff granted a new trial," to which action of the court the defendant excepted, and appealed. In due course the case reached this court, and was assigned to division No. 2, where the plaintiff filed her motion to dismiss the appeal, on the ground "that there is no judgment from which an appeal will lie"; whereupon the case was transferred to the court in banc for determination by division No. 2 on its

own motion. On the hearing in banc, the motion to dismiss was taken with the case, and presents the first question to be determined.

1. By an act of the general assembly approved April 18, 1891 (Sess. Acts, p. 70), section 2246, Rev. St. 1889, providing for an appeal only in cases of "final judgment or decision," was repealed, and a new section enacted in lieu thereof, providing that "any party to a suit aggrieved by any judgment of any circuit court in any civil cause from which an appeal is not prohibited by the constitution, may take an appeal to the court having appellate jurisdiction from any order granting a new trial, or in arrest of judgment, or dissolving an injunction, or from any interlocutory judgments in actions of partition which determine the rights of the parties, or from any final judgment in the case, or from any special order after final judgment in the cause. * * *" In *Ready v. Smith*, 141 Mo. 305, 42 S. W. 727, a case coming under the operation of this law, and decided in division No. 2 on the 9th of November, 1897, it was held that an appeal does not lie from an order setting aside a nonsuit and reinstating the case; while in the subsequent case of *State v. Missouri Pac. Ry. Co.*, 50 S. W. 278, a like case, also governed by this law, decided by division No. 1, February 15, 1899, it was held, without mention of the former case, that an appeal does lie from an order setting aside a nonsuit and granting a new trial. It was in view of and to remove the conflict between these cases that this case was transferred to the court in banc. The law of 1891 was set out in the opinion in *Ready v. Smith*, but most of the opinion was devoted to the discussion and decision of the question whether or not an appeal would lie under that provision of the law giving an appeal from "any final judgment." The question as to whether an appeal would lie under any other provision of the law was disposed of summarily, in the following language: "It will be noted that an order or judgment setting aside a nonsuit is not enumerated in the statute as an order from which an appeal may be taken. If permitted then, it must be under the general clause allowing an appeal from 'any final judgment.' * * * The act of 1891 was before this court in banc for interpretation in *Greeley v. Railway Co.*, 123 Mo. 157, and 27 S. W. 613, and it was pointed out that it was the purpose to allow appeals from certain orders which up to that time had been held to be merely interlocutory, and not final, in their nature, and the appeal in that case was dismissed because an order appointing a receiver was not mentioned among those orders mentioned by the statute of 1891. Applying the reasoning of that case, it is obvious, we think, that as an order setting aside a nonsuit is not final, and, as the statute has not made it appealable in terms, it must be held that an appeal cannot be prose-

cutted therefrom, and the appeal in this case must be and is dismissed." This was all that was said on the question now at issue, and the reasoning falls far short of covering that issue. It may be conceded that an appeal would not lie under the general clause, and that one of the purposes of the law was "to allow an appeal from certain orders which, up to that time, had been held to be merely interlocutory, and not final." But this was not, by any means, the whole scope of that legislation; for, in addition, it expressly provided for an appeal "from an order granting a new trial," and "from any special order after final judgment in the cause,"—the bearing of which upon the question seems not to have been considered in that case. Now, an order setting aside a nonsuit is an order after judgment, and is therefore not "an interlocutory order." Its effect and purpose is to set aside a judgment that would otherwise be final in that case, and to grant a new trial thereof. Therefore it is an "order granting a new trial." So that, with these unquestionable characteristics of an order setting aside an involuntary nonsuit staring us in the face, when the subsequent case of *State v. Missouri Pac. Ry. Co.* came on for determination in division No. 1 we held: "The right of appeal from an order sustaining a motion for a new trial was given by an act of the general assembly approved April 18, 1891. In that act no mention is made, by that name, of an order sustaining a motion to set aside an involuntary nonsuit, but such an order is necessarily comprehended in the words 'order granting a new trial.' The proceeding which results in a ruling that enforces a nonsuit is as much a trial as the proceeding which results in a verdict, and the judgment which follows an involuntary nonsuit is as final a disposal of the case in which it is rendered as is the judgment that follows a verdict in such case. The effect of the judgment on the cause of action involved is not the same in both cases,—the cause of action being extinguished in the judgment on a verdict, but surviving the judgment on the nonsuit; but, so far as the suit itself is concerned, it is as completely ended in the one case as the other. What is a 'trial'? Our statute answers the question. Section 2130, Rev. St. 1889: 'A trial is the judicial examination of the issues between the parties, whether they be issues of law or fact.' The proceeding in this case, then, amounted to a trial, although it culminated on an issue of law, and the effect of sustaining the motion to set aside the nonsuit is nothing more than granting a new trial of that issue. Defendant, therefore, had a right to this appeal." When it is considered, in connection with this reasoning, that the very essence of an involuntary nonsuit is that it be the product of adverse rulings which cover the case, and preclude a recovery, as has frequently been decided (*Bank v. Gray*, 146 Mo. 568, 48 S. W. 447; *McClure v. Campbell* [Mo.] 49 S. W.

881), it becomes so palpably evident that a judgment on such a nonsuit is the consummation of a trial of the case, and that the setting aside of that judgment, and granting another trial upon the issues thereof, is "granting a new trial," within the meaning of the statute, that we cannot hesitate to give our assent to the conclusion reached. Hence the decision in *Ready v. Smith* on this subject will be overruled, and the ruling in *State v. Missouri Pac. Ry. Co.* followed, and the motion to dismiss the appeal in this case will be denied.

2. Plaintiff's cause of action, as stated in the petition, is as follows: "That near said city of Granby there is, on said railroad, a bridge spanning a stream, which the defendant has permitted the public to use as a footway crossing for over twenty years continuously and undisputedly, and as such had become a public traveled crossing of said railroad; that on the 5th day of October, 1890, the plaintiff's husband, James Coatney, was, at a time when no regular trains were crossing said bridge, lawfully crossing the same, using all the care possible under the circumstances, when a special train of cars, drawn by a locomotive, carelessly and negligently approached said bridge and crossing from the west, when said Coatney was midway on said bridge and crossing, at the unusual speed of 30 miles per hour, without sounding whistle or ringing the bell on said locomotive at a distance of 80 rods, or any other distance, from said crossing, or another crossing 100 yards west thereof, and without checking, or attempting to check, the speed of said train, although said James Coatney was in plain view of said employes and agents of defendant in charge of said train for the distance of 80 rods, then and there carelessly and negligently struck and killed the said James Coatney, who was at the time making every effort in his power to get out of the way of said train." The answer of the defendant was a general denial and a plea of contributory negligence.

As the only ground for setting aside the nonsuit was the alleged error of the court in sustaining the demurrer to the evidence, it is perhaps as well to let the evidence speak for itself. As furnished in the abstract of the appellant, of which no complaint is made, it is as follows:

T. J. Reynolds testified: He resided in Granby in October, 1890, and knew James Coatney, and had known him eight or ten years. Saw Coatney on Sunday, October 5, 1890, and went fishing with him and Will Broen on that day. "We started between 1 and 2 o'clock, and went down on the south side of the creek, and crossed the second bridge, and came back to the Skinner Lake, and had our net in, I believe, twice before we crossed the bridge, and came back to the lake, and lost Coatney there, some way. I can't tell how. We went to a spring there is up there, and waited for a while, and he nev-

er come. Will Broen was with me, and went back to look for him, and couldn't find him, and we thought he had taken the near way, and waded the creek, and come home." That Granby City is about one and a half miles from Granby. That the first bridge is about 300 yards below the depot, and that the second bridge is about a mile and a half west of the first bridge. That they remained in the neighborhood of the second bridge until about 5 o'clock, when they started home. "We got ahead of Coatney somewhere there, right across from the Skinner Lake. I guess these men have got it in the deposition here. We went ahead of him there somewhere. We thought he had went on, you know, and crossed at the ford, and come on home. In the place of that, he didn't." That they went up the railroad, and crossed the first bridge, and got home "just a little before dark." That he heard, or some one told him, that a train whistled twice just as he got to Granby. It was getting along towards night. That the three of them had a pint and a half of alcohol when they started. That they used a pint of it up to the time he and Broen got separated from Coatney, and "I believe Coatney had about a half pint of it when we left him." All of them used a pint of alcohol. They weakened the alcohol before drinking it. That Coatney was in the habit of drinking occasionally, but was all right when they left him, as far as he knew. That he had been acquainted with the bridge ever since it was built, which he guessed was about 20 years. That the bridge was used to cross on. On cross-examination, the witness testified: That he, Broen, and Coatney met that afternoon, and decided to go fishing. Coatney had a pint of alcohol, Broen had half a pint, and witness had the seine. Had seen Coatney take a drink in the morning, and at the time they started could tell that he had been drinking some. They started out, and went down on the south side of Shoal creek, to the second bridge. There they crawled through the barbed-wire fence, and got on the railroad track, went along the railroad to second bridge, and crossed it. After crossing the bridge, and going east several hundred yards, they stopped at a spring to get a drink, and there missed Coatney. Broen went back, and hunted for him, but did not find him, and they then went on without him, crossing the east or first bridge, and keeping the railroad track to Granby City. That Coatney could walk when they left him, but not very straight. Was a little full, but did not stagger much. That he was fuller in the morning than when witness left him on the railroad. He had sobered off on the alcohol he had drunk that afternoon. That Coatney crossed the second bridge, and they lost him on the railroad between it and the first bridge. That the afternoon was cloudy, and there was a drizzling rain.

Will Broen testified: That he knew Coat-

ney in his lifetime. That Coatney was a miner, and witness worked with him. That on the day in question he, Reynolds, and Coatney went fishing. On reaching Shoal creek, they fished a little, went down the creek, crawled through the railroad fence, got on the railroad, walked across the second bridge, and started home by way of Granby City, taking the railroad east by way of the first bridge. They left Coatney on the railroad between the two bridges. "He was following along behind. I told him to come on, that he would get wet if he did not come on. It was kind of misting rain, and he did not come. He was walking along, and says, 'I am coming.'" On reaching a spring, half way between the bridges, they missed Coatney, and witness went back to a point where he could see to the second bridge, to look for him, but could not find him, and he and Reynolds then went on to Granby. That he had used the bridge to cross Shoal creek five or six years. That they took a pint and a half of alcohol with them that afternoon, and drank it, taking the last drink at Skinner Lake. "Do not know how many drinks I took on that drunk. I had so many it was too hard to count them." That Coatney kept the pint bottle, and it had about a half pint in it. On cross-examination, witness testified: That alcohol, when mixed with an equal amount of water, makes it about as strong as whisky, and that diluting what they started with on that day in that proportion would make a quart and a pint of diluted alcohol as strong as whisky. That, if they had drank it all, each would have had as much as a pint of whisky. That Coatney, when he started, had been drinking, and when they left him had about a half pint of diluted alcohol. That after getting on the railroad they crawled through the railroad fence, and went to Skinner Lake. Then crawled through on their way back, and got on the railroad again. "I told him to come on, he would get wet. It was misting rain." They waited for him. "We wanted him to go home with us. He was older than me, but he was a friend of mine, and I wanted to take care of him. One reason was that I thought he was too full, and could not get home. I went back, and looked for him, but could not see anything of him. We then crossed the first bridge, and went home. When we got a mile or so from the railroad track, we heard a whistle, but could not tell whether it was east or west of Granby City. The railroad is fenced between the two bridges. At the road crossing just west of the first bridge there are cattle guards. From the crossing east to the first bridge the railroad curves some. It commenced to drizzle rain while we were at Skinner Lake, and was kind of misting from that time on. Coatney was in such a condition that he staggered to a certain extent when we lost him."

Anton Stanka testified: That he was in Granby City on the day Coatney was killed. That the regular passenger train due there

at 5:56 was late, and he waited until after 6 o'clock, and started home before its arrival, going down the railroad by way of the first bridge. That there is an approach to the bridge from the east of a trestle about 10 or 12 feet high, which is about 200 feet long. That the bridge proper is about 100 feet long. After he crossed the bridge, and got away from the railroad about one and a fourth miles, he heard the train whistle twice near the bridge. It was a freight train, coming from the west. It was between 6 and 7 o'clock, and was getting dark. Had been a section foreman on that road, and knew the road. There is a road crossing about 60 yards from the west end of the bridge, and the railroad curves just at the west end of the bridge, kind of in the shape of the letter "S." Did not know whether one, 150 yards west of the bridge, could see through or not. A man would have to look pretty close to see through 130 yards. It is a covered bridge. It is about three-fourths of a mile from the Granby City depot to the first bridge, and about a mile from the first bridge to the second bridge. Knew the bridge for 10 or 12 years, and it had been crossed over by people some days more than others. Had seen the place on the trestle where Coatney was killed. The trestle at this point is about 8 or 10 feet high. There was no water under the trestle at that time. On cross-examination witness testified: "The track commences to curve to the south about two rails west of the bridge, and then curves to the north, and an engine approaching it from the west would get within 60 feet before it struck the straight track. Until it did come within 60 feet of the bridge, the train would be on a curve, and the headlight would not shine around the curve, but would throw the light straight ahead."

Joseph Zehr testified: On the day Coatney was killed at the bridge he lived in Granby City, which is a way station on the 'Frisco Railroad, consisting of a depot, section houses, a mill, and another house or two; the town of Granby being about a mile south of Granby City. The distance from the bridge to the depot is about 12 telegraph poles, and from the depot to witness' house is about 5 telegraph poles. These poles are 180 feet apart. Was in the house, and heard the train about three miles west of the bridge where Coatney was killed. "I heard it give three whistles for the crossing. I saw it when it got to the whistling post, but heard it west of there. Saw it from the time it whistled until it got to the depot. Saw an object on the bridge when the train came to the bridge. Didn't know what it was. Would not swear what it was. It looked like a man. It was on the trestle of the bridge, about two and a half rail lengths from the bridge proper. The object was up. I could not tell what it was. It looked like it was trying to get out of the way mighty fast. Could not tell anything about the motion it

was making, only saw the object moving east. When I first saw the object the train was at the west end of the bridge, about the length of six rails from it. About the time the train struck the west end of the bridge it whistled, and I thought I heard some one holler. There were some campers on the other side of the creek, and I thought it was them. Had worked on this section before the accident. Railroad curves considerably west of the bridge. About an hour after the train passed, I heard that Coatney was killed, and went down there. He had been struck about 65 feet west of the east end of the trestle, and was badly mangled." On cross-examination witness testified: "It was dark when I saw this object. Didn't know whether it was killed or not. Didn't go to see, until I heard of the accident. I was at the house 300 yards from the bridge. There were some trees between the house and bridge near the trestle, a little to the north. The bridge has upright iron sides and iron over the top." Does not know that a headlight would throw shadows on bridge in the direction train was coming. Thought it was a man, but did not go down to see. An inquest was held that night. Witness knew the purpose was to find out how deceased came to his death. Was present. Did not tell the coroner or any other person about what he had seen. "It was not my business to tell them until I was called on to do so."

Ben Zehr testified: He lived in Granby City on the day Coatney was killed, and that it was about dark. Was in the house about a quarter of a mile from the bridge, sitting at a table writing a letter. Heard the train from the west whistle twice near the bridge. Understood two whistles were for loose brakes. "My brother Joseph was outside of the house, on the porch, when we heard of the accident. My brother, Joe, Mr. Whipple, and I went down there. The bridge there is used every day by persons to cross the creek." On cross-examination, the witness said: "My brother, Joe, did not say anything about having seen the object while at the house that evening, nor on the way down there, after we heard Coatney was killed."

Wm. Lambert testified: He is a brother of plaintiff, and lived in Granby at the time Coatney was killed. Saw him in the morning of that day, and he was perfectly sober. Saw him on the bridge that night after he was killed. The lower part of the body was on the inside of the rail, and his head and shoulders on the outside of the south rail. Everybody used the bridge that went across there. Could safely say that he had seen the bridge used by people crossing hundreds of times.

J. T. Martin testified: Had seen persons cross bridge ever since it was built. Did not think one could see straight through from the public road. Might a little past the road.

S. C. Hart, justice of the peace, testified: He acted as coroner, and held the inquest

over Coatney's body. At the place of the accident, found hundreds of pieces of flesh and bones scattered on the trestle of the bridge. Had seen people cross there frequently. The road begins to curve to the south at the west end of the bridge, and after one gets out several hundred feet cannot see through the bridge. The railroad fence begins on each side of the track right up to the west end of the bridge.

Jack Hudson testified: He was a brother-in-law of the deceased. Had been in several kinds of business during the last three years. Had been a city marshal of Granby, but was not then. On the day Coatney was killed went down to the depot with Col. Tom Freeman, who was going to St. Louis. The passenger train was late. A freight train passed just before the passenger, and could see it through the bridge to the other side. The train passed quite a little bit after the passenger train was due. It whistled just as it came on the bridge, or a little before, but the speed was not checked. "You can go west of the crossing, and see through the bridge."

J. M. Lambert testified: That the plaintiff, Mrs. Coatney, was his daughter. That he saw Coatney on the morning of the day he was killed, before he started out fishing. "I supposed he had been taking a little to drink, but he talked with all his wits. He talked as well as he ever did in his life, and walked as straight."

We have carefully scanned this testimony, but have failed to find in it any evidence tending to prove that the servants of the defendant were guilty of any negligence contributing to the death of the plaintiff's husband. We do find in it abundant evidence that the proximate cause of his death was his own negligence, superinduced by an intoxicated condition, willfully brought on himself, and we do not find any evidence tending to prove that the defendant's servants willfully, wantonly, or recklessly ran him down and killed him when, by the exercise of proper care, they might have avoided it. Consequently we find no ground therein upon which a recovery by the plaintiff could be predicated. Counsel for plaintiff has furnished us no brief showing any such ground, and as the evidence may well speak for itself, and a discussion of it, in the light of settled principles and adjudicated cases, would be, not only a thrashing of old straw, but the exercise itself would consist merely in setting up men of straw and knocking them down again, we shall content ourselves with the simple announcement of this conclusion: The court erred in setting aside the judgment on the nonsuit, and in granting the plaintiff a new trial, and its order to that effect will be reversed, and the cause remanded, with directions to set the same aside.

SHERWOOD, ROBINSON, MARSHALL, and VALLIANT, JJ., concur. GANTT, C. J., and BURGESS, J., dissent.

RIDGEWAY v. HERBERT et al.

(Supreme Court of Missouri, Division No. 1.
June 14, 1899.)

INFANTS—DEEDS—DISAFFIRMANCE—EJECTMENT—ANSWER—EVIDENCE—PROVINCE OF COURT—INJUNCTION—FRAUD—HARMLESS ERROR.

1. Where a minor supposing himself of age conveyed property, and after coming of age he sued to set aside the transfer for fraud, a statement afterwards made by him to the transferee that he was satisfied with the transaction was not a ratification of his act as a minor, unless he had learned that he was a minor when he executed the transfer.

2. A minor may avoid his deed when he comes of age, though he represented himself of age when he made the deed, and thereby misled the other party to his disadvantage.

3. Where a person, on coming of age, sued to set aside a previous conveyance for fraud, the fact that he alleged in his petition that he was of age when he executed the deed does not estop him from afterwards disaffirming the deed, because he was a minor when he executed it.

4. If a minor wastes the consideration received for a deed, he may disaffirm the deed, on coming of age, without restoring the consideration.

5. It is a sufficient disaffirmance of a conveyance executed during minority for the grantor to give a warranty deed of the same property to another grantee on coming of age.

6. It is a question for the court whether a deed executed by a person on coming of age was a disaffirmance of a deed of the same property given to another grantee during minority.

7. An allegation in an answer in ejectment that the title on which plaintiff sues was fully litigated and adjudged invalid in a suit wherein defendant's grantors were plaintiffs and plaintiff was defendant will not be stricken out, though it is not a defense, since it may be material on the question of defendant's right to have further litigation enjoined.

8. It was harmless error to admit secondary evidence without laying a predicate therefor, where the party giving it immediately afterwards offered to lay the predicate, and withdrew his offer only on the opposite party's objection that it was immaterial, since the secondary evidence was already in.

9. Where a grantor was young and dissipated, and a spendthrift, and his character was known to the grantee, a mature business man, it was fraudulent for the latter to obtain conveyances from the former for an inadequate consideration in cash which he knew would be squandered, though at the time of the transfer the grantor was sober.

10. A successful defendant in ejectment is not entitled to a judgment enjoining plaintiff from further suing on the same title, where the case is the first suit plaintiff has brought on that title.

Appeal from circuit court, Grundy county: P. C. Stepp, Judge.

Ejectment by D. D. Ridgeway against W. V. Herbert and others. From a judgment for defendants, plaintiff appeals. Reversed, with directions.

S. C. Price, for appellant. Hall & Hall, for respondents.

VALLIANT, J. This is an action of ejectment to recover 60 acres of land in Grundy county. The petition is in the usual form. The answer admits that defendants are in possession, and sets up a state of facts showing that plaintiff is entitled to recover. "in-

less the leases and deed under which he claims are rendered invalid by reason of the further facts pleaded in the answer, which are substantially that on December 2, 1891, George W. Moberly, who is the common source of title, was the owner and in possession of the land, and on that day he executed a lease for a term of five years from March 1, 1892, to one Martin, at the yearly rental of \$100, and on December 31, 1891, Moberly, for the consideration of \$25, assigned his interest as landlord in the lease to the plaintiff and J. D. Ridgeway, the latter afterwards assigning his interest to the plaintiff; that afterwards, on February 1, 1892, Moberly executed a lease to plaintiff for five years from March 1, 1897, for a total rental of \$50, and three days later executed a deed to the plaintiff for the land for \$50; that, at the time he made those leases and the deed, Moberly was under 21 years of age; that after he came of age he disaffirmed those transactions, and made a deed conveying the land to Williams and Linney, under whom, by mesne conveyances, defendants hold title; that Moberly, while yet a minor, squandered the money plaintiff paid him for the lease and the deed, and did not have it to restore to plaintiff, but W. B. Linney, as attorney for Moberly, tendered it to plaintiff, but he refused it; that, after they purchased from Moberly, Williams and Linney sued this plaintiff in ejectment for the land, and recovered it in a judgment rendered in 1895, and after that they sold it to defendant Herbert, and defendants now hold under that title. The answer then proceeds in the nature of a cross bill in equity, and states separately three causes calling for equitable relief. The first is leveled at the Martin lease, and charges not only that Moberly was a minor when he made it, but that, in the matter of obtaining the assignment of the landlord's interest in it from Moberly, the plaintiff, who is a shrewd business man, took advantage of the inexperience of Moberly, plied him with whisky until he was drunk, falsely represented that the lease, which was worth \$500, was of no value, and by that means obtained the assignment for \$25. Then follows a reiteration of the statements in reference to the making of the deed to Williams and Linney by Moberly after he came of age, disaffirmance of the transactions with plaintiff, his squandering of the money received while a minor, the tender of the amount by Williams and Linney, their recovery of the land by suit against plaintiff, and sale of the same under which defendants hold as above stated, and concludes with the charge that the lease, being of record, is a cloud on defendants' title, and prayer that the cloud be removed and plaintiff enjoined from suing and asserting title under it. The remaining two paragraphs of the cross bill are substantial repetitions of the one just summarized, except that one of them is aimed at the second lease, and the other at the deed made by

51 S.W.—66

Moberly to plaintiff, and praying for their cancellation as clouds on defendants' title, and for injunction against them. The reply admits the execution of the leases and deed as alleged in the answer; denies all the allegations as to fraud or improper dealing on the part of plaintiff; denies that Moberly was a minor when he executed the same; but avers that, if he was a minor, he was within a few months of being of age, that plaintiff dealt with him fairly and in good faith, believing him to be of age, he holding himself out as such, and that he and defendants claiming under him are estopped to plead his infancy. Further, that on March 18, 1893, when he was of age, Moberly brought suit against plaintiff, seeking to annul the leases and deed on the alleged ground that they were obtained by fraud, and stating in his petition that he was of age when he executed them, which suit resulted in a judgment of dismissal at Moberly's cost; that thereby he ratified and affirmed his act, and defendants are estopped to question it. The court submitted the issues to a jury, who returned a verdict for defendants. After motions for new trial and in arrest were overruled, the cause is here on plaintiff's appeal.

Under the pleadings, the issues were divisible into two classes,—the one constituting an action at law, the other a suit in equity. The issues affecting the validity of the plaintiff's leases and deed on account of the alleged minority of Moberly, and his disaffirmance of the same after coming of age, were issues in an action at law triable by a jury, and those affecting the validity of the instruments on account of the alleged fraud were issues in an equity suit, and for the chancellor to try. Where an answer in a lawsuit admits the plaintiff's cause of action, and sets up purely an equitable defense, it converts the whole case into a suit in equity, triable by the chancellor. *Hodges v. Black*, 8 Mo. App. 389; *Allen v. Logan*, 96 Mo. 591, 10 S. W. 149; *McCollum v. Boughton*, 182 Mo. 601, 30 S. W. 1028, 33 S. W. 476, and 34 S. W. 480. A plaintiff is not thereby deprived of his right of trial by jury, because the defendant by his answer concedes the plaintiff's right to recover, unless the equity defense prevails. But in this case the defendants plead two affirmative defenses,—the one cognizable at law, the other in equity, although they have mingled both in the same paragraphs; but no objection to the answer on that account was made, and, as the facts can be distinguished, we will do so. If the court had seen fit to try first the issues presented in those portions of the answer which are in the nature of an equitable cross bill, and had found that the plaintiff's leases and deed were obtained by fraud, the finding would have covered the whole case, and there would have been no propriety in trying the other issues. But, if the court had found for the plaintiff on the cross bill, it would have left the issues relating to Moberly's minority and his

disaffirmance or ratification live questions for trial. It was also in the discretion of the trial court to have singled out the issues at law, and have tried them first with the aid of a jury. In that event, if the verdict had been for the plaintiff, the chancellor would have proceeded to try the issues relating to the alleged fraudulent procurement of the instruments, and, if his finding had been for the plaintiff, judgment would have followed the verdict of the jury, and, if for the defendants, there would have been a decree for them, notwithstanding the verdict. But all the issues in this case were submitted to the jury, and neither party has a right to complain of that course, because both parties tried it in that way, and both asked instructions of that kind, which were given. There was a general verdict for defendants which might have been the result of a finding for defendants on one class of issues or the other, or on both. If it was on the issues relating to the minority, etc., of Moberly, this court would not be required to balance the evidence to sustain the verdict; but, if it was on the question of the fraudulent procurement of the instruments, we would have to weigh all the evidence and find the facts.

Appellant omits from his abstract the evidence relating to the age of Moberly at the period in question, because he says he concedes that the evidence on that point was sufficient to support the finding that Moberly was under 21 years of age. That leaves open, on that branch of the case, only the question as to disaffirmance or ratification or estoppel. There was really no evidence entitling the plaintiff to have those questions submitted to the jury. The evidence shows that in March, 1893, Moberly filed a suit against this plaintiff to set aside the leases and deed on the ground that they had been obtained by fraud similar to the charge in the answer in this case, which suit was dismissed August 23, 1893, for failure to give security for costs. The evidence of defendants tended to show that it was about the time that suit was dismissed that Moberly discovered that he was a minor when he had the transactions with plaintiff, and then it was that he made the deed to Williams and Linney under which defendants claim. The only evidence on the part of plaintiff which it is now claimed tends to show a ratification by Moberly after he came of age is by plaintiff himself as follows: "Q. And this conversation you recited in answer to Judge Hill's question, between you and George Moberly after the Moberly suit had been brought against you; what, if anything, did Moberly say about whether he was satisfied with the transactions between you and him? A. He told me he was satisfied for me to have the place. That I had paid him all I had agreed to, and that it was his wife and attorneys that was suing me, and as for him he considered the land sold and paid for." Wit-

ness further said that he was not clear whether this was after the suit had been dismissed or while it was pending. He knew it was after the suit was brought, and that in the conversation no allusion was made to the fact that Moberly was a minor when the transactions were had,—nothing said about affirming his act done as a minor. Witness up to that time had never heard about Moberly's being a minor when he made the leases and deed. This conversation evidently related to the impeachment of the transactions on the grounds set up in the suit. It could not be taken as a ratification of his act as a minor, unless it appeared that he knew that he was a minor, and intended it as a ratification of an act which he might, if he saw fit, disaffirm. In the face of that evidence, there was the fact of the suit wherein Moberly was seeking to have the instruments annulled on the charge of fraud, which charge the plaintiff in this case escaped answering only because Moberly could not give security for costs. The appellant's counsel at the trial did not seem to attach any value to the plaintiff's evidence on that point, since he asked no instruction submitting the question of ratification of the act of a minor to the jury. The hypothesis of ratification given in the eighth instruction is on the theory that Moberly was drunk when he executed the instruments. But the learned counsel there took the position that defendants were estopped from asserting that their grantor, Moberly, was a minor, because Moberly, by his conduct, held himself out as a man, and thereby misled the plaintiff, and also because, in the suit which he filed to set aside the instruments, he alleged that he was of age at the time. An instruction for the plaintiff on each of these points was asked and refused. The deed of a minor is voidable at his option under certain equitable restrictions when he comes of age, even though he may have represented himself as of age when he made the deed, and thereby misled the other party to his disadvantage. A minor is no more responsible under the circumstances for his representations than he is for his deed. Of still less force on the theory of estoppel is his statement in the petition in the suit referred to that he was of age when he executed the instruments. That was after the transactions had occurred, and the plaintiff could not have been misled by it. When one, on coming of age, seeks to avoid his deed made when he was a minor, he must act promptly, and, if he has the consideration that was paid him for the deed, he must restore it; but if, during his minority, the consideration he received has been wasted, he may avoid the deed without making restitution. *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906. In that case this court, per Black, J., said: "The privilege of repudiating a contract is accorded an infant, because of the indiscretion incident to his immaturity; and, if he were required

to restore an equivalent where he has wasted or squandered the property or consideration received, the privilege would be of no avail when most needed." The evidence showed that this young man went on a spree when he received the money from plaintiff, and in a short while it was all gone. There was also evidence on the part of defendants tending to show that, as soon as it was discovered that Moberly was under age when he had the transactions with plaintiff, a tender of the money that had passed from plaintiff to him was made by one of Moberly's attorneys to plaintiff, and refused. That evidence, however, leaves the impression that that tender was made in the interest of Williams and Linney, who were about to become the purchasers of the land from Moberly, though it was made in Moberly's name. But the plaintiff at the trial seems to have not considered that the evidence justified the submission to the jury of a question as to the invalidity of Moberly's alleged disaffirmance of the transaction because of nonrestitution, since he asked no instruction on that point. It appears from the evidence that the trustees under the will of the young man's adopted father thought he had reached his majority a year earlier than the fact was, and in that mistaken fact invested the money left for him in this land, giving him a life estate and the remainder to the heirs of his body. He was under the same mistaken belief as to his age, and, while so, executed the papers under which the plaintiff claims. But just about the time the suit he had filed against this plaintiff was dismissed the mistake was discovered. Then it was he made the deed to Williams and Linney under which the defendants now claim. That deed is not set out in full in the appellant's abstract, but it is there described as a warranty deed in due form, dated August 23, 1893, and recorded two days later. From this we infer that it was a deed sufficiently absolute on its face to amount to a disaffirmance of the prior deeds. In such case the question of disaffirmance is not one of fact for the jury, but one of the legal effect of the deed, and is for the court. *Peterson v. Laik*, 24 Mo. 541. Therefore, under the record before us, it is clear that Moberly was under age when he made the leases and deed under which the plaintiff claims, that he squandered the money he received from plaintiff while he was yet a minor, and disaffirmed the acts as soon after he came of age as he became informed of the facts, and, under those conditions, the verdict of the jury was right. There was no error in any of the instructions given, and none in refusing those refused.

2. Before beginning the trial, the plaintiff moved the court to strike out those parts of the defendants' answer that related to the suit brought by Williams and Linney against the plaintiff and the judgment therein, which motion the court overruled. As already

above intimated, the statements constituting the ground on which the defendants asked relief in equity were not as clearly separated from those constituting their plea at law as might have been. Those parts of the answer at which the motion to strike out was directed constituted no defense to the action at law, nor did they constitute alone an equitable defense, but they stated a fact which it was proper for the court to consider, with other circumstances, in determining whether or not the plaintiff should be enjoined from further suing. If, as stated in the answer, the title on which the plaintiff now sues was in that suit fully litigated and adjudged to be invalid, and if in this suit it should also be so adjudged, the defendants might with reason insist that they be protected by injunction from further unnecessary litigation on that account. Therefore the court did not err in overruling the motion to strike out.

3. On the trial the defendants offered to read the records of the deed from Moberly to Williams and Linney and the mesne conveyances of the title to defendants. Plaintiff objected for the reason that it was secondary evidence, and the proper foundation had not been laid for its introduction. The court overruled the objection, and the records were read. Then the defendants offered evidence to prove that the instruments were lost or not within their power. But this was objected to on the ground that it was then immaterial, since the records had already been read, and defendants withdrew the offer. Under section 2428, Rev. St. 1889, the record itself was competent, if the defendants had satisfied the court that the deeds were lost or not within their power to produce; but the court erred in allowing the record to be read before defendants had made the proper showing. As, however, it was followed immediately with an offer of the preliminary evidence required, we cannot regard it as an injurious error. The defendants' offer, the plaintiff's objection, and withdrawal in deference to the objection are to be taken as indicating that defendants would have proven the fact if plaintiff had permitted.

4. As to the alleged fraud on the part of the plaintiff in obtaining the leases and deed from Moberly, the evidence can be compassed within small bounds. The young man was very dissipated and a spendthrift, and his character as such was well known. The plaintiff knew him well,—had known him all his life. Plaintiff was 41 years old, a merchant, and engaged also in buying and selling notes. Moberly, in December, 1891, shortly after the trustees had bought it for him, leased the farm to Martin for five years from March 1, 1892, for \$100 a year, payable in advance. Within a few days after the lease was executed plaintiff bought the first \$100 rent note for \$55, and within a few days afterwards bought the rest of Moberly's interest

in the lease for \$150, and obtained a lease from him for a period of five years from the termination of the first lease at a total rental of \$50 cash and a promise to pay taxes, and then, again, in a few days a deed to all Moberly's interest in the land (that is, his life estate) for \$50. The land was worth about \$2,000; that is, the fee. The evidence does not show that plaintiff gave the young man intoxicating drinks, nor does it affirmatively appear that the youth was drunk when he signed the papers. But the plaintiff knew the young man's misfortune, knew how his adopted father and the trustees under the will had tried to provide for him against his own improvidence; and the plaintiff ought not to have had those transactions with him. For a total of \$250 the plaintiff essayed to become the owner of all this unfortunate youth's estate, knowing as well beforehand how the money would be spent, as did afterwards the somewhat flippant witness who stayed with him until he spent it all. The law does not justify that kind of dealing, and courts of equity will set aside deeds obtained in that way.

5. The judgment that was first entered was simply responsive to the verdict of the jury to the effect that the plaintiff take nothing by his writ, and the defendants go hence and recover their costs. But, on overruling the motion for a new trial, the court added to the judgment that the plaintiff be enjoined from further prosecuting a suit under the same title. It was not only irregular to enter judgment in that broken form, but the defendants were not entitled to such an injunction. This is the first suit the plaintiff has brought on that title, and we have no right to presume that he is going to continue to sue. The defendants, however, were entitled, in addition to the ordinary judgment following the verdict, to a cancellation of the assignment by Moberly to plaintiff and J. D. Ridgeway of the Martin lease, and a decree that the second lease and the deed from Moberly to plaintiff on the records of Grundy county were clouds on defendants' title, and canceling the same.

6. In accordance with the foregoing views, the judgment of the circuit court is reversed, and the cause remanded, with directions to that court to enter judgment for defendants according to the verdict of the jury on the plaintiff's cause of action, and canceling the assignment of the Martin lease to plaintiff and J. D. Ridgeway, decreeing the lease of date February 1, 1892, and the deed of date February 4, 1892, from Moberly to plaintiff clouds on defendants' title, and canceling the same, and adjudging that defendants recover of plaintiff the costs incurred in the circuit court.

BRACE, P. J., and ROBINSON, J., concur. MARSHALL, J., concurs in result, but dissents from the doctrine quoted from *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906.

WINDES et al. v. EARP et al.

(Supreme Court of Missouri, Division No. 1.
June 14, 1899.)

JUDGMENT IN PARTITION—MOTION TO SET ASIDE—APPEAL.

Where a judgment in partition is entered without objection, a party cannot indirectly, by motion, assail it or the court's refusal to set it aside after the time when it could be challenged by appeal, as, under *Sess. Acts 1895, p. 91*, allowing an appeal from interlocutory judgments in partition, if exceptions are not timely made, the judgment will be conclusive.

Appeal from circuit court, Camden county: Argus Cox, Judge.

Proceedings on motion by Nancy Windes and another against J. C. Earp and others to modify a decree in partition. From an order overruling the motion, movants appeal. Dismissed.

Nixon & King, for appellants. Carter & Moore, for respondents.

ROBINSON, J. The original proceeding in which the motion to be considered on this appeal was filed was commenced in the Camden county circuit court by appellant as plaintiff and heir at law of Thomas Kelly, deceased, against the other heirs of said Kelly and one J. C. Earp (who became interested with them in the land by purchase), to partition the real estate belonging to said Thomas Kelly in his lifetime. H. H. Windes, the husband of appellant, was joined as a party plaintiff in the suit. At the May term, 1894, when all the parties to the cause were present in court, the case was taken up for hearing, and the court proceeded to ascertain their respective interests, and to determine whether the land should be partitioned in kind or same ordered sold and the proceeds be partitioned. At the August term, 1894, the court entered its judgment of record therein, setting out the interests of the parties so ascertained, together with the charges against each interest, and, finding that the nature and amount of the property sought to be divided and the number of the owners thereof were such that partition of the land in kind could not be made without great prejudice to the owners, made its order that said property be sold according to law at the next term of court, the purchaser to pay one-third cash and the remaining two-thirds in equal payments in 12 and 24 months, respectively, and that the proceeds of said sale be partitioned between the parties according to their respective interests as set out in said judgment. As to what was done in the original proceeding at the two succeeding terms of court, there is nothing disclosed in the record before us, except what may be inferred from the recitation contained in the motion filed by the plaintiff Nancy T. Windes at the August term, 1895, the action of the court in overruling which constitute the grounds of plaintiffs' appeal. The motion is in words and

T partition suit was adjudicated as to this
 1 land in controversy, and that H. H. Windes
 and his wife were upon the premises; that
 the judgment and decree rendered in that
 case cannot be attacked in that way; and
 the testimony is incompetent, irrelevant,
 and immaterial. Objection sustained by the
 court, to which ruling of the court in sus-
 taining defendants' objection plaintiffs, by
 counsel, then and there at the time duly ob-
 jected and excepted." No further steps be-
 ing taken upon the motion, the court refused
 to correct the judgment theretofore entered
 on the premises, and overruled plaintiffs' mo-
 tion, to which action of the court the appel-
 lant at the time duly objected, and had noted
 exceptions thereto. The appellant then
 filed her motion for a new trial as follows:
 "We come the plaintiffs, and move the court
 for a new trial, and for grounds state:
 (1) that said judgment is contrary to law
 and evidence; (2) that court erred in refus-
 ing to admit proper evidence offered by the
 plaintiffs; (3) that court erred in admitting
 improper evidence for the defendants; (4)
 that the judgment against the plaintiffs
 in the partition proceedings charging Nancy
 with rents was without evidence and
 contrary to law; (5) that the entry and proceedings
 in the partition proceedings, charging the
 Nancy Windes with rents, were null
 and void, and contrary to law and evidence;
 and that the plaintiff Nancy Windes was
 not a tenant of Sarah Kelly, and never
 occupied said premises." This motion be-
 ing read, plaintiff again excepted to the
 ruling of the court, filed her affidavit for
 due form, gave bond, and brings
 this case on for trial. Whether the trial
 should be opened up to the inquiry into the
 charge against the interest of
 Nancy T. Windes, and to modify
 the judgment suggested by plaintiff's mo-
 tion, or whether the testimony of-
 fered at the hearing of the motion
 is incompetent and irrelevant, and should
 be excluded, and the motion filed as un-
 availing, is a question for the trial
 court to determine. It is the duty of
 the trial court to inform us; and if,
 on the facts, the trial court was justified
 in its ruling, the court would be compelled
 to affirm the overruling of said
 motion. In the case from
 which this appeal is taken, the court
 should properly lie. Be-
 cause in this case, there
 is no record to indicate upon
 what grounds the first instance
 judgment was made from
 the record (if we were au-
 thorized to appeal) its correct-
 ness, or whether its action on
 the motion was to affirm or
 modify the judgment from
 the record.

which plaintiffs now seek relief was made without objection or exception at the time, and plaintiffs will not be allowed, through the indirection of a motion, which is here styled "a motion to modify," to assail that judgment, or the court's action in refusing to set aside the same, and rehear the facts upon which it was predicated, when the judgment itself could not have been directly challenged on appeal after the lapse of two terms from its rendition without objection or exception. The right of appeal from interlocutory judgments in partition before final judgment in the cause, given by the amendment of 1895 (Sess. Acts 1895, p. 91), certainly contemplated exceptions would be timely made, or, like other judgments, they would become final and conclusive upon the matters determined and adjudicated. Plaintiffs' objection to the interlocutory judgment herein comes too late at the third term of court after its rendition; and to put that objection in the shape of a motion to modify, and then attempt an appeal from the court's action thereon in overruling same, would be the accomplishment by indirection of that which could not be done by direction. There is nothing before the court open for review in a proceeding of this character. Plaintiffs' appeal is therefore dismissed. All concur.

ST. LOUIS BREWING ASS'N v. HOWARD.

(Supreme Court of Missouri, Division No. 1.
June 14, 1899.)

HOMESTEAD—EXEMPTIONS—EVIDENCE.

The owner of land lived on it for four years while single, and afterwards moved away, and lived for years in another county, and after marriage lived at various places; but, though he had some stock on part of the land not rented, he had no house or furniture there, and his wife was never there, except once on a visit to the tenant. *Held*, that he had no homestead rights in the land, though he always intended to return to it to live, and did so after levy of execution thereon.

Case certified from St. Louis court of appeals.

Action by the St. Louis Brewing Association against Henry C. Howard. There was a judgment for plaintiff, and from an order setting aside a sale under execution plaintiff appealed to the St. Louis court of appeals, which certified the case to the supreme court. Reversed.

The plaintiff obtained judgment against the defendant in the circuit court of St. Francois county on the 18th of May, 1894, for \$389.85, and on the 10th of June, 1894, a transcript of the judgment was filed and recorded in the office of the clerk of the circuit court of Washington county. Thereafter, on the 10th of July, 1895, the plaintiff caused two executions to be issued by the circuit court of St. Francois county,—one directed to the sheriff of St. Francois county, and the other to the sheriff of Washington

county. The sheriff of St. Francois county notified defendant personally of the fact that he held the execution issued to him against him, and properly informed defendant of his exemption rights under the statute, and called his attention to some property in St. Francois county which he thought defendant owned, but he said he had nothing. At the same time, to wit, on the 31st of July, 1895, the sheriff of St. Francois county served upon defendant a notice, in writing, from the plaintiff, dated July 22, 1895, of the issuance of the execution against him by the circuit court of St. Francois county, directed to the sheriff of Washington county. At that time the defendant was living at Elvins, in St. Francois county, and the notice was served on him there. Before this notice was served, to wit, on the 23d of July, 1895, the sheriff of Washington county had levied the execution directed to him on the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 10, and the W. $\frac{1}{2}$ of section 15, and the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 15, in township 35 N., range 3 east, aggregating 440 acres, in Washington county; and thereafter, on the 27th of August, 1895, without any further notice or procedure, sold the land in two parcels,—one for \$75, and the other for \$100,—and the plaintiff became the purchaser, and on the 27th of August, 1895, the sheriff made a deed thereof to the plaintiff. The execution was returnable on the second Monday in November, 1895, to the circuit court of St. Francois county, and on the 12th of November, 1895, being the second day of the return term of the execution, the defendant filed a motion in the circuit court of St. Francois county to set aside and quash the sale, based upon the following grounds: "First, because the said defendant is a housekeeper and the head of a family, and as such is entitled to a homestead in such lands, and the said sheriff in whose hands the execution was placed failed to apprise defendant of his right of exemption as required by statute, and levied upon and sold said property without giving defendant an opportunity to select a homestead, which homestead he now claims and ever has claimed; second, because said defendant is the head of a family, and as such is entitled to hold exempt from execution levy and sale the property to the amount limited in said section 4903, Rev. St. Mo. 1889 and at the time of the levy of this execution defendant had no opportunity to select the same; third, that no notice was given defendant of the issue of the execution to the sheriff of Washington county, as required by the statute, and that no notice of levy of said execution on the said land was filed by the said sheriff, as the law requires, in the office of the circuit clerk and recorder of Washington county, Mo.; fourth, that said lands were sold in gross, and not in parcels such as would have proved most inviting to bidders, and thus realized the greatest sums for the interest of the parties, but offered and sold the same as one piece," etc. Upon the hear-

ing of this motion it appeared that the 440 acres were deeded to the defendant and his brother, George W. Howard, by their father, on the 22d of November, 1886, and that the brothers divided the property between them, the defendant getting 160 acres, which was worth from \$1,000 to \$1,200; that defendant's first wife died in 1883 without issue, and that he married again on the 30th of July, 1893, and has one child by that marriage; that, after he acquired the property, he lived on it for about four years; that he had lived at Bonne Terre, in St. Francois county, for 11 years; that in 1894 he lived at Flat River, in St. Francois county, and was engaged in the saloon business; that in 1895 he lived at Elvins, in St. Francois county, and was also engaged in the saloon business; that he had never lived on this property after his second marriage in 1893; that, for the four years next before the sheriff's sale, most of the property was rented to Berryman, with whom defendant boarded when there; that defendant kept some stock on the part not rented, but had no furniture there; that in June, 1895, defendant commenced to build a house upon this land; that in July, 1895, he lived at Elvins in a house rented from Mr. Elvins; that in August, 1895, he lived part of the time at Flat River and part of the time on this property, and finally gave up the house at Elvins about the 1st of September, 1895. The defendant claims that, although he has been away from the property as above stated, he still claimed it as his home, and always intended to return to it. The circuit court sustained the motion and set aside the sale, and the plaintiff appealed to the St. Louis court of appeals, which court certified the case to this court, because the title to real estate is involved, as construed in *McAnaw v. Matthis*, 129 Mo. 142, 31 S. W. 344.

William Carter & Weber, for appellant. D. L. Rivers, for respondent.

MARSHALL, J. (after stating the facts). The defendant claims that the property sold by the sheriff of Washington county was his homestead, and that the sale by that sheriff is void, because he failed to notify him of his right of exemption. It may be conceded that it is the duty of a sheriff, under section 4907, Rev. St. 1889, before he levies an execution, to apprise the defendant of the property exempt under sections 4902, 4903, and 4906, and that if he levies upon a homestead and fails to so notify the defendant, and fails to give him an opportunity to designate what part he will retain as a homestead (if the value of the land levied on exceeds the homestead exemption), or, in case of his refusal to designate, he fails to appoint appraisers, as required by section 5436, the sale will be void, and will pass no title. *Vogler v. Montgomery*, 54 Mo. 577; *Brown v. Hoffmeister*, 71 Mo. 411; *State v. Beamer*, 73 Mo. 37; *State*

v. Barnett, 96 Mo. 133, 8 S. W. 767; *Paddock v. Lance*, 94 Mo. 233, 6 S. W. 241; *Peake v. Cameron*, 102 Mo. 563, 15 S. W. 70; *Finke v. Craig*, 57 Mo. App. 393; *Macke v. Byrd*, 131 Mo. 682, 33 S. W. 448; *Ratliff v. Graves*, 132 Mo. 76, 33 S. W. 450 (overruling *Casebolt v. Donaldson*, 67 Mo. 309; *Crisp v. Crisp*, 86 Mo. 630; *Thompson v. Newberry*, 93 Mo. 18, 5 S. W. 34, and *Schaffer v. Beldsmeyer*, 107 Mo. 314, 17 S. W. 797); *Bank v. Guthrey*, 127 Mo. 189, 29 S. W. 1004. Still this will not help the defendant in this case, because—First, there was no property of the character specified in sections 4902, 4903, and 4906 levied on under this execution, and there was therefore nothing of that character of property for defendant to claim as exempt, or to elect which should be sold first, as provided by section 4926; and, second, because the defendant clearly had no homestead right in this property. It may also be conceded that the sheriff of Washington county did not file a notice of the levy in the office of the recorder of deeds, under section 4922; but that does not affect this case, for that section only requires such a notice to be so filed where the judgment is not already a lien on the property, and in this case the judgment had been a lien on this property for more than a year before the execution was levied on it. The defendant proceeded upon the idea that he could leave the property, be absent for years, engage in business elsewhere, keep his family in other places, live in rented houses, and yet, if all the time he claimed the property as a homestead, and had an intention to return to it at some future time, and occupy it as such, it was still his homestead in law, and hence exempt from sale under legal process. In this he was in error; for, while such animus revertendi would preserve his residence in this state, it would not preserve his right to a homestead in this property, even if, under the evidence in this case, it could fairly be said that he ever had such a homestead right, which we do not think the evidence warrants, for it is a visible occupancy of the premises as the head of a family at the time of the levy of the writ which fixes the homestead rights of the defendant. *Beckmann v. Meyer*, 7 Mo. App. 577; *Id.*, 75 Mo. 333; *Finnegan v. Prinderville*, 83 Mo. 517; *Jackson v. Bowles*, 67 Mo. 609; *Graham v. Lee*, 69 Mo. 334. There is no other way in which it can be made to appear beyond cavil, question, or the possibility of fraud on creditors than by actual, visible occupancy. This occupancy is always prima facie evidence to any officer of the law charged with the execution of a writ that it is a homestead, and the absence of such evidence at the time of the levy is the only safe criterion by which to gauge the intention of the defendant touching the character of the possession. This record shows that the defendant had formerly lived on the property for four years; but at that time he was a single man and in no sense the head of a family, and hence had no homestead rights in

it. He left the place and lived for years at Bonne Terre, in St. Francois county. Afterwards he married and lived at Flat River and at Elvins, in St. Francois county; but, although he had some stock on a part of the property not rented out to a tenant, still he had no house or furniture there, and his wife never was on the property but once, and then only on a visit to the tenant. He never occupied it visibly or actually after his second marriage, in 1893, and at the time of the levy, in July, 1895, he admittedly was living at Elvins, keeping house with his family there, and did not leave there until August, 1895 (after the sale under the execution), when he went to Flat River for a while, and then to the property. Manifestly, therefore, the defendant never had any homestead rights in the property at the time of or at any time prior to the levy of the execution, and he could acquire none thereafter as against the execution. All the requirements of the law were complied with in the levy and sale, and the purchaser obtained a good title. It follows that the judgment of the circuit court must be reversed, and the cause remanded to that court, with directions to set aside and vacate its order setting aside and quashing the sale. It is so ordered. All concur; BRACE, J., in the result only.

HAZELETT v. WOODRUFF.

(Supreme Court of Missouri, Division No. 1.
June 14, 1899.)

BREACH OF COVENANT OF WARRANTY—MEASURE OF DAMAGES.

In an action to recover for breach of covenant "to warrant and defend a title," the covenantee is entitled to recover an amount paid for an abstract to be used in the defense of an action attacking the title and a reasonable amount paid for attorney's fees in that behalf, where he gave the grantor timely notice to defend the suit, and the grantor refused.

Case certified from Kansas City court of appeals.

Action by Richard M. Hazlett against Milton W. H. Woodruff. From a judgment in favor of plaintiff, defendant appealed to the Kansas City court of appeals, where the judgment was reversed, one of the judges dissenting, whereupon it was certified to this court. The judgment of the court of appeals reversed, and the judgment of the circuit court affirmed.

Sallee & Goodman and McCullough & Peery, for appellant. D. J. & W. L. Heaston, for respondent.

BRACE, P. J. This is an action for damages for breach of a covenant of seisin and warranty in a deed to real estate in which the plaintiff obtained judgment in the trial court for the sum of \$85 and costs, and the defendant took an appeal to the Kansas City court of appeals, where the judgment of the circuit court was reversed, but one of the judges dis-

senting; and, being of the opinion that the decision was in conflict with prior decisions of the supreme court, the case was certified to this court for final determination. The case was disposed of in the court of appeals on the following opinion, by Smith, P. J.:

"The case in hand may be stated to be, in substance, this: While plaintiff and defendant were both residents of the state of Indiana, the defendant, by deed, conveyed to the plaintiff certain lands in that state, in which deed the following covenants were contained; that is to say, that the title so conveyed is clear, free, and unincumbered, that the grantor is lawfully seised of the premises as of a sure and indefeasible estate of inheritance in fee simple, and that the grantor will warrant and defend the same against all claims whatsoever. It is conceded that at the time of the execution of said deed the defendant had title to only an undivided two thirds of said land, and that his two daughters and son had title to the other one third. It is further conceded that shortly after the execution of said deed by defendant his two daughters conveyed their interests in said land to the son, who thereupon commenced a suit in partition against the plaintiff herein. It is not disputed in the evidence that the plaintiff gave the defendant timely notice of the commencement of the said partition suit, and requested him to defend the same, and that this defendant refused to do. The plaintiff then employed a firm of reputable lawyers, who appeared for him in said partition case, and filed an answer. Nor is it disputed that the services performed by the plaintiff's lawyers in and about defending the partition suit were reasonably worth the amount he paid them therefor. It appears that after the defendant had refused to defend said partition suit, and the plaintiff had taken such steps in that direction as he had been advised by his attorney were necessary for him to take, the defendant's son executed and delivered to plaintiff a deed conveying to him the outstanding title to one-third interest in the said land, by which said conveyance the plaintiff's title became perfect. The defendant's son then dismissed the partition suit, paying the court costs that had accrued therein. The plaintiff brought this action on the covenants contained in the said deed made by defendant to plaintiff, and hereinbefore set forth, to recover the amount laid out and expended by him for fees paid his attorneys in said partition suit, and for the cost of an abstract of title to said land. The plaintiff had judgment in the trial court, and the defendant appealed. The defendant's deed to the plaintiff, as has been seen, contained not only a covenant of seisin, but the further covenant that defendant would warrant and defend the title so conveyed against all claims whatsoever. If at the time of the execution of the deed the defendant was not seised, then no title passed, and the covenant was broken when made. The plaintiff in the partition suit asserted a paramount ad-

verse title to an undivided third interest in the land, and if the defendant herein, after he had been notified of the commencement of the said partition suit, refused to defend the same, then there was a breach of the covenant for quiet enjoyment as well. For these breaches of the covenants of the warranty the plaintiff was entitled to recover of the defendant, in an appropriate action, such damages as were given by the *lex loci contractus*. There is no evidence contained in the record of the laws of the state of Indiana relating to the measure of damages where there is a breach of one or both of the covenants just mentioned. There is no proof of the statutes or the decisions of that state relating to the subject disclosed by the record. We cannot take judicial notice of the statutes and decisions of sister states. Where a cause of action or defense interposed is based upon the law of another state, that law must be both pleaded and proved; but when it is not the basis of the action or defense, and is merely an evidential part thereof, it may be proved without being pleaded. *Clark v. Barnes*, 58 Mo. App. 667. The common law was in force in the territory of Indiana at the time of its admission into the Union as a state. It is only in respect of those states which were never subject to the common law that, in the absence of proof as to the *lex loci contractus*, the court will apply the statute laws of the forum. *Flato v. Mulhall*, 72 Mo. 526; *White v. Chaney*, 20 Mo. App. 389; *Barhydt v. Alexander*, 59 Mo. App. 189; *Manufacturing Co. v. Lang*, 54 Mo. App. 147. On common-law questions the presumption is that the common law of another state is the same as that of our own state. *White v. Chaney*, supra. As the only question presented by the record for decision is that of the measure of damages, we think it is obvious, from the principles just adverted to, that it must be resolved in the light of the common law. 'The weight of American authority,' says Judge Scott in *Lawless v. Collier's Ex'rs*, 19 Mo. 481, 'has determined that the covenant of seisin is broken, if broken at all, as soon as it is made, and thereby an immediate right of action accrues to him who has received it. * * * The damages to be recovered are measured by the actual loss at that time sustained.' The authorities are agreed that where this covenant is broken the covenantee is entitled to recover no more than nominal damages (*Collier v. Gamble*, 10 Mo. 467; *Bircher v. Watkins*, 13 Mo. 522) until he had bought in the adverse right, or has been actually 'deprived of the whole subject of his bargain,' in either of which latter events he has the right to recover substantial damages. *Holladay v. Menifee*, 30 Mo. App. 207; *Lawless v. Collier's Ex'rs*, supra; *Henderson v. Henderson's Ex'rs*, 13 Mo. 153; *Walker's Adm'r v. Deaver*, 79 Mo. 664; *Dickson v. Deslire's Adm'r*, 23 Mo. 166; *Magwire v. Riggins*, 44 Mo. 514; *City of St. Louis v. Bissell*, 46 Mo. 157; *Hutchins v. Roundtree*, 77 Mo. 500; *Lambert*

v. Estes, 99 Mo. 608, 13 S. W. 284; *Matheny v. Stewart*, 108 Mo. 73, 17 S. W. 1014. And whatever may be the technical or the practical rule as to the measure of damages upon total breach of the covenant of seisin, it is well settled that upon a partial breach a purchaser may, and it seems must, recover pro tanto. *Rawle*, Cov. § 180, and cases cited in note 4; *Guthrie v. Pugsley*, 12 Johns. 126; *Collier v. Gamble*, supra. The measure of damages upon breach of covenant of seisin and the right to convey is, as a general rule, the purchase money, interest, and costs. *Collier v. Gamble*, supra; *Bircher v. Watkins*, supra; *Lawless v. Collier's Ex'rs*, supra; *Rawle*, Cov. §§ 184, 186; *Overhiser v. McColister*, 10 Ind. 41, and numerous cases cited in briefs of plaintiff's counsel. No case that we have seen has extended the rule beyond this. It would seem that the damages claimed by plaintiff are not allowed for breach of the covenant of seisin. But is the plaintiff entitled to recover the damages claimed for a breach of the covenant to 'warrant and defend the title against all claims whatever'? Littleton tells us that, 'although the words "warrant and forever defend" were those generally inserted in a warranty, yet the word "defend" added no additional force, as it seemeth that hath not the effect of warranty, nor comprehendeth in it the cause of warrantee.' *Co. Litt.* 101.

'In *Rawle*, Cov. § 116, it is stated that: 'Apart from the word "warrant," the covenant would seem to be no more than an engagement that it should bar the covenantor and his heirs from ever claiming the estate, and that he and they should undertake to defend it when assailed by a paramount title. The latter was, indeed, one of the consequences of a warranty deed, and its effect in this respect has been continued, though with modifications, down to this day.' And the same author further along (section 117) states that 'it is settled in most, if not all, of the United States, that in general, upon suit being brought upon a paramount claim against one who is entitled to the benefit of any of the covenants of warranty, he can, by giving notice of the action to the party bound by the covenants and requiring him to defend it, relieve himself from the burden of being obliged to prove in an action on the covenants the validity of the title of the adverse claimant.' The covenant of warranty or for quiet enjoyment is a covenant of indemnification, whose object is to compensate the covenantee for his actual loss at the time of the breach. In *Field*, Dam. § 467, it is said that: 'The decisions on this question are somewhat conflicting and various in the different states. In several states it has recently been held that the measure of damages on breach of warranty in a deed is the value of the property at the time of the conveyance, and interest thereon, together with the necessary costs and expenses incurred in defending the title, and

that such costs and expenses include a reasonable counsel fee,'—citing *Robertson v. Lemon*, 2 Bush, 301; *Dalton v. Bowker*, 8 Nev. 190; *Keeler v. Wood*, 30 Vt. 242; *Rowe v. Heath*, 23 Tex. 614. In 1 Sedg. Meas. Dam. § 238, it is said that: 'In an action for breach of the covenants of seisin or of warranty, the costs, and, if reasonably defended, the counsel fees, in the eviction suit, are recoverable,'—citing as authority for the statement of the rule a great number of English and American cases. In *Suth. Dam.* (2d Ed.) § 983, it is said that 'it is generally held that counsel fees reasonably incurred in maintaining or defending an action may be recovered,'—citing many cases in note d. It would seem that in a large number of the states it is the rule in actions for breach of the covenant of warranty, or, which is the same thing, that for quiet enjoyment, to allow as part of the damages the reasonable fees of attorneys employed by the coveantee in defending the title conveyed by the deed containing the covenant; but in this state the rule seems to be an unbending and inflexible one which limits the damages in such actions to a recovery of the purchase money, interest, and costs. *Matheny v. Stewart*, 108 Mo. 73, 17 S. W. 1014; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. 284; *Hutchins v. Roundtree*, 77 Mo. 500; *Murphy v. Price*, 48 Mo. 247. The deed was made in contemplation of the laws of the state in which it was executed, and if we could take judicial cognizance of the laws of that state, as we cannot, it would be seen that the measure of damages for breach of the covenant of seisin, as well as that of warranty, is precisely the same as in this state. *Burton v. Reeds*, 20 Ind. 87; *Overhiser v. McCollister*, 10 Ind. 41; *Wood v. Bibbins*, 58 Ind. 392; *Coleman v. Lyman*, 42 Ind. 289. In *Matheny v. Stewart*, supra, the question whether, in an action for the breach of the covenant of warranty, attorney's fees expended in defending an action brought by the owner of the outstanding title to recover possession should be allowed as a part of the coveantee's damages was fairly presented for decision. That item of damage had been disallowed by the trial court, and its action was affirmed by the supreme court. It is true that it is said, in disposing of the question, that such fees are not allowed in the state of Mississippi, where the covenant was made and the land situate; but it is also further said, in the same connection, that the measure of damages in such cases in this state is limited to the purchase money, interest, and the court costs.

"It seems, therefore, that the rule for the measure of damages in this state is the amount in an action for the breach of the covenant of seisin as that for the breach of the covenant of warranty; that is to say, in either case the recovery is limited to the purchase money, interest; and costs. In the face of this Procrustean rule, we are con-

strained to declare that the trial court erred in its action refusing the defendant's request for an instruction in the nature of a demurrer to the evidence. The judgment must accordingly be reversed."

In *Matheny v. Stewart*, 108 Mo. 73, 17 S. W. 1014, the plaintiff sought to recover as damages the value of the land at the time of the eviction, court costs, attorney's fees, and necessary expenses in defense of the suit. The contract was made in Mississippi. The judgment of the circuit court was for the purchase price of the land and interest thereon from the date of eviction, and the judgment was affirmed. It was therefore, of course, decided that the plaintiff in that case could recover neither court costs nor attorney's fees, but, as appears from the opinion therein, for the all-sufficient reason that, the paramount title being simple, palpable, and unambiguous, and the plaintiff's grantor having notified him to make no defense, there was no merit in the defense of the title. It is true it was said in the opinion, in reply to the argument that the damages should be the enhanced value of the property, that: "The rule of damages for breaches of warranty in the conveyance of land in case of total failure of title has ever been limited in this state to the purchase money paid, with interest thereon, and costs. *Dickson v. Desire's Adm'r*, 23 Mo. 166; *Hutchins v. Roundtree*, 77 Mo. 500; *Lambert v. Estes*, 99 Mo. 608, 13 S. W. 284. The rule seems to be the same in Mississippi. *Phipps v. Tarp-ley*, 31 Miss. 433; *Brooks v. Black* (Miss.) 8 South. 332; *White v. Presly*, 54 Miss. 313." Having thus disposed of the plaintiff's first claim, the learned judge then proceeds to the second,—the court costs,—as to which, he says: "There can be no question, we think, under a covenant, as in this deed, to warrant and defend the title that the grantee should ordinarily recover as damages, for the breach of such covenant, the legal costs reasonably and in good faith incurred in the assertion or defense of the title warranted. 3 Sedg. Meas. Dam. (8th Ed.) § 982; *Hutchins v. Roundtree*, 77 Mo. 501. This is the rule also in Mississippi, though followed with apparent reluctance. *Brooks v. Black* (Miss.) 8 South. 332." After which he proceeds to the plaintiff's third claim,—for attorney's fees, etc., as to which all that is said is: "Attorney's fees are also allowed as damages in many of the states (3 Sedg. Meas. Dam., supra), but are denied in the state of Mississippi. *Brooks v. Black*, supra. This conveyance was made in contemplation of the laws of the state in which it was made, and in which the real estate was situated, and effect should be given the covenants in accordance with the construction placed upon them by the courts of that state." After thus intimating that the charge for attorney's fees ought not to be allowed, because not allowable under the laws of Mississippi, but without making any specific ruling upon the subject, he re-

turns to the item of costs, and says: "The reasonable cost of defending the title should have been allowed, unless that item of damage was properly excluded under some exception to the rule,"—and then proceeds to state the facts, showing the folly and uselessness of making a defense of the title in that case, after notice not to defend by the grantor, taking it out of the rule that the defendant should be taxed with the costs of making it. Of course, if he could not be charged with the costs of making the defense, a fortiori he could not be taxed with attorney's fees for making the defense; so it was unnecessary to return to that subject again, as the decision as to the costs in that case was decisive of the claim for attorney's fees. But, under the rulings of that case, the plaintiff in the case under consideration would have been allowed his legal costs, and the ruling of the court upon the facts in judgment therein would not preclude a recovery of either costs or attorney's fees in a case like the one in hand. If that case is authority for precluding the recovery of attorney's fees by plaintiff herein, it is not because of the rulings upon the facts in judgment therein, but of something contained in the dicta of the opinion. As the contract in this case, as is shown in the opinion of Judge Smith, is governed by the law of the forum, nothing that is directly said upon the subject of attorney's fees in the opinion is applicable. So that we are remitted for authority solely to the dictum that "the rule of damages for breach of warranty in the conveyance of land in case of total failure of title has ever been limited in this state to the purchase money paid, with interest thereon, and costs." For the purpose of determining whether "it has ever been so limited in this state," we have gone through all the cases. The first case in which the rule was announced is *Tapley v. Labeaume's Ex'r*, 1 Mo. 550, in which it was held that the true rule of damages on a breach of covenant of seisin is the purchase money, with interest, and, as thus announced, it was followed and reiterated as the true measure of damages for breaches of covenants of seisin and warranty through a great number of cases. *Martin v. Long*, 3 Mo. 391; *Colgan v. Sharp*, 4 Mo. 264; *Collins v. Clamorgan's Adm'r*, 6 Mo. 170; *Reese v. Smith*, 12 Mo. 345; *Bircher v. Watkins*, 13 Mo. 522; *Lawless v. Collier's Ex'rs*, 19 Mo. 480; *Dickson v. Desire's Adm'r*, 23 Mo. 151; *Tong v. Matthews, Id.* 437; *City of St. Louis v. Bissell*, 46 Mo. 157; *Murphy v. Price*, 48 Mo. 247; *Kirkpatrick v. Downing*, 58 Mo. 32; *Hutchins v. Roundtree*, 77 Mo. 500. This last case was decided in 1883. In all the preceding cases the damages had been limited to the "purchase money and interest," because in the facts presented for the judgment of the court in those cases that was a sufficient declaration of the rule as to the measure of damages. But in *Hutchins v. Roundtree* the question was first raised and

presented whether, in addition thereto, the plaintiff was not also entitled to recover the costs expended in defending the title warranted, and the court unhesitatingly responded, "There is no question of the right of an evicted grantee to recover such costs, where he gave notice to the grantor or his legal representative of the pendency of the ejectment suit." The fact that theretofore the damages had been limited to the purchase money and interest was not thought in that case to preclude a recovery of legal costs in defending the title, and, although the rule was again restated in the same general terms in the next case of *Lambert v. Estes*, 99 Mo. 604, 13 S. W. 284, when thereafter the case of *Matheny v. Stewart*, 108 Mo. 73, 17 S. W. 1014, came on to be decided in 1891, in which the question as to the allowance of attorney's fees as well as of costs was raised, the court unhesitatingly stated the rule as including costs, showing again that the court did not consider that that item had been precluded by the terms in which the rule had been theretofore so often and uniformly formulated, but in none of which had the mind of the court been directed to the question of the right to recover costs. So the general statement of the rule including costs, in that case, cannot of itself be held to preclude a recovery for attorney's fees, that being the first case in which the question as to the right to such recovery was first raised. So that we perceive in our decisions no "Procrustean rule" that excludes the allowance of attorney's fees, as well as legal costs, as necessary expenses in defending the title warranted. And as, in principle, no distinction can be made between the two items, and as such allowances are supported by the great weight of authority, and the facts of this case bring it within the principles upon which such expenses should be allowed, we think the court of appeals erred in reversing the judgment of the circuit court. Its judgment will therefore be reversed, and the cause will be remanded to the Kansas City court of appeals, with directions to enter judgment affirming the judgment of the circuit court. All concur.

COX v. BARKER et al.

(Supreme Court of Missouri, Division No. 1.
June 14, 1899.)

SUPREME COURTS—JURISDICTION—TITLE TO
REALTY—TRESPASS ON LAND.

In an action for trespass on land by tearing down and carrying away a partition fence, though the title to realty may be incidentally involved, yet, since the judgment could be satisfied by a money payment without affecting the title, the case did not involve the title to realty, so that it would fall within the jurisdiction of the supreme court under Const. art. 6, § 12.

Case certified from St. Louis court of appeals.

Action by Nicholas J. Cox against John R.

Barker and others. There was a judgment for defendants, and plaintiff appealed to the St. Louis court of appeals, which transferred the case to the supreme court. Retransferred to the court of appeals.

This case was certified to this court by the St. Louis court of appeals on the ground that the title to real estate is involved. It is an action of trespass on land. The parties are owners of adjoining parcels of land, and for many years maintained a partition fence. In 1884 the defendants removed a portion of the fence. The plaintiff replaced it, but placed it a few feet further west of the line of the old fence. Defendants notified plaintiff that he was putting the fence on their (defendants') land, and that, if a survey proved this to be true, they would hold the fence. A subsequent survey proved defendants' claim was correct, and they thereupon tore the fence down and carried away the materials. Plaintiff then instituted this action, claiming \$25 for the materials and \$50 damages for the trespass. The trial court found for the defendants, and plaintiff appealed to the St. Louis court of appeals. The court of appeals held that as the liability of the defendants depended upon the ownership of the land, and as "it was competent for defendants to show in defense of the action a superior title and right of possession in themselves" (*Fuhr v. Dean*, 26 Mo. 116; *More v. Perry*, 61 Mo. 174), the title to real estate was involved, and hence this court alone had jurisdiction, and therefore certified the case here.

Smoot, Mudd & Wagner, for appellant.
John M. Jayne, for respondent.

MARSHALL, J. (after stating the facts). In *Price v. Blankenship*, 144 Mo. 203, 45 S. W. 1123, this court reviewed the question here involved, and held that, although the title to real estate may be incidentally, collaterally, or necessarily inquired into in a trial for the purpose of settling the issues involved, still, if the judgment rendered by the trial court could be satisfied by the payment of money without affecting the title to the real estate, the case would not fall within our jurisdiction under section 12 of article 6 of the constitution. It was further held that, to give this court jurisdiction for this reason, "the judgment to be rendered must directly affect the title itself to the real estate." This decision was rendered after this case had been certified to this court, or we may properly assume this case would not have been sent here. In determining the question of trespass here complained of, it may be conceded that an inquiry into the title may be necessary, but the title itself will not be affected by any judgment that could be rendered in this case. Therefore the case does not involve the title to real estate, and does not come within the jurisdiction of this court. Hence the case will be retransferred to the St. Louis court of appeals. All concur.

SMITH et al. v. HAUGER.

(Supreme Court of Missouri, Division No. 1.
June 14, 1899.)

EXECUTORS AND ADMINISTRATORS—CONCLUSIVENESS OF SETTLEMENT—ACTION TO SET ASIDE—FINDINGS.

1. A judgment of the probate court, finally settling and distributing the estate, and discharging the executor, without objection, from a specific legatee, is a final judgment, which, after the term at which it was entered, can be set aside only by direct proceedings in equity, on the ground of fraud, and with the parties brought into court by summons, and not by mere notice.

2. A finding that a final settlement by an executor was acquiesced in by a specific legatee, "under a misapprehension of fact," is erroneous, where the complaint seeking to have the settlement disregarded only claims that it was founded upon "a verbal agreement" between the legatee and the executor, which had not been lived up to.

Appeal from circuit court, Clinton county; William S. Herndon, Judge.

Ejectment by Hiram Smith and others against Andrew D. Hauger. Judgment for defendant, and plaintiffs appeal. Affirmed.

Ejectment to recover 20 acres of land in Clinton county. The petition is in the usual form, and the answer is a general denial. The facts are these: In December, 1884, William Hauger died, testate, seised of certain lands, those here involved included, and certain personal property. He devised the personal property to his wife, Christina, absolutely, and gave her a life estate, without power of disposal, in the real property, and the remainder in the real estate he bequeathed to his two sons, Andrew Dickson Hauger (the defendant) and Jonathan Hauger, in fee simple absolute, in equal parts. He appointed his wife executrix, without bond. Then he directed that, after the debts were paid, his wife should pay to his children, "in the order named, each of the following specific legacies: To William H. Hauger, \$150; Amanda Myers, \$1; Luranna Adaline Smith, \$1; Nancy A. M. Hauger, \$1; Isaac Leonidas Hauger, \$1; and to Aaron Lewis Hauger, \$1." The executrix administered the estate, and, after proper notice, made final settlement on the 3d of February, 1894, on which it appeared that there was a balance due the estate of \$121.68; and the court, finding that all the debts, costs, and expenses had been fully paid, ordered the said balance to be paid to the widow as the legatee of the personal property, and on the 16th of February, 1894, entered final judgment discharging the executrix. On the 15th of February, 1895, William H. Hauger, one of the specific legatees, presented a petition to the probate court of Clinton county, in which he represented to that court that the executrix had paid all the debts of the estate, but had not executed the will, in that she had not paid him the specific legacy of \$150 bequeathed to him by his father; and further alleging "that on the — day of —, 1894, the said Christina

Hauger made an alleged final settlement of her accounts as such executrix, this legatee interposing no objection, because a verbal agreement for the payment of said legacy had been entered into between plaintiff and defendants" (the petition was entitled "William H. Hauger, Plaintiff, vs. Christina Hauger, Andrew D. Hauger, and Jonathan Hauger, Defendants"), which defendants had refused to carry out, and asking the court "to disregard said settlement so far as the same is held to be a final settlement of said estate, and that the said executrix be required to execute said will specifically by paying plaintiff the said legacy of \$150, with interest on said sum at the rate of 6 per cent. per annum, and for such purpose to sell any part of said real estate devised to defendants as aforesaid, and for other relief." The persons named as defendants were served by the sheriff on December 6, 1894, with a copy of the petition, and a notice from the person named as the plaintiff, and signed by his attorney, that he would present the petition to the probate court of Clinton county at its February term, to begin on the second Monday in February, 1895. It does not appear from anything in the record in this case whether the so-called defendants appeared in the probate court, as so required, or not, but on the 15th of February, 1895, that court entered an order reciting the filing of the petition, and stating that it had been proved, to the satisfaction of the court, that notice of the application had been given "to the above-named defendants," and that "the court being satisfied [It does not state that any proofs were adduced or evidence heard,—just "satisfied"] that the settlement as made by the executrix as and for a final settlement was made by her and acquiesced in by all the parties hereto under a misapprehension of fact [It is not stated what that fact was which the parties misapprehended], the court finds that the said William H. Hauger, under and by virtue of said will, is entitled to the sum of \$150, and that the same dominates the residuary devise or legacy given by the terms of said will to the defendants, and that the legacy aforesaid had never been paid, in whole or in part"; and then the court found that this legacy should have been paid one year after the grant of the letters, and that it was demanded, and so plaintiff is entitled to interest from that date; and thereupon the court ordered the executrix (whom the court had discharged a year before) to pay William H. Hauger \$231, "and that, if necessary, she shall sell any part of the property, personal or real, for such purpose, and that she report her proceeding hereunder for approval." This order must have been a most disastrous shock to the mind of the executrix, for it appears, from a further order entered by the same probate court on the 30th of May, 1895, that, on the same day it entered its first order (February 15, 1895), the same probate court adjudged

the said Christina Hauger "to be a person of unsound mind, and incapable of managing her own affairs, leaving a part of said will unexecuted"; and therefore, "to the end that said will may be duly and fully executed, and that said estate may be fully and duly executed and legally disposed of," the court appointed E. C. Hall administrator d. b. n. c. t. a., with full power "to receive and dispose of said property according to law," etc. Hall sold the property here involved to pay this legacy to the plaintiffs in this action for \$310, the probate court approved the sale, and Hall executed and delivered to the plaintiffs herein a deed to the land, and this is plaintiffs' only title to the property. The defendant refused to surrender the land, and plaintiffs instituted this action. The case was tried in the circuit court without a jury, neither party asked any instructions, and the court gave none, and, upon these undisputed facts, the circuit court entered judgment for defendant, and plaintiffs have brought the case to this court.

Turney & Goodrich, for appellants. William Henry, for respondent.

MARSHALL, J. (after stating the facts). This case is *sui generis*,—without a precedent or parallel in the books. The specific legatee stood by, and consented to a final settlement and distribution of the estate, without demanding his legacy, because of a verbal agreement between himself and the other legatees that they would pay his legacy. A year afterwards he gave the other legatees notice that on a day certain he would file a bill in equity in the probate court setting out these facts, and would ask the probate court to "disregard" the final settlement, and order the real estate devised to defendants sold to pay his legacy. At the time named he filed his bill, and that court found that the final settlement was made and acquiesced in by all the parties "under a misapprehension of fact," and so entered judgment for the specific legatee for the amount of his legacy, with interest thereon beginning to run one year after the grant of the letters testamentary, and ordered the executrix, whom it had discharged more than a year previously, to pay the judgment, and, if necessary, to sell the real and personal property lately being, but then fully, administered upon, to pay the same. Thus, without attempting to set aside the final judgment, upon a petition to "disregard" it, because other persons had not carried out a "verbal agreement" with him, when he stood by and saw the final judgment entered without objection, the probate court entered a decree that the final settlement had been made and acquiesced in "under a misapprehension of fact," awarded the petitioner a judgment, and ordered the personal and real property of the closed estate sold to pay the judgment. This would be bad enough, but when it appears that the other legatees

were only attempted to be brought into court by notice, and not by summons, as the statute requires a defendant to be brought into court, and when we observe that on the same day the probate court entered its decree in equity it also adjudged the principal "defendant" to be "a person of unsound mind and incapable of managing her own affairs, leaving a part of said will unexecuted," and, without removing her, a few days thereafter appointed another person administrator d. b. n. c. t. a., the performance becomes Shakespearean, and may be properly designated "a comedy of errors."

A judgment of a probate court, finally settling and distributing an estate, and discharging an executor, is a final judgment, which, after the expiration of the term at which it is entered, cannot be set aside by that court at all, and not by any other court, except in a direct proceeding, in equity, on the ground of fraud perpetrated upon the court in the very act of procuring the judgment; and this implies that the parties shall have been brought into court by a summons, and not by a mere notice from one to the other. *Garner v. Tucker*, 61 Mo., loc. cit. 431; *Sheets v. Kirtley*, 62 Mo. 417; *Miller v. Major*, 67 Mo., loc. cit. 248; *State v. Gray*, 106 Mo., loc. cit. 533, 17 S. W. 501; *McClanahan v. West*, 100 Mo., loc. cit. 320, 13 S. W. 975; *Nelson v. Barnett*, 128 Mo., loc. cit. 570, 27 S. W. 520; *Baldwin v. Davidson*, 139 Mo., loc. cit. 125, 40 S. W. 766; *Howell v. Jump*, 140 Mo. 441, 41 S. W. 976. "After the time has elapsed for the allowance of claims against an estate, and when all demands and charges of every kind have been settled, and the sole duty remains upon the executor to pay the legacies, or of the administrator to make distribution, and he fails to do so, an action may be maintained against him for this breach of duty, without waiting for an order of distribution by the probate court." *Clarke v. Sinks*, 144 Mo., loc. cit. 453, 46 S. W. 200. But even this rule will not avail in this case, because the probate court made an order of distribution, which the specific legatee consented to for reasons which then seemed sufficient to him. This order was not excepted to or appealed from, and stands unimpeached in any proper proceeding, and is final and conclusive upon all persons interested in the estate. The action of the probate court was not only erroneous in holding that the final settlement was made and acquiesced in by the parties "under a misapprehension of fact," when the very petition upon which the court was acting did not so complain or intimate, but, on the contrary, expressly stated it was founded upon "a verbal agreement" between the legatees which had not been lived up to by them, but that action was wholly *coram non iudice*, because it acquired no jurisdiction over the parties by mere notice from one to the other, and it had no jurisdiction over the subject-matter, and therefore had not "a constitutional power to

commit error." The sale at which the plaintiffs acquired apparent title was void, and the deed under which they claim is a nullity. The judgment of the circuit court is right, and is affirmed. All concur.

LITTLE ROCK & FT. S. RY. CO. v. MILLER COAL CO.

(Supreme Court of Arkansas. June 3, 1899.)
CARRIERS—SHIPMENT TO WRONG DESTINATION—DAMAGES.

1. Where plaintiff directed defendant carrier to transport a car of coal from O. to H., but afterwards directed that the shipment be made to another place, and thereafter the car was shipped to H., and received by plaintiff, the measure of damages is erroneously stated by an instruction to assess them at the value of the coal delivered on the track at O., the cost of transportation thereof to H., and the cost of plaintiff's telegram to an agent to take charge of the coal.

2. The proper measure of damages, where the plaintiff, through its agent, received the coal for sale and disposal at H., is the value of the coal at that point when so received, less the price it actually brought, with due care in the sale, plus the cost and carriage, if the same had not been paid.

Appeal from circuit court, Yell county; Jeremiah G. Wallace, Judge.

Action by the Miller Coal Company against the Little Rock & Ft. Smith Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

Dodge & Johnson, for appellant.

BUNN, C. J. This is a suit for freight erroneously paid, and for damages to a car load of coal shipped to the wrong destination, and delayed in final disposition on that account. Judgment for plaintiff, and defendant appealed.

J. H. Ganner was, and had been for some time previous to the 6th of February, 1894, operating, under the name of the Miller Coal Company, a coal mine about one mile northeast of Ouita, in Pope county, this state, and on or before that day loaded one of defendant's coal cars, standing on the side track or spur at Ouita for that purpose, with prepared nut coal, and on or about that day took his bill of lading therefor, in which said car—No. 9,292—was ordered to be shipped and consigned to the Central Coal & Coke Company at Hutchinson, in the state of Kansas. At that time Mill Creek, a small station on defendant's road, was the shipping station for Ouita, and the bill of lading referred to was obtained from the agent there, who had authority to issue the same, and presumably the only one at the time who did have such authority. By reason of a washout on the spur track to Ouita, the moving of the car was delayed. The order for the car load of coal had been made by the Central Coal & Coke Company of Hutchinson, Kan., and received by Ganner—the Miller Coal Company of Ouita—on or soon after the 1st day of February, 1894, and on account of said delay

(such coal having in the meantime ceased to be saleable for remunerative price at Hutchinson) the order was countermanded on or about the 10th of February, 1894. The bill of lading seems to have been issued about the 5th or 6th of the same month. After the order was countermanded, nothing was done concerning the car, nor, indeed, does there seem to have been anything said about it for some time by Ganner, or any one for him or the Miller Coal Company, and the car continued to stand on the side track for a time. The dates, which, if given, would greatly elucidate matters, are unaccountably wanting to a great extent in the testimony of witnesses. As it is, we are left in great doubt as to some very material points. Ganner testifies that about February 10th the Central Coal & Coke Company of Hutchinson, Kan., canceled and countermanded their order. "A short time after receiving this notice, I went with Mr. Crook to Mr. Patrick, the agent [of defendant] at Mill Creek, and notified Mr. Patrick not to let this car go under the original bill of lading, and told him that I desired to ship the car to another point. I do not know exactly what day this was, but it was a short time after I received the notice from the Central Coal & Coke Company canceling its order for this coal." The undisputed proof in the case is that the office at Mill Creek, under the charge of Mr. Patrick up to that time, was abolished on the 15th February, 1894, and the business of the office was distributed between the office at Russellville and the office at Knoxville; and from that day Mr. Patrick was not in official position anywhere, so far as the evidence shows. The shipments to go west were to be under the control and supervision of the office at Knoxville, as was this car, going to Kansas, under the original bill of lading, as we infer. Shipments going east—as were shipments to Texas—were under the control of the office at Russellville, as seems to have been the case with this car under a new bill of lading, which will be noticed further on. This being the situation of things, it was quite important to have the date of Ganner's direction to Patrick about the change of the order of shipment; for, if that was before the 15th, and made in the proper manner, it might have been in Patrick's power to act, and it may have been his duty to act so as to effectuate the change; but, if this direction of Ganner to Patrick was after the 15th February, then it would appear that Patrick had no power to act in the premises, and the direction was not made to the proper person. This is assuming, of course, that the arrangement of the railroad concerning the unfinished business at Mill Creek was reasonable, which it appears to have been from all that appears to the contrary. Whether Patrick was there in charge of the office or not, it would seem that the original bill of lading should have been surrendered before a new bill could have been demanded, and this appears not to have been

done until some time afterwards, as will appear from Ganner's testimony, who, continuing, said, "On the 24th day of February, 1894, I saw Mr. Ellsworth, the agent at Russellville, and delivered to him the original bill of lading to this car." It appears that the shipment of this car under the original bill of lading fell to the office at Knoxville, and not to Russellville, under the distribution of the business of Mill Creek, and therefore the surrendering of the original bill of lading to Ellsworth, the agent at Russellville, would not of itself have the effect of stopping the shipment under the original bill of lading, for the shipping books containing this order must have been at Knoxville. Ellsworth, in his testimony, says the original bill of lading was never surrendered to him, that he advised with Ganner as to how to get the order of shipment changed, but not officially, merely for accommodation, as he had nothing officially to do with the matter. The witness Ganner, continuing, said that the car was on the side track at Ouita when he directed Mr. Patrick not to have it sent to Hutchinson, and that this was on the 24th February, 1894; and this, it seems, was the same day Ganner and Cook had the conversation with Ellsworth, the agent at Russellville. It appears that on that day a new bill of lading was made out, and signed on the 26th February—two days afterwards—by Brownell, the local freight conductor running eastward, by which the car was consigned to the Kniffen Coal, Coke & Manufacturing Company of Weatherford, Tex., and, had it been properly shipped under this new bill of lading, would have gone east from Russellville under the arrangement referred to above. Brownell, the local freight conductor, who signed this new bill of lading for cars, says in his testimony that he had no authority to sign bills of lading for cars unless they were present, and that within 15 minutes after signing this one at the instance of Ganner he went to the Ouita switch, and the car was not there. It is shown in the testimony elsewhere that it reached Hutchinson on the 28th of that month, showing that it had been shipped out on the old bill of lading, and no doubt between the time Ganner and Cook saw it on the Ouita switch (that is, on the 24th) and the time when Brownell saw it had gone (that is, on the 26th February). When this car had reached Hutchinson, the consignee, the Central Coal & Coke Company, refused to receive it, but soon afterwards received a telegram of instruction from the Miller Coal Company to receive the car for it, and to dispose of it to the best advantage. As the agent of the Miller Coal Company, the Central Coal & Coke Company received, but did not at once open, the car, and did not do so until some time in April following, when, having found a purchaser, it opened the car to examine and weigh the coal and deliver it to the purchaser; the car in the meantime having been permitted to stand on the side track.

Upon this state of facts, the trial court, among others, gave the following instruction, over the objection of the defendant, to wit: "(4) If you find for the plaintiff, you will assess his damages at the value of the coal delivered on the track at Ouita, and the cost of transportation on the same to Hutchinson, Kan., and the cost of the telegram of the plaintiff to the Central Coal & Coke Company to take charge of the car of coal, and legal interest from that to this day." The plaintiff, through its agent at Hutchinson, having received the coal for sale and disposal there, the measure of damages was the value of the coal at that point when so received, less the price it actually brought with due care in the sale, plus the cost and carriage, if the same had not been paid; for the measure of damages is the value at the place where the delivery is to be made or where the goods are received by the party entitled, less the price received, etc. The theory of the trial court would possibly be correct, if the coal had been shipped without orders from Ouita, and had never been received by plaintiff at Hutchinson. For this error the judgment is reversed, and the cause remanded for a new trial not inconsistently herewith.

MUSKEGON LUMBER CO. v. BROWN.

(Supreme Court of Arkansas. June 24, 1899.)

TAX SALES—VALIDITY—LAND FORFEITED TO THE STATE.

1. A sale of lands in 1872 for delinquent taxes, where including costs other than the cost of advertising, was void.

2. After land has been sold to the state as forfeited for nonpayment of taxes, it is not subject to sale for subsequent taxes.

3. The commissioner of state lands had no authority in 1886 to sell land forfeited to the state for nonpayment of taxes until such taxes were certified to him by the county clerk, as required by Sand. & H. Dig. § 4505.

Appeal from circuit court, Grant county; Alexander M. Duffie, Judge.

Petition by the Muskegon Lumber Company against Joseph Brown. From a decree for defendant, petitioner appeals. Affirmed.

Hill & Auten, for appellant. Wood & Henderson, for appellee.

BATTLE, J. The Muskegon Lumber Company applied to the Grant circuit court for a decree confirming a purchase of certain lands by it from the state of Arkansas. A part of these lands were claimed and held by the state under a forfeiture in 1872 for the taxes of 1871 and the penalty and costs charged against the same. The lands last referred to are as follows: The E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 35, and the N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 36, in township 5 S., range 15 W. Another part of the lands so purchased was held and claimed by the state under a forfeiture in 1886 for the taxes assessed against

the same for the years 1876 and 1885 and the intervening years. The latter part is as follows: The S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, the S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, the S. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 26, and the S. W. $\frac{1}{4}$ and N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section 35, in township 5 S., range 15 W. Joseph Brown appeared, and answered the application for confirmation, and claimed the lands forfeited for the taxes of 1871 and one undivided half of the other lands above described, and alleged that the forfeiture of all the lands claimed by him was illegal, null, and void. The trial court, upon a final hearing, declared the forfeitures and purchases aforesaid void to the extent they affect the title of Brown to the land in controversy.

Each tract of the land forfeited in 1872 was sold to the state for the taxes assessed against it for 1871 and penalty, and the costs of advertising them for sale, and for the sum of 25 cents as clerk's costs, and the sum of 50 cents as collector's costs. The lands forfeited in 1886 were sold to the state under a decree of the Grant circuit court, rendered in an action instituted on the relation of T. C. Trimble, under an act of the general assembly entitled "An act to enforce the payment of overdue taxes," approved March 12, 1881. They were sold under this decree on the 18th day of September, 1883, for the taxes of the years 1876 to 1880, inclusive. After this sale was confirmed by the circuit court, taxes were assessed against the lands that were sold under the same for the years of 1876 to 1885, inclusive, and the lands were forfeited and sold to the state for the last-mentioned taxes on the 16th day of April, 1886. The lands forfeited in 1872 were sold to the state under the same decree. The clerk of Grant county failed to certify to the commissioner of state lands that the lands were sold under the decree. He was restrained by an order of the Grant circuit court from so doing. He, however, certified the forfeitures in 1872 and 1886 to the commissioner of state lands, who sold the lands, under the forfeitures so certified, to the Muskegon Lumber Company, on the 6th and 15th days of April, 1891, while the restraining order was still in force.

All the lands in controversy belong to Brown, to the extent he claims the same, provided the sale or forfeiture of them in 1872 and 1886, and the sale under the decree, were illegal. The question is, were the forfeitures in 1872 and 1886 valid? The sale under the decree is unquestioned. But he can redeem from this sale, if his title be otherwise valid. Acts 1895, p. 35.

The forfeiture in 1872 was void, because the collector had no authority to sell lands delinquent for taxes for any costs except the cost of advertising. Acts 1871, pp. 162-164, 187, §§ 100-103, 105, 187; Railroad Co. v. Parks. 32 Ark. 131; Goodrum v. Ayers, 56 Ark. 93, 19 S. W. 97; Cooper v. Lumber Co., 61 Ark. 36, 31 S. W. 981, and 32 S. W. 494.

Salinger v. Gunn, 61 Ark. 414, 38 S. W. 959.

The forfeiture in 1886 was void, because the lands belonged to the state, and were not subject to the taxation on account of which they were forfeited in that year; they having been previously sold to the state under the decree of the Grant circuit court. *Sand. & H. Dig.* § 4675; *Joyner v. Harrison*, 56 Ark. 276, 19 S. W. 920.

At the time the Muskegon Lumber Company undertook to purchase the land in controversy, the statutes conferred upon the commissioner of state lands no authority to sell land forfeited to the state for nonpayment of taxes until they were certified to him by the county clerk. *Sand. & H. Dig.* § 4565. The forfeiture and the certificate of the clerk vested him with the power to sell. The office of the certificate was to officially inform him of the forfeiture, and that the land was subject to sale by the state on account of such forfeiture. Until he secured this information, he had no power to act. If the forfeiture was void, the certificate conferred no power, and could not have been made to serve the purpose of certifying sales or forfeitures to the state, which the law required to be certified to him by another certificate. Each certificate served its own purpose, and ceased to be of any effect if the forfeiture certified by it was void. A forfeiture did not confer any power to sell until it was certified, and the deed of the commissioner vested no title which he had no power to convey.

The act to enforce the payment of overdue taxes required the sale of lands under decrees to the state for taxes to be certified to the county clerk, and made it his duty to send certified copies of the certificate to the commissioner of state lands and to the auditor. That was not done in this case.

Decree affirmed.

BUNN, C. J., and RIDDICK, J., did not participate.

SUMMERS et al. v. HEARD.

(Supreme Court of Arkansas. June 17, 1899.)

EXECUTION—WRONGFUL LEVY—MEASURE OF DAMAGES—PLEADING—INSTRUCTIONS.

1. The owner of a stock of druggist's goods, cannot, on the wrongful seizure and conversion of the goods, recover for their use as for loss of profits, in the absence of proof that they could not have been readily replaced, so as to prevent any stoppage of business.

2. In an action for wrongfully levying an execution on a stock of goods, special damages for the destruction of plaintiff's business through the levy cannot be recovered, unless the amount thereof be alleged and proved.

3. To show that a person on whose stock in trade an execution was wrongfully levied had sustained special damages because his business had been destroyed through the levy, evidence that he was doing a good and improving business, that others in the same line were doing well, and that there was no reason why he could not do well also, is inadmissible, being too vague and uncertain.

51 S. W.—67

4. A complaint for damages for wrongfully levying an execution on plaintiff's stock in trade alleged that the levy had destroyed plaintiff's business, but did not state the amount of damages sustained thereby. To show such damages evidence was received that plaintiff had been doing a good business, that others in that line were doing well, and that there was no reason why he could not do well also. The court charged that, if plaintiff recovered, he was entitled, in addition to the value of the stock and interest, to damages sustained by being deprived of his business. *Held* erroneous, because it authorized damages for loss of profits beyond the time necessarily required for replacing the goods.

Battle and Hughes, JJ., dissenting.

On rehearing. Reversed. For prior report, see 50 S. W. 78.

J. C. Hawthorne, for appellants. Parker & Parker and Norton & Prewett, for appellee.

RIDDICK, J. This was an action for damages caused by the seizure and sale of a stock of goods claimed by plaintiff, the facts of which are fully stated in the opinion of the court (50 S. W. 78) by Mr. Justice BATTLE. It is insisted, on the motion to rehear, that the court erred in giving to the jury the following instruction in reference to the measure of damages: "If you find for the plaintiff, you will assess the actual damages at the value of the property at the time of the seizure, with 6 per cent. interest thereon from the seizure up to this date, and such further sum as you will find, from the proof, the plaintiff has sustained from being deprived of his business." As a general rule, the measure of damages in an action of this kind is the value of the property at the time and place of the conversion, with interest thereon from that time. *Kelly v. McDonald*, 39 Ark. 387; *Jones v. Horn*, 51 Ark. 19, 9 S. W. 309. There is nothing shown here to take this case out of the general rule. The goods taken and converted were such as are generally kept for sale by druggists, and there is nothing in the evidence to show that they could not have been readily replaced by the purchase of other like goods in the market, thus preventing any stoppage of business. Under the facts of this case, plaintiffs cannot, in addition to the value of the goods and interest, recover for use of goods as for loss of profits. *Anderson v. Sloane*, 72 Wis. 566, 40 N. W. 214.

It is said on part of appellees that the complaint alleged that the seizure and sale of the stock of goods destroyed plaintiff's business, and that this allegation, not being denied, must be taken as true. If we concede this statement to be correct, still, before any recovery could be had for loss of business, the amount of such special damages should be alleged, and shown by evidence, with some degree of certainty. We have nothing of the kind here. The value of the business said to be destroyed is not alleged,

nor is there in the transcript any competent evidence of such value. There is in the complaint only the general allegation that the business was established and profitable, and that it was destroyed by the levy and the sale of the stock of goods. On the trial the plaintiff was allowed, over the objection of defendants, to state generally that he was doing a good business, which was improving, that others were doing well in the drug business, and that he did not see why he could not do well also. This evidence, even if there were no other objection to it, was too vague and indefinite, and should have been excluded. But the circuit judge refused to exclude it, and by the instruction above noticed told the jury that, in addition to the value of his goods and interest, they should allow the plaintiff such further sums as the proof showed that he had sustained by being deprived of his business. Even if it were proper to allow damages for stoppage of business in this case, this instruction would still be erroneous; for it does not limit the damage for such loss to the time necessarily required for replacing the goods seized by defendants, but leaves the jury free to assess damages for loss of profits for any length of time they might choose to fix upon, and was, when taken in connection with the evidence above noticed, calculated to mislead the jury to the prejudice of appellant. The evidence and instruction as to loss of business were both, we think, improper; for, as before stated, in the absence of any allegation or proof as to special damages, and where no grounds for exemplary damages are shown, the recovery in cases of this kind is limited to the value of the goods converted, with interest from the time of conversion. *Kelly v. McDonald*, 39 Ark. 387; *Jones v. Horn*, 51 Ark. 19, 9 S. W. 309; *Ingram v. Rankin*, 47 Wis. 403, 2 N. W. 755; *Anderson v. Sloane*, 72 Wis. 566, 40 N. W. 214.

This point was not overlooked in the former consideration of the case, but at that time we were of the opinion, taking into consideration the amount of the verdict, the remittitur required by the circuit judge, and all the evidence, that no prejudice resulted from the instruction noticed. The question was not discussed in the former opinion, for the reason that a difference among the judges in regard to the decision of the case arose on other points, which were discussed at length; but, there being at that time no disagreement on this point, it was passed without discussion. I concurred in the former opinion delivered in this case, and find no reason to change on any of the questions discussed therein; but a further consideration of the question has convinced me that the instruction above noticed was not only erroneous, but prejudicial. As I am not able to say what effect it had upon the verdict of the jury, I think it safer to reverse, and remand for a new trial. For the reasons above stated, the judgment is reversed, and cause remanded for a new trial.

WOOD, J., concurs. BUNN, C. J., concurs also, but for reasons stated by him in separate opinion.

BUNN, C. J. When this cause was decided by us in the first instance, I dissented from the opinion of the majority of the court, because the trial court had excluded certain evidence which went to make up a cause of fraud and overreaching on the part of the plaintiff, whereby he was enabled the more readily to show his claim of being a partner with Jenkins and wife, and therefore to sustain his contention for damages on account of the levy and sale of the goods. On this (the defendant's) motion for a rehearing, the instructions on the measure and manner of assessing damages being more particularly called to our attention, I find that there was no evidence to sustain actual damages for loss of business, etc., and, as against the officer making the levy and sale out of the defendants, no evidence upon which exemplary damages should have been assessed, and only inferentially against the others. This instruction—or, rather, these instructions—as to damages, were erroneous. The remittitur entered by the court tended to cure the defect, and, if this was all the error in the case, I might concur in the idea that the error, so corrected, was not reversible, seeing that the jury apparently left out of consideration the damages for loss of business; but the error of the court as to the fraud of the plaintiff, and the exclusion of testimony relating thereto, constrain me to sustain the motion for a new trial on both grounds, as only in that way can justice be done, as I view it, and, indeed, taking all the circumstances under consideration, I cannot certainly say that errors in the instructions as to damages were not reversible errors. Had the court not erred as to the question of fraud, there would have been no occasion for these instructions as to damages, in my opinion.

BATTLE, J. (dissenting). Appellants ask for a rehearing of this cause upon two grounds:

First. Because the court overlooked the error contained in an instruction given by the trial court to the jury in the following words: "By actual damages is meant such sum as will compensate for actual loss sustained; and, if you find for plaintiff, you will assess the actual damages at the value of the property at the time of the seizure, with 6 per cent. interest thereon from the time of seizure up to this date, and such further sum as you will find, from the proof, the plaintiff has sustained from being deprived of his business."

Second. "Because the evidence was not sufficient to support the verdict of the jury."

It is unnecessary to say anything as to the second ground of the motion in addition to what has already been said in the opinion of the court. Counsel for appellants have filed

no briefs, nor made any argument in support of their motion, but rely upon their brief which was on file when this cause was submitted for decision. No reason for additional comments has been suggested.

The motion seems to be based upon the belief that the instruction copied in this opinion was overlooked by the court. I know of no reason for this belief, except the failure to make mention of it in the opinion of the court. In preparing that opinion, I carefully considered the instruction, and thought no specific mention of it was necessary. In speaking for the court, and referring to that and other instructions, I said: "Many other instructions were given, but it is not necessary to set them out in this opinion." Referring to these instructions, and all other proceedings of the trial court, this court said: "Finding no prejudicial errors in the proceedings of the trial court, its judgment is affirmed."

I think the opinion of the court is correct, especially as to the instruction mentioned in the motion. The part of the instruction objected to is in these words: "And such further sum as you will find, from the proof, the plaintiff has sustained from being deprived of his business." In the opinion it is said: "The evidence does not show the damage suffered, further than the value of the goods sold." Inasmuch as the jury were told by this instruction to return a verdict in favor of the appellee for such damages as they found, from the proof, that he had sustained by the loss of his business, and the evidence did not show that he had sustained any, it is difficult, if not impossible, to see how it could be prejudicial.

The record in the case clearly shows that the appellants were not prejudiced by the alleged error contained in the instruction. In connection with it the court instructed the jury as follows: "Exemplary damages are given by law as a punishment, and to deter others from the commission of like trespass. In order to justify exemplary damages, the sale and the conversion of the property must have been malicious; and the sale is maliciously made, under the law, if made without reasonable cause to believe that it should be made under execution in hand; and if, in this case, you find [the] property to have been partnership property, and also find that Heard in writing notified the defendant Graham, or his deputy in charge of his interests, and that, notwithstanding the notice, the goods were sold under execution, the law will imply malice, and you will, in your sound discretion and judgment, assess such sum as you see proper as exemplary damages." The evidence showed that the value of the goods sold was variously estimated at \$400 and \$1,400, and that the goods were involved, by the persons selected by the constable to appraise them, at \$930.06. The jury returned a verdict in favor of the appellee for \$930 actual damages, and 6 per cent. interest from

the 15th of April, 1895, the date of the levy of the execution, and \$250 exemplary damages; and the trial court compelled him to remit the exemplary damages and \$230 of the actual. Why did they return a verdict for \$930 for actual damages? Manifestly, because the goods were estimated to be worth that much by the persons selected by the court to appraise them. If so, they found that the \$930 was the value of the goods, and that that was the damage sustained by the loss of the same. This is further evidenced by the fact that the court instructed the jury that, if they found for the appellee, they would assess his damages at the actual value of the property sold and 6 per cent. interest thereon from the time of the seizure thereof, and the fact that they were not instructed to allow any interest on any other damage, and by the fact they returned a verdict for \$930 and 6 per cent. interest thereon from the time of the seizure. But it has been said that they might have been induced by the objectionable part of the instruction to estimate the actual damages at \$930. This is an unreasonable assumption. They were told by that part of the instruction not to allow the appellee any damages for loss of business, unless they found, from the proof, that he had sustained such loss. The evidence did not show that he had. There was no cause in the instruction for the prejudicial effect attributed to it, and the jury manifested no disposition to travel beyond the instruction of the court to increase the actual damages of the appellee, as is shown by the fact that they could have found the actual value of the goods sold to be \$1,400, according to the evidence, instead of \$930.

In assessing the actual damages at \$980, did the jury intend to compensate the appellee for loss of business, in addition to the value of the goods sold? I think not. There was no occasion for them to cover up an award for such loss by the assessment of \$980, without evidence to sustain them in so doing, when they could have found the actual value of the goods to be a much larger sum; neither did they do so. The court instructed them that, if they found the "property to have been partnership property, and also" found "that Heard in writing notified the defendant Graham, or his deputy in charge of his interests, and that, notwithstanding the notice, the goods were sold under execution, the law will imply malice," and they might return a verdict for exemplary damages in such sum as to them might seem proper. In response to this instruction the jury returned a verdict in favor of appellee for \$250. This sum was awarded as a punishment of appellants for depriving appellee of his business. The return of the verdict for \$930 could not have been the result of any prejudice of the jury against appellants on account of such loss. If there was any, it found full gratification in the return of the verdict for \$250. The award of \$930 for actual dam-

ages, as appears from the record, was based solely upon the invoiced value of the goods sold.

I think the motion should be denied.

HUGHES, J., concurs with me in this opinion.

ST. LOUIS & S. F. RY. CO. v. NEAL.

(Supreme Court of Arkansas. June 24, 1899.)

CARRIERS—FREIGHT TRAINS—DUTY TO CARRY TO STATION—ATTORNEY'S FEE.

1. Under Sand. & H. Dig. § 6284, providing that local freights shall carry passengers from and to their stations, a railroad company running a local freight must, at any event, carry the passenger to the yard of the station at his destination, at a place not unreasonably distant from the station platform.

2. Under direct provisions of Sand. & H. Dig. § 6218, authorizing plaintiff, on recovery in any action against a railroad company for violation of law regulating transportation of passengers, to recover a reasonable attorney's fee, he is entitled to recover in an action for failure of carrier to carry passenger to his station.

Appeal from circuit court, Crawford county; Jephtha H. Evans, Judge.

Action by one Neal against the St. Louis & San Francisco Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The evidence in this case shows that the appellee, a citizen of the city of Van Buren, bought a ticket from the appellant at Van Buren, which entitled him to be carried thence, on a local freight train of the appellant, to the city of Ft. Smith, and the train carried him to within about one mile of the station at Ft. Smith and stopped; and that after waiting some 10 minutes the appellee inquired of the employees on the train if the train would carry him to the station at Ft. Smith, and was informed that it would not, and that, if he was waiting for that, he had as well go on; that it was dark, and the appellee got out of the car, and walked on towards town, and met a street car, which he boarded, and went up town, paying street car fare of 5 cents; that appellee paid 15 cents for his ticket from Van Buren to Ft. Smith. The appellee recovered a judgment for \$10 damages, and on his motion the court assessed an attorney's fee of \$10 against the appellant as costs. The railroad company excepted and appealed to this court.

B. R. Davidson, for appellant.

HUGHES, J. (after stating the facts). The appellant contends that, unless it appears from the evidence that it was the custom of freight trains on that road to receive and discharge passengers at the platform of the passenger depot, it should not be required of them. Conceding this to be true, it does not follow that appellant was not bound by its undertaking to at least discharge the passenger in the yard of the station, at a place not unreasonably distant from the platform at

the station. This we think the contract of carriage obliged it to do. Of course, there is always incident to travel on a freight train the delay of frequent stopping and switching, for which they are not liable to passengers; but in this case the appellee was informed by the employees of the company that they would not pull up to the station, and that, if that was what he was waiting for, he had as well go on. Section 6284, Sand. & H. Dig., provides: "Local freight trains on all railroads or railways in this state shall carry passengers from and to any and all of their stations." A railroad station is a place where passengers are received upon and discharged from railroad trains.

It is contended that the court erred in assessing an attorney's fee of \$10 as costs against appellant. But we think otherwise. The statute covers this contention in express terms. Section 6218, Sand. & H. Dig., provides: "In all actions at law or suits in equity against any railroad company, its assignees, lessees, or other person or persons operating any railroad in this state, partly therein, for the violation of any law regulating the transportation of freight or passengers by any such railroad, if the plaintiff recover in any such action or suit he shall also recover a reasonable attorney's fee to be taxed as a part of the costs, and collected as other costs are or may be by law collected." Act April 4, 1887. Finding no error, the judgment is affirmed.

BUNN, C. J., and BATTLE, J., did not participate.

RUTHERFORD v. McDONNELL.

(Supreme Court of Arkansas. May 6, 1899.)

NONTRADING PARTNERSHIP—POWERS OF PARTNER—MORTGAGES—SETTLEMENTS WITH MORTGAGEE.

1. A partner in a firm formed to cultivate the lands of one of the partners has no implied power to sell the live stock and farming utensils of the firm without the consent of the co-partner.

2. A partnership to cultivate lands owned by W., one of the partners, became indebted, and W. mortgaged his land, and the firm mortgaged its personality, as security. The mortgages were foreclosed, and certain sums decreed liens respectively on the realty and personality. Afterwards W. and the mortgagee agreed on a full settlement, whereby the latter was to pay the former \$500, and release certain live stock and farm utensils from the decree, in consideration of a conveyance of all the lands and the remaining personality of the firm. *Held* that, while the co-partner can object to the transfer of the personality without his consent, yet he cannot claim that the decree has been satisfied in full by the conveyance of the land, since if W. conveyed under the mistake shared in by the mortgagee that he was the owner of all the personality because the co-partner had not paid any part of his note given to W. for his share of the personality, the mortgagee should be allowed to rescind the sale of the personality, and set aside the satisfaction of the decree.

Appeal from Jefferson chancery court; James F. Robinson, Chancellor.

Action by James S. McDonnell against James S. Rutherford, to quiet title. From a decree for plaintiff, defendant appeals. Reversed.

The facts in this case are, briefly stated, as follows: Eliza R. Walkerwitz, a married woman, owned certain farming lands in Jefferson county; also live stock and other personal property on said farm. She entered into a partnership with James S. Rutherford for the purpose of cultivating said lands, and sold him a half interest in the personal property for the price of \$1,800. For the payment of this he executed his note, but has never paid the same. Afterwards Mrs. Walkerwitz and the firm became indebted to James S. McDonnell, for money borrowed to run the farm and for other purposes, to the amount of several thousand dollars. To secure these sums, Mrs. Walkerwitz executed to McDonnell a mortgage on her lands, and the firm of Walkerwitz & Rutherford also executed to him a mortgage on the personal property above mentioned. In March, 1894, McDonnell brought suit in the chancery court of Jefferson county to foreclose these mortgages. He recovered judgments against Walkerwitz & Rutherford for the sum of \$12,500, all of which was adjudged to be a lien on the lands of Mrs. Walkerwitz, and a portion of which, to wit, \$1,088, declared to be a lien on the personal property of the firm of Rutherford & Walkerwitz. Afterwards, in March, 1895, McDonnell and Mrs. Walkerwitz agreed upon a full settlement of said judgment and decree as follows: McDonnell was to pay Mrs. Walkerwitz \$500, and release from the mortgage and decree certain live stock and farming utensils, and she was to convey to him all the lands described in the mortgages and decree, and also all the live stock and farming utensils described in the mortgage, except that portion released to her; and such conveyance of the land and live stock was to be taken by him in full satisfaction of all debts due him from Mrs. Walkerwitz, both as an individual and as a member of the firm of Walkerwitz & Rutherford. This agreement was carried out by proper conveyances from Mrs. Walkerwitz. McDonnell took possession of the lands conveyed to him, but Rutherford, who had possession of the personal property, claimed that he owned a half interest therein, and he refused to surrender the same. McDonnell thereupon brought this action to quiet his title, and to subject any interest of Rutherford in the property to the payment of his decree. Rutherford answered, alleging that the decree had been satisfied in full by the conveyance from Mrs. Walkerwitz; that he was not a party to such conveyance, and that the same did not affect his one-half interest in the personal property, and that plaintiff had no interest in or claim on the same. He also demurred to the complaint on the ground that it did not state

facts sufficient to constitute a cause of action in equity. The chancellor found in favor of the plaintiff that Rutherford had no interest in the property, and decreed accordingly.

Austin & Taylor, for appellant. J. M. & J. G. Taylor and Crawford & Hudson, for appellee.

RIDDICK, J. (after stating the facts). The appellant, Rutherford, insists in this case that Mrs. Walkerwitz had no power to sell his interest in the partnership property, and that the chancellor erred in holding that he had now no interest in such property. As the partnership of Walkerwitz & Rutherford was not formed for the purposes of trade, but to cultivate the lands of Mrs. Walkerwitz, we concur in the contention that she could not sell the live stock and farming utensils of the firm without the consent of Rutherford. That property was not held for the purpose of sale, and we do not think that power to sell it without consent of the partner can be inferred from the terms of the partnership. *Lee v. Onstott*, 1 Ark. 206; *Drake v. Thyng*, 37 Ark. 228; *Cayton v. Hardy*, 27 Mo. 536. It may therefore be true that Rutherford was not bound by such sale, and could recover his interest in the property upon paying or satisfying the decree of foreclosure, or so much of it as affects his property. He does not, however, offer to do that, but asserts that the decree has been satisfied in full by the contract and conveyance of Mrs. Walkerwitz, and that he now has an undivided half interest in the personal property of the firm, free from the lien of such decree. We think that the evidence shows that the satisfaction of the decree depended upon the sale of the property, both real and personal, to McDonnell. Mrs. Walkerwitz assumed to be the owner of the property. As no part of the note given by Rutherford for one-half interest in the property has been paid, the property was treated by both Mrs. Walkerwitz and McDonnell as her property, and she undertook to convey, not one-half interest in the property, but a title to the whole, in satisfaction of the judgment and decree. If Mrs. Walkerwitz and McDonnell were acting under a mutual mistake as to her ownership and right to sell the property, and Rutherford refuses to ratify her act, and make the sale good, McDonnell should be allowed to rescind the sale, and set aside the satisfaction of a decree, and the foreclosure decree should be enforced by the sale of the property. *Benj. Sales* (Bennett's Ed.) 368, and note; *Cooper v. Phibbs*, L. R. 2 H. L. 170. If there was any agreement between Mrs. Walkerwitz and McDonnell as to the price of the land, it might be necessary to rescind the sale of land, but the price of same could be credited on the decree. The same thing may be said of her interest in the personal property if there was any agreement as to

the price. But the evidence here does not show that there was any agreement between Mrs. Walkerwitz and McDonnell as to the price of either the land or the personal property, but the chancellor disposed of the case upon the theory that Mrs. Walkerwitz could sell the personal property without consulting Rutherford. The judgment will therefore be reversed, and the cause remanded, with an order that Mrs. Walkerwitz be made a party, and for further proceedings.

NOTE. Judgment set aside, and, by consent, decree affirmed.

McCLENDON v. STATE.

(Supreme Court of Arkansas. June 24, 1899.)
HOMICIDE—MURDER IN SECOND DEGREE—EVIDENCE—MISCONDUCT OF JURORS
—INTOXICANTS.

1. Accused was engaged in a quarrel, and was cursing, when deceased, who was not an officer, attempted to induce him to keep quiet; and, accused refusing so to do, deceased took him by the shoulder and started off with him. A scuffle ensued, and accused jumped on deceased, and began beating him; and, the latter reaching for his pistol, accused grappled with him, jerked the pistol away, and, as deceased was falling, shot him. Accused fired several shots point blank at deceased after he was down. Held, that a verdict of murder in the second degree was justified.

2. Where the supreme court is convinced that the verdict is correct, it will not order a new trial for misconduct of the bailiff and jurors in drinking liquor in the jury room; the testimony showing that liquor was taken in small quantities, not oftener than twice a day, and that none of the jurors were under its influence.

3. The misconduct, however, was such as to justify the severest condemnation. The court should instruct the jury and bailiff in charge to abstain from the use of liquor, and, in case of disobedience, they should be severely punished.

Appeal from circuit court, Pulaski county; Robert J. Lea, Judge.

George McCleendon was convicted of murder in the second degree, and he appeals. Affirmed.

T. J. Olphint, for appellant. Jeff Davis, Atty. Gen., and Chas. Jacobson, for the State.

WOOD, J. This is an appeal from a conviction of murder in the second degree. Without going into details, the proof shows substantially the following: Appellant and one Crist, on the 29th of December, 1898, were in a quarrel, brought on by appellant, near the Star Steam Laundry in this city. Appellant was "raving and cursing" when Witt, the deceased, came along and told appellant to keep quiet, and tried to get him "to behave himself." The appellant told Witt that "he would not do it," and Witt replied, "Well, I will have to take you in if you don't keep quiet," and took appellant by the hand or shoulder, and started off down the sidewalk. They had proceeded but a short distance down the street when a scuffle ensued. They had proceeded several feet when appellant

refused to go further. Witt was remonstrating with appellant to keep quiet, when appellant jumped upon him, and began beating him, when "Witt ran his hand back for his gun, and pulled it out." Appellant, according to one witness, took the gun away from Witt, turned around, and shot Witt in a slanting way, while he (Witt) was in a falling position. According to another witness, Witt had one hand on appellant's shoulder, and his right hand back to his pocket, when appellant grappled with him. They were struggling over the pistol. Each had hold of it, trying to get it. Appellant got it, and, in jerking the pistol away, it pulled Witt forward, and, as he was falling, appellant fired, killing Witt. Appellant fired several shots after Witt had fallen. One witness says he was shooting at Witt, and that he "looked for every shot to hit him in the center of the head." Another witness said: "I saw the shots fired after the first shot. The defendant then was raving mad,—infuriated. He just seemed to be staggering around." Witt was not an officer.

Appellant contends that the proof would only support a verdict for manslaughter. "If a person, in resisting an attempt unlawfully to arrest him, unnecessarily takes the life of the person so making the attempt, he is guilty of manslaughter, but not of murder, in the absence of express malice." 9 Am. & Eng. Enc. Law, p. 587; 1 Bish. Cr. Law, § 868; 1 McClain, Cr. Law, § 340. The proof here would justify a finding of express malice under the definition of same as given by our statute, which was embodied in the court's charge. The proof justified the verdict for murder in the second degree. Objection was raised to some of the instructions of the court, but we find that the law was correctly declared.

The most serious question in the case grows out of the alleged misconduct of the jury, and the bailiff having them in charge, as to the use of intoxicating liquor. The proof is as follows: E. J. Jabine: "The jury had some whisky. I gave it to them. I got the whisky for myself. There were about five or six jurors that took a drink out of it. No one got under the influence of the whisky. There was not a juror that drank enough whisky to get under the influence. I do not know which of the jurors drank. After I got back from supper, I would bring a bottle with me. We would take a drink before I went to bed,—that is, those of us who wanted to,—and a drink in the morning before breakfast. That was all the whisky that was drunk, either by myself or the jury, during the time I had them in charge. At the outside, only two drinks a day were taken, and then just a small quantity. I had them in charge three days, and altogether we only consumed one quart. They could not have possibly taken over two drinks a day, and on the morning the verdict was rendered, about 10:30 o'clock, there was not any whisky drank by myself or the jury from 7:30 in the morning up to that time. Nobody had even one drink from

that time until they agreed upon a verdict at 10:30. They could not possibly have been under the influence of it, because there was not enough here to put one man under. I talked to none of the jury about the case, neither did any of them talk to me. No one else talked to them. At the time the jury was mingling in the court room, I was at the entrance to prevent the crowd from coming in. On the inside were only Judge Merri-man, Mr. Olphint's little boy, Mr. Nichols, and, I believe, Mr. Bellar. I asked him to go and bring the prisoner. I was with the jury at the time Donohue passed. He only said, 'Good evening.' We were then going to the court house from supper. We were together three days and nights, and during all that time only had one quart of whisky. I never expressed myself as to the guilt or innocence of the defendant, nor have I given to the jury any indication of what I thought ought to be done to the defendant, nor permitted any one else to do so." The witness further testified: "I am a little fond of a long toddy. The jury took two drinks a day, and I don't know how much they drank. I would bring a bottle here at night, and, if there was any left, I would not buy another bottle that night. I gave the first whisky to the jury, sometime the first night they were together. The jury got more whisky the next night. The next night they got more whisky, and I was in charge of the jury. The jury got two drinks a day, and did not drink over a small whisky glass full at a time. I don't know how much each jurymen drank at a time. I did not see any of them take a drink except Louis Pollock, and he just put the bottle to his mouth, and took a swallow, and set it down." There was testimony by numbers of the jury who drank liquor during the progress of the trial, and by those who did not drink at all, to the effect that none of the jurors were drunk, or under the influence of intoxicating liquor.

Under the rule announced by this court in *State v. Dolan*, 40 Ark. 454, the misconduct of the jury and deputy sheriff in the use of intoxicating liquors could not be said to be reversible error. It was such misconduct, however, as to justify the severest condemnation. Trial courts should not permit the use of intoxicating liquors at all during the progress of a trial of this magnitude. They should instruct the bailiff having the jury in charge, as well as the jury, to abstain from their use, and, in case of disobedience by the sheriff or any juror, they should be severely punished, to the end that such practice may be forever abolished. Where the trial judge, knowing the bailiff, and seeing and hearing his testimony and that of the jurors in purging themselves from a charge of misconduct in the use of intoxicating liquors, concludes that there has been no misconduct, it is difficult for us to determine that his finding is not correct without passing upon the credibility of the witnesses, and he

is in a much better position to do that than this court. Because of this fact, the trial court should be exceedingly careful to see that the use of intoxicating liquors, which is so well calculated to bring forth verdicts resting under grave suspicions, is avoided altogether. This is the only safe course; for it is well known that the use of intoxicating liquors is not conducive to that freedom from passion and that calm deliberation and unclouded judgment which should ever characterize jurors who are to render a verdict involving the life and liberty of a human being. It is also well known that intoxicating liquor is insidious in its effects. It affects different individuals differently, and the same individual in a different way at different times and under varying conditions, depending entirely upon the temperament and the habits and disposition of the man. Some men can drink a large quantity, and apparently not be affected by it, while others are visibly affected by very small quantities. Some men, too, may be decidedly under the influence of liquor, and be unconscious of it, and others, although conscious, may be loath to acknowledge it. It is by no means a certain test that the beverage has not had a baneful influence because, forsooth, it has only been taken in the moderate quantity of two drinks per day. That, we think, would depend largely upon the size of the drink and the quality of the liquor, as well as upon the time intervening between drinks.

But the trial court has passed upon all these questions and adjudged the verdict without prejudice, and we cannot say that he is in error. Because, however, of our grave apprehensions as to the perfect purity of the verdict, we might set it aside, were we not thoroughly convinced, from the evidence, that the verdict is correct, notwithstanding the misconduct complained of, and that a new trial would not likely produce a different result. There is no conflict in the evidence upon the essential elements of the crime. Affirmed.

BATTLE and HUGHES, JJ., not participating.

MEHLIN v. MUTUAL RESERVE FUND LIFE ASS'N.

(Court of Appeals of Indian Territory. June 6, 1899.)

NOTE—DELIVERY—PAROL EVIDENCE.

Parol evidence is admissible that a note containing a promise to pay a certain sum as premium on delivery of a policy on the life of the maker was placed in the hands of the company's agent, to be held by him till the maker could look into and become satisfied with the insurance proposed, and hence that his being so satisfied was a condition precedent to a legal delivery.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, November 5, 1897.

Action by the Mutual Reserve Fund Life Association against James G. Mehlin. Judgment for plaintiff. Defendant appeals. Reversed.

The questions at issue in this case arise on the pleadings, and judgment of the lower court thereon. On the 15th day of November, A. D. 1894, the Mutual Reserve Fund Life Association, plaintiff (hereinafter called "appellee") instituted suit in the United States court for the Northern district of the Indian Territory, at Muskogee, against James G. Mehlin, defendant (hereinafter called "appellant"), for the recovery of the sum of \$110. The complaint filed is as follows: "Comes now the plaintiff, a corporation duly organized and existing under and by virtue of the laws of the state of New York, and complains of the defendant, a citizen of the Cherokee Indian Tribe or Nation, and residing in the First judicial division of the Indian Territory, and alleges: First. That on the 15th day of May, 1894, at Alluwee, I. T., the defendant made and delivered to the plaintiff his promissory note in writing, of which the following is a copy: '\$110.00. Alluwee, I. T., May 15th, 1894. On delivery of policy, without grace, I promise to pay to the order of the Mutual Reserve Fund Life Association one hundred and ten dollars, being \$80.00 for first payment, and \$30.00 for general expense fund, on an application for a policy of insurance for \$10,000.00. The amount due to be paid at First National Bank, Vinita, without defalcation, for value received. It being understood and agreed that, if this note is not paid when due, the insurance for which the same is given shall at once cease and determine, and thereupon be null and void; but this note shall be due and payable notwithstanding the termination of the insurance, as aforesaid, and, in the event that the said application for insurance is not accepted by the Mutual Reserve Fund Life Association, then no contract of insurance has been effected, and no benefit created or acquired hereby, and this note shall also be void and of no effect. [Signed] Jas. G. Mehlin.' Second. That said policy of insurance was duly executed and delivered to said defendant on the 22d day of June, A. D. 1894. Third. That no part of said note has ever been paid. Wherefore the plaintiff prays for judgment against said defendant for the sum of \$110, with interest at 6% from date until paid, and for his costs in this behalf expended. Hutchings & English, Attys." On the 9th day of May, A. D. 1895, appellant filed an answer to said complaint as follows, viz.: "Now comes the defendant, and admits that plaintiff is a corporation as alleged, and also the citizenship of plaintiff and defendant. But defendant denies that he is indebted to plaintiff in any sum whatever, but states the facts to be that, at the time he signed the instrument sued on, he did not know that it was a note, but thought it was simply an agreement with

reference to procuring a policy in plaintiff's association. He further states: That he refused to sign the same at first for the reason that he did not know anything about the plan of insurance carried on by plaintiff, and desired time to look into the same. That thereon one Ozler, who was acting as plaintiff's agent in this transaction, insisted on defendant signing the same, and leaving it with him until defendant could look into the plan of plaintiff's plan of insurance, and, if satisfactory, he, said Ozler, would forward the note to the company, and the policy would be issued; but that, if defendant was dissatisfied with the plan of insurance, the note would not be forwarded or acted on, and the note or agreement would be at an end. In pursuance of this agreement, defendant signed the instrument sued on, and, relying on said Ozler's said agreement as agent for plaintiff, he left the said note with said Ozler, as his agent, to hold until he could make an investigation as aforesaid. That shortly thereafter he made said investigation, and decided that he did not wish a policy on the said plan, and so wrote to said Ozler. That said Ozler disregarded his said agreement, and, in violation of his promise as the agent of defendant as aforesaid, he forwarded the said note to plaintiff, and the policy was issued by plaintiff and tendered to defendant, which defendant refused to receive, and still refuses, for the reasons aforesaid. Wherefore defendant prays for judgment against plaintiff, and for the costs for his behalf expended. Marcum, Fears & Wiggins, Attys. for Deft., Jas. G. Mehlin." On the 1st day of November, 1897, appellee filed a demurrer to appellant's answer, as follows: "Comes now the plaintiff, and demurs to the answer of defendant, and for ground therefor says that the same does not constitute a defense to this action." The demurrer to the answer was by the court sustained, and, appellant declining to further plead, judgment was rendered by the court in favor of appellee and against appellant for the sum of \$133.10, etc.

Fears & Bailey, for appellant. William T. Hutchings, for appellee.

THOMAS, J. (after stating the facts). The only question of importance raised by the record in this case necessary to be passed upon by this court is, was the note set forth in the complaint legally delivered by appellant to appellee, so as to form a complete legal contract, binding upon appellant, and enforceable at law? While it is a well-settled rule of law that parol evidence is not admissible to vary or contradict the terms of a written instrument, "the rule would become the instrument it was intended to prevent, if there were no exceptions to the universality of its application." *Insurance Co. v. Wilkinson*, 13 Wall. 231. In effect, the contention of appellee is that to allow proof of the facts set forth in

appellant's answer would be a violation of the general rule above stated (i. e. "Parol evidence is not admissible to vary or contradict the terms of a written instrument"), and numerous authorities are cited to sustain this well-established general rule of law. On the other hand, it is urged by the appellant that the facts set up in his answer as a plea in bar do not contravene the rule mentioned, but put in question the important primal fact, was the note in question a legal contract between the parties, enforceable at law? In other words, was the note legally delivered by the appellant to the appellee, with the understanding and intention by both parties that in its terms it embodied the whole contract?

Appellee contends that to have overruled the demurrer would have violated three distinct and well-established rules of law: First. "Oral testimony is inadmissible to vary or contradict a written contract, and all previous oral agreements are merged into the written contract." Second. "It would violate the elementary principle of law that a note, whether negotiable or otherwise, cannot be delivered to the payee or his agent, to be held in escrow." Third. "It would have permitted the assured to adopt as his agent the agent of the insured, while acting within the legitimate purposes of his agency, to do something inconsistent with his duty towards his principal. There can be no doubt that one can make the agent of another his own agent in the same transaction, but there must be no conflict or antagonism of duty, and what he assumes to do for his second principal must in no way conflict with what he is doing for his first."

In support of the first proposition, reference is made to 1 Daniel, Neg. Inst. (4th Ed.) §§ 80, 81a; Insurance Co. v. Mowry, 98 U. S. 544; and Greenwood v. Insurance Co., 27 Mo. App. 401. 1 Daniel, Neg. Inst. (4th Ed.) § 81a, states that it has been held in a number of cases that a note may be delivered to the payee to take effect only upon a condition precedent, and that default in the fulfillment of such conditions may be shown by parol evidence, and will defeat recovery, as between immediate parties; referring to Benton v. Martin, 52 N. Y. 574. But, unless the non-fulfillment of the condition goes to the failure of consideration, this would seem to trench upon fixed principles of law. Evidence of want of consideration is admissible as between original parties. Every bill or note imports two things,—value received, and an agreement to pay the amount on certain specified terms. Evidence is admissible to deny the receipt of value, but not to vary the engagement. The cases amply sustain the foregoing views, which seem to us altogether correct. It has been held that it is competent to show by parol evidence that at the time a note was made it was agreed that it should be held for nothing on the happening of a certain event. But, unless such event operated a failure of consideration, we cannot perceive upon what principle such a view

could be taken. The consideration of contracts in writing is in general open to inquiry, and it is not an infringement of the rule excluding parol evidence to add to, vary, or contradict writings, to receive parol evidence for the purpose of determining its validity or its failure, or that from any cause it is sufficient or insufficient to support the contract. The last proposition is so well sustained by the authorities referred to by the learned author, and by others, that it has long since ceased to be a moot question. See 1 Greenl. Ev. 285; 2 Whart. Ev. § 1042; Ramsey v. Young, 69 Ala. 158; Bank v. Nugen, 99 Ind. 160; Maltz v. Fletcher, 52 Mich. 484, 18 N. W. 228; Burke v. Dulaney, 153 U. S. 228, 14 Sup. Ct. 816; Scalfe v. Byrd, 39 Ark. 568; Brackett v. Barney, 28 N. Y. 341. Neither one of the authorities cited by appellee sustains the view that overruling the demurrer to the appellant's answer would have violated the first rule specified by appellee.

The second rule mentioned has no application to the controversy, nor do the authorities cited in support thereof negative the view that a note may not be signed and manually delivered to a payee or his agent, subject to certain conditions precedent, before being legally delivered so as to conclude the transaction. The rule of law governing the delivery of a promissory note is identical with that governing the delivery of other personal property.

The third principle which appellee claims would have been violated by overruling the demurrer and sustaining the answer of the defendant is not sustained by either reason or the authorities cited. To contend that an insurance solicitor may not become the agent of the maker of a note for the purpose of holding the same, not in escrow, but in abeyance of delivery, until certain conditions precedent have been complied with, is not tenable, since the holding of said note as the agent of the maker could not in any way possibly conflict with the duty incumbent upon and owing by him by reason of his being the agent of the insurance company. The authorities cited by appellee not only fail to sustain his view, but, on the contrary, unquestionably support the contention of the appellant. Justice Eakin, speaking for the supreme court of Arkansas in the case of Scalfe v. Byrd, 39 Ark. 568, says: "The appellant sued appellees on a note for \$1,625, due January 1, 1879. They answered by an equitable defense and cross bill, setting up that the note in question was one of six which had been signed by them in April, 1878, pending negotiations for a sale to them by Scalfe of a tract of land, and alleging that although a conveyance of the land had been drawn up, signed, and acknowledged by Scalfe, and a mortgage back had also been drawn by Scalfe, signed and acknowledged by appellees and their wives, at the same time with the note, yet that none of them had been executed by delivery. They say

that the papers were thus prepared in the country for convenience of acknowledgment; that they (the defendants) intended, before delivery, to be satisfied, upon consultation with their legal advisers, that the title was good, and that the papers, as drawn, accorded with their intention, which was to make a conditional purchase of the land, if they found themselves able to do so by the first of the coming year; that they did not agree or mean to purchase absolutely, nor, in case of purchase at all, to bind themselves to pay the notes, beyond the security of the land itself; that they were assured by plaintiff that such was his understanding of the mortgage; that they paid in cash \$25 as a forfeit on account of the option, or as a credit if they took the land, and also paid for plaintiff a small debt of something over \$90, to be credited on the note if they took the land, or to be repaid if they did not. They allege that the plaintiff was on the eve of departure for South Carolina, and that the papers were prepared with a view that the parties should meet in Helena, and if, upon consultation with attorneys, they should be approved, that plaintiff might proceed without further delay upon his journey; that plaintiff took the papers all together to keep and carry them for the purpose, but, without meeting with defendants, or any further understanding, had them recorded as they were, and left the state. This amounts, in effect, to a denial of the execution of the instruments, and, if true, gave them the right to have them canceled. The chancellor so decreed, and gave a personal decree on the cross bill against the plaintiff for the debt of \$97, which they had paid, with interest. Plaintiff appeals. A contract is not complete until the minds of the parties unite in an assent to the terms. If writings are drawn and executed by delivery, they are the best evidence of the assent to the terms, and of the terms themselves, and cannot be altered by parol proof. It does not conflict with this, however, to show that the instrument was never delivered for the purpose of binding an obligor. This is a fact which generally must be within the scope of parol proof alone, as the writing, in the nature of things, does not usually contain the evidence of its delivery. Signature and acknowledgment may be simply preparatory to execution, but they amount to nothing if there be no delivery. To leave a writing in the custody of another, to be carried to another place, and with the intent that it shall there be delivered if found satisfactory to the maker, is not delivery in any sense. It is a mere confidence reposed. When complete execution is established, then the rule excluding parol proof first finds place. It may be presumed from possession of the instrument by the obligee, and from the fact that it has been recorded, but this is only *prima facie*. It may be rebutted by parol," etc. *Brackett v. Barney*, 28 N. Y. 341. In the case of *Bronson v. Noyes*, 7 Wend. 188, Justice Nelson, delivering the opinion of the

court, said: "There must be a delivery, as well as an acceptance, to give validity to a deed. It is true, the bond was delivered to the defendant at the time of its execution, but for what purpose? If for the purpose expressed therein, then it would be valid; if as a mere deposit until additional security is obtained, clearly there was no delivery. * * * The mere manual tradition of a deed by the grantor to the grantee or obligee, and nothing else, would be *prima facie* evidence of legal delivery, but not necessarily conclusive and inexplicable. The party may explain and rebut the *prima facie* legal effect of the act. This is not impugning the doctrine applicable to an escrow. It is only allowing a party to contest the delivery." The principle upon which that decision rests is clearly applicable to the present case. The note in question was placed in the hands of the agent of the appellee, to be held by him until the appellant could look into, and become satisfied with, the plan of insurance proposed. Hence, since there was a condition precedent to be performed and affirmed by the obligor before there could be, according to the contract set up in appellant's answer, a legal delivery of said note, and until such legal delivery the title to said note did not pass to appellee, the rules invoked by the appellee could not preclude the appellant from invoking that law which enabled him, as his defense, to demonstrate the nonlegal delivery of said note. In an exhaustive discussion of the identical questions involved in this case by Justice Harlan, of the supreme court of the United States, in the case of *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, it is held that evidence which does not contradict the terms of the writing in suit, nor vary their legal import, but tends to show that the written instrument was never in fact delivered as a present contract, is not in contradiction of the writing, and is admissible between the original parties thereto. The rule that excludes parol evidence in contradiction of a written agreement has no application if the writing was not delivered as a present contract. The effect of the delivery and the extent of the operation of the instrument—such as a promissory note—may be limited, as between the original parties thereto, by the conditions with which delivery is made. In the case of *Ware v. Allen*, 128 U. S. 590, 595, 9 Sup. Ct. 176, "which was an action upon a written instrument, the defense was that it was understood between the parties at the time the instrument was signed that it should not be of any effect, unless in certain named contingencies, which, it was shown, never occurred. Mr. Justice Miller, speaking for the court, said: 'We are of the opinion that this evidence shows that the contract upon which this suit was brought never went into effect, that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that

it is one of that class of cases, well recognized in law, by which an instrument, whether delivered to a third person as an escrow, or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or to be ascertained thereafter.' * * *

The supreme judicial court of Massachusetts said [in the case of *Willson v. Powers*, 131 Mass. 539]: 'The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced.' In *Benton v. Martin*, 52 N. Y. 570, 574, the principle is thus stated: 'Instruments under seal may be delivered to the one to whom, upon their face, they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions, the observance of which is essential to their validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it, or others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery, and the extent of the operation of the instrument, may be limited by the conditions with which delivery is made. And so, also, as between the original parties and others having notice, the want of consideration may be shown.' To the same effect are *Juilliard v. Chaffee*, 92 N. Y. 529, 535, and *Reynolds v. Robinson*, 110 N. Y. 654, 18 N. E. 127, in the latter of which it was said that the rule was now well established that 'parol evidence is admissible to show that a written paper, which in form is a complete contract, of which there had been a manual tradition was nevertheless not to become a binding contract until the performance of some condition precedent resting in parol.' * * * In *McFarland v. Sikes*, 54 Conn. 250, 7 Atl. 408, which was an action upon a note which the defendant alleged had been executed and delivered to the plaintiff upon an agreement that it should be canceled under certain named circumstances, and in the event he demanded, by a named day, that it be returned to him, the trial court having ruled that the facts relied upon by the defendant did not constitute a defense, the supreme court of errors of Connecticut, reversing the judgment, said: 'The error was in applying to the case the familiar and well-established rule that parol evidence is inadmissible to contradict or vary a written contract. A written contract must be in force as a binding obligation, to make it subject to this rule. Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled. If the payee of a note has it in his possession, that

fact would be prima facie evidence that it had been delivered, but it would be only prima facie evidence. The fact could be shown to be otherwise, and by parol evidence. Such parol evidence does not contradict or seek to vary its terms. It merely goes to the point of its nondelivery. The note, in its terms, is precisely what both the maker and the payee intended it to be. No one desires to vary its terms, or to contradict them.'"

We have been unable to find a single vital authority sustaining the appellee's contention in this case, but, on the contrary, authorities without number, uncontroversible in reason, sustaining the contention of the appellant. The sustaining of the demurrer by the court below, and the rendition of the judgment on the alleged note, were clearly error. Hence the judgment of the court below is reversed, and the case remanded, with instructions that the court proceed with the trial of said cause in compliance with the views herein expressed.

CLAYTON and TOWNSEND, JJ., concur.

MISSOURI, K. & T. RY. CO. v. ELLIOTT
et al.

(Court of Appeals of Indian Territory. June 8, 1899.)

CONTINUANCE — JURORS — DEPOSITIONS — SECONDARY EVIDENCE — WITNESS — DECLARATION — NEGATIVE PREGNANT — FELLOW SERVANTS — ACTION FOR DEATH.

1. A stipulation for continuance, signed by one only of several plaintiffs, does not necessitate a continuance.

2. Defendant is not entitled to continuance to enable it to prepare for trial, the case having been on the docket for more than four years; the attorney for the minor plaintiffs having written defendant's attorney a month before the day of trial offering to compromise, and stating if his proposition was rejected they would be ready and press a trial; no diligence to secure the testimony, which it is inferable from the motion could be procured, being shown; and it not being intimated what witnesses could be secured or what they would testify; though Mansf. Dig. § 5108, requires the affidavit to show what facts the absent witness will prove, and provides that there shall be no continuance if the adverse party will admit that the absent witness would testify to the statement contained in the application.

3. Challenge for cause to jurors on account of their claims against defendant is properly overruled, none of them having any pending or in course of suit, some of them testifying that they had dropped all suits they ever had, and the others that they never had any intention of bringing suit, and all that their minds were free from bias or prejudice.

4. Under Mansf. Dig. § 2921, declaring that depositions may be used where the witness does not reside in the county where the action is pending, or in an adjoining county, or is absent from the state, or resides 30 or more miles from the place where the court sits in which the action is pending, it is no objection to deposition that witness, as an employé of a railroad, is frequently within the jurisdiction of the court, though residing in another state, and not within the district where action is pending or an adjoining district, and more than 30 miles from the place of trial.

5. Objection to deposition that the witness, though living out of the state, was frequently within the state, being made for the first time after commencement of trial, is too late; Mansf. Dig. §§ 2955, 2956, declaring that no exception to deposition, other than to competency of witness or relevancy or competency of the testimony, shall be regarded, unless filed before commencement of trial, and that the court, on motion of either party, shall decide on the exceptions before commencement of the trial.

6. Parol testimony is admissible as to contents of writings that have been destroyed or lost, or that defendant has in his possession, and refuses to produce at the trial, as notified by plaintiffs to do.

7. The chief train dispatcher of a railroad is competent to testify that B. was train dispatcher at a certain point on the road, and likewise engineers who receive orders from B.

8. A station agent of defendant railroad company, who testifies that he has in his possession a schedule showing the amount paid firemen and a fireman of defendant, is competent to testify to the compensation of its firemen.

9. Testimony of witness that deceased told him his salary as fireman for defendant was a certain amount is competent in an action for his death.

10. Contents of records in the office of defendant's train master, without the state, may be proved by secondary evidence, defendant not having produced the same on notice from plaintiffs, notwithstanding statutes providing the manner in which courts may compel the production of papers and the penalty for failure to comply with the court's order.

11. An answer which, to the allegation of the complaint that defendant was a private corporation "duly incorporated under the laws of the state of M.," pleads, "Defendant denies that it is a private corporation duly incorporated under the laws of the state of M.," admits that it is a corporation.

12. A train dispatcher and a locomotive fireman are not fellow servants, the former being the representative of the company in the running of its trains, and the latter in that particular his subordinate.

13. A right of action for wrongfully killing a husband and father survives in the widow and heirs.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, November 29, 1897.

Action by Georgia C. Elliott and others against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

This is an action brought by Lydia J. Elliott, the widow, and Georgia C. Elliott and Nannie F. Elliott, the minor children, of William H. Elliott, deceased, to recover damages of the appellant for the alleged wrongful killing of the said William H. Elliott, who, at the time of his death, was employed as a fireman upon one of the engines operated upon the line of the appellant's railway between the town of Muskogee, in the Indian Territory, and Denison, in the state of Texas. The complaint was filed on the 9th day of April, 1893. Verdict was rendered in favor of the appellees on the 29th day of November, 1897, for the sum of \$7,500. Motion for new trial was overruled, and appeal prayed, and allowed by this court.

The attorney for the appellant, in his "Speci-

fications of Error," alleges that 101 errors were committed in the trial of this cause by the lower court. The first error alleged by appellant in his brief in this cause is as follows: "No. 1. The district court erred in refusing to grant a continuance of this case in accordance with the stipulation between appellee Lydia J. Elliott and appellant, and, after declining to grant continuance on stipulation, in further declining to either grant continuance or postponement of this case, to enable appellant to prepare for trial."

Clifford L. Jackson, for appellant. William T. Hutchings and Preston C. West, for appellees.

THOMAS, J. (after stating the facts). We have carefully examined this alleged stipulation, and also the motion for a continuance filed by the appellant, and the exhibits attached thereto, and it is our opinion that the appellant had no right to a continuance of this cause on either. This cause had been upon the docket for more than four years. The venue had been changed by the appellant from South McAlester, on the 1st day of February, 1894, and the record does not disclose that between that date and the month of November, 1897, this case had ever been reached for trial. There were other parties plaintiff in this case, the minor heirs, who were present in person and by their attorneys, pressing for trial, and we do not think that a stipulation signed by the attorney for the appellant and by only one of the appellees, the widow, should have worked a continuance, to the inconvenience and annoyance of the other appellees. The court also had a right to insist that this case, which had been on the docket for such a length of time, should be taken up and disposed of, and a stipulation of this kind certainly would not compel the court to continue the case to the detriment, perhaps, of other suitors. The motion for continuance did not state legal grounds for a continuance, and, discloses that the appellant railway company for over five years had had an opportunity to investigate the case and circumstances surrounding the killing of Elliott. It further shows that the attorneys for the minor appellees had written a letter to the attorney for the appellant a month before the day of the trial, offering to compromise the case, and also stating that, if the proposition was not accepted, they would be ready for trial, and would press for a trial, when the case was called. There seems to have been no diligence used by the railway company to secure testimony which they infer in their motion for a continuance that they could procure, nor do they even intimate what witnesses they would have secured, or what their testimony would have been. And, even if there had been diligence on the part of the defendant railway company in this respect, the appellees would have had the right, under the statute (had the railway company given the names of its witnesses and what they expected to prove by

each), to have admitted that such absent witnesses would, if present, have testified as claimed by the appellant in its motion for continuance, and the appellees would have then been entitled to an immediate trial. Section 5107, Mansf. Dig., provides that "the trial in each action shall be in the order in which it stands upon the docket." And section 5108 provides that "a motion to postpone a trial on account of the absence of evidence shall, if required by the opposite party, be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it; and, if it is for an absent witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant himself believes them to be true. If, thereupon, the adverse party will admit that on the trial, the absent witness, if present, would testify to the statement contained in the application for a continuance, then the trial shall not be postponed for that cause: provided, that the opposite party may controvert the statement so set forth in the said motion for continuance by evidence."

"(2) The court erred in refusing to allow appellant's challenges to jurors Murphy, Bramstetter, and Whiteside." The record shows that the juror Murphy had had several claims against the Missouri, Kansas & Texas Railway Company; that some of them had never been settled; but, when asked by the court the question, "Are they still pending?" he answered, "They have been dropped." He stated that he had not had any claim against the railway company since the year 1889, except such as had been settled by the railway company, with one exception, and that was a small fire, which burned a few hundred rails for him, and that that had occurred in 1884 or 1885, and that he had never brought suit. He was further asked by the court the question: "Is there any reason why you cannot try this case now according to the law and the evidence, without any bias or prejudice whatever on account of your previous relations with the company?" Answer: "That would cut no figure in the case pending, nor in any other case." Question: "Your mind, then, is perfectly free from any bias or prejudice against the company?" Answer: "Yes, sir." The juror Bramstetter testified that he did not have a claim of any kind against the Missouri, Kansas & Texas Railway Company; that he lost a son at Pryor Creek recently; that his son was killed by a car on the railway; that he never had any intention of instituting suit against the company for the killing of his son; and that he could try the case fairly and impartially, without prejudice or bias in any way. The juror Whiteside testified that he lived in the district; was a cattleman; that he did not have any claims at that time against the Missouri, Kansas & Texas Railway Company; that he had had; that all

claims which the company did not pay he had dropped; that the last claim which he had had against the company was about a year and a half ago; and that he could try the case according to the law and the evidence, without any bias or prejudice as to the rights of the defendant. The appellant's attorney challenged the jurors Murphy and Whiteside because they had once had claims against the company, and the juror Bramstetter because his son had been killed by a railway car at Pryor Creek. As none of these jurors at the time had any claims against the defendant railway company pending or in course of suit, and as Murphy and Whiteside both testified that they had dropped any and all claims which they ever had, and the juror Bramstetter testified that he had never had any intention of bringing suit for his son, and all swore that their minds were free from bias or prejudice, and that they could try the case according to the law and the evidence, we think that the lower court did not err in overruling the appellant's challenges for cause. We are not willing to declare the law to be that all persons who have ever had claims against the railroad company are forever thereafter disqualified from acting as jurors in any cause where that railroad company may be a party.

"(3) The district court erred in overruling appellant's objection to the introduction of any evidence under the complaint in this cause." This alleged error will be fully considered upon the appellant's specification of alleged error of the court in holding that the plaintiffs' complaint stated a cause of action, and in refusing to instruct the jury to return a verdict for the appellant.

"(4) The district court erred in overruling appellant's objection to the reading of the depositions of witnesses Andrews, Thoman, and Smythe." The record discloses that all three of these witnesses resided at the city of Denison, in the state of Texas; that they were or had been in the employ of the defendant railway company; that the witness Andrews was, at the time his deposition was taken, a conductor for the Missouri, Kansas & Texas Railway Company; that the witness O. E. Thoman, at the time his deposition was taken, was a locomotive engineer for the defendant railway company; and that the witness John Smythe, at the time his deposition was taken, was a fireman for the defendant railway company. And the record further discloses that the appellant was present, and cross-examined these witnesses, at the time their depositions were taken. The objection to the reading of these depositions was that all three of these witnesses, although they resided in the state of Texas, were frequently within the jurisdiction of this court, as they were employed by the defendant railway company upon its division running from Muskogee, Ind. T., to Denison, Tex. At the time these depositions were taken, although the appellant was present and cross-exam-

lined the witnesses, no objection was made to the taking of the depositions for the reasons now urged; nor was there any objection made by the appellant until this case was called for trial, and the jury sworn. Sections 2954-2956, Manaf. Dig., read as follows:

"Sec. 2954. Exceptions to depositions shall be in writing, specifying the grounds of objection, filed with the papers of the case, and noted on the record..

"Sec. 2955. No exception, other than to the competency of the witness, or to the relevancy or competency of the testimony, shall be regarded, unless filed and noted on the record before the commencement of the trial.

"Sec. 2956. The court, on the motion of either party, shall decide upon the exceptions before the commencement of the trial."

The first and fourth paragraphs of section 2921 read as follows:

"Sec. 2921. They [meaning depositions] may be used on the trial of all issues in any action in the following cases: First. Where the witness does not reside in the county where the action is pending, or in an adjoining county, or is absent from the state, or in the military service of the United States, or of this state. Fourth. Where the witness resides thirty or more miles from the place where the court sits in which the action is pending, unless the witness is in attendance upon the court."

We are therefore of the opinion that the objection of the appellant to the reading of the depositions of these witnesses was properly overruled by the court, because the witnesses did not reside in the district or in an adjoining district, and resided more than 30 miles from Muskogee, where this action was pending; and we are also of the opinion that, even if this objection had been well taken, it was made too late by the appellant, the trial of the cause having commenced, and this objection not having been made as required by the statute.

"(5) The district court erred in admitting the evidence complained of in the specifications of error 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 21, 31, 32, 33, 35, 37, and 38." The appellant objected to the witnesses named in the specifications of error as above, each testifying to the contents of certain writings. We think the court properly overruled these objections.

The witness J. F. Andrews testified that he was the conductor of the south-bound train which collided with the north-bound train; that he had received orders for the running of his train, which were issued from the train dispatcher's office, which was located at McAlester, Ind. T., at that time; that he received various orders at different stations between Muskogee and McAlester; that he received his last order at Eufaula station; that this order was in writing, and that he had torn it up or destroyed it. As this order had been destroyed, it certainly was not error for him to testify what the order was.

The witness O. E. Thoman produced the order about which he was testifying, identified it, it was made a part of his deposition, and it was clearly admissible; and as the record shows that all the testimony as to the contents of these writings was admitted either because the writings themselves had been destroyed or lost, or, being in the possession of the defendant railway company, it refused to produce them at the trial, as it had been notified to do by the attorneys for the appellees on the 24th day of September, 1897, we are of the opinion that the appellant's objections were properly overruled.

As to the alleged errors urged by the appellant in its paragraph 6, on page 61 of its brief, that the court erred in admitting the testimony of the witnesses Thoman, Smythe, and Sullivan, stating that the man Barton was a train dispatcher, and in further stating what the duties of a train dispatcher were, we are of the opinion that the court properly admitted this testimony. All of those witnesses were in the employ of the defendant railway company. Two of them were employed as engineers, running on this Choctaw division, and the witness Sullivan was the chief train dispatcher of the defendant railway company. We certainly think that the chief train dispatcher of the defendant railway company would be presumed to know that the defendant railway company had a train dispatcher's office at McAlester at the date of this collision, and that Barton was the train dispatcher at that point; and that the other two witnesses, who were engineers, and received orders from this train dispatcher at McAlester, would certainly be presumed to know that Barton was the train dispatcher of the defendant railway company at McAlester, and that the defendant railway company maintained a dispatcher's office at that point. The court properly refused to charge the jury, as requested by the appellant, that they could not find that this man Barton was a train dispatcher from the mere fact that these witnesses called him so. All of the testimony on this point was that Barton was a train dispatcher as distinguished from an ordinary telegraph operator, and there was no testimony in this case which would have justified the jury in finding that Barton was only an ordinary telegraph operator, and therefore a fellow servant of the deceased, and for that reason that the jury should return a verdict for the defendant. We think that, if there was any one witness who could have been produced by the appellees in this case to have testified as to whether or not the defendant railway company maintained a train dispatcher's office at McAlester at the time of this collision and to testify as to who that train dispatcher was, the chief train dispatcher of the appellant railway company, at that time was the one witness who was, of all others, competent to testify as to these facts.

As to the errors alleged and urged by the appellant in paragraph 7, on page 62 of its

brief, the court properly admitted the order attached to the deposition of Thoman, because he swore that it was the order issued to him by the train dispatcher, was identified by him, and made a part of his deposition. The court properly admitted the testimony of the witness Smythe as to the contents of the train order which was delivered to him, because the proof showed that this order had been destroyed or misplaced, and could not be produced. The testimony of the witness Andrews, as to the contents of the order which was delivered to him by the train dispatcher, was properly admitted, because the witness Andrews testified that the original order had been torn up or destroyed by him. It appears from the testimony in this case that the train dispatcher at McAlester delivered to the engineer of the north-bound train a copy of this order, and also delivered to the conductor of that train a copy of the order, and retained a copy himself. We do not think that it was incumbent upon the appellees to have produced the copy retained by the train dispatcher, and which most probably was in the possession of the defendant railway company. The contention of the appellant that the notice given by the appellees, to wit, to produce books and papers at the time of the trial, was not such a notice as would permit the appellees to offer secondary evidence as to the contents of the writings referred to in the testimony, in our opinion is not tenable. If the contention of the appellant was correct, it would be in its power to withhold or destroy writings of this character; and as, under the section referred to by the appellant, the only remedy which the appellees would have would be to strike out the defendant's answer, this would clearly work a great injustice, and would prevent the proof of negligence of this character, if the appellees were compelled to prove the contents by the writings themselves. We think that this notice to produce these writings and records, which were in the possession of the defendant railway company, was sufficient to permit the appellees to prove the contents of these writings by secondary evidence.

As to the eighth assignment of error, urged on page 65 of appellant's brief, "that the court erred in admitting the testimony of the witnesses Powers, Morton, and Broyles as to the compensation and salary of firemen in general, and as to the deceased," we are of the opinion that this testimony was properly admitted. Morton was the station agent of the defendant railway company at Muskogee, and Powers was a fireman in the employ of the defendant. Morton testified that he had in his possession a schedule showing the amount paid firemen, and we think that both of these witnesses were competent to testify as to the amount received by firemen on defendant's line of railway, and the testimony of the witness Broyles, who stated that the deceased told him the amount received by him, we believe was competent testimony.

As to the error alleged in specification No. 9, on page 71 of appellant's brief, that "the court erred in permitting the witness Sullivan to testify as to the contents of certain records in the train master's office," we think the testimony was competent. The testimony shows that all of these records were kept in the state of Texas, outside of the jurisdiction of this court. It would be an impossibility to have them produced by a subpoena duces tecum, and the contents of those records could be proved—First, by the production of the records themselves; second, when the writing is in the hands or power of the adverse party, as in this case, the notice served upon the adverse party to produce the writing at the trial is sufficient to lay the foundation for the introduction of secondary evidence as to the contents of the document or record. See 2 Greenl. Ev. (13th Ed.) § 560. It appears from the record in this case that this notice was served upon the defendant railway company, that they failed to produce the records called for, and therefore the appellees had the right to prove their contents by secondary evidence. The statute of the United States referred to by appellant (section 724, Rev. St. U. S.), and the statute of Arkansas, also referred to by counsel for appellant, do not apply. These statutes simply provide the manner in which the courts may compel the production of books and papers by a party to a suit, and the penalty to be imposed for a failure to comply with the court's order. The appellees might have proceeded under the statute of Arkansas, and, in that event, a failure on the part of the railway company to produce the books and papers called for would have been punished by striking its answer and defense from the files; but the notice served upon the defendant railway company was sufficient to lay the foundation for the introduction of secondary evidence.

The alleged error complained of in paragraph 10, on page 73 of appellant's brief, in our opinion, is without merit. The witness Broyles was the father-in-law of the deceased; was acquainted with him, and had been for a number of years, and certainly was qualified to testify as to his habits and his custom with reference to providing for his family; and we think that his testimony with reference to the wages received by the deceased as railway fireman was admissible. It is probable that no witness, except an official of the railway company, who kept the account of the deceased as fireman, or the paymaster, who paid him monthly, could have testified exactly as to the amount of wages received by the deceased. While the appellant infers that it could have proved that Elliott was in his private life a profligate man, it did not attempt to give the name of any witness by which this proof could be made, and we are of the opinion that, if the deceased had been the character of man claimed by counsel for the appellant, he

would not have been in the employ of the defendant railway company as a fireman.

There are three other questions raised by the appellant's brief which we deem necessary to consider. The first is that the plaintiffs allege in their complaint that the defendant was a private corporation, "duly incorporated under the laws of the state of Missouri." The defendant's answer upon that proposition is as follows: "Defendant denies that it is a private corporation, duly incorporated under the laws of the state of Missouri." Appellant claims that the court should have directed the jury to return a verdict for it, because the plaintiff failed to prove the allegation as charged. This contention is not well taken. It was the duty of the appellant, if it had intended to deny that it was a corporation, or that it was a Missouri corporation, or that, if it had been a corporation, the corporation had been dissolved, or if it intended to plead misnomer, to have also stated the facts. In the case of *Express Co. v. Haggard*, 37 Ill. 465, the defendant was sued as a corporation, which was in fact a limited partnership, and the denial in its answer was as follows: "It denies that the defendant is, or ever was, a corporation organized and existing under the laws of England." The court held that this was a negative pregnant,—pregnant with the admission that the defendant was a corporation,—and that it consequently raised no issue. The plea of the defendant admitted that it was a corporation, and, by answering the pleading as such, it waived this objection. See 6 *Thomp. Corp.* §§ 7677, 7678.

The second question to be considered is a proposition contended for by counsel for appellant that the train dispatcher Barton was a fellow servant of the deceased, and therefore that the appellees could not recover for that reason, and that the court below should have directed a verdict for the appellant. The case of *Railroad Co. v. Barry*, 58 Ark. 198, 23 S. W. 1097, was a case very similar to the one at bar. In that case a fireman was injured in a railway collision, and sued the railroad company, claiming that his injury was caused by the negligence of the train dispatcher in ordering the movement of trains. The question as to whether or not the train dispatcher was a fellow servant of the fireman was directly passed upon. The court in that case refused to instruct the jury that the train dispatcher was a fellow servant of the fireman; and the court in that case also held that the negligence of the train dispatcher was the negligence of the company, and that the plaintiff was entitled to recover for the damage, citing *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184; referring to which case we find that Justice Field, speaking for the court, quotes many English and other authorities to the effect that employes engaged by the same corporation or employer in carrying on the usual business of the corporation or employer were fellow servants, notwithstanding the fact of their being engaged in

the performance of different duties and work in different departments of the same business, and that one employé could not recover damages from the corporation or employer growing out of the negligence of his fellow servant. He then proceeds to show that this cannot be regarded as a general rule applicable alike to each case arising from the negligence of a co-laborer or employé, and cites the case of *Coal Co. v. Reid*, 3 Macq. 266, and *Same v. McGuire*, Id. 300, decided in 1858, in which some of the exceptions to the rule are stated. Lord Chancellor Chelmsford, who gave the principal opinion in the latter case, referring to previous cases in which the master's exemption from liability had been sustained, said: "In the consideration of these cases, it did not become necessary to define with any great precision what was meant by the words 'common service' or 'common employment,' and perhaps it might be difficult beforehand to suggest any exact definition of them. It is necessary, however, in each particular case, to ascertain whether the servants are fellow laborers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon another by carelessness of his peculiar work is not within the exemption, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him." The lord chancellor also commented upon some decisions of the Scotch courts, among others that of *McNaughton v. Railway Co.*, 19 Sess. Cas. Scot. (2d Series) 271, and said that it might be "sustained without conflicting with the English authorities, on the ground that the workmen in that case were engaged in totally different departments of work; the deceased being a joiner or carpenter, who, at the time of the accident, was engaged in repairing a railway carriage, and the persons by whose negligence his death was occasioned were the engine driver and the persons who arranged the switches." And in the same case Lord Brougham, after mentioning the observations of the judge of the Scottish courts that an absolute and inflexible rule releasing the master from responsibility in every case where one servant is injured by the fault of another was utterly unknown to the law of Scotland, said that it was also utterly unknown to the law of England, and added: "To bring the case within the exemption, there must be this most material qualification: that the two servants must be men in the same common employment, and engaged in the same common work, under that common employment." Later decisions in the English courts extend the master's exemption from liability to cases where the servant injured is working under the direction of a foreman or superintendent, the grade of service of the lat-

ter not being deemed to change the relation of the two as fellow servants. Thus, in *Wilson v. Merry*, decided in the house of lords in 1868, on appeal from the court of sessions of Scotland, the submanager of a coal pit, whose negligence in erecting a scaffold which obstructed the circulation of air underneath, and led to an accumulation of fire damp, which exploded and injured a workman in the mine, was held to be a fellow servant with the injured party. And the court laid down the rule that the master was not liable to his servant unless there was negligence on the master's part in that which he had contracted with the servant to do, and that the master, if not personally superintending the work, was only bound to select proper and competent persons to do so, and furnish them with adequate materials and resources for the work; that when he had done this he had done all that he was required to do; and, if the persons thus selected were guilty of negligence, it was not his negligence, and he was not responsible for the consequences. L. R. 1 H. L. Sc. 326. In this case, as in many others in the English courts, the foreman, manager, or superintendent of the work by whose negligence the injury was committed was himself also a workman with the other laborers, although exercising a direction over the work. The reasoning of that case has been applied so as to include, as contended here, employes of a corporation in departments separated from each other; and it must be admitted that the terms "common employment," under late decisions in England, and the decisions in this country following the Massachusetts case, are of very comprehensive import. It is difficult to limit them so as to say that any persons employed by a railway company, whose labors may facilitate the running of its trains, are not fellow servants, however widely separated may be their labors. See *Holden v. Railroad Co.*, 129 Mass. 268. But, notwithstanding the number and weight of such decisions, there are, in this country, many adjudications of courts of great learning restricting the exemption to cases where the fellow servants are engaged in the same department, and act under the same immediate direction, and holding that, within the reason and principle of the doctrine, only such servants can be considered as engaged in the same common employment. It is not, however, essential to the decision of the present controversy to lay down a rule which will determine, in all cases, what is to be deemed such an employment, even if it were possible to do so. There is, in our judgment, a clear distinction to be made, in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from

the brakeman, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and a just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him, in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles, at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know, from the manner in which railways are operated, that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the terms is he a fellow servant with the fireman, the brakemen, the porters, and the engineer. The latter are fellow servants in the running of the train under his direction, who, as to them and the train, stands in the place of and represents the corporation. As observed by Mr. Wharton in his valuable treatise on the Law of Negligence: "It has sometimes been said that a corporation is obliged to act always by servants, and that it is unjust to impute to it personal negligence in cases where it is impossible for it to be negligent personally. But, if this be true, it would relieve corporations from all liability to servants. The true view is that, as corporations can act only through superintending officers, the negligences of those officers, with respect to other servants, are the negligences of the corporation." Section 232a. The author, in a note, refers to *Brickner v. Railroad Co.*, decided in the supreme court of New York, and afterwards affirmed in the circuit court of appeals, and to *Malone v. Hathaway*, decided in the latter court, in which opinions are expressed in conformity with his views. These opinions are not, it is true, authoritative, for they do not cover the precise points in judgment, but were rather expressed to distinguish the questions thus arising from those then before the court. They indicate, however, the disposition to ingraft a limitation upon the general doctrine as to the master's exemption from liability to a servant for the negligence of their fellows, when a corporation is the principal and acts through superintending agents. Thus, in the first case, the court said: "A corporation cannot act personally. It requires some person to superintend structures, to purchase and control the

running of cars, to employ and discharge men, and provide all needful appliances. This can only be done by agents. When the directors themselves personally act as such agents, they are the representatives of the corporation. They are then the executive head or master. Their acts are the acts of the corporation. The duties above described are the duties of the corporation. When these directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointee, equally with themselves, represents the corporation as master in all those respects. And though, in the performance of these executive duties, he may be and is a servant of the corporation, he is not in those respects a 'co-servant,' a 'co-laborer,' a 'co-employé,' in the common acceptance of those terms, any more than is a director who exercises the same authority." 2 Lans. 516, affirmed in 49 N. Y. 672. And in *Malone v. Hathaway*, in the court of appeals, Judge Allen says: "Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employés, provide materials and machinery for the service of the corporation, and generally direct and control, under powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duties, exercising the discretion ordinarily exercised by principals, and, within the limits of delegated authority, the acting principal. These acts are in such case the acts of the corporation, for which and for whose neglect the corporation, within adjudged cases, must respond, as well to the other servants of the company as to strangers. They are treated as the general agents of the corporation in the several departments committed to their care." 64 N. Y. 5-12. See, also, *Corcoran v. Holbrook*, 59 N. Y. 517. In *Railroad Co. v. Stevens*, the supreme court of Ohio held that where a railroad company placed the engineer in its employ under the control of a conductor of its train, who directed when the cars were to start and when to stop, it was liable for an injury received by him caused by the negligence of the conductor. 20 Ohio, 415. There a collision between two trains occurred in consequence of the omission of the conductor to inform the engineer of a change of places in the passing of trains ordered by the company. Exemption from liability was claimed, on the ground that the engineer and conductor were fellow servants, and that the engineer had in consequence taken, by his contract of service, the risk of the negligence of the conductor, and also that public policy forbade a recovery in such cases. But the court rejected both positions. To the latter it very pertinently observed that it was only when the servant had himself been careful that any right of action could accrue to him, and that it was not likely that any would be careless of their lives and persons or property merely because they might

have a right of action to recover for injuries received. "If men are influenced," said the court, "by such remote considerations, to be careless of what they are likely to be most careful about, it has never come under our observation. We think the policy is clearly on the other side. It is a matter of universal observation that, in any extensive business where many persons are employed, the care and prudence of the employer is the surest guaranty against mismanagement of any kind." In *Railroad Co. v. Keary*, 3 Ohio St. 201, the same court affirmed the doctrine just announced, and decided that when a brakeman in the employ of a railroad company, on a train under the control of a conductor having exclusive command, was injured by the carelessness of the conductor, the company was responsible; holding that the conductor in such case was the sole and immediate representative of the company, upon which rested the obligation to manage the train with skill and care. In the course of an elaborate opinion, the court said that, from the very nature of the contract of service between the company and the employés, the company was under obligation to them to superintend and control with skill and care the dangerous force employed, upon which their safety so essentially depended. "For this purpose," said the court, "the conductor is employed, and in this he directly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operations of the train which essentially pertains to the prerogatives of the owner, and in its exercise he stands in the place of the owner, and is in the discharge of a duty which the owner, as a man and a party to the contract of service, owes to those placed under him, and whose lives may depend on his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence alone should be trusted for this purpose. This service is not common to him and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both are necessary to produce the result. It is his to command, and theirs to obey and execute. No service is common that does not admit a common participation, and no servants are fellow servants when one is placed in control over the other." In *Railroad Co. v. Collins*, 2 Duv. 114, the subject was elaborately considered by the court of appeals of Kentucky. And it held that in all those operations which require care, vigilance, and skill, and which are performed through the instrumentality of superintending agents, the invisible corporation, though never actually, is yet always constructively, present through its agents who represent it, and whose acts, within their representative spheres, are its acts; that the rule of the English courts, that the company is not responsible to one of its servants for an injury inflicted from the neglect of a fellow servant, was not adopted to its full extent in that state, and was regarded

there as anomalous, inconsistent with principle and public policy, and unsupported by any good and consistent reason. In commenting upon this decision, in his treatise on the Law of Railways, Redfield speaks with emphatic approval of the declaration that the corporation is to be regarded as constructively present in all acts performed by its general agents within the scope of their authority. "The consequences of mistake or misapprehension upon this point," says the author, "have led many courts into conclusions greatly at variance with the common instincts of reason and humanity, and have tended to interpose an unwarrantable shield between the conduct of railway employes and the just responsibility of the company. We trust that the reasonableness and justice of this construction will at no distant day induce its universal adoption." 1 Redf. R. R. 554. There are decisions in the courts of other states, more or less in conformity with those cited from Ohio and Kentucky, rejecting or limiting, to a greater or less extent, the master's exemption from liability to a servant for the negligent conduct of his fellows. We agree with them in holding, and the present case requires no further decision, that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that for injuries resulting from his negligent acts the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner.

If, now, we apply these rules of the relation of a train dispatcher of railway trains to the company and to the subordinates on trains under his direction, the objections urged to the rulings of the court below will be readily disposed of. The purport of the court's rulings touching the liability of the company is that the train dispatcher and fireman, though both employes, were not "fellow servants," in the sense in which that term is used in the decisions; that the former was the representative of the company, standing in its place and stead in the running of its trains, and that the latter was, in that particular, his subordinate; and that for the former's negligence, by which the latter was injured, the company was responsible.

It was not disputed on the trial below that the collision which caused the death of the fireman was the result of the negligence of the train dispatcher, and hence was attributable to the negligence of the appellant company. See *Sheehan v. Railroad Co.*, 91 N. Y. 332; *Smith v. Railway Co.*, 92 Mo. 359, 4 S. W. 129; *Darrigan v. Railroad Co.*, 52 Conn. 285; *Railroad Co. v. McLannan*, 84 Ill. 109; *Railroad Co. v. McKenzie*, 81 Va. 71; *Cooley, Torts*, 564. In the case of *Railroad Co. v. Camp*, 13 C. C. A. 233, 65 Fed.

952, this question was involved and directly passed upon. The court, in substance, held as follows: A train dispatcher, who has complete control of all trains on a division of a railroad, is not a fellow servant of an engineer of a train running on such division, either at common law or under the statute of Ohio. Judge Taft delivered the opinion of the court in that case, and the conclusion was that a person who was merely a telegraph operator; and who has no authority to direct the movement of trains, is a fellow servant of a fireman or engineer; but that a train dispatcher, who has the power and authority, acting in the name of the superintendent, to direct the movement of trains, would not be a fellow servant, and the railroad company would be liable for his negligence.

The third and last question raised by the appellant in its brief is that the right of survivorship of actions by the widow and heirs against one who wrongfully killed the husband and father does not exist in the Indian Territory, and that for that reason the court should have directed a verdict for the railway company. As this question has been directly passed upon by the United States circuit court of appeals for the Eighth circuit in the case of *Coal Co. v. Bevil*, 10 C. C. A. 41, 61 Fed. 757, which court holds that the right of action does survive in the widow and heirs, this court is bound by the decision of the circuit court of appeals. No errors appearing in the record in this case, the judgment of the lower court is affirmed.

CLAYTON and TOWNSEND, JJ., concur.

PYBOS et al. v. McLAUGHLIN et al.
(Court of Appeals of Indian Territory. June 12, 1899.)

UNLAWFUL DETAINER — JUDGMENT — RECOVERY BY TENANT FOR IMPROVEMENTS.

In an action for unlawful detainer, wherein plaintiff files a bond and takes possession of the premises, and in which defendants admit plaintiff's title, and set up improvements as tenants, and an agreement that they should retain possession until the improvements were paid for, a judgment that plaintiff is entitled to possession, and awarding damages to defendant, is erroneous, for the reason that defendant cannot recover for improvements in this action, and there could have been no damages for wrongful eviction.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Constantine B. Kilgore, May 4, 1896.

Action for unlawful detainer by J. C. Pybos and others against Mary E. McLaughlin and another. From a judgment in favor of defendants, plaintiffs appealed. Reversed.

On January 9, 1895, A. C. Mays instituted unlawful detainer proceedings against George W. McLaughlin, Sam McLaughlin, and others, for the possession of about 125 acres of land in

the Chickasaw Nation, executed bond, with J. C. Pybos and others as surety, and took possession of the property. Prior to the trial, the death of George W. McLaughlin being suggested, the court ordered that his widow, Mary E. McLaughlin, be made a party defendant. Afterwards Mary E. and Sam McLaughlin filed separate answers, admitting that they had leased the land described by plaintiff,—the one about 75 acres, and the other about 46 acres,—alleging that they had paid the rent therefor, but that, under an agreement with the plaintiff, they were to make improvements on the premises, and were to retain possession until such improvements were paid for. The other defendants answered, denying tenancy, and claiming no rights in the suit. A trial was had, resulting in a verdict for Mary E. McLaughlin for possession of 72 acres of land and \$288 damages, and for Sam McLaughlin for 46 acres of land and \$184 damages; and judgment was rendered against the plaintiff and his sureties for such damages, and restoring possession of the premises to the defendants named. On May 4, 1896, this judgment, in so far as it restored the premises to the possession of the defendants, was, by agreement of the defendants, by the court set aside. Afterwards, on May 9, 1896, the court, on its own motion, set aside the verdict of the jury awarding the defendant Sam McLaughlin \$188 damages, and ordered that he take nothing in the suit, and reduced the damages assessed in favor of Mary E. McLaughlin to the sum of \$108, and rendered judgment in her favor against the plaintiff A. C. Mays and his sureties for this amount. From this judgment an appeal is taken.

B. D. Davidson and Dorset Carter, for appellants. R. N. Coffee, J. W. Cherryholmes, and J. L. Abernathy, for appellees.

CLAYTON, J. (after stating the facts). The case presented for our consideration is a suit for unlawful detainer, wherein the plaintiff is awarded possession of the premises, and the defendant given judgment for damages. The judgment does not state what the damages are for, but, as the only damage that could accrue to a defendant in an action of this kind would be by reason of a wrongful eviction, it must be presumed that this was the element of damages. But as the court, by its last judgment, found that the defendant was not entitled to the possession of the property, she could not have been wrongfully evicted, and hence could not have been damaged. The question of improvements placed upon the premises by defendant cuts no figure in the case, as they could not have been assessed as damages in the case, the court having found that defendant was not entitled to possession of the premises, and therefore there could have been no agreement that the improvements were to hold the place until paid for. Therefore, if the court awarded the sum of \$108 as damages for wrongful eviction, it was error, as defend-

ant was not entitled to the possession of the premises; and if it was for the value of the improvements, the court erred in rendering such judgment, for, as the law then stood, a simple claim for improvements could not have been adjudicated in a suit of this kind. The judgment of the lower court is reversed and remanded.

TOWNSEND and THOMAS, JJ., concur.

WARWICK v. KINGMAN et al.

(Court of Appeals of Indian Territory. June 12, 1899.)

REVIEW—DENIAL OF TRIAL BY JURY.

Unless a trial by jury, to which a party is entitled under Const. U. S. Amend. art. 7, is waived in one of the ways prescribed by Mansf. Dig. § 5148, a judgment on a trial without a jury against a party who demanded it will be reversed.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Constantine B. Kilgore, November 28, 1896.

Action by Kingman & Co. against Dan Warwick. Judgment for plaintiffs, and defendant appeals. Reversed.

This action was brought by Kingman & Co. in the United States commissioner's court at Purcell to recover the possession of "one gray mare, ten years old, named Kate, weight about 1,200 pounds, and one sorrel mare, eight years old, named 'Dol,' weight about 1,200 pounds," alleged to be of the value of \$50 each, from Dan Warwick, the appellant herein; the appellees claiming the right to the possession of the mares sued for by virtue of a chattel mortgage executed by one J. J. Cunningham to them, which was not paid. Defendant, Warwick, answered, denying that the plaintiffs held a mortgage on these mares; that they were entitled to their possession, were the owners thereof, or held the legal title thereto, or were interested therein,—and alleged that he was a livery stable keeper at Purcell; that these mares were brought to his stable on December 6, 1895, and that there was owing him for the feed and care of same \$38.05, for which amount he claimed a lien superior to that of the plaintiffs; that these mares had been sold under the provisions of the statute relating to liens and livery stable keepers, to satisfy his lien, and that he himself had purchased at the sale, and was the owner of the mares sued for. Judgment was rendered in favor of Kingman & Co. in the United States commissioner's court, and also in the United States court, at Purcell, and against the defendant, Dan Warwick, for the possession of the mares, or for \$50 their value, and a motion for a new trial was made and overruled, and an appeal prayed and allowed to this court.

Hocker & Woods, for appellant. J. F. Sharp, for appellees.

THOMAS, J. (after stating the facts). The first error assigned by appellant is that the trial court erred in denying him a trial by jury. The bill of exceptions which was allowed by the trial court, and made a part of the record in this case, contains the following recital: "Mr. Hocker: Still objecting to the way and manner of proceeding herein, and not waiving the right to a trial by jury, and still demanding a jury trial, we do not care to introduce any testimony." In the certificate of the judge of the trial, at the end of the bill of exceptions which had been presented to him by the attorneys for the appellant, and which were modified by him, the following appears: "The defendant's counsel did not distinctly waive a trial by jury by any declaration in open court." Article 7 of the amendments to the constitution of the United States provides that "in suits at common law where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved." Section 5148 of Mansfield's Digest, adopted by congress, and put in force in the Indian Territory, reads as follows: "The trial by jury may be waived by the parties in actions arising on contract, and, with the assent of the court, in other actions in the following manner. First. By failing to appear at the trial. Second. By written consent in person or by attorney filed with the clerk. Third. By oral consent in open court, entered on the record." We have certainly read the entire record in this case, including the bill of exceptions presented to the trial court by the attorneys for the appellant, and the certificate of the trial judge, in which the bill of exceptions as presented was modified to a certain extent, and we are of the opinion that the appellant properly demanded a trial by jury, and was entitled to it, and that this right was not waived by him in any way as provided by the above statute. It is not contended that the appellant failed to appear at the trial, but, on the contrary, the record shows that he did appear. It is not contended that the written consent of the appellant in person or by his attorney, waiving a trial by jury, was filed with the clerk, nor does the record disclose that such was the case. It is not contended that the appellant, by oral consent in open court, entered on the record, waived a trial by jury, nor does the record anywhere disclose that he did; but, on the contrary, the judge at the trial court certifies that he did not. We are of the opinion that in all cases where the right to a trial by jury is guaranteed by the constitution of the United States it is the duty of the trial court to tender to the parties a trial by jury with a free and open hand, and we are unwilling to approve of any record where this right is seemingly refused or abridged. It has been said that the right to a trial by

jury "is the bulwark of American liberties." This right was contended for by the barons of England when they wrung from King John, at Runnymede, the Magna Charta, in which it was provided that no Englishman should be deprived of his possessions except by the judgment of his peers; and this right was afterwards incorporated into the constitution of the United States, which is the fundamental law of the land; and it is the duty of this court to see that this right, which is most cherished by the American people, is preserved. For the reasons stated, the judgment of the trial court herein is reversed, and the cause remanded. Reversed and remanded.

SPRINGER, C. J., and CLAYTON and TOWNSEND, JJ., concur.

BALDWIN et al. v. FARRIS.

(Court of Appeals of Indian Territory. June 12, 1899.)

APPEAL FROM UNITED STATES COMMISSIONER.

Under Act Cong. March 1, 1895 (28 Stat. 695), providing that no appeal shall be allowed from a judgment of a United States commissioner not exceeding \$20, exclusive of costs, plaintiff cannot appeal from a United States commissioner's judgment dismissing his action, though the amount sued for exceeded \$20.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Constantine B. Kilgore, February 9, 1897.

Attachment by D. M. Farris against F. D. Baldwin in a United States commissioner's court. From a judgment for defendant, plaintiff appealed to the district court, and from a judgment of that court for plaintiff, defendant and the surety on his forthcoming bond appeal. Reversed and dismissed.

This action was brought by the plaintiff and appellee, D. M. Farris, on November 19, 1896, before a United States commissioner, at Chickasha, in the Southern district, against the appellant F. D. Baldwin, to recover upon a judgment rendered in his favor by the probate court of Oklahoma Territory, against the said F. D. Baldwin, for the sum of \$123, and \$73.60 costs. An affidavit and bond for attachment were filed at the same time, and on the 20th day of November, 1896, the writ of summons and writ of attachment were personally served upon the defendant and appellant F. D. Baldwin, and a levy made under the writ of attachment. On January 4, 1897, a trial was had before the United States commissioner, all the parties being present, and a judgment was rendered by the commissioner, in favor of the defendant F. D. Baldwin, quashing the writ of attachment and dismissing the action, from which judgment the plaintiff, D. M. Farris, appellee here, took an appeal to the United States court at Chickasha, Southern district, where, at the trial, a

judgment was rendered in his favor for \$196.60, and costs, and sustaining the attachment. From this judgment the defendant, F. D. Baldwin, and the surety on his forthcoming bond, prayed and were allowed an appeal to this court.

Charles M. Fehheimer and F. A. Fisher, for appellants. P. B. Monical and R. W. Shepherd, for appellee.

THOMAS, J. (after stating the facts). Numerous errors are alleged by counsel for appellants in their motion for a new trial, bill of exceptions, and brief, but we are confronted with the inquiry as to whether or not the plaintiff, appellee here, D. M. Farris, could legally appeal from the judgment of the United States commissioner, quashing his attachment and dismissing his action; and, if not, the United States court for the Southern district, at Chickasha, did not have jurisdiction of this cause. Section 4 of the act of congress approved March 1, 1895 (28 Stat. 695), relating to the Indian Territory, reads as follows: "Provided, that no appeal shall be allowed in civil cases where the amount of the judgment, exclusive of costs, does not exceed twenty dollars." This refers to all civil cases tried by United States commissioners in the Indian Territory, and no appeal is allowed in such cases where the judgment, exclusive of costs, does not exceed \$20. This question was presented to this court at the present term in a similar case,—that of Hardware Co. v. Brittain, reported in 48 S. W. 1069. Inasmuch as the judgment of the United States commissioner in this cause was not for a sum exceeding the sum of \$20, exclusive of costs, the United States court for the Southern district of the Indian Territory was without jurisdiction, and its judgment is reversed, and the cause dismissed. Reversed and dismissed.

SPRINGER, C. J., and CLAYTON and TOWNSEND, JJ., concur.

MORROW v. BURNEY.

(Court of Appeals of Indian Territory. June 12, 1899.)

UNITED STATES COMMISSIONERS—JURISDICTION—ACTION FOR REMOVING IMPROVEMENTS FROM LANDS—APPEAL.

1. Buildings and fences, placed on lands by an occupant under an agreement with the owner that he may remove them, or that the owner shall pay for them if not removed, do not become fixtures; and hence an action by a transferee of the owner against the occupant for damages for removing them is within the jurisdiction of the United States commissioner's court, not being an action for trespass to realty.

2. Under Act Cong. March 1, 1895 (28 Stat. 695), providing that no appeal shall be allowed from a judgment of a United States commissioner not exceeding \$20, exclusive of costs, plaintiff cannot appeal from a commissioner's judgment that he take nothing, and that defendant recover costs.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Constantine B. Kilgore, February 3, 1897.

Action by E. S. Burney against T. T. Morrow in United States commissioner's court. From a judgment for defendant, plaintiff appealed to the district court, and from a judgment of that court for plaintiff, defendant appeals. Reversed and dismissed.

This action was brought before a United States commissioner, at Chickasha, by the appellee, E. S. Burney, against the appellant, T. T. Morrow, to recover the sum of \$100 damages, alleging in his complaint that the appellant "did on or about the 9th day of January, 1896, without authority or permission from plaintiff, enter said premises (a farm south of and adjoining the old town of Fred, I. T.), and take therefrom, and carry away and appropriate to his own use and benefit, said dwelling house, granary, chicken house, and smoke house; that said defendant did enter said premises, and tear down and remove the fencing from said premises, and carry away and appropriate the same to his own use and benefit; that plaintiff, by reason of the loss and removal of said property from said premises, has been damaged in the sum of \$100." Defendant answered orally, denying each allegation, and also denied the jurisdiction of the commissioner to hear and determine the cause. A trial was had before a jury in the commissioner's court, which returned a verdict in favor of the defendant (appellant here), and judgment was rendered against the appellee for costs, from which he, the appellee, took an appeal to the United States court at Chickasha; the defendant there demurring to the plaintiff's complaint for the reason that the court was without jurisdiction, the action being one to recover damages for trespass to real estate, and that the commissioner had no jurisdiction to entertain such an action, and that the United States court had no jurisdiction upon appeal. It does not appear that this demurrer was ever acted upon, but the cause was tried anew in the United States court, and verdict and judgment was had for the plaintiff, E. S. Burney, for \$100, and motion for new trial was made by defendant, and overruled, and an appeal prayed and allowed to this court.

F. E. Riddle and E. M. Payne, for appellant. Monical & Shepherd, for appellee.

THOMAS, J. (after stating the facts). The first error assigned by the appellant is that this was an action for trespass to real estate, and that the United States commissioner did not have jurisdiction to hear and determine it. From the testimony incorporated in the bill of exceptions in this case, we can only conclude that the improvements, for the value of which this action was brought, were placed upon this claim near

Fred, in the Chickasaw Nation, by the appellant, Morrow, under an agreement with one Campbell, a Chickasaw citizen who owned the claim, that when he left or abandoned the premises he could remove these improvements, or that Campbell should pay for them. Campbell sold this claim to the plaintiff and appellee, E. S. Burney. Neither Campbell nor Burney, who succeeded Campbell as owner of the claim, paid Morrow for these improvements, and he therefore removed them. If the bill of exceptions contains all of the testimony, the trial court would, doubtless, have directed the jury to return a verdict for the defendant, if it had been requested; and, inasmuch as these improvements were placed upon these premises by Morrow and the witness Frey, under an agreement with the owner of the claim, Campbell, that they could remove them when they left or abandoned the premises, or that he would pay for them, these improvements did not become a part of the real estate, but remained personal property, and the property of Morrow, and for that reason the United States commissioner had jurisdiction,—this being an action for conversion of personal property.

But did the United States court for the Southern district have jurisdiction to try this cause anew, on appeal from the United States commissioner? A verdict and judgment in favor of the defendant was had in the United States commissioner's court, and the plaintiff, E. S. Burney, appealed to the United States court. In the case of *Hardware Co. v. Brittain* (Ind. T.) 48 S. W. 1069, and in *Baldwin v. Farris* (Ind. T.) 51 S. W. 1077, not yet officially reported, both cases determined by this court, it was held that an appeal would not lie from a judgment of a United States commissioner in the Indian Territory "where the amount of the judgment, exclusive of costs, does not exceed twenty dollars." As an appeal did not lie from the judgment of the United States commissioner in this action, the United States court was without jurisdiction, and its judgment is reversed, and the action dismissed. Reversed and dismissed.

SPRINGER, C. J., and OLAYTON and TOWNSEND, JJ., concur.

REEVES v. REEVES (MOORE, Intervener).
(Court of Appeals of Indian Territory. June 8, 1890.)

EXEMPTIONS—RECEIVERS.

1. It being necessary, to entitle defendant to exemptions, that he be a bona fide resident of the territory, and that the action in which they are claimed be one to recover a debt due on contract, they are improperly allowed; the action being one to recover specific personal property, or its value, and the value of other property converted by defendant, and the evidence being that he had gone to another state, and there died.

2. Where, by agreement of all the parties, land is taken out of the hands of the receiver, and plaintiff put in possession thereof, he agreeing to pay the wife of defendant a certain rental therefor, and she agreeing to renew it on the same terms every year thereafter, and plaintiff remains in possession after the year, but makes no payment, whereby the contract is terminated, he alone, and not the receiver, is liable to said wife, or her assignee, for the rental value.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, June 25, 1897.

Action by Charles C. Reeves against Charles Reeves. C. W. Moore intervened. From the decree, plaintiff appeals. Modified.

On June 10, 1890, the plaintiff filed his complaint in this action against the defendant, praying judgment for the sum of \$2,500, for moneys advanced to the defendant to purchase live stock, farm implements, farm improvements, etc., and caused a writ of attachment to be issued, and to be levied upon the following property: "Ninety-one head of cattle, including twenty-seven calves, H & R under; eight head of horses; three mules; two wagons, of Moline and Harrison make; two sets of double harness; three pitchforks; one scoop shovel; one lot of miscellaneous small farming tools and implements; one cornplanter; one cultivator; one hayrake; 57 head of mixed hogs and pigs (total weight, 6,024 pounds); and about 500 bushels of corn, more or less, and about 50 acres of growing corn and 360 acres of growing wheat,—as their interest may appear, on the Reeves ranch, Indian Territory." And on June 28, 1890, the plaintiff filed another complaint by separate suit against the defendant to recover \$2,479.50 upon four promissory notes; alleging that the consideration of the said notes was certain personal property delivered by the plaintiff to the defendant, with the understanding that the same should be the defendant's upon the payment of the notes sued upon, and also alleging that the defendant had sold, and converted to his own use, about \$500 worth of the said personal property, and refused to account to the plaintiff for same. A writ of attachment was also sued out in this action, and levied upon the following property: "All the wheat raised on thirty-four acres of land, and now in shock and stack; also, the undivided one-half interest of three hundred acres of wheat, in shock, stack, and granary; also, one-third interest of fifty acres of growing corn (undivided) on said fields on Reeves ranch, Indian Territory; also, all the improvements on said ranch, consisting of about four hundred fifty acres of plowed land, with buildings, fences, etc., adjoining said plowed land, and about one hundred acres of meadow lands adjoining said plowed land, and belonging to said Reeves ranch. All the wheat on thirty-four acres of land, and now on the land of the Reeves ranch, in shock and stack; also, the undivided $\frac{1}{2}$ interest of three hundred acres, in shock, stack, and granaries, on said land; also, $\frac{1}{2}$ interest of fifty acres of

growing corn on said Reeves ranch, in Indian Territory, C. H. Nation; also, all the improvements on said ranch, consisting of about 450 acres of plowed land, with buildings, fences, etc., thereon, two pastures, of about fifty acres each, adjoining said lands, and about one hundred acres of meadow lands adjoining said meadow land, and belonging to said Reeves ranch, Indian Territory. * * * These two actions were afterwards consolidated. On July 30, 1890, the defendant appeared by his attorney, and moved the court to quash the writs of attachment, and on the same day the plaintiff moved the court to appoint a receiver for the property attached in the two actions. On August 8, 1890, the defendant served notice on the plaintiff that he would on August 14, 1890, file a schedule of personal property claimed by him as exempt from levy and sale under the writs of attachment in these actions. On August 14, 1890, the defendant filed his schedule, and the clerk issued a supersedeas releasing $66\frac{2}{3}$ bushels of wheat, at 75 cents per bushel, of the value of \$500, claimed as exempt by the defendant, and which had been previously levied upon. On August 25, 1890, upon the hearing of the motion to quash the writs of attachment, the court dissolved and discharged the writs of attachment so far as the levy and seizure affected the improvements upon the lands, and also ordered the attachments in all things to be discharged and dissolved unless the plaintiff should file a good and sufficient bond by September 25, 1890. On August 29, 1890, the plaintiff filed this bond, which was duly approved. On August 30, 1890, the plaintiff filed a motion to quash the supersedeas which had been issued by the clerk; alleging that the defendant was not a resident of the Indian Territory, and had not been for two years last past, that the defendant was not the owner of the property scheduled by him, and that the defendant had converted over \$600 worth of property belonging to the plaintiff, for which he had not accounted. This motion was supported by affidavits on file. On the same day, on the plaintiff's petition, the court ordered that the supersedeas which had been issued by the clerk should be suspended until the final determination of this action, upon the plaintiff's executing a bond to the defendant in the sum of \$1,000 to indemnify him, which bond was executed and filed by the plaintiff, and duly approved on September 12, 1890. On October 14, 1890, the plaintiff filed an amended complaint in the two causes as consolidated, for the possession of 120 head of cattle, 10 head of horses, 3 mules, 60 head of hogs, farming implements, and 400 acres of farming lands, and improvements thereon, and also for the conversion of some of the property claimed by the plaintiff, and prayed recovery in the sum of \$5,000, and the appointment of a receiver to take charge and control of the property levied upon in both actions. On December 22, 1890, the writs of attachment were dis-

solved, the two causes, as consolidated, transferred to the equity side of the docket, and W. S. Edwards appointed receiver of the property and improvements levied upon, and ordered to give a bond in the sum of \$8,000, which he did on January 31, 1891. On September 3, 1894, the receiver, W. S. Edwards, was ordered to make a report of his doings as such receiver by the first day of the next term of court; and on the same day, this cause coming on to be heard upon the question of defendant's right to an exemption of \$500, and plaintiff's motion to quash the supersedeas, the court held that the defendant was entitled to the exemptions claimed, and ordered the receiver to pay that sum to George E. Nelson, Esq., attorney for defendant, which payment was finally compelled by contempt proceedings against the receiver, and all over the objection and exception of the plaintiff. It does not appear that the order of the court, which had been formerly made, suspending the operation of supersedeas upon plaintiff giving a bond in the sum of \$1,000 to the defendant until the final determination of this cause, had ever been vacated.

S. M. Porter, for appellant. George E. Nelson, for appellee. N. B. Maxey, for intervener.

THOMAS, J. (after stating the facts). After a long and careful examination of the voluminous record, the preceding statement of the case has been winnowed out of the great mass of irrelevant matter, and is believed to cover all the points essential to a proper determination of the questions of law and fact involved.

Appellant assigns 15 errors, as follows: "First. It was error to require plaintiff to pay to defendant's attorney \$500 as an alleged exemption right, for the reason that the plaintiff, by order of the court, had given a bond of indemnity to defendant, in the sum of \$1,000, to abide the final result of this litigation. Second. It was error to permit the interpleader to interplead in this cause at all, and plaintiff's demurrer to the first interplea and to the amended interplea should have been sustained. The interpleader's claim is based upon the theory that the receivership was at all times, and still is, existing and unsettled, while the plaintiff contends that the receivership was settled and discharged by mutual agreement of all parties in interest more than two years before the interpleader claims to have obtained any rights in the premises. Third. It was error to decree that the premises in controversy were of the cash rental value of \$500 per year, when the interpleader's own testimony was positive that the premises had no actual or market rental value in cash. Fourth. It was error to charge the receiver with the rental value of the premises, in the sum of \$500 per year, when the testimony, positively and beyond

contradiction, shows that he had never received any such a sum, and that the rents and profits from the premises had not amounted to that sum for any one year after he was appointed receiver. Fifth. It was error to render any judgment against the receiver, under the testimony and admitted facts in this cause. Sixth. It was error to render any judgment in favor of the interpleader, because he assumes to have purchased some rights to property in litigation, and pending a receivership of the same property he claims to have purchased without any order from the court for the sale to him or to any other person, and, furthermore, because all the testimony shows that he purchased a right to the improvements, to become operative only after plaintiff's time under his contract for making the improvements had expired. Seventh. It was error to decree to the interpleader possession of the premises, at least until after the plaintiff's time thereon had expired, or until plaintiff had received back, in rents and profits, the amount of money he had expended in making improvements; and the testimony conclusively proved that the plaintiff, up to the time of the final decree in the court below, had only received, in rents and profits, the sum of \$3,714, whereas he had expended in making said improvements the sum of \$7,200. Eighth. It was error to institute any contempt proceedings against the receiver, when he had fully and at all times reported his doings to the court, and had reported that the subject-matter of the receivership had been all settled agreeably to every person in interest on July 14, 1892. Ninth. It was error to decree that the plaintiff's time under his contract with defendant's wife had expired on the premises in the year 1893, when the plain provisions of that contract were that the plaintiff was to have possession of the premises for eight years after the contract was made, as compensation for his money invested. Tenth. It was error to decree that the making of the contract of July 14, 1892, between plaintiff and defendant's wife was a merger of all previous contracts, and particularly the contract between plaintiff's assignor and defendant, and that said second contract of July 14, 1892, was a full settlement of all claims against defendant and his wife up to that date. Eleventh. It was error to find and decree that the contract between Bessie Terrell and the interpleader made in November, 1894, was a valid contract, and that said Bessie Terrell is entitled to the sum of \$200, or any other sum, because, according to the testimony of H. D. Lannom, who wrote the contract for the interpleader and Mrs. Terrell, it was not intended to convey or grant to such interpleader any rights against the plaintiff or the receiver, but only to get some demand, if any existed, against one A. J. Reeves. Twelfth. It was error to find that interpleader was entitled to any rents on the premises, or that he would become entitled to any rents until

the expiration of plaintiff's time thereon had expired, because, from the uncontradicted testimony, it appears that the interpleader purchased only a future right to the whole premises, for a consideration of \$175, with the express understanding that he was not to have any rents or profits or possession until the plaintiff's time under his contract with defendant and defendant's wife had expired, which would be in the year 1900. Thirteenth. It was error to find that the receiver, having not been formally discharged by the court, was liable on his bond for rents and moneys which he had never received, and never could have received, under the circumstances, because no such money could have come into his hands, even if he had received the one-third part of the crops as rents and profits for the various years specified. Fourteenth. It was error to require the receiver to pay into court money which he had never received, and which never in any way had come into his possession or control. Fifteenth. It was error to require the receiver to file an appeal or supersedeas bond in this case."

As to the first error complained of by the appellant, there was no proof on the part of the defendant as to his right to the exemptions claimed, except his own affidavit attached to the schedule filed. There were several affidavits on file at the time this order was made, showing that the defendant had absconded and left the Indian Territory. From the proof afterwards taken in this cause before its final determination, it appears conclusively, and seems to have been conceded by all parties concerned, that the defendant had in fact left the Indian Territory during the summer of 1890, and there was some proof tending to establish the fact that he had committed suicide at Hot Springs, Ark., shortly after he left the Indian Territory. By the last-amended complaint, filed previous to this order, the cause became one to recover specific personal property, or its value, and also for the value of certain other property, alleged to have been sold and converted by the defendant, of the value of about \$600. In order to have entitled the defendant to the exemptions claimed by him, the law required that he be a bona fide resident of the Indian Territory, and also that the action in which the exemptions were claimed be to recover a debt due by contract. We are of opinion that the trial court erred in allowing the defendant the exemptions claimed by him, in the sum of \$500, and in requiring the receiver to pay this sum to George E. Nelson, Esq., defendant's attorney. See first and third findings of fact of master (pages 96 and 97 of record); section 2992, Mansf. Dig.; *Massie v. Enyart*, 33 Ark. 688; *Smith v. Ragsdale*, 36 Ark. 297.

The other errors complained of in this cause arise upon the issue made between the interpleader, C. W. Moore, and the plaintiff, Charles C. Reeves, and W. S. Edwards as receiver. We have carefully read

all the testimony in this case, and the report and supplemental report of the master, and his findings of fact and conclusions of law, and, with the following exceptions, we are of the opinion that the facts, as found by the master and approved by the court below, are correct: The master finds that on July 16, 1892, the defendant, Charles Reeves, who was an adopted citizen of the Cherokee Nation, having absconded and left the Cherokee Nation, under and by virtue of the laws of the Cherokee Nation his wife, Bessie Reeves (also called "Bessie Lilliard" and "Bessie Terrell" in the record in this cause), succeeded to all the right, title, and interest of her said husband, the defendant in this cause, in all of the property attached in these actions, as well as the ranch and farm lands and improvements which had been placed in the hands of the receiver, W. S. Edwards, which finding we approve. But we further find that on the said 16th day of July, 1892, all the parties in interest in this suit at that time, to wit, A. J. Reeves, Charles C. Reeves, Mrs. Bessie Reeves, and the receiver, W. S. Edwards, went to the law office of the plaintiff's attorney, S. M. Porter, Esq., at Caney, Kan., and it was there agreed by all the parties in interest that all of the personal property attached in this cause should be turned over and delivered to the plaintiff in satisfaction of his claim against the said defendant, and that the litigation should terminate, and that the said receiver should be discharged. And we find that, in pursuance to this agreement, the receiver, W. S. Edwards, turned over and delivered to the plaintiff, Charles C. Reeves, all of the property attached in this action, together with the ranch and farm lands. It was more than two years after this settlement made by all of the parties in interest in this cause that the interpleader, C. W. Moore, purchased from the wife of the defendant, then Mrs. Bessie Terrell, all of her right, title, and interest in and to the farm and ranch lands known as the "Reeves Ranch," and it was not until the 20th day of July, 1895, three years after the intervener had purchased the right of Mrs. Bessie Terrell, the divorced wife of the defendant, that he appeared by his attorneys, and by leave of the court filed his plea of intervention in this cause. We find from the testimony in this case that at the time the intervener, C. W. Moore, purchased the interest of Mrs. Bessie Terrell to the Reeves ranch, his agent and he himself knew that it was in the possession of the plaintiff, and he purchased this ranch subject to the contract which had been made on the 16th day of July, 1892, by the plaintiff, Charles C. Reeves, with Bessie Reeves, by the terms of which the plaintiff was to have the Reeves ranch for one year from that date at a rental of \$200, and Bessie Reeves agreed to renew that contract every year thereafter upon the same terms. We agree with the master that this contract ter-

minated on the 16th day of July, 1893, and that the plaintiff has not paid any rent to Mrs. Bessie Terrell, or her assigns, for the ranch since that date. We are of the opinion that the trial court erred, under this state of facts, in rendering a personal judgment against the receiver and officer of the court, W. S. Edwards, for the rent of this place from the 16th day of July, 1893, until the 16th day of July, 1897, at \$500 per year. While we are of the opinion, from the testimony in this case, that the sum of \$500 was a reasonable rental value of these premises for each of these years (the plaintiff himself testifying that he received during the year 1893 the sum of \$700, in 1894 \$420, and in 1895 the sum of \$580), the finding of the trial court as to the rental value of the premises we believe to be correct; but we are of the opinion that inasmuch as, by the agreement of the parties in interest, this property had all been taken out of the hands of the receiver and placed in the hands of the plaintiff, Mrs. Bessie Reeves, who afterwards became Mrs. Bessie Terrell, was estopped from claiming that the receiver was liable to her for the rent of these premises during that period; and therefore her assignee, the intervener, C. W. Moore, would not be entitled to anything more than she herself would have been, and certainly the receiver would not have been responsible to her personally, and is not responsible to the intervener, C. W. Moore. Supposing that Mrs. Bessie Terrell, the divorced wife of the defendant, Charles Reeves, had intervened in this cause, claiming to have succeeded to all the rights of the defendant in the property attached in these causes, and to the Reeves ranch, with rents, profits, and issues derived from it, and had asked for a personal judgment against the receiver, W. S. Edwards, for these rents after the 16th day of July, 1893, and it appeared, as it does in this case, that on the 16th day of July, 1892, she had agreed that the receiver should turn over all of this property to the plaintiff in satisfaction of his claim against the defendant, and that the receiver should be discharged, could it be lawfully urged that she was entitled to recover a personal judgment against the receiver for the rent after that date, which he had not received, under her agreement with him? It would certainly be most unjust to allow her to recover these rents from the receiver personally, and the intervener in this cause succeeds to only such rights as she had at that time. It would be inequitable to allow her to recover those rents if she were the intervener, and it certainly would not be less to allow this intervener to recover a personal judgment against the receiver, an officer of the court.

We are of the opinion that the plaintiff, Charles C. Reeves, is indebted to the intervener for the reasonable rental value of these premises from the 16th day of July,

1893, the date when his contract with Mrs. Reeves expired, to the 16th day of July, 1897, less the \$500 paid defendant for exemptions claimed, which the court found to be \$1500, but the decree of the trial court, in rendering a personal judgment against the receiver, W. S. Edwards, for this sum, was error. It further appears from the testimony and from the findings of the master in chancery that about the 16th day of July, 1896, the receiver, W. S. Edwards, again took possession of these premises, undoubtedly forced to do so by the attitude of the trial court in holding him responsible for the rents of this place, under the theory that he should have received and collected them, and that, although he had not, from that date until the present time, he should account for the rents, profits, and issues of the premises in dispute in this case. And the said receiver, W. S. Edwards, is directed to file a report showing his acts as such receiver from the 16th day of July, 1896, to the present time, and the amount of rents collected by him for the said premises; and this accounting may be compelled, or the matter referred to the master to ascertain the amount of rents actually collected by the receiver since that date. We are of the opinion that the plaintiff, Charles C. Reeves, should have a credit in the sum of \$500 on back rent for the amount paid by him to the defendant as exemptions, and approve the finding and decree of the trial court in that respect.

Let the decree of the court be modified as follows: Let the intervener, C. W. Moore, have judgment against the plaintiff, Charles C. Reeves, for the sum of \$1,500, the rental value of the premises, as found by the court, from July 16, 1893, to July 16, 1897, at \$500 per year (that being the amount due after deducting the sum of \$500 paid by the plaintiff to the defendant as his exemptions), and also judgment against the plaintiff, Charles C. Reeves, for the reasonable rental value of the premises from July 16, 1897, to be determined by further proceedings herein. Let a personal judgment go against the receiver, W. S. Edwards, for all rents, profits, and issues actually collected or received by him for said premises, to be determined by the court by further proceedings, and, when it is determined, to be ordered paid into court, and applied as a credit upon the judgment in favor of the intervener,—an accounting and payment to be compelled by proper proceedings; but a personal judgment is not to be rendered against the receiver in this action, except for moneys actually received by him as such receiver. And let the costs of this appeal be adjudged against the intervener, C. W. Moore, to be credited upon his judgment. In all other respects, the judgment and decree of the lower court is affirmed and modified and remanded.

CLAYTON and TOWNSEND, JJ., concur.

DANSBY v. UNITED STATES.

(Court of Appeals of Indian Territory. June 9, 1899.)

CRIMINAL LAW—ARREST OF JUDGMENT—ARRAIGNMENT—LARCENY OF UNBRANDED CATTLE RUNNING AT LARGE.

1. The judgment should be arrested where defendant was not arraigned before the jury was impaneled and sworn.

2. Under the express provision of Mansf. Dig. § 1655, that cattle running at large shall be designated by brands if over 12 months of age, and that otherwise a person converting the same shall not be deemed guilty of larceny, but the owner may sue for value, it was error to convict for the larceny of unbranded cows running at large.

Springer, C. J., dissenting.

Appeal from the United States court for the Central district of the Indian Territory; before Justice Yancey Lewis, May 13, 1896.

Thomas J. Dansby was convicted of larceny. He moved in arrest of judgment. The motion was overruled, and he appeals. Reversed.

This is a prosecution commenced by the return of an indictment November 19, 1895, against the appellant, charging him with the larceny of two cows of the value of \$13, alleged to have been taken with the intent to steal, on the 10th day of April, 1895, from Charles Colbert, in the Central district of the Indian Territory. On the 13th day of November, 1896, the appellant was, without arraignment or plea, placed upon trial. After the jury was sworn to try the case, the appellant was arraigned, and refused to plead, whereupon the court ordered a plea of not guilty to be entered, which was done.

Ralls Bros., for appellant. J. H. Wilkins, for the United States.

THOMAS, J. The record in this case is as follows: "Now comes the United States, by its attorney, and comes the defendant in person and by counsel, and comes a jury of twelve men of the regular panel, who are duly sworn and impaneled to try the issues herein, and the defendant is thereupon duly arraigned, and refuses to plead. It is ordered by the court that a plea of not guilty be entered herein, and, after hearing the evidence, the instructions of the court, and the arguments of counsel, they retired to consider of their verdict," etc. It is not necessary to proceed with the record further.

Appellant assigns as error this proceeding of the court: "(1) The judgment should have been arrested on the ground that the defendant was not arraigned before the jury was sworn to try the case." Before a trial by jury in any case can commence or proceed, there must be an issue joined. Ordinarily, the issue to be tried by a jury in a criminal case is, "Guilty or not guilty," raised by the plea of "Not guilty" interposed by defendant upon his arraignment, or entered by the court where the defendant stands mute, or refuses to plead. After issue join-

ed, the case may then lawfully and regularly proceed to trial by the examination, swearing, and impaneling of a jury. In this case the jury was impaneled and sworn before the defendant was either arraigned or had been legally required to make answer to the charge preferred against him by the grand jury, and set forth in the indictment. This was clearly error. There was no issue for the jury to try and determine, hence no legal basis upon which either the verdict of the jury or the judgment of the court could rest. This is not a new question, having been extensively treated by text writers, and passed upon by the supreme court of the United States and the courts of last resort in several of the states. "It is laid down in a general way that the arraignment and plea are a necessary part of the proceeding, without which there can be no valid trial and judgment. With the consent of the court, the prisoner may waive the reading of the indictment, though, without waiver, it will be read, even where he has been furnished with a copy. And as the object of the arraignment is to obtain the plea, if the prisoner voluntarily makes it without, and it is accepted by the court, nothing more is required. But without plea there can be no valid trial. Nor will the proceeding be rendered good by the fact that the defendant went to trial voluntarily, and without objection, knowing there was no plea. It must be before the jury are sworn. Afterwards the plea comes too late." 1 Bish. Cr. Proc. (3d Ed.) § 733. "There can be no trial on the merits without a plea of not guilty." 1 Bish. Cr. Proc. (2d Ed.) § 801. * * * "When brought to the bar in capital cases, and at strict practice in all cases whatever, the defendant is formally arraigned by the reading of the indictment, and the calling on him for a plea. * * * The right of arraignment on a criminal trial may, in some cases, be waived, but a plea is always essential." 1 Whart. Cr. Law, § 530. * * * It may be stated to be a prevailing rule in this country and in England, at least in cases of felony, that a plea to the indictment is necessary before a trial can be properly commenced, and that, unless this fact appears affirmatively from the record, the judgment cannot be sustained. Until the accused pleads to the indictment, and thereby indicates the issues submitted by him for trial, there is nothing for the jury to try; and the fact that the defendant did so plead should not be left to be inferred from a general recital in some order that the jury was sworn 'to try the issue joined.' The record should be a permanent memorial of what was the issue tried, and show whether the judgment whereby it was proposed to take the life of the accused, or to deprive him of his liberty, was in accordance with the law of the land. In *Hopt v. Utah*, 110 U. S. 574-579, 4 Sup. Ct. 204, this court, observing that the public has an interest in the life and liberty of an

accused person, said: 'Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods.' The views we have expressed would seem to be the necessary result of Rev. St. U. S. § 1032: 'When any person indicted for an offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter a plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when a party pleads not guilty, or such plea is entered as aforesaid, the case shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury.' This statute is based on the act of April 30, 1790, § 30 (1 Stat. 119), the act of March 3, 1825, § 14 (4 Stat. 118), and the act of March 3, 1835, § 4 (4 Stat. 777). It proceeds upon the established principle that, before a criminal trial can be legally commenced, there must be an issue to try, and that a plea by or for the accused is essential to the formation of the issue. And the section above quoted requires the entry of the plea before the trial commences. Where the crime charged is infamous in its nature, are we at liberty to guess that a plea was made by or for the accused, and then guess again as to what was the nature of that plea? Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to established modes of procedure, devised for the security of life and liberty. Nor should the courts, in their abhorrence of crime, nor because of their anxiety to enforce the law against criminals, countenance the careless manner in which the records of cases involving life or liberty of a person are often prepared. Before a court of last resort affirms a judgment of conviction of at least an infamous crime, it should appear affirmatively from the record that every step necessary to the validity of the sentence has been taken. * * * It is true that the constitution does not, in terms, declare that a person accused of crime cannot be tried until it be demanded of him that he plead, or unless he pleads to the indictment. But it does forbid the deprivation of liberty without due process of law; and due process of law requires that the accused plead, or be ordered to plead, or, in a proper case, that the plea of not guilty be filed for him, before his trial can rightfully proceed; and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law,

and essential to a valid trial, was taken in the trial court; otherwise, the judgment will be erroneous. * * * The present defendant may be guilty, and may deserve the full punishment imposed upon him by the sentence of the trial court, but it were better that he should escape altogether than that the court should sustain a judgment of conviction of an infamous crime where the record does not show that there was a valid trial." *Crain v. U. S.*, 162 U. S. 643, 16 Sup. Ct. 958.

It has been held to be error to swear the jury to pass upon the guilt or innocence of the accused before calling upon him to plead. The court said that, until the prisoner was called upon for his plea, it could not be known whether there would be an issue of fact for the jury, or what the issue (if any) might be; but the prisoner, instead of submitting the question of his guilt, may have pleaded in abatement, or have presented to the court legal objections to the indictment; and that, though a formal arraignment of one charged with a criminal offense may not be indispensable to the legality of conviction, it was clear that the case must be put in a condition for trial before the jury are sworn. *State v. Hughes*, 1 Ala. 655-657. In *Sartorius v. State*, 24 Miss. 602, 611, 612, which was an indictment for buying certain goods knowing them to be stolen, the court said: "In trials for minor offenses, a formal arraignment in practice is generally dispensed with. In such cases, where the defendant has pleaded to the indictment, arraignment will be presumed. But a party, before he can be put on his trial, must plead to the indictment. In civil proceedings it is error to submit a case to the jury without an issue in fact having been made up by the parties. In prosecution for offenses, it must be clearly erroneous to put a party upon his trial unless he has taken issue upon the charge by pleading to the indictment." In *Bowen v. State*, 108 Ind. 411-413, 9 N. E. 379, the court said: "Under the decisions of this court it can no longer be recognized as a subject of controversy that, where the record in a criminal case fails to disclose affirmatively that a plea to the indictment was entered either by or for the defendant, such record, on its face, shows a mistrial, and that the proceedings were, consequently, erroneous, to say the least." The same doctrine has been universally held by the supreme court of the state of Illinois. See *Aylesworth v. People*, 65 Ill. 301; *Johnson v. People*, 22 Ill. 314; *Hoskins v. People*, 84 Ill. 87. In *Yundt v. People*, 65 Ill. 372, it was held that without an issue formed there could be nothing to try, and the party convicted could not properly be sentenced. See, also, *Parkinson v. People*, 135 Ill. 401-403, 25 N. E. 764. In the case of *State v. Chenier*, 32 La. Ann. 103, where the arraignment was made and plea entered after the commencement of the trial, and the trial then proceeded under the direction of the court, the supreme court of Louisiana said: "We cannot sanction such

departure from ancient landmarks of criminal procedure. The prisoner must be arraigned, and must plead to the indictment, before the case can be set down for trial or tried." In the case of *Ray v. People*, 6 Colo. 231, the supreme court said: "The statutes of Colorado require all criminal trials to be conducted according to the course of the common law, except where a different mode is pointed out. Without an issue, there was nothing to try; and, if the record failed to show an arraignment and plea prior to trial, the proceeding was a nullity." See *State v. Van Hook*, 88 Mo. 105, and to the same general effect are *State v. Wilson*, 42 Kan. 587, 22 Pac. 622; *Jefferson v. State*, 24 Tex. App. 535, 7 S. W. 244; *Hicks v. State*, 111 Ind. 402, 12 N. E. 522; *State v. Agee*, 68 Mo. 264; *State v. Saunders*, 53 Mo. 234. The motion in arrest of judgment should have been sustained, and the judgment arrested. There are other errors in the record; notably the conviction of defendant for the larceny of an unbranded animal over one year of age, running at large. Such animal is not the subject of larceny in this territory. See section 1655, *Mansf. Dig.* For the reasons given, the judgment of the court below is reversed, and cause remanded, with instructions to the court to arrest the judgment, and discharge the defendant. Reversed and remanded.

CLAYTON and TOWNSEND, JJ., concur.

SPRINGER, C. J. I dissent from the opinion of the court in this case. My views upon the question involved are set forth at length in the opinion of this court in the case of *Gaines v. U. S.*, reported in 37 S. W. 98-100 (q. v.). The opinion in the *Dansby Case* overrules that in the *Gaines Case*. But I still adhere to the opinion in the *Gaines Case*. *Mansf. Dig.* § 2454, provides that a judgment of conviction in a criminal case shall be reversed only for an error to the defendant's prejudice appearing on the record. There was no possible prejudice to the defendant in the error complained of in the case at bar, and the statute prohibits the court of appeals or a trial court from reversing a judgment in a criminal case unless for error prejudicial to the defendant.

GULF, C. & S. F. RY. CO. v. BOLTON et al.
(Court of Appeals of Indian Territory. June 12, 1899.)

RAILROADS—TRESPASSERS—DEGREE OF CARE
REQUIRED—NEGLIGENCE.

1. Where a prospective passenger left a waiting room and sat down on the edge of the platform, with his feet on the ground, within a foot or a foot and a half of the track, and went to sleep in front of an approaching train, the railroad company owed him no duty, except not to wantonly injure him after its employees discovered him.

2. An engineer discovered a trespasser on the track when 140 to 150 feet away from him. He had a loaded train of 10 cars, each 31 feet long, and was running 15 to 18 miles an hour. He applied the emergency air, reversed the engine, and sanded the track, but was unable to stop the train in time to avoid injury; and three witnesses testified the train could not be stopped within 350 feet. *Held*, that negligence in failing to stop the train in time was not shown.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Constantine B. Kilgore, March 9, 1897.

Action by Josie Bolton and others against the Gulf, Colorado & Santa Fé Railway Company. There was a judgment for plaintiffs, and defendant appeals. Reversed.

Robert B. Bolton, residing at Oakland, a small village near Ardmore, in the Chickasaw Nation, Ind. T., was the manager of a cotton gin and a gristmill, and had an interest in a mercantile establishment, at that place; and this action was brought by his widow, Josie Bolton, and his minor children, Roberta and Mamie Bolton, to recover damages of the appellant, the Gulf, Colorado & Santa Fé Railway Company, for the alleged wrongful killing of the said Robert Bolton. On the 11th of December, 1895, Robert B. Bolton went from his home to the town of Gainesville, in the state of Texas; and on the night of the same day he purchased a ticket from the appellant railway company which entitled him to transportation over its line of railway from Gainesville to the town of Ardmore, in the Indian Territory, and at about 11 o'clock on that night he entered a passenger train of the appellant railway company, going north, for Ardmore, Ind. T. This train arrived at Ardmore about midnight, and stopped at the station at Ardmore for the purpose of permitting passengers to alight and to take on passengers. But Bolton was asleep, and failed to leave the train at Ardmore, and after the train had left Ardmore the conductor came through the car where he was, and awoke him, and told him that the train had passed Ardmore; and, after they had talked awhile, Bolton paid his fare to Berwyn, the next station north of Ardmore, where the train arrived about 1 o'clock a. m., and stopped to permit Bolton and a man by the name of Attaway to depart from the train, and they did depart, and Attaway took Bolton to the waiting room, opened the door for Bolton, and Bolton entered. The conductor had told Attaway to tell the agent at Berwyn to send Bolton back to Ardmore on the next passenger train south, but Attaway did not do this. The next passenger train going south was due in about an hour or two. Some time after Bolton entered the waiting room provided for passengers, he left, and went out on the platform in front of the station, and, going to a point near the north end of the platform, sat down upon the edge of the platform, with his feet upon the ground, and

within a foot or a foot and a half of the rail of the main track, and went to sleep; his head falling forward on his breast. At about 2:15 a. m. a freight train bound north, consisting of 10 loaded cars, caboose, and engine, about 350 to 375 feet in length, and running about 15 to 18 miles per hour, arrived at Berwyn station, and whistled for the station and for the crossing south of the depot, and also whistled, in answer to a signal from the conductor, who was at the rear end of the train, that the train would not stop. The deceased was sitting on the edge of the platform, to the north of the station, and the light from a lamp at the south of the station was burning, and the light thrown by it was between the engine and the deceased. The engineer could ordinarily see an object upon the track, with the aid of the headlight, at night, from 120 to 150 feet; and it was possible to stop the train, at the rate of speed it was running, in a distance equal to the length of the train. Bolton was not discovered by the engineer of the train until the engine had reached the south end of the depot, and about 140 to 150 feet distance from Bolton; and the engineer at once applied the emergency air, reversed his engine, and "put sand under her" to keep the wheels from slipping, but was unable to stop the train until Bolton was struck in the head with the cylinder of the engine and knocked over on the depot platform. As soon as the train came to a stop, the trainmen carried Bolton into the depot. Dr. Wright, a physician, was at once summoned, and arrived within a few minutes after Bolton was carried into the depot; but Bolton never recovered consciousness, and died in about half an hour from the injuries thus received. The testimony further discloses that Bolton was probably intoxicated, as it appears from the testimony of appellees' witnesses that he was drinking, and that some one had vomited near the place where he sat when he was struck by the engine, and there was found in a sack which he had at the time of the injury a jug of whisky. Trial was had before a jury, and a verdict rendered in favor of the plaintiffs for the sum of \$9,000. A motion for a new trial was made and overruled, and an appeal prayed and allowed to this court.

Ledbetter & Bledsoe and J. W. Terry, for appellant. Hamp P. Abney, Johnson & Cruce, and W. O. Davis, for appellees.

THOMAS, J. (after stating the facts). The errors assigned by appellant, which are properly presented for review here, and which it will be necessary to consider, are the following: (1) The request of the appellant, made to the trial court, to instruct the jury to return a verdict in its favor, which request was refused, and the refusal excepted to. (2) The request of the appellant, made to the trial court, to instruct the jury as follows:

"The court instructs the jury that, taking all the testimony in this case with its greatest probative force, it shows that the deceased was guilty of contributory negligence, and plaintiffs cannot recover,"—which request was refused, and the refusal excepted to. (3) The request of the appellant, made to the trial court, to instruct the jury as follows: "You are further instructed that a person who goes upon a railroad track, other than at a crossing, is a trespasser, and that the railroad company owes no further duty to discover such trespasser upon its track, except at a crossing, than to avoid inflicting a wanton injury upon him after his dangerous position shall have been discovered,"—which request was refused, and the refusal excepted to by appellant. (4) The request of the appellant, made to the trial court, to instruct the jury as follows: "You are further instructed that the employes of a railway company owe no duty to a person, who is a trespasser upon its tracks, to keep a lookout for and discover him so as to prevent injury to him,"—which request was refused, and the refusal excepted to by appellant. (5) The court charged the jury as follows: "But if the deceased failed to exercise that degree of care and caution which an ordinarily prudent man would have used under like circumstances, and thereby placed himself in a position of peril, it is still incumbent upon the defendant to exercise due care and diligence to prevent the injury, if it knew, or could have known by the exercise of reasonable diligence, the dangerous position of the deceased. Therefore, notwithstanding the fact that the deceased put himself in the way of great peril, if the defendant saw him, or could have seen him, in time to have prevented his death, by the use of ordinary diligence, and failed to use such diligence, the plaintiff in such case would be entitled to recover,"—to which instruction of the court the appellant excepted.

In the case of *Newport News & M. V. Co. v. Howe*, 3 C. C. A. 121, 52 Fed. 362, a freight train upon appellant's railway parted; and the conductor, who was on the rear part of the train, sent Howe, a brakeman, forward with a lantern to signal the engine, when it should return, and to give the engineer information as to the whereabouts of the rear cars. Howe went forward several hundred yards, sat down on the end of a tie, put his lantern down near him, and went to sleep, with his arm thrown over the rail. The engineer, after running about five miles, discovered that the train had parted, side-tracked the cars still attached, and started his engine and tender back, to take up the rest of the train; and not discovering Howe in time to stop his engine, one of the rear wheels of the tender ran over Howe's arm and cut it off. Judge Taft, in delivering the opinion of the court in that case, said: "We are of the opinion that, on the evidence adduced, it was the duty of the court below to have directed a verdict for the defendant on the ground of

the plaintiff's contributory negligence. In order that a defendant shall be exonerated from liability by the plaintiff's negligence, it must appear that it was the proximate cause of the accident. It need not be the sole proximate cause. It is enough if it concurs with the defendant's negligence to produce the injury. Plaintiff admits that, with knowledge that an engine was approaching, on a very dark night, he laid down with his arm over the rail and went to sleep. Grosser negligence, more certain to result in injury, can hardly be suggested. It is charged that the engineer was negligent in not sending out before him his brakeman, in not signaling his return, by whistling as often as he should, and in running at a higher rate of speed than four miles an hour,—all contrary to the rules of the company. There was evidence tending to show such negligence, but it was all plainly concurrent with that of the plaintiff, and therefore constitutes no ground for recovery. The counsel for the plaintiff below rely, however, on the conduct of the engineer at the time of the accident, in failing to stop the engine before Howe was run over, as bringing the case within the so-called exception to the general rule of contributory negligence, according to which plaintiff's negligence is no defense, if it appears that by the exercise of due care the defendant might have avoided the consequences of plaintiff's negligence. The exception obviously refers only to those cases where the negligence of the plaintiff is not a proximate cause of his injury, because, after the fact of plaintiff's negligence, and with that as a circumstance or condition of the situation, defendant might then, by exercise of due care, avoid the injury. In such cases defendant's negligence, in the chain of causes leading to the accident, intervenes between plaintiff's negligence and the injury, and is, in law, the sole proximate cause. * * * Upon the point, however, if the engineer had looked out, he could have seen Howe's perilous position in time to stop the engine before striking him, the evidence is conflicting; and, if the point is material, it should have been submitted to the jury. It remains to inquire, therefore, whether the failure of the engineer to see Howe on the track in time to avoid the accident, when by looking out he might have seen him, can be said to be a legal cause of the accident. If so, it is the sole proximate cause, and would render the company liable. When a man lies down to sleep upon a railroad track at night, with full knowledge that a train is about to pass that way, does he thereby impose upon the engineer the duty, with respect to him, of keeping a lookout, and of discovering him upon the track? It is true that the engineer owes it to the passengers on the train, and to persons lawfully upon the track, to keep a lookout, in order to prevent injury to them. But that is because danger to such persons is probable, and should be looked for, to be avoided. One is bound to use one's own so as not to injure another.

This duty, of course, is commensurate with the reasonable probability that any particular use of one's own will injure another. Now, there is no probability that a man will be asleep upon the railroad track. While, therefore, an engineer who fails to keep a sharp lookout upon the track is wanting in due care to passengers and lawful travelers, because of the probability of danger to each from such failure, such conduct is not a want of due care with respect to a man asleep upon the track, because of the presumption—upon which the engineer has a right to rely—that no one would be so grossly negligent in court-riding death. As there was no duty imposed upon the engineer to look out for the sleeping man, there was no negligence in his failing to see Howe. It would follow that the engineer's failing to learn the peril earlier was not a proximate cause of Howe's injury."

As applied to a case like the present, we believe the rule relied on by counsel for plaintiff below should be construed to mean that the negligence of the plaintiff will be no defense if the defendant, after he knew the peril of the plaintiff, did not use care to avoid it. This view seems to be sustained by authority, and by several eminent text writers. 2 Thomp. Neg. 1157; Cooley, Torts, 674; O'Keefe v. Railroad Co., 32 Iowa, 467; Yarnall v. Railway Co., 75 Mo. 575; Denman v. Railroad Co., 26 Minn. 357, 4 N. W. 605; Button v. Railroad Co., 18 N. Y. 248, 259. In O'Keefe v. Railroad Co., supra, a man lay down at night on the defendant's track, in a state of intoxication. He was there run over by an engine which had no headlight. The court charged the jury that he could not, under those circumstances recover, "unless they found that defendant or its agents had knowledge that he was thus lying, in time to prevent the accident, or could have known with the exercise of ordinary caution." The judgment for plaintiff was reversed on the ground that the italicized clause was error. In Yarnall v. Railway Co., supra, the plaintiff's intestate lay intoxicated upon the track; and it was held that the railway company could only be held for such negligence, causing the accident, as occurred after its agents became aware of plaintiff's exposed condition. In Button v. Railroad Co., supra, plaintiff lay down at night, in a state of intoxication, on a street-car track, and was run over. The court below said to the jury that the defendants were liable unless the negligence of the deceased directly contributed to the injury, and a verdict followed for the plaintiff. The case was reversed; Harris, J., saying of the plaintiff: "If in his senses, as he must be presumed to have been, he courted his own destruction. Under these circumstances, he must be regarded as having co-operated with the defendants to produce his death. Unless the jury could be made to believe that, after the deceased was discovered, the defendants, by reasonable care, could have avoided the fatal result, they were not liable." In Den-

man v. Railroad Co., supra, the plaintiff went to sleep on the defendant's track, and was severely injured by a passing train. In holding that the plaintiff could not recover, the supreme court of Minnesota used the following language: "The only negligence upon the part of the defendant's employes upon the train, which the plaintiff argues that the evidence tends to establish, is evidence going to show that the track at the place of the accident, and for a long distance on either side of such place, was level and straight, so that an object no larger than a man's hat could be seen for four or five hundred yards, and that, therefore, the employes of the defendant were negligent in not observing the plaintiff. In our opinion, this is no evidence whatever of negligence on the part of a defendant in a case of this kind. The plaintiff had no right whatever to sit or lie down upon the track, or near enough to it to be within reach of a passing train, and go to sleep. If he saw fit to do so, he took the risk upon himself. The defendant owed him no duty, except that of exercising due diligence to avoid injuring him after discovering he was there. If the defendant's employes in charge of the train had neglected to watch the track, and so had failed to observe some obstruction by which the train was thrown from the track, and as a consequence a passenger was injured, the case, unless some excuse appeared, might well be one in which the defendant would be liable to the passenger for the negligence. The reason would be because the defendant owed the passenger a duty, the neglect of which had occasioned the injury. But, for the reasons before given, the plaintiff occupies a position entirely different from that of a passenger." The foregoing is, in our opinion, a correct statement of the law governing the present case. We are aware that there are many cases, which are collected in Shearman & Redfield's work on Negligence (4th Ed.), in which the rule is thus expressed: The defendant is liable, in spite of plaintiff's negligence, if, after he discovers, or ought by due care to discover, plaintiff's peril, he might, by the use of due care, avoid the consequences of plaintiff's negligence, and does not do so. The due care with respect to discovering plaintiff's negligence depends upon the relation of the parties. In a case like the present, where, in our view, there is no duty on the part of the defendant to discover plaintiff's peril, the additional clause adds nothing to the effect of the rule, but implies a duty which, as we have found, does not exist. In the case of Railway Co. v. Bennett, 16 C. C. A. 300, 69 Fed. 525, Sanborn, Circuit Judge, in delivering the opinion of the United States circuit court of appeals for the Eighth circuit, said: "The only duty which a railroad company owes to those who, without its knowledge or consent, enter upon its track, not at a crossing or other like public place, is not wantonly and unnecessarily to inflict injury upon them after its employes have dis-

covered them. It owes them no duty to keep a lookout for them before they are discovered, because they are unlawfully upon the tracks, and the railroad company is not required to watch for violations of the law. *Newport News & M. V. Co. v. Howe*, 3 C. C. A. 121, 52 Fed. 362; *Railway Co. v. Tartt*, 12 C. C. A. 618, 64 Fed. 823; *Railroad Co. v. Cook*, 13 C. C. A. 364, 66 Fed. 115; *Denman v. Railroad Co.*, 26 Minn. 357, 4 N. W. 606; *Railway Co. v. Monday*, 49 Ark. 257, 4 S. W. 782; *Sibley v. Ratliffe*, 50 Ark. 477, 8 S. W. 686; *O'Keefe v. Railroad Co.*, 32 Iowa, 467; *Yarnall v. Railroad Co.*, 75 Mo. 575; *Button v. Railroad Co.*, 18 N. Y. 248, 259; *Nicholson v. Railway Co.*, 41 N. Y. 525."

The charge of the trial court in the case at bar that, "notwithstanding the fact that the deceased put himself in the way of great peril, if the defendant saw him, or could have seen him, in time to have prevented his death, by the use of ordinary diligence, and failed to use such diligence, the plaintiff, in such case, would be entitled to recover," was, in effect, an instruction to the jury that it was the duty of the railway company to keep a lookout for Bolton; and it owed him no such duty, in the situation in which he had voluntarily placed himself,—a place where he had no right to be, and where sleep on his part would, in all probability, result fatally. One who is about to take passage upon a railway train has no right to leave the waiting room provided for passengers, and go out upon or near the main track of the railway, and go to sleep; and, if he do so, he is guilty of the grossest negligence, and the only duty which the railway company owes him is not to wantonly and unnecessarily inflict injury upon him after its employes have discovered him. In this case the testimony discloses that the engineer did not discover Bolton until his train was within 140 to 150 feet of him; that he used every means at his command to bring the train to a stop,—applying the emergency air, reversing the engine, and putting sand upon the track; that he had a loaded freight train, of 10 cars, each 31 feet in length, with the couplings, and the engine and caboose, running 15 to 18 miles per hour; and that his train could not be stopped in a distance less than the length of the train, 350 to 375 feet. And his testimony is corroborated by the fireman, and also by Dr. Wright, a witness called by the appellees. As we have seen, the failure of the engineer to discover Bolton sooner was not negligence on the part of the railway company; and, as there was no proof of other negligence on the part of the railway company, the request of the appellant to instruct the jury to return a verdict in its favor should have been given. It should have been given for the further reason that the death of Bolton was caused by his own negligence, the proof not disclosing any neglect on the part of the employes of the railway company after they discovered Bolton in his perilous position. For the reasons stated, the judgment

of the trial court is reversed, and the cause dismissed. Reversed and dismissed.

SPRINGER, C. J., and CLAYTON and TOWNSEND, JJ., concur.

CROFT et ux. v. SMITH.

(Court of Civil Appeals of Texas. June 7, 1899.)

DEATH BY WRONGFUL ACT—EVIDENCE—NEGLIGENCE — SELF-DEFENSE — REASONABLENESS OF APPREHENSION.

1. Under Sayles' Rev. Civ. St. arts. 3017, 3020, providing that an action for actual damages on account of injuries causing the death of any person may be brought when it is caused by the wrongful act or negligence of another, although not caused under such circumstances as amounts in law to a felony, and without regard to any criminal proceedings that may or may not be had in relation to the homicide, evidence in regard to any action that may have been taken by plaintiff or the grand jury in connection with criminal proceedings is inadmissible.

2. In an action by parents to recover for the wrongful killing of their son, testimony to the effect that they may have brought the action simply to investigate the circumstances of the homicide is irrelevant, and may have been prejudicial, as creating the impression that plaintiffs wanted an investigation, and not damages.

3. It is error to permit the introduction of evidence to impeach a witness as to an immaterial matter.

4. In an action to recover for the wrongful killing of plaintiff's son, when it has been shown that deceased was in the employ of defendant, and had during the day been sent off by him with a wagon, and that he returned after dark, when he was shot by defendant, evidence that defendant was in a position to see the wagon when he fired the shots is material, for, if he did, it should have suggested the identity of deceased at whom he shot.

5. In an action to recover for the wrongful killing of plaintiff's son, where it appears that defendant shot deceased intentionally, but claimed to have done so in the belief that deceased was about to attack him, it is error to submit the case to the jury on the theory of negligence.

6. Where the trial court submits a case to the jury on an erroneous theory of the case, which is embodied in the requested instructions of appellant, the error is unavailable on appeal.

7. In an action to recover for the wrongful killing of plaintiff's son, where the evidence shows that it was intentional, to escape liability the defendant must show that it was done under a reasonable apprehension or fear of death or serious bodily harm.

8. In passing upon the reasonableness of the apprehension which moved defendant to shoot deceased, the matter must be judged from the standpoint of defendant, and not from the standpoint of any ordinarily prudent man; but the right of self-defense does not rest alone on the fear of the person asserting the right, but there must be a reasonable appearance of danger to call it into exercise.

Appeal from district court, Uvalde county; R. B. Green, Judge.

Action by Jacob W. Croft and wife against Fred Smith to recover for the wrongful killing of plaintiffs' son. From a judgment in favor of defendant, plaintiffs appealed. Reversed.

O. Ellis and Joseph Jones, for appellants. Garner & Love and Clark, Ball & Fuller, for appellee.

FLY, J. This suit was instituted by appellants against appellee to recover damages for the death of their son, Thomas Oliver Croft, who came to his death by a gunshot wound inflicted by appellee. There was a trial by jury, resulting in a verdict and judgment for appellee. It was testified by the witnesses for the defense that Thomas Croft, a boy about 18 years of age, was in the employ of appellee, and occupied a room in his house. On July 17, 1896, the boy was sent off from the place with a wagon and team, and did not return until late at night. Appellee being aroused by a lady in the house, and told that there was some one in the lot, got his gun, and went out, and, seeing a man bent over, shot at him twice. Appellee swore that he thought the man was about to shoot. After the second shot, appellee ascertained that he had shot Tom Croft, who had returned, and was engaged about the wagon. He was in the wagon when shot. He afterwards died from the wounds inflicted by appellee. There was no conflict as to the facts surrounding the homicide. It is provided in article 3017, Sayles' Rev. Civ. St., that "an action for actual damages on account of injuries causing the death of any person may be brought * * * when the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another." The right is one not given by the common law, but arises alone by reason of the statute. It is also provided by statute (article 3020) that "the action may be commenced and prosecuted, although the death shall have been caused under such circumstances as amounts in law to a felony, and without regard to any criminal proceedings that may or may not be had in relation to the homicide." In the absence of the statute last cited, we think that evidence in regard to any action that may have been taken by the plaintiff or the grand jury in connection with criminal proceedings would be inadmissible, and it is clearly so when the statute is kept in view. Appellants had the right to institute and prosecute the suit without reference to any criminal action, and it doubtless prejudiced their case to permit questions to be asked which would convey to the jury the idea that, unless appellants had proceeded in a criminal action against appellee, they could not sustain a civil action for damages. Testimony to the effect that appellants may have brought the suit simply to investigate the circumstances of the homicide could have no relevancy, and should not have been permitted. It is often the case that the unworthy motives actuating a plaintiff in instituting a suit may be inquired into; but we see no pertinence in the testimony introduced on this point in this case, and it may have been positively prejudicial in creating the impres-

sion that appellants wanted an investigation merely, and not damages. The question as to the motive of appellant J. W. Croft in instituting suit being immaterial and irrelevant, it was error to permit evidence showing that he had made contradictory statements on that point. *Railway Co. v. Phillips*, 91 Tex. 278, 42 S. W. 852.

Appellee had sent the deceased boy off with a wagon on the day before he was killed, and it became a material question as to whether appellee saw the wagon before he fired the shots, for, if he did, it should have suggested to him that the boy had returned, and that it was probably he in the wagon. This question being material, it was proper to admit testimony on the part of J. W. Croft which tended to show that appellee was in a position to see the wagon when he fired the shots. The sixth assignment of error, which complains of testimony admitted to show contradictory statements about his being able to see the wagon from where Smith stood when he fired the shots, is therefore not well taken.

In the charge of the court two theories are presented to the jury upon which the cause was to be tried; one being based upon the negligence of appellee measured by what an ordinarily prudent person would have done under like circumstances, and the other based upon the question as to whether appellee acted in self-defense upon appearances of danger which reasonably appeared to him imminent and pressing. The two theories are, to our minds, utterly antagonistic and irreconcilable. The pleadings and the facts show a willful homicide, and not a case of negligence. Appellee admitted the killing, but testified that he had no malice towards the deceased, but killed him under the impression that he was some person who was about to attack him. It was not negligently done, because it was willfully and intentionally done. If the act be intentional, it may be fraudulent or criminal, or it may be a trespass, but it cannot be negligence. *Whitt. Smith, Neg.* p. 3. In the petition the facts surrounding the homicide are pleaded, and, while the acts are denominated negligence, they show what would be denominated a "wrongful act" in the statute, and the case should have been tried upon that theory. If no other cause for reversal had arisen than erroneous charges of the court, appellants could not have availed themselves of the errors, for the reason that in their requested charges the doctrine of negligence and a willful assault are both presented. In cases where the death is caused by intentional violence, the question at issue would be whether or not the defendant was justified or excused by the circumstances in committing the act. *Cooley, Torts* (2d Ed.) pp. 317, 318. If the testimony of appellants showed a *prima facie* case of a wrongful killing by appellee, the duty then devolved on him to prove that he acted under a reasonable apprehension or fear of death

or serious bodily harm at the time of the killing. Greenl. Ev. § 95; Bell v. State, 20 Tex. App. 445. The law of self-defense in a civil action is the same as in a criminal action, with the exception that in the criminal action the defendant has the benefit of a reasonable doubt, while in the civil action the cause should be decided upon a preponderance of the testimony. March v. Walker, 48 Tex. 372. It follows that in passing upon the appearance of danger, the reasonableness of the apprehension of death or serious bodily injury upon the part of the appellee, the matter must be judged of from his standpoint, and not from the standpoint of any ordinarily prudent man. "Each juror must place himself in the position of the defendant at the time of the homicide, and determine from all the facts as they appeared to defendant at the time of the killing whether his apprehension or fear of death or serious bodily harm was reasonable." Bell v. State, above cited; Gonzales v. State, 28 Tex. App. 135, 12 S. W. 733; Cochran v. State, 28 Tex. App. 422, 13 S. W. 851. In this connection it may be well to say that the right of self-defense cannot be invoked by the fears alone of the person who relies on appearances of danger, but "there must be a reasonable appearance of danger to call it into exercise." Ex parte Taylor, 33 Tex. Cr. R. 531, 28 S. W. 957. The judgment is reversed, and the cause remanded.

**GALVESTON, H. & S. A. RY. CO. v.
MASTERSON et ux.¹**

(Court of Civil Appeals of Texas. June 7, 1890.)

**MASTER AND SERVANT—FELLOW SERVANTS—
LIABILITY OF MASTER.**

1. A switchman on one engine is not a fellow servant of a switchman on another engine, though both may work in or near the same yard, and use the same tracks, where each belongs to a separate crew, under direction of its own foreman.

2. A switchman engaged in piloting an engine from the roundhouse to the train to which it was to be attached, finding another engine in his way, moved it, killing deceased, who was under it, cleaning it. *Held*, that the company was liable, as such switchman was in the performance of his duty in moving the engine.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by P. T. Masterson and wife against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Upson & Newton, for appellant. Perry J. Lewis, for appellees.

FLY, J. This suit was instituted by appellees to recover of appellant damages for the death of their son, Joseph P. Masterson. The trial resulted in a verdict and judgment for appellees in the sum of \$1,000. This is a

second appeal of this case, the opinion of this court on the former appeal being in 42 S. W. 1001. We find that the death of Joseph P. Masterson, who was an employé of appellant, was caused through the negligence of another employé of appellant, who was acting within the scope of his employment, and who was not a fellow servant of Joseph P. Masterson.

Several decisions of courts of civil appeals are cited by appellant as sustaining the contention that the switchman on one engine is the fellow servant of a switchman of another engine, because they used in common all the tracks in the yard of appellant in San Antonio, and their respective duties in said yard as to the switching of trains were the same, and one of them (the case of Railroad Co. v. Tatman, 31 S. W. 333), seems to sustain the contention; but that decision was rendered prior to the decision in the case of Railway Co. v. Warner, 89 Tex. 475, 35 S. W. 384, which we think holds adversely to the contention of appellant. In the last case cited it is said: "The members of a crew running a train, though each be in the performance of different acts in reference thereto, are all engaged in the common service, for they are jointly performing the thing or work of managing the train for the employer; but they would not be engaged 'in the common service' with the members of a crew running another train for the employer over the same road, for one crew would be jointly performing the thing or work of managing one train, while the other would be performing the thing or work of managing another train." The facts in this case demonstrated that Joseph P. Masterson was a switchman on engine No. 591, and while the engineer of 591 was off his engine, getting a lunch, the deceased, with his knowledge, went under the engine to clean out the ashpan; and, while so engaged, D. B. Church, a switchman belonging to a different crew, got on engine 591, and turned on the steam to move it out of the way of an engine which he, in pursuance of his duties, was conducting from the roundhouse to the train to which it was to be attached, and the deceased was run over and killed. The engine on which deceased worked was known as the "outside engine," and the one on which Church worked was known as the "inside engine." The crews on the two engines were separate and distinct, and each crew consisted of an engineer, a fireman, a foreman, and three switchmen, and each crew was under the supervision and control of its foreman. These crews were just as distinct from each other as the crews that run on the main line, and the fact they worked in or near the same yard and used the same tracks would not alter their relation to each other.

There is no merit in the contention that Church was not acting in the scope of his duties when the man was killed. He was engaged in his business of piloting an engine from the roundhouse to the train to which it was to be attached, and, finding the engine on

¹ Rehearing denied June 27, 1890.

which deceased was working in the way, he moved it, with the result that deceased was killed. Although he may have been violating a positive rule of the railroad company, yet the act was done in furtherance of the master's business. "For the mode in which the servant performs the duty he is engaged to perform, if wrongful and to the injury of another, the master is liable, although he may have expressly forbidden the particular act." *Railway Co. v. Anderson*, 82 Tex. 520, 17 S. W. 1039. As said in this case by this court, through Chief Justice James, on the former appeal, "It was in the performance or furtherance of this work or duty that he moved the other engine out of the way, and this, therefore, cannot be held to have been an independent, personal act of his own, for which the master is not responsible." The judgment is affirmed.

STRAIT v. COLE.

(Court of Civil Appeals of Texas. June 3, 1899.)

NEW TRIAL—CONDITIONAL ORDER.

An order granting a conditional new trial is not void, and objection thereto is waived, by not being urged before the end of the next term of court.

Appeal from Dallas county court; K. K. Foree, Judge.

Action by M. V. Cole against Enoch Strait. From a judgment holding void an order for new trial, and striking the case from the docket, defendant appeals. Reversed.

The following statement of the case is taken from the brief of appellant: "The appellee brought this suit in Judge Skelton's justice court in Dallas against the appellant for \$180 alleged to be due on open account as a part of commission for the sale of a piece of real estate; said suit being filed in said justice court on November 15, 1895. On December 9th judgment by default was rendered in said justice court against the appellant, and in favor of the appellee, for the sum of money sued for; and on December 20, 1895, execution was issued from said court for the collection of said judgment. On January 21, 1896, appellant filed his petition for a writ of certiorari with the county judge of Dallas county, and on the same day said county judge ordered the county clerk of Dallas county to issue the writ of certiorari, etc., whereupon this appellant executed and filed a bond with the county clerk of Dallas county, writ of supersedeas was issued to said justice court in due form, citation in the matter was duly issued and served, and returned in said proceedings, and on February 15, 1896, the transcript from said justice court was duly received and filed in said county court under a writ of certiorari, and the case thus stood on the docket of the county court for trial; this appellant,

who was defendant in said cause, having made his legal appearance in the same while the suit was pending in the justice court. On June 25, 1896, a judgment was rendered by said county court against this appellant, who was absent and took no part in said trial, and on June 27, 1896, the appellant filed his original motion for new trial, and on July 1, 1896, appellant filed his amended motion for a new trial. Appellee filed his counter affidavit, resisting said motion for a new trial; and said motion for a new trial in behalf of this appellant, asking that said judgment by default rendered on June 25, 1896, be set aside and vacated, was duly heard, considered, and granted by the county court on July 4, 1896. On December 15, 1897, this appellant filed in the county court his original answer in writing, setting up the merits of his defense of said suit. On July 27, 1897,—more than one year after said judgment by default rendered by the county court was set aside, and a new trial granted this appellant, who was defendant in this suit then pending in the county court,—the plaintiff filed his original motion to strike the case from the trial docket, and declare the said default judgment rendered by said county court in full force and effect. Thus stood the case on the trial docket of the county court, being set for trial, passed, and continued by agreement of attorneys and other ways until said cause came up for trial on December 16, 1898,—more than two years after said new trial had been granted to this appellant,—whereupon appellee, for the first time, urged his motion to strike the case from the docket, etc.; and appellant filed his reply to appellee's said motion, which matter of the trial of said motion to strike said cause from the docket was heard and considered by said county court on said December 16, 1898; and on that day the county court sustained appellee's said motion, and entered judgment, striking said cause from his trial docket, and further ordering that the judgment of this court, granted more than two years prior thereto, on July 4, 1896, was a conditional judgment and void, and further ordering that the default judgment rendered in June, 1896, should be revived and held in full force and effect. From this order of the court striking the said cause from the docket, declaring the county court judgment granting the new trial in this cause void, and reviving a default judgment more than two years old, this appellant brings this case to this court on appeal. Appellant appeals from said judgment of the county court setting aside the former judgment of that court which granted appellant a new trial of the cause."

This statement is concurred in by appellee with the following qualifications: "(1) The record discloses herein that upon the hearing of the appellant's motion for a new trial, and asking that the judgment rendered against him be set aside and vacated, the

trial judge on July 4, 1896, entered only the following order and judgment: 'M. V. Cole vs. Enoch Strait. No. 9,539. Saturday, July 4, 1896. This day came on to be heard the defendant's motion for a new trial herein, and the court having heard said motion and the argument of counsel thereon, and being fully advised, is of opinion that defendant should have a new trial herein, provided he shall pay all costs incurred to date in this cause. Accordingly it is ordered, adjudged, and decreed by the court that, upon the payment of all costs of court herein incurred, the judgment of this court heretofore entered herein in favor of plaintiff and against defendant be, and the same is hereby, set aside, vacated, and held for naught, and a new trial of this case ordered to be had. Entered July 4, 1896.' (2) The appellant is in error in his statement that, by the judgment of the trial court rendered December 16, 1898, said court not only struck the said case from the trial docket, but went further and ordered and adjudged that the judgment rendered against appellant on June 27, 1896, should be revived and held in full force and effect. The judgment of the trial court entered December 16, 1898, from which this appeal is prosecuted, does not undertake to revive the judgment of June 27, 1896, but does nothing more in respect to said original judgment than to declare it to be the final judgment in this case in full force and effect, and not vacated by the order entered on the defendant's motion for a new trial filed July 1, 1896."

S. H. Russell and L. M. Calloway, for appellant. McCormick & Spence and E. M. Browder, for appellee.

BOOKHOUT, J. (after stating the facts). There is but one question presented by this appeal for our determination. This question is, did the county court err in holding the order of July 4, 1896, a nullity, and in striking the case from the trial docket? The court evidently based its action on the case of *Secrest v. Best*, 6 Tex. 190. That case has been modified by subsequent cases of the supreme court, and it is now held that an order granting a conditional new trial is not absolutely void, but that a party wishing to take advantage of it must do so on or before the next term of court, and that the passing of a term at which the objection ought to have been made should be regarded as a waiver of the objection. *Gorman v. McFarland*, 13 Tex. 237; *City of San Antonio v. Dickman*, 34 Tex. 650. In this case more than one year elapsed after making the conditional order before a motion was made calling in question its validity, and more than two years elapsed before the motion was presented to, and acted upon by, the court. During all this time the cause was pending on the docket, and the parties treated the order as valid. We hold, under the

authorities above cited, that the parties waived the objection to the order of July 4, 1896, granting a new trial, and the court erred in not so holding. The judgment is reversed, and cause remanded.

THOMPSON et al. v. CARUTHERS et al.¹
(Court of Civil Appeals of Texas. April 15, 1899.)

GIFTS.

Where T. made a verbal gift to minors of certain money, and delivered it to C., their mother, and she accepted it in trust for them, whereby the title vested in them, their title was not affected by C. at the same time, and on her own suggestion, executing her note, payable to T., for the amount of the gift, in which she agreed to pay interest thereon.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Action by Frank Thompson and others, suing as heirs of Martha J. Thompson, against M. J. Caruthers, on a note. R. L. Caruthers and others intervened. Judgment for interveners. Plaintiffs appeal. Affirmed.

Wolfe & Hare, for appellants. C. L. Vowell, for appellees.

BOOKHOUT, J. On a former day we certified the main questions raised by this appeal to the supreme court. That court has answered the questions so certified in favor of appellee. See answer of said court to certified questions in this case in 50 S. W. 331. We conclude that none of the assignments of error presented by appellants are well taken, and hence they are overruled. The judgment of the trial court is affirmed. Affirmed.

Conclusions.

We find that on the 20th day of December, 1891, Mrs. M. J. Thompson made a verbal gift to her grandchildren, interveners R. L. Caruthers and Edna E. Vowell, née Caruthers, of \$1,200, and delivered said money to Mrs. M. J. Caruthers, the mother of said interveners, who at the time were minors. The father of the interveners, Sam Caruthers, was dead at the time of said gift. Said Sam Caruthers was a son of Mrs. M. J. Thompson by her first marriage, she having been married twice. Mrs. M. J. Caruthers accepted said gift and money in trust for said interveners, and thereby the title to said money vested in them. The interveners were heirs at law of Mrs. M. J. Thompson. When Mrs. Thompson made said gift, Mrs. M. J. Caruthers, upon her own suggestion, executed her note, payable to the order of Mrs. M. J. Thompson, for \$1,200, in which she agreed to pay interest at the rate of 10 per cent. per annum thereon. We conclude that, the title to the money having vested in the interveners by gift from their

¹ Writ of error denied by supreme court.

grandmother to Mrs. Caruthers as trustee, they took title to the money, and their rights were not affected by the execution of said note by said trustee. The evidence shows a perfected parol gift to the interveners, and judgment was properly rendered in their favor. The trial court did not err in admitting parol evidence to prove the gift. See opinion of supreme court on certified questions in this case in 50 S. W. 331.

EVANS et al. v. PACE.

(Court of Civil Appeals of Texas. May 6, 1899.)

BUSINESS HOMESTEAD—RIGHT OF WIDOW.

1. An owner of a lot, on which he conducted a mill and gin business, bought a house and lot contiguous thereto, which he connected therewith by a fence, and used as a lodging for his hired man, who looked after and attended to the gin. *Held*, this did not show that it was necessary for conducting the gin and mill business, or put to such a use in connection therewith as to constitute it a part of the business homestead.

2. On death of a married man, leaving no other member of the family but his wife, she is entitled to exemption of a business homestead which he had; the business being continued by the heir, and the constitution exempting the homestead of a family, and declaring that it shall consist of lots not exceeding a certain value, "provided that the same shall be used for the purposes of the home, or as a place to exercise the calling or business of the head of the family," and declaring that on death of the husband or wife the homestead "shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife or so long as the survivor may elect to use or occupy the same as a homestead."

Appeal from district court, Henderson county; W. H. Gill, Judge.

Action by S. A. Pace against M. J. Evans & Co. Judgment for plaintiff. Defendants appeal. Reversed.

Bishop, Eustace & McDonald, for appellants. Simkins & Mays and Paul Jones, for appellee.

RAINEY, J. The appellee brought this suit to recover on an indebtedness due by appellants, a firm composed of Mrs. Mary D. Evans and C. E. Waldron. Plaintiff caused an attachment to be levied on certain real estate, of which two tracts were claimed, respectively, by the defendants as their business homesteads. A recovery was had by plaintiff for amount of the indebtedness sued for, and foreclosing the attachment lien, from which this appeal is prosecuted.

As to the lots claimed by Waldron as his business homestead, the evidence shows that he was the head of a family, and that he and W. J. Evans in the year 1894 formed a co-partnership to conduct a mercantile business in the town of Malakoff, under the firm name of W. J. Evans & Co. Prior to said year he owned a lot, which he used for the purpose of carrying on a mill and gin business, and which business was conducted by him contin-

uously to the time of the trial of this cause. He attended to this business in person, and never had any other business homestead. Subsequent to Waldron becoming the owner of the mill and gin property, "he bought what is known as the 'Foster Lot and House' (the property in controversy), and connected same by fencing with the gin property, using same thereafter as a lodging or residence for his hired man, whose duty it was to look after and attend to the gin. This place was never rented out, was never used for any other purpose after its purchase by Waldron, and no rent was charged its occupant, who was hired to attend to the gin and mill. This lot was contiguous to the gin lot, and a convenient distance from the same for the man whose duty it was to look after the gin and mill." This evidence fails to show that the property was necessary for conducting the gin and mill business, or put to such a use in connection with the conducting of the mill and gin business as to constitute it a part of the business homestead, and the court did not err in so holding. *McDonald v. Campbell*, 57 Tex. 614; *Hinzle v. Moody*, 1 Tex. Civ. App. 26, 20 S. W. 769; *Pfeiffer v. McNatt*, 74 Tex. 640, 12 S. W. 821.

As to the lot claimed by Mrs. Evans as her homestead, the evidence shows that she is the surviving wife and only heir of W. J. Evans, deceased. At the time of his death he was doing a mercantile business in the town of Malakoff, in Henderson county, Tex. He had associated with him as a partner in said business C. E. Waldron, one of the appellants; the style of the firm being W. J. Evans & Co. The said business was conducted in a store building situated on lots 11 and 12 in said town. W. J. Evans also owned at his death a residence in which he and his wife lived, the wife being the only heir and constituent of his family. Upon his death the wife took his place in the mercantile business, and it was continued under the old firm name of W. J. Evans & Co. The new firm assumed the debts of the old firm, one of which was due plaintiff. Besides the debt due plaintiff by the old firm, the new firm contracted other indebtedness with plaintiff; goods being bought of and moneys paid him without distinguishing between the old and new indebtedness. After the new firm had conducted business for some months, it made a deed of trust conveying to the trustee all property owned as a firm, and individually by its members, subject to execution for the benefit of certain creditors therein named. The business house claimed by Mrs. Evans and the tract claimed by Waldron were not included; being claimed by them, respectively, as their business homesteads and exempt. Two days after the trust deed was executed, this suit was brought, and the writ of attachment was levied on said real estate. Three weeks after the attachment was levied, Mrs. Evans, for value, conveyed same to one Eustice. Under this state of case, the court below held that

Mrs. Evans being a feme sole, and not the head of a family, and being personally liable for the debt sued for, she was not entitled to a "business homestead," and that the storehouse was not exempt. The constitution exempts from forced sale the homestead of a family, and, in specifying a homestead in a city, town, or village, provides that it "shall consist of lot or lots not to exceed in value five thousand dollars at the time of their designation as the homestead, without reference to any improvements thereon; provided that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family." The provision of the statute exempting the homestead is the same as the constitution. The constitution also provides that upon the death of the husband or wife the homestead "shall not be partitioned among the heirs of the deceased during the life time of the surviving husband or wife or so long as the survivor may elect to use or occupy the same as a homestead." It is contended by appellee that, as the business homestead is exempt by the constitution and statutes only to the head of a family, Mrs. Evans, not having a family after her husband's death, was not entitled to such exemption. We are of the opinion that the contention is not tenable. The constitution and statutes exempt a residence homestead to a family, yet our supreme court, in construing the foregoing constitutional and statutory provisions, has held that where the husband and wife own a residence homestead, and either one dies, the homestead character is not changed thereby, but is exempt to the survivor so long as the same is used by the survivor as a home, although there may be no other constituent of the family. *Blum v. Gaines*, 57 Tex. 119; *Kessler v. Draub*, 52 Tex. 575; *Watkins v. Davis*, 61 Tex. 414. We know of no decisions where this construction has been applied to the business homestead, but we see no reason why it should not. There is nothing in said provisions that warrants a different construction. At the time of W. J. Evans' death, the business house was exempt. Had he lived, and his wife died, we think there could be no question as to his right to hold the business house exempt from forced sale so long as he used it for pursuing his business therein. The law makes no difference in this respect between the husband and wife. So when W. J. Evans died, the business house being exempt, it so descended to her, and so remained until she failed in business, she having used it for the purpose of conducting a mercantile business from the time her husband died until her failure in business; and it so remained until she sold it, unless, as a matter of fact, she abandoned it as such after her failure. Appellee insists, however, that there was an abandonment of the business house as a place for carrying on business by her. If this be true, then the judgment of the court is correct, though founded on the

proposition that Mrs. Evans was not the head of a family, and could not hold the storehouse as a homestead. From the state of the record, we are unable to determine this question. Whether or not there was an abandonment was a fact which should have been determined by the trial court. There was no finding by the trial court, as a matter of fact, as to abandonment, though, as a matter of law, the court found there was not. There is no statement of facts in the record from which we could determine, as a matter of law, that there was an abandonment; and, as this fact should have been settled by the court below, we are not authorized to affirm the judgment on this ground. *Edwards v. Chisholm* (Tex. Sup.) 6 S. W. 558. The finding of the court, as a matter of law, that there was no abandonment, being favorable to appellants, no assignments of error were presented by them on this ground; nor does appellee present any cross assignment of error. We therefore have not discussed this feature as a ground of reversal, but merely to call attention to this omission of the court in view of another trial. The judgment is reversed, and the cause remanded.

JACKSON et al. v. BUTLER.

(Court of Civil Appeals of Texas. May 13, 1899.)

BROKERS—SALE—UNAUTHORIZED CONDITION—LIABILITY OF PURCHASER.

Where H., a broker, through whom W. sold, made a contract to sell to J. for W. a car of produce conditioned that a rebate of \$40 should be allowed J. on account of another deal, but instructed W. to ship, without informing him of the condition, and W., after shipping, refused to make the rebate on being informed by J. of the condition, J. could refuse to take the car, though he had no valid claim for the \$40, and though H. had no authority to make contract with the condition.

Appeal from Dallas county court; Kenneth Foree, Judge.

Action by M. W. Butler, assignee, against A. A. Jackson & Bro. Judgment for plaintiff. Defendants appeal. Reversed.

Alexander, Clark & Thompson and Perkins. Gilbert & Hall, for appellants. Thompson & Thompson, for appellee.

RAINEY, J. This suit was brought by M. W. Butler, as assignee of Waldram, Dean & Co., of Ogden, Utah, against A. A. Jackson & Bro., to recover the value of a car load of onions alleged to have been sold and delivered to said Jackson & Bro. at their special instance and request. The onions were placed on board the cars at Ogden, and transported to Dallas, Tex. Jackson & Bro. refused to receive them. The onions remained in possession of the railroad for some time, deteriorated in value, and were finally sold by the railroad company for charges at a reduced price. Special issues were submitted

to the jury by the court, and upon their findings judgment was rendered for plaintiff, from which this appeal is taken.

The testimony shows that on the 23d day of February, 1892, and for some time prior thereto, J. C. Howerton & Co. were doing a brokerage business in the city of Dallas, where Jackson & Bro. were doing a general produce business. On the date last mentioned J. C. Howerton made a contract with Jackson & Bro. to sell them, for Waldram, Dean & Co., a car load of onions for the price of \$1.20 per 100 pounds, conditioned that a rebate of \$40 would be allowed to Jackson & Bro., claimed on account of Waldram, Dean & Co.'s refusal to ship a car of onions ordered in December prior thereto. Howerton & Co. instructed Waldram, Dean & Co. to ship Jackson & Bro. the car load of onions at \$1.20 per 100 pounds, but failed to notify them as to the condition that a rebate of \$40 was to be allowed. In pursuance of said instructions, Waldram, Dean & Co. delivered the onions, free on board the cars at Ogden, to be transported to Dallas, taking the bill of lading in their own name, which they indorsed to Jackson & Bro., with draft attached for the purchase price of the onions. When the bill of lading and draft was presented to Jackson & Bro. through the bank at Dallas, they refused to pay the same, because the draft was for the full value of the onions, and the rebate of \$40 contracted for was not allowed. Jackson & Bro. immediately sent Waldram, Dean & Co. the following telegram: "What about the rebate? Will reject if you do not allow it. Answer." No answer was made to this telegram, though received by Waldram, Dean & Co. The car of onions ordered in December, above mentioned, was ordered by De Steffano, but Jackson had a half interest therein, and De Steffano had a half interest in the car ordered by Jackson & Bro. These facts were known to Howerton & Co., but were not known by Waldram, Dean & Co. The car of onions ordered for De Steffano in December was not shipped for fear of damage on account of frosts, and De Steffano would not take the risks when informed that the onions were to be shipped under that provision. Lonzo Waldram, Jr., testified that the firm of Waldram, Dean & Co. had no agent in Dallas, Tex. "The nature of the business we had with J. C. Howerton & Co., and the character of our transaction with said firm, were with letters we sent to J. C. Howerton & Co. regarding potatoes, onions, etc., naming prices, terms, and conditions of same at Ogden, Utah. Whenever they saw an opportunity to make a sale, they telegraphed us for prices, which were sent them by wire. When orders were procured, they at once submitted them to us by wire. We at once notified them by wire whether the order was accepted or rejected. We also notified the buyer of the acceptance of his order. Howerton acted on these instructions, and received a stipulated sum for brokerage on each

car sold and accepted. Howerton & Co. had authority to submit the prices on potatoes, onions, etc., furnished them by Waldram, Dean & Co. to intending buyers, and, when orders were tendered them, to submit said orders to Waldram, Dean & Co. for approval or rejection by letter or wire. They positively had no authority from Waldram, Dean & Co. to make any transactions except thus specifically stated to them by letter or wire in each particular case." On cross-examination he testified: "I only know Howerton & Co. were brokers from their letter heads and from their letters and telegrams to our firm. I have no personal knowledge of the business they were in, except through their correspondence with our firm. As I remember it, Howerton & Co. were our only brokers in Dallas, Texas, during the winter of 1891 and 1892. No one had authority to place orders for Waldram, Dean & Co., but simply to solicit orders under certain specified conditions." The jury found that J. C. Howerton was the broker of Waldram, Dean & Co. at Dallas in December, 1891, and in February, 1892, that they could confirm or reject any sale made by Howerton & Co., and that they had no authority to allow for Waldram, Dean & Co. any rebate on the car shipped to Jackson & Bro. They further found that the contract between Howerton and Jackson & Bro. was conditioned that a rebate of \$40 was to be allowed Jackson & Bro. on the price of said car. A. A. Jackson testified that he would not have ordered the onions, only upon the condition that the rebate was to be allowed. It is also shown that Jackson & Bro. knew that Howerton & Co. were brokers, and the capacity in which they were acting. The question arises, were Jackson & Bro. bound to receive the car of onions after the refusal of Waldram, Dean & Co. to allow the rebate upon which the contract of sale was conditioned?

The authorities denominate a broker as a "middleman," or "go-between," to perfect an understanding between the contracting parties; and he is not necessarily the agent of either party. When employed by a party to do a particular thing, he is primarily that party's agent, and ordinarily the party with whom he deals must take notice of the authority given him by his principal. 4 Am. & Eng. Enc. Law (2d Ed.) p. 966; 1 Lawson, Rights, Rem. & Prac. § 225; Mechem, Ag. § 939; Story, Ag. §§ 28-31. Howerton had no authority to contract with Jackson & Bro. for a rebate on the car of onions. His authority extended no further than to sell at the prices given him by Waldram, Dean & Co., subject to their approval; and they were not bound to comply with the contract as made. Neither were Jackson & Bro. bound to receive and pay for the car of onions unless the rebate of \$40 was allowed, as stipulated by the contract. Howerton's failure to notify Waldram, Dean & Co., when ordering the onions, of the condition made by Jackson & Bro. as

to the rebate, did not change Jackson & Bro.'s liability on the contract. He was not Jackson & Bro.'s agent, and his omission cannot be laid to their charge. The transaction was unfortunate for Waldram, Dean & Co., but, taking the findings of the jury to be true, Jackson & Bro. were not to blame, and ought not to be made to suffer. They notified Waldram, Dean & Co. as soon as they were informed of the condition of the matter, and the damages might have been materially lessened, if not altogether prevented, had Waldram, Dean & Co. acted upon the receipt of Jackson & Bro.'s telegram in relation to the rebate. Had the understanding been as Howerton advised them, Waldram, Dean & Co. could have refrained from doing anything as they did, and held Jackson & Bro. liable for their claim. *Waples v. Overaker*, 77 Tex. 7, 13 S. W. 527. But, as the condition of the contract was not complied with, the duty was to protect themselves from loss, if possible. The title to the goods still remained in them (*Kentucky Refining Co. v. Globe Refining Co.* [Ky. App.] 47 S. W. 602), and they could probably have disposed of them without loss. Anyhow, Jackson & Bro. were not liable, as the terms of purchase submitted by them were never complied with. "A sale is a mutual agreement, constituted by an offer to sell on terms by one side and an acceptance by the other, and the acceptance must be responsive to the very terms stated in the offer." There was no contract of sale in this case, as there was no mutual understanding between the parties as to the terms thereof. *Joseph v. Cannon* (Tex. Civ. App.) 32 S. W. 241; *Refining Co. v. Lee* (Tenn. Sup.) 41 S. W. 362; *Summers v. Mills*, 21 Tex. 78; *Carr v. Duvall*, 14 Pet. 77. It is insisted, however, by appellees, that Howerton had no authority to contract for a rebate, and, further, that Jackson & Bro. were not entitled to a rebate, as there were no just grounds therefor. This is immaterial. Jackson & Bro., in making the contract, had a right to impose such conditions as they saw proper, whether just or not, and had the right to insist on a compliance therewith, and, unless complied with, they incurred no responsibility. The judgment is reversed, and cause remanded.

FORBES et al. v. THOMAS.

(Court of Civil Appeals of Texas. May 13, 1899.)

HOMESTEAD—MORTGAGE—BONA FIDE PURCHASER—ACKNOWLEDGMENT.

1. A mortgage is good, as against a homestead claim, where the owner of the property makes a colorable conveyance thereof, and the grantee obtains a loan on mortgage, the mortgagee or agent not knowing the conveyance was simulated.

2. A conveyance by B. and wife, being regular on its face, improper taking of the wife's acknowledgment cannot affect one who, without notice thereof, takes a mortgage from the grantee.

Error from district court, Red River county; E. D. McClellan, Judge.

Action by Sarah Ann Thomas against M. W. Forbes and others. Judgment for plaintiff, and defendants bring error. Affirmed.

R. H. Wells and Hale & Hale, for plaintiffs in error. Lennox & Lennox, for defendant in error.

RAINEY, J. This is an action of trespass to try title, brought by defendant in error to recover the land in controversy and for rents. Defendants answered by general denial, plea of not guilty, and specially that the land in controversy was the homestead of defendants Baker and wife; that a simulated conveyance of the property was made to their co-defendant, Forbes, for the purpose of obtaining a loan from plaintiff; that the conveyance was without consideration, and made at the suggestion and under the advice of Corley, Rainey & Kennedy, who were the authorized and acting agents of plaintiff and the J. B. Watkins Land-Mortgage Company; that plaintiff would loan upon the security thus conveyed; that she and all of her agents knew that it was her homestead, and that the conveyance to Forbes was only a colorable transaction for the purpose of getting a loan thereon, and to evade the constitution and laws of the state; and that the wife unwillingly executed the instrument to the said Forbes, and was induced to do so on account of threats made by her husband to leave her unless she so executed said deed; that she did not agree to the conveyance or incumbrance of her homestead, and had nothing to say or do in reference to the borrowing of said money; that she did not intend to give up her rights to her homestead, and that the land in controversy was all they owned, and that said deed was not explained to her when she acknowledged same. Defendants Baker and wife also prayed that the deed to Forbes and the deed from trustee to plaintiff be canceled, and held for naught, and that all cloud be removed from their title. Plaintiff, in reply, pleaded that she had no notice or knowledge of any claim whatever to the premises in question by Baker and wife, or any other person other than Forbes, at the time the loan was made thereon and deed of trust to her was executed; that she made the loan in good faith, believing that the property belonged to said Forbes, and without any notice or knowledge of any agreement or understanding between the said Baker and Forbes; that she had no notice or knowledge of the means employed to obtain the signature of the wife thereto; and that said deed is duly acknowledged by Baker and wife, and recorded in the county clerk's office of Red River county, Tex., with their knowledge and consent, before the execution of deed of trust to plaintiff, and that they were estopped from denying the validity of

same. She further alleged that neither Corley, Rainey & Kennedy, nor either of them, nor any other person, was her legally constituted and authorized agent or agents in negotiating to obtain said loan for said Forbes, or for any one else; that she made the loan through the J. B. Watkins Land-Mortgage Company, a private corporation, upon the basis of a written instrument duly executed and sworn to by the said Forbes on the 16th day of December, 1889, in which said company was appointed as agent to procure a loan upon the lands involved in this suit; that in said instrument the said Forbes represented that the title to the said property was perfect in him, and was no part of his homestead, or the homestead of any other person or persons, and at the time of said loan and the execution of said deed of trust the records of Red River county indicated that the said representations were true, and she had no notice or knowledge of any other facts tending to show the contrary; that she relied upon them as true, and would not have made the loan if she had known otherwise. She further alleged that, if it should be held that the J. B. Watkins Land-Mortgage Company was her agent in making said loan (which she did not admit, but denied), it had no authority whatever from her to make a loan upon the homestead of Baker and wife, or upon the homestead of any other person, all of which was well known to the defendants at the time of the execution of the deed to Forbes and the execution by him of the deed of trust to plaintiff; and that the J. B. Watkins Land-Mortgage Company, if her agent, was only a special agent, and was not authorized or empowered by her to employ the services of any one else in the accomplishment of same, and the scope and nature of the business did not require such services; that if Corley, Rainey & Kennedy, or either of them, were the agents of any one, they were agents of these defendants or the J. B. Watkins Land-Mortgage Company, and not the agents of the plaintiff, and they did not act in good faith towards this plaintiff in obtaining said loan in case they knew the simulated character of said sale, but conspired, confederated, and colluded with the defendants to cheat and defraud her, or any one else who might act upon the belief that the representations as contained in the application were true. She further alleged that, in case she did not acquire good title to the property, the money so obtained from her was borrowed for the purpose of paying off and discharging a valid and subsisting judgment and vendor's lien against said property, and was so used for that purpose; and that she be subrogated to all the rights of the original owners of said liens, and prayed in the alternative for foreclosure of same. The defendants replied by supplemental answer that the acts of the J. B. Watkins Land-Mortgage Company and Corley, Rainey & Kennedy had been ratified by

plaintiff in accepting the benefits of the loan with full knowledge of all the facts, and specially answered setting up the statute of limitation of two, four, and ten years in bar of the vendor's lien. The defendants admitted in open court, before the commencement of the trial, that plaintiff had a good cause of action as set forth in her petition and supplemental petition, except in so far as might be defeated in whole or in part by facts of the answer and supplemental answer of the defendants, and they were permitted to open and close the case. The case was tried before a jury, and verdict and judgment rendered in favor of the plaintiff for the land in controversy and \$160 rent, from which this writ of error is prosecuted.

The evidence shows:

First. A general warranty deed, absolute on its face, for the land in controversy, from J. W. Baker and wife, Orphy C. Baker, to Malcolm W. Forbes, dated December 9, 1889, duly acknowledged by Baker and wife before W. H. Bagby, the county clerk of Red River county, on the 16th day of December, 1889, and filed for record the same day, and afterwards duly recorded in the proper records of said county. The deed recited a cash consideration of \$2,200, the receipt of which was therein acknowledged.

Second. A deed of trust by Forbes upon the same land to defendant in error, dated February 1, 1890, duly acknowledged before D. H. Taylor, deputy county clerk, on the 10th day of February, 1890, filed for record the same day, and thereafter recorded in the proper records for deeds of trust. J. B. Watkins was named as trustee in deed of trust, and M. J. Dart and H. D. Norris substitute trustees, and the same recited that it was executed for the purpose of securing Sarah Ann Thomas in the actual loan of \$800 to the said Forbes, as evidenced by his certain bond dated February 1, 1890, and due five years after date and bearing interest at 6 per cent, payable semiannually.

Third. A trustee's deed from Forbes to Sarah Ann Thomas, dated October 25, 1897, and reciting a consideration of \$1,000. This deed was executed in conformity with and according to the provisions of the foregoing deed of trust, Forbes having defaulted in the payment of the principal and interest of said note.

Fourth. The following testimony was introduced by defendants, which was admitted over the objection of plaintiff, and finally stricken out by the court, to wit: "It was shown by J. W. Baker: That the land in controversy adjoined a 76-acre tract upon which he and his wife had resided 24 years. That there were 40 acres of same in cultivation and 60 acres in timber, and had been used since its purchase, in 1885, in connection with the homestead tract. That, needing \$800, he applied to A. P. Corley for a loan upon it; but, knowing it was part of his homestead, he refused to accept the security.

It was his recollection, however, that he was advised by Corley that if he would transfer the land to some one else, and get it appraised at \$1,800 or \$2,000, he might be able to get a loan for him. That he claimed to be the agent of the J. B. Watkins Land-Mortgage Company, and that on the 16th day of December, 1889, he and his wife deeded to Forbes, for the purpose of getting a loan upon it from said company. That the deed recited a cash consideration of \$2,200, but nothing was paid at the time. Forbes was simply to make the application and mortgage, and they were to get the money. Some time in 1889 or 1890, he received \$800 for the land, which was paid him by one J. B. Donoho. For $4\frac{1}{2}$ years he paid interest on this sum to the J. B. Watkins Land-Mortgage Company of Dallas, Texas, from which written demands for payment of same were received by him through the mails. He further stated on cross-examination that he got the land appraised at \$2,050, but that it was not worth over \$1,000; that he knew at the time the deed to Forbes was made that he could not mortgage his homestead, or get a loan on it, in his own name; that these facts were known to him prior to his consultation with Corley, and that he needed no instructions as to how to manage the scheme; that he received no information at any time from the J. B. Watkins Land-Mortgage Company that Rainey and Corley were authorized to represent it in any capacity; that the simulated character of the transaction was never communicated by him to either Sarah Ann Thomas or said company, and of his own knowledge he did not know that either of them knew anything about it; that all he knew was what Corley told him and what he told Corley; that the name of plaintiff was not mentioned when he first spoke to Corley about the loan, and he never heard of her until after execution of deed. Being shown a written instrument, signed and sworn to by M. W. Forbes, dated the 16th day of December, 1889, and addressed to the J. B. Watkins Land-Mortgage Company, Lawrence, Kansas, in which the land in controversy was described, and said company appointed by said Forbes as his agent to procure for him a loan of money for the term of five years on the land so described, and in another portion of which it was represented that the land was no part of his homestead, or the homestead of any one else, and that the title was perfect in him, the said Baker; admitted that he knew that an application of the kind was to be made, and that Forbes was authorized by him to make such representations as were necessary to obtain the money so desired; that he had no understanding with him for a reconveyance of the property; that he merely agreed to deed it to Forbes, and was to get the proceeds of such loan as he should get thereon; that he knew that Corley had no authority to loan money upon a homestead; that he had no communication with either

Watkins or the plaintiff prior to the execution of deed and consummation of loan; that he was present when the application was made, and caused it to be sent in; that he paid \$500 for the land, and received \$800 in this transaction, and thought it was a good sale at the time; that there were two sets of notes executed,—one set composed of bond and coupon interest notes at 6 per cent. to Sarah A. Thomas, and secured by first trust deed upon the land in controversy, and the other set payable to the J. B. Watkins Land-Mortgage Company in payment for its services in getting the loan, and was secured by a second mortgage upon the same property; that the notices in reference to the payment of interest came through the mails, and were first sent to Forbes, who gave them to him, but subsequently came direct to him. It was shown by Forbes that the application above mentioned was executed and sworn to by him upon the authority of Baker on the 16th day of December, 1889, and the representations therein contained were the basis upon which the loan from plaintiff was obtained; that it was in the handwriting of A. P. Corley, but was sent off by him; that in the course of time the bond and deed of trust which he executed came here for him to sign, and were in the handwriting of some one else, and were executed by him on the 10th day of February, 1890; that he agreed with Baker, at Bagwell, Texas, for the land to be conveyed to him, but the simulated character of the transaction was communicated to neither Corley, the J. B. Watkins Land-Mortgage Company, nor plaintiff, and, if they knew anything about it, the information was not derived from him; that he accompanied Baker to Clarksville, and the latter, in his presence, requested Corley to draw up deed to him for the land, but he did not state for what purpose. J. R. Word testified that about this time he got a loan from the J. B. Watkins Land-Mortgage Company through A. P. Corley, but it was not in the name of plaintiff, nor from her, and he never knew of his acting in any capacity for her. W. R. Baker testified that he was son of J. W. Baker; that the coupons on the Forbes loan were sent to J. W. Baker; that the notices in reference to payment came through the mails, stating that part was for Sarah Ann Thomas, and balance for the J. B. Watkins Land-Mortgage Company, but when they were paid the coupons were sent all in one piece of paper; that he and his brother paid \$40 on loan twice a year. Orphy C. Baker testified that she could neither read nor write; that she signed the deed in Mr. Corley's office; that it was not explained to her by any one; that she only made her mark to what was handed her; that she did not try to get a loan on land, and did not want one. She further stated on cross-examination that she did not notify either the plaintiff or the J. B. Watkins Land-Mortgage Company that it was not explained to her, or that it was not a bona fide sale, and that neither was

present when deed was executed; that she acknowledged it before W. H. Bagby, and did not know for what purpose she came to town on that day, unless for the purpose of executing deed. Her husband stated that she went to Corley's office for purpose of executing deed to Forbes, but, not being present, could not say whether or not it was explained to her. The plaintiff objected to the admission of foregoing evidence of J. W. Baker, M. W. Forbes, J. R. Word, and Orphy C. Baker at the time it was offered, on the grounds: (1) Because immaterial and irrelevant; (2) because the said Baker and wife having voluntarily executed a deed absolute upon its face to Forbes, and acknowledged the same in the manner required by law for conveyance of homestead, and caused the same to be duly recorded in the county where said land was located, they were estopped from denying that it was a bona fide sale for a valuable consideration, unless it was shown that plaintiff had notice at the time of her loan and execution of deed of trust; (3) because the declarations of A. P. Corley were irrelevant and incompetent to prove that he was the agent of the J. B. Watkins Land-Mortgage Company, and did not tend to show that he was agent of plaintiff. But all of said evidence was offered by defendants and admitted by the court with the understanding that it would be excluded unless it was shown by competent evidence that plaintiff had notice that the property in question was homestead of Baker and wife, and that the deed to Forbes was only a simulated transaction for the purpose of getting a loan thereon at the time she made the same, and took a deed of trust as security therefor. The plaintiff also objected to the admission of the testimony of J. W. and W. R. Baker as to the demand being made upon the former by the J. B. Watkins Land-Mortgage Company for payment of principal and interest, etc., on the ground that it was shown to be in writing, and the writing was the best evidence of the character of the demand, from whom it was made, and in what capacity the party so demanding was acting; but at the time the court overruled the objection, and permitted the evidence to go to the jury. After the introduction of the evidence on pages 7 and 8 of this brief, and the oral testimony of the foregoing witnesses, the defendants closed their case, whereupon the plaintiff again moved the court to exclude the testimony of said witnesses upon the ground that it did not tend to show that plaintiff had notice and knowledge, or any one else who was authorized to act for her, of the simulated character of the transaction, or that the deed to Forbes was wanting in consideration, which motion the court then and there sustained, and excluded the evidence."

After the exclusion of the evidence, as above stated, the court instructed the jury to return a verdict for the plaintiff, which was accordingly done.

The only assignment we deem it necessary to consider is whether or not the court erred in excluding the evidence and instructing the jury to return a verdict for plaintiff. It is settled in this state that where the husband and wife convey their homestead by deed duly acknowledged, and though simulated, and made for the purpose of borrowing money thereon, and the vendee does borrow money thereon, and mortgages the land to secure the payment thereof, and the one from whom said loan is obtained and to whom said mortgage is given has no knowledge at the time of the execution of the mortgage that the conveyance of the land is simulated or colorable only, the mortgage is valid as against the homestead claim, and a foreclosure and sale thereunder will convey the superior title to the vendee. *Eylar v. Eylar*, 60 Tex. 315; *Alstin v. Cundiff*, 52 Tex. 453; *Murphy v. Smith* (recently decided by this court) 50 S. W. 1040. If there was no knowledge by or notice to plaintiff that the land was the homestead of Baker and wife, the judgment of the court must be affirmed. In our opinion, the evidence excluded by the court fails to show that Corley, with whom the defendants dealt, was the agent of either the J. B. Watkins Land-Mortgage Company or plaintiff, or that the J. B. Watkins Land-Mortgage Company was the agent of plaintiff. On the other hand, it shows that Forbes, by a written instrument, constituted said land-mortgage company his agent to procure the loan, and the money was paid to him by C. Donoho, whose further connection with the transaction or the parties is not shown. Corley not being the agent of the plaintiff, such knowledge as he may have possessed concerning the transaction cannot be imputed to plaintiff.

We are also of the opinion that, the conveyance from Baker and wife to Forbes being regular on its face, and plaintiff having no notice of the manner in which the wife's acknowledgment was taken, the plaintiff's right cannot be affected by reason of the acknowledgment being improperly taken. As the evidence excluded fails to show that plaintiff had knowledge of the simulated character of the conveyance from Baker and wife to Forbes, the court did not err in excluding it, and directing a verdict for plaintiff. The judgment is therefore affirmed.

PRIDE v. WHITFIELD et al.

(Court of Civil Appeals of Texas. May 13, 1899.)

BONA FIDE PURCHASER—NOTICE—CONSIDERATION—NEW TRIAL.

1. Possession of one who fences a lot, builds a house thereon, and moves into it, is sufficient to charge persons taking a mortgage thereon with his title.

2. A pre-existing debt is not a consideration that will support a claim of bona fide purchaser.

3. A new trial cannot be had because of the filing of an amended petition of which defendant had no notice till after the commencement

of trial, he having made no complaint, and asked for nothing on account thereof, till his motion for new trial.

4. New trial for newly-discovered evidence cannot be had, the affidavit not showing diligence to discover it, or that it was not known before trial, and it not appearing that it would tend to change the result.

Appeal from district court, Lamar county; E. D. McClellan, Judge.

Action by W. W. Whitfield and others against Carson Pride. Judgment for plaintiffs. Defendant appeals. Affirmed.

McCuiston & Patrick, for appellant.

BOOKHOUT, J. This suit was an action in trespass to try title and for damages. The appellant was defendant and the appellees were plaintiffs in the court below. The common source of title was Ike Morgan. Appellees derived title under a verbal contract of sale made with Ike Morgan during the summer or fall of 1894, followed by improvements upon same, together with possession and occupation from Christmas, 1895, with deed consummating said verbal sale, duly executed on the 6th day of April, 1897, filed for record on the 19th of July, 1897, and duly recorded. Appellant claimed under the following transfers: (1) Deed of trust executed by Ike Morgan to Henry Pack and Bud Hill, of Talequah, Ind. T., to secure indebtedness of \$100, executed March 17, 1896, acknowledged the same day, and filed for record in Lamar county, Tex., on the 19th day of March, 1896, and duly and properly recorded. (2) Judgment of the district court foreclosing said deed of trust; date of rendition September 28, 1897. It forecloses lien, and awards writ of possession. (3) Sheriff's deed under order of sale issued upon the above judgment; date of same December 8, 1897; properly acknowledged the same day, and recorded December 13, 1897; the grantees being McCuiston & Patrick. (4) Deed from McCuiston & Patrick to Carson Pride; date of same is January 22, 1898; duly acknowledged on same day, filed for record on same day, and properly recorded. File docket was then introduced, showing suit to have been filed on February 2, 1897, to foreclose the deed of trust executed by Ike Morgan to Pack and Hill. Judgment was rendered in favor of appellees herein, who were plaintiffs in the court below, for title and possession of the premises in controversy, and for \$60 as rental value of same. Appellant filed motion for a new trial, which was overruled by the court, to which judgment and ruling of the court appellant excepted, and gave notice of appeal to the court of civil appeals of the Fifth supreme judicial district, and assigned said judgment and ruling of the court as error. No findings of law and fact were filed by the trial court.

Appellant's first assignment of error complains that "the judgment is contrary to the law and evidence, in that the court erred in holding that the title of the plaintiff under a

verbal contract to convey, possession beginning about December 25, 1895, would prevail over the title of one claiming under a contract lien derived from the common source, acquired without notice of adverse possession or verbal contract to convey, which said contract lien was duly executed and acknowledged March 17, 1896, and recorded on March 19, 1896." It was shown by W. W. Whitfield that in the fall of 1894 he and Ike Morgan entered into the following contract: Ike Morgan told Whitfield that if he would pay off the unpaid vendor's lien note of \$104.50, which he owed for the lot of land he had bought from E. G. Scales, he (Morgan) would convey Whitfield the west half of the Scales lot. Whitfield agreed to this. In August, 1895, Ike Morgan measured off said lot, and marked the corners with posts. In October, 1895, Whitfield paid off the vendor's lien note, and Morgan placed him in possession of the lot. Whitfield built a house on the lot, dug a well, built a fence, and set out fruit trees thereon, all of the value of \$170. He moved in the house about Christmas, 1895, and lived there with his family until dispossessed by the sheriff in January, 1898. All the improvements were placed on the lot prior to March, 1896. On March 17, 1896, Ike Morgan executed a deed of trust on the lot to secure Henry Pack and Bud Hill in an indebtedness of \$100, which deed of trust was duly recorded on March 18, 1896. Suit was instituted by them against Ike Morgan to foreclose this deed of trust on February 2, 1897, and a judgment of foreclosure rendered on September 28, 1897. An order of sale was issued, the property was sold, and a deed executed by the sheriff to the purchasers, and a writ of possession issued, by virtue of which W. W. Whitfield was dispossessed, and the purchasers at the sheriff's sale were placed in possession of the property. Whitfield was not a party to the foreclosure proceedings instituted by Henry Pack and Bud Hill. Appellant's contention seems to be that the purchase of the land by Whitfield by verbal sale from Ike Morgan, and his placing of Whitfield in possession, and the payment of the purchase money, and making of permanent and valuable improvements upon the property, was not notice to Henry Pack and Bud Hill, at the time of the execution of the deed of trust to them, of Whitfield's title to the land. In support of this contention he cites the case of Eylar v. Eylar, 60 Tex. 315. The facts of that case are not analogous to those here shown. Under the facts of this case the possession of Whitfield at the time of the execution of said mortgage was sufficient to charge the beneficiaries therein with notice of his title. The appellant, in his brief, assumes that at the time the mortgage was executed by Ike Morgan to Henry Pack and Bud Hill they had no notice of Whitfield's title. There is nothing in the record which shows that they were not fully informed of his claim and title at the time the mortgage was executed. The duty was upon defendant to show want

of notice of Whitfield's title by Henry Pack and Bud Hill when they took their mortgage. Nor is there any evidence showing the nature or character of the indebtedness due them, or when created. If the deed of trust was executed to secure a pre-existing debt existing at the time of Whitfield's purchase, they could not claim to be innocent purchasers. *Overstreet v. Manning*, 67 Tex. 657, 4 S. W. 348. The record fails to show that they were innocent purchasers. There is no merit in appellant's first assignment of error. Nor is there any merit in the second assignment. The plaintiffs showed title to the land by a purchase for a valuable consideration, and the fact that the rent during the time of Whitfield's occupancy may have been of value equal to the improvements made by him upon the land cannot benefit appellant in any way. The record fails to support the proposition announced by plaintiffs under this assignment. It does not show the rents equaled the value of the improvements.

The court did not err in overruling defendant's motion for a new trial. The record shows the amended petition, of which appellant contends he had no notice until after the trial was begun, was filed on November 10, 1898. The judgment was rendered on the 14th of November. The first time, as shown by the record, appellant made any complaint about the filing of this amendment was in his motion for a new trial. If the amendment set up new matter not theretofore pleaded, and appellant, when he first learned of the amendment, was surprised, and not then prepared to meet the allegations contained in it, he should at once have asked to withdraw his announcement, and moved for a continuance. Not having done so, but taking his chances upon the pleadings as they then stood, he cannot now be heard to complain. *Birdwell v. Cox*, 18 Tex. 586. Nor was the defendant entitled to a motion for a new trial upon the ground of newly-discovered evidence. It was not shown by the affidavit of appellant or his attorneys that he did not have knowledge of the newly-discovered evidence before going into trial. No diligence whatever was shown to discover this evidence, nor does it appear that the newly-discovered evidence would in any way tend to change the result upon another trial. *Johnson v. Flint*, 75 Tex. 379, 12 S. W. 1120. There is no reversible error pointed out by appellant, and the judgment is affirmed. Affirmed.

KENDALL et al. v. STATE.

(Court of Civil Appeals of Texas. May 20, 1899.)

WRIT OF ERROR—DISMISSAL—WITHDRAWAL OF ATTORNEY.

1. Under Rev. St. art. 4346, providing that appeal shall be prosecuted to the term of the appellate court in session at the time of the rendition of the judgment, and, if it is not then in session, then to the next term, judgment having

been rendered three months before expiration of the term of the appellate court then in session, and no appeal having been prosecuted, writ of error, for which steps were commenced after lapse of the six months of the next term, will be dismissed on motion of parties, or, in the absence thereof, on the court's own motion.

2. An attorney wishing to withdraw a motion to dismiss writ of error, or to withdraw his name from the motion, must do so by motion, and the scratching off of his name by the clerk, at his direction, is not enough.

Error from district court, Grayson county: Don. A. Bliss, Judge.

Quo warranto by the state against W. R. Kendall and others. Judgment for the state, and defendants bring error. Dismissed.

E. C. McLean and J. C. Edmonds, for plaintiffs in error.

FINLEY, C. J. This is a quo warranto proceeding instituted in the name of the state, having for its object the dissolution of an independent school district alleged to have been created in violation of law. The information was heard and a trial had in March, 1898. Judgment was rendered March 21, 1898, declaring the corporation illegal and void, etc. Motion for new trial was overruled March 25, 1898, and notice of appeal given and entered of record. No appeal, however, was prosecuted. On March 2, 1899, a petition for writ of error was filed, service of citation was waived, and the transcript was filed in this court March 27, 1899. On the part of the state, a motion filed May 3, 1899, to dismiss the writ of error, because the appeal was not prosecuted within the time required by law.

The statute requires that the appeal shall be prosecuted to the term of the appellate court in session at the time of the rendition of the judgment, and, if such appellate court is not then in session, then to the first term to be held thereafter. Rev. St. art. 4346. This court's term, as fixed by law, covers the period from first Monday in October to first Monday in July. At the time of the rendition of the judgment this court was in session, and continued in session until the first Monday in July thereafter. That term was allowed to pass without prosecution of the appeal, and nearly six months of the succeeding term were allowed to elapse before the record was filed in this court. The effort to have this court revise the proceedings of the court below clearly comes too late. *Fontaine v. State*, 69 Tex. 510, 6 S. W. 816; *Livingston v. State*, 70 Tex. 393, 11 S. W. 115.

It is contended that we should not take cognizance of the motion, because the state's prosecuting officer's name has been withdrawn from the motion, leaving only the names of private counsel subscribed thereto. The prosecuting attorney's name was subscribed to the motion when filed, and now appears there with a pen mark drawn through it. The clerk informs the court that he ran the pen through the name at the

request of that officer, made by telephone communication. We do not think we should give effect to such irregular action. If the state's officer desired to withdraw the motion, or to withdraw his name from the motion, he should have done this by regular motion filed in this court, of which the counsel associated with him would have taken notice. Counsel cannot withdraw from cases in this court by merely scratching their names off the record, or causing the clerk to do it for them. There is no authority for counsel or the clerk to make such changes in the record. Aside from this view, however, we would have dismissed the writ of error upon our own motion. The motion to dismiss is sustained.

BUMPASS v. ANDERSON et al.
(Court of Civil Appeals of Texas. May 20, 1899.)

TRESPASS TO TRY TITLE—TITLE—EVIDENCE—WARRANTY.

1. Error complaining of refusal of continuance cannot be considered; the record, though showing that application therefor was made, not showing that it was called to the court's attention, or acted on by it.

2. It being unnecessary for plaintiffs in trespass to try title to prove title beyond the common source from which they and defendant claimed, any error in admitting a deed beyond such source was harmless.

3. Personal judgment for costs is void; the citation in the suit being void on its face, because published a shorter time than prescribed by the statute, and the judgment being against M., if living, or his heirs if dead, and M. being dead when judgment was rendered, and all his heirs being nonresidents, except one, on whom no service was had, so that no title is conveyed by sheriff's deed under execution sale on the judgment.

4. Where a deed in terms grants only the right, title, claim, and interest received by the grantor, through a certain deed, a general covenant of warranty is confined in its effect to the title and interest conveyed.

Appeal from district court, Hunt county; Howard Templeton, Judge.

Action by Levica Anderson and others against J. K. Bumpass. Judgment for plaintiffs, and defendant appeals. Affirmed.

Perkins, Gilbert & Perkins and Ed. R. Bumpass, for appellant. Sherrill & Hefner and Seay, Seay & Seay, for appellees.

BOOKHOUT, J. Appellees, Levica Anderson et al., instituted suit against appellant, J. K. Bumpass, April 22, 1898, in trespass to try title, and for possession of the premises in controversy, consisting of 500 acres of land out of the Reese Price survey, situated in Hunt county, Tex.; claiming said premises by virtue of being heirs of one William T. Miller, who died in Nashville, Tenn., in 1857. Appellant, J. K. Bumpass, answered: (1) General exception; (2) not guilty; (3) limitation of 3, 5, and 10 years; (4) valuable improvements on said premises of \$500; (5) that he had possession of the premises by regular

chain of title from the sovereignty of the soil, and also by virtue of a deed executed by C. W. Collier, tax collector of Hunt county, Tex., to one E. J. Waldron, dated June 1, 1886, filed for record December 6, 1887. In addition: That one of his warrantors was J. D. Martin. That he relied upon said warranty. That said warrantor is dead, and left surviving him a large estate, inherited by the following heirs and only heirs: Mrs. E. C. Martin, mother of said J. D. Martin; William A. Martin and Ben L. Martin, brothers of said J. D. Martin; Mrs. Mary Marshall, wife of A. S. Marshall, who was a sister of said J. D. Martin. That the value of the property inherited by these parties, of the said J. D. Martin, was in excess of the value of the premises in controversy. William and Mrs. E. C. Martin and Mrs. Mary E. Marshall answer, "Not guilty, and no warranty." Appellees amended, and suggested death of Levica Anderson, and made new parties plaintiff. Upon the trial, judgment was rendered for appellees for the land sued for, with writ of possession, to which appellant excepted and gave notice of appeal, and has duly prosecuted an appeal to this court.

Appellant's first assignment of error complains of the action of the trial court in refusing to grant his application for a continuance. The record shows that such an application was made, but does not show that it was called to the court's attention, or that it was acted upon by the court; hence this assignment will not be further considered.

Appellant's second assignment of error complains of the action of the court in admitting in evidence the deed from L. W. Gilliam to William T. Miller, dated March 5, 1855; the objection to said deed being that the plaintiff sues for land, a part of the Reese Price survey in Hunt county, Tex., and this deed described land, a part of the Reese Price survey in Kaufman county, and there are no pleadings upon the part of plaintiffs alleging a mistake in the location of the land in said deed. If this deed was improperly admitted, yet it would not be ground for reversing the judgment. The plaintiffs introduced the title papers of defendant to show that the plaintiffs and defendant claimed from a common source. Such source was shown to be a judgment of the district court of Hunt county, rendered in a cause in said court (No. 2,295) styled, "L. E. Holden vs. E. J. Waldron et al.," said suit having been brought to have partitioned among the respective owners the Reese Price survey. In this suit 500 acres of said survey were set aside to W. T. Miller. A judgment for costs was rendered against said W. T. Miller, if living, or his heirs if dead, and execution issued thereon; and the 500 acres set apart to him were sold to satisfy said execution, and the land bought by John D. Martin, under whom defendant deraigned title by mesne conveyances. The plaintiffs elected to accept the benefits of said judgment of partition, and sued for the 500 acres

of land set aside in this partition to their ancestor, W. T. Miller. Such judgment was the common source of title, and it was not necessary for plaintiffs to prove title beyond the common source; hence, if there was error in admitting said deed, it was harmless.

The appellant's third assignment of error complains of the action of the court in refusing to allow the defendant to introduce in evidence a copy of the judgment and report of the commissioners in the case of *L. E. Holden v. E. J. Waldron et al.*, and the sheriff's deed made by virtue of the execution issued on the judgment for costs rendered in said cause. This judgment was objected to because: (1) That, at the time the judgment was rendered against W. T. Miller, he was dead; (2) the judgment is in the alternative, it being against W. T. Miller, or his heirs if he is dead; (3) the citation as to W. T. Miller only commanded publication thereof for four weeks, and it was only published for four weeks, when the statute required it to be published eight weeks; (4) because it is a personal judgment against unknown heirs residing beyond the limits of the state. The court sustained these exceptions, but admitted the record on the question of good faith. The statement of facts shows that the judgment, report of commissioners, and decree confirming the report, were admitted, as stated by the court, for any legitimate purpose. They are copied in the statement of facts. The citation issued in said cause was void upon its face. It was not published for the length of time prescribed by the statute. There was a personal judgment against W. T. Miller, if living, or his heirs if dead, for costs. W. T. Miller was dead when the judgment was rendered. All his heirs were nonresidents of Texas, except one, and no service was had upon him. The personal judgment for costs was void, and the sheriff's deed made by virtue of a sale under an execution issued upon said judgment for costs conveyed no title. *Hardy v. Beaty*, 84 Tex. 562, 19 S. W. 778. The judgment execution and sheriff's deed were not sufficient to show title in J. D. Martin, the purchaser at execution sale. *Stewart v. Anderson*, 70 Tex. 589, 8 S. W. 295; *Footo v. Sewall*, 81 Tex. 659, 17 S. W. 873. The defendant, Bumpass, had not been in possession of the land for 12 months before the bringing of this suit; hence, he was not entitled to judgment for improvements. *Sayles' Civ. St. art. 5277*.

Appellant's fourth assignment of error complains of the refusal of the court to render judgment against the heirs of J. D. Martin by reason of their liability upon the warranty contained in the deed from J. D. Martin to Earnest W. Harrison, dated October 2, 1891. J. D. Martin, the grantor in said deed, was dead, and his heirs were made parties. It was shown that they had received from the estate of J. D. Martin property in excess of the amount for which they were alleged

to be liable upon said warranty. The granting clause of the deed from J. D. Martin to E. W. Harrison reads: "Do grant, sell, and convey unto the said Earnest W. Harrison, of the county of Hunt, state of Texas, all the right, title, claim, and interest which I have and received by and through a deed from S. J. Mason, sheriff of Hunt county, Texas, dated May 5, 1891, and recorded in vol. 68, pages 373-375, Hunt County Record of Deeds, and no greater interest." Then followed the description. There was a clause of warranty, reading: "I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said Earnest W. Harrison, his heirs and assigns, against any person whomsoever lawfully claiming or to claim the same or any part thereof." By the terms of the granting part of the deed, the estate granted is expressly restricted and limited to such title and interest as J. D. Martin received by the deed from the sheriff, and no greater. The legal import of his warranty is that he warrants against the title and interest conveyed. "Where a deed, instead of conveying the entire land generally, purports to convey only the right, title, claim, and interest of the grantor to the land, a general covenant of warranty contained in the deed is confined in its legal effect to such title, and the assertion or enforcement of a paramount title outstanding against the grantor at the time of the execution of the deed cannot operate as a breach of the covenant." 1 Devl. Deeds, § 27; 2 Devl. Deeds, § 931; *Reynolds v. Shaver*, 59 Ark. 299, 27 S. W. 78; *Van Rensselaer v. Kearney*, 11 How. 297; *Tied. Real Prop.* § 858. We conclude that appellant's fourth assignment is not well taken. There was no attempt to show a valid assessment, levy, and sale to support a title under the tax deed. Finding no error in the record, the judgment is affirmed. Affirmed.

HAMILTON v. SAN ANTONIO FOUNDRY CO.¹

(Court of Civil Appeals of Texas. May 24, 1899.)

GARNISHMENT—JUDGMENT AGAINST GARNISHEE.

Where a garnishee answers that it holds shares of its stock in the name of the judgment debtor, which are not paid for, and the evidence shows that at market price they will not pay the debt for which they are pledged, plaintiff in garnishment cannot complain that it was not decreed that they be sold and the surplus applied to his debt.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action in garnishment by Letitia G. Hamil-

¹ Rehearing denied June 27, 1899.

ton against the San Antonio Foundry Company. There was a judgment for garnishee, and complainant appeals. Affirmed.

Jas. Routledge, for appellant. J. A. Buckler, for appellee.

FLY, J. Appellant, having a judgment for \$511.20 against George W. Bonham, sued out a writ of garnishment against the appellee. Appellee answered, denying indebtedness to Bonham, and stating that it held 49 shares of its capital stock that stood on the books in the name of Bonham, but that the same had never been paid for, and that Bonham was indebted for the shares to George M. Dilley & Son and to appellant in sums largely in excess of the value of the shares. Dilley & Son were made parties. The note given by Bonham for the shares of stock was executed to appellee, but it was satisfactorily explained how it was done, and that the shares were bought by Bonham from Dilley & Son, and never paid for. It was established by uncontroverted evidence that the shares, at their fair market value, would not pay the debts for which they were pledged; and appellant has no cause to complain that it was not decreed that they be sold, and the surplus applied to her debt. There is no merit in the appeal, and the judgment is affirmed.

WOITEN et al. v. AMERICAN UNION LIFE INS. CO.

(Court of Civil Appeals of Texas. May 31, 1899.)

APPEAL—HARMLESS ERROR.

Where a directed verdict is proper, it makes no difference that a wrong reason was assigned for directing such verdict.

Appeal from district court, Brazos county; W. G. Taliaferro, Judge.

Action by Emilie Woiten and others against the American Union Life Insurance Company. From a judgment for defendant entered on a directed verdict, plaintiffs appeal. Affirmed.

Doremus & Butler, for appellants. Armstrong & Nagle and McKinnon & Carlton, for appellee.

JAMES, C. J. The action was upon a life insurance policy. The court charged the jury to return a verdict for the defendant upon the issue that the policy had been forfeited. The briefs discuss some interesting questions in reference to the issue of forfeiture, in view of this particular contract; but the undisputed testimony, showing that the insured committed suicide, renders it unnecessary to examine said questions. The policy provided it should be void in case of suicide while sane or insane. This defense was pleaded, and sustained by all the testimony; hence, no other verdict than the one

returned would have been proper. It does not matter what reasons the court gave for directing such verdict. Affirmed.

WATSON et al. v. WATSON et al.¹

(Court of Civil Appeals of Texas. May 24, 1899.)

WILLS—CONSTRUCTION—NATURE OF ESTATE.

A testator devised to his wife all his property, to have, hold, and enjoy same for her natural life, with full power and authority to devise and bequeath the same, by will or otherwise, to such of his sons as shall be kindest to her, but such will or other conveyance not to become operative until after her death. *Held*, that she had absolute power to devise or convey the property to some or all of his sons.

Appeal from district court, Washington county; Edward R. Sinks, Judge.

Action by W. E. Watson and others against Carrie J. Watson and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Searcy & Garrett and R. J. Swearingen, for appellants. Thomas B. Botts and Beauregard Bryan, for appellees.

JAMES, C. J. This is a suit brought by W. E. Watson and others, the children and grandchildren of William Watson, deceased, by his first marriage, against Carrie J. Watson, the second wife and widow of William Watson, and the sons of said William and Carrie Watson, for the purpose of obtaining a construction of the will of William Watson, and a judicial declaration of the rights and powers of the said Carrie Watson and of the rights and interests of plaintiffs and defendants thereunder. The will was made a part of the petition, and is as follows: "Know all men by these presents, that I, William Watson, of Rosedale Nurseries, near Brenham, Texas, being of sound and disposing mind and memory, do make and publish this, my last will and testament, hereby revoking all wills by me at any time heretofore made. First. I direct that all my just debts shall be paid by my hereinafter named executrix as soon after my decease as shall be by her found convenient. Second. All of the property of every kind and description now owned by me is community between myself and my wife, Carrie J. Watson, and I do hereby will, devise, and bequeath to my beloved wife, Carrie J. Watson, all property of every kind and description, whether real, personal, or mixed, of which I shall die seised and possessed, to have, hold, use, and enjoy same for and during her natural life, with full power and authority to her to devise and bequeath the same by will or otherwise, and especially the property known as 'Rosedale Nursery,' as hereinafter set out. Third. It is my desire, wish, and will that my beloved wife shall keep the property known as 'Rosedale Nursery' intact during her life, using

¹ Rehearing denied June 23, 1899.

and enjoying the same free from the control of any one, and that she leave same by will or otherwise to whichever of my sons are best and kindest to her during her life, or divide, as she may deem best. She, being my sole beneficiary, shall have the right by will or otherwise to dispose of said property, as above set out, but such will or other mode of conveyance not to become operative until after her death. Fourth. I hereby nominate and appoint my beloved wife, Carrie J. Watson, sole executrix of this, my last will, and direct that no security be required of her as such executrix. Fifth. It is my will that no other action shall be had in the county court in the administration of my estate than to prove and record this will and to return an inventory. Sixth. I wish here to state that my reason for leaving all my estate to my wife is that I have every reason to know her entire honesty and integrity, and, as she has helped me to make and save all we have, it is only just and proper that she have all that is left after my death, with full power to dispose of same as set out in the foregoing paragraphs. Witness my hand this August 16th, 1897, in presence of C. B. Felder and W. Y. Yates, who attest at my request. [Signed] William Watson." The petition alleged plaintiffs' contention to be that under said will Carrie J. Watson took only a life estate in William Watson's property, and that at her death the same is to descend according to the law of descent and distribution; and the defendants' claim to be that she takes an absolute title to his estate, or a life interest therein with full power to dispose of the same at her death. It also alleges that Carrie J. Watson will attempt to dispose of said property in accordance with her ideas of the powers granted her under said will, and that the power and rights given to her by the will are doubtful and obscure. To this petition defendants interposed general and special demurrers, which the court sustained, and, upon plaintiffs declining to amend, the suit was dismissed by the court, from which judgment the appeal is prosecuted.

The special demurrers, in substance, were: First, that there was no room for the construction of the will as contended for in the eighth paragraph of the petition, viz. that upon the death of Carrie J. Watson the property would descend to all the children and grandchildren of Watson according to the statute of descent and distribution, because (using the language of the demurrer) by the terms of the will the property is left to such of the sons of the testator as shall, in the discretion of the sole beneficiary, Carrie J. Watson, be kindest and best to her in her lifetime, this power of disposition to be exercised by her in her lifetime, either by deed or will; and, second, that paragraph 11 of the petition, alleging that the powers and rights given to Carrie J. Watson under the will are doubtful and obscure, should be stricken out, because the terms of the will are clear, and

the powers and rights conferred are specific, and in no way doubtful or obscure, and do not require construction to make their meaning plain. The district judge does not indicate any particular ground for the judgment rendered. The general and special demurrers were all sustained, and it seems to us that by passing on them the court must have passed on the will in respect to the matters called attention to in the petition; in other words, the court must have considered the will, and must have determined that it was not obscure or doubtful as to the powers and rights which it conferred on Mrs. Watson, and that, instead of vesting Watson's estate in his children and grandchildren upon the death of Mrs. Watson according to the statute of descent and distribution, the will gave the latter power to dispose of it to some or all of Watson's sons. The action of the court in sustaining the demurrers was, we think, correct, and therefore the judgment is affirmed.

TAYLOR v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1899.)

HOMICIDE—MANSLAUGHTER — EVIDENCE—INSTRUCTIONS—CONDITIONAL PARDONS.

1. On trial of an accused for murdering his eight year old stepdaughter by beating her with a rope, evidence that accused was an able-bodied man and his wife a small woman is irrelevant.

2. On a trial for murdering a child by beating her with a rope, one who has been overseer for many years, and has whipped many children with ropes, but who has had no medical experience, and cannot identify blood on the rope as human blood, cannot testify that in his opinion the child was whipped with a rope, and that a wound on her head was made by a sharp stick.

3. Where a convict has served his term, and a pardon is subsequently issued solely to restore him to citizenship, a condition therein that it might be revoked if the grantee should violate any of the criminal laws of the state is void, since the constitution provides that no one can be deprived of his rights as a citizen in regard to voting, sitting upon juries, holding office, and testifying in court, except on conviction of felony.

4. Pen. Code, art. 653, provides that, if a person inflicting an injury which makes it necessary to call aid neglect to call it, he is equally guilty as if the injury were one that would inevitably lead to death. Article 718 provides that if an injury be inflicted in a cruel manner, though with an instrument not likely under ordinary circumstances to produce death, the killing would be manslaughter or murder, according to the facts. Article 720 provides that where the circumstances show an evil or cruel disposition, or a design to kill, the offender is guilty of murder or manslaughter, according to the facts, though the means used are not such in their nature as to produce death ordinarily. *Held* that, where accused gave a little girl such a cruel beating with a heavy rope that death resulted, it was error to charge article 653 without also charging articles 718 and 720, since the homicide might have been manslaughter merely, if no intent to kill existed.

Appeal from district court, Wharton county; Wells Thompson, Judge.

Albert Taylor was convicted of murder in the first degree, and he appeals. Reversed.

D. W. Wilcox and Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the first degree, and his punishment assessed at death. The indictment charges defendant with killing Carrie Reed by beating and bruising her with a rope. The testimony shows that Carrie Reed was the stepdaughter of appellant and seven or eight years of age. There was no eyewitness to the transaction. A few days prior to the whipping, which resulted in the death of the little girl, appellant gave her another very severe whipping with a rope.

The first, second, and third bills of exception were reserved to the introduction of testimony which shows that defendant was a strong, able-bodied man, and his wife a small woman. While we would not, perhaps, feel justified in reversing the judgment for the admission of this testimony, yet we are unable to ascertain its relevancy, or what light it shed upon the transaction.

The fourth bill was reserved to the following evidence of Hall: "In my opinion, the child was whipped with a rope. I have been overseer for many years, and have whipped many a one in the same way. The wound in the head I am pretty certain was made with a sharp stick or board. I have had no medical experience, and do not know whether the blood found on the rope was human blood, horse blood, or rabbit blood." This testimony, in our opinion, was inadmissible and injurious.

Over appellant's objection, Abe Hatchett was permitted to testify. In this connection it is shown that Gov. Ireland, on the 7th of December, 1885, issued a pardon to Hatchett, restoring him to citizenship. His conviction was for theft of cattle, at the August term, 1873, of the district court of Wharton county; and the jury assessed a punishment of four years in the penitentiary. So it will be seen that the consummation of the punishment had expired some eight or nine years prior to the issuance of the pardon. There was a condition stated in this pardon that the governor reserved the authority to revoke it if the grantee should violate any of the criminal laws of the state. The objection urged was that this was a conditional pardon, which did not restore citizenship, in that it was not a full and free pardon, and therefore not effective as such, and it was not shown that he had observed the condition reserved. It is also contended the pardon on its face was inoperative, because it was first stated that the pardon was issued to Brazoria county, and Brazoria county erased and changed to Wharton county. The bill itself sufficiently shows that the conviction did occur in Wharton county; and this may be proved, although the wrong county was inserted. By an un-

broken line of decisions in Texas it has been held that a conditional pardon does not restore the convict to his right of citizenship, because of the fact that it is subject to revocation. This, of course, means where the condition is a valid and legal one. But in every one of such cases the conditional pardon was issued before the convict had served out his term, and in such case the pardon was subject to revocation; and it was held that, as long as this condition was a valid one, it did not restore the party to his rights of citizenship. The reasoning of these opinions we adhere to, and think they are correct. If not, then the governor would have the right to restore the convict to his citizenship one day and deprive him of same the following day. As we understand the express provisions of the constitution, no man can be deprived of his rights as a citizen, in regard to voting, sitting upon juries, holding office, and testifying in the courts of the country, except on conviction for felony. Therefore, if the governor had restored the rights of citizenship, if these constitutional provisions mean anything, it would take the verdict of a jury in another felony case to deprive him of such rights. It could not be done in that case by a jury; for he had been once convicted, and could not be a second time placed in jeopardy or on his trial for the same offense. But that rule does not hold good in this case. Here the party had served his time, and the pardon was issued subsequently, for the purpose of restoring citizenship, and for no other purpose, and so expressed on the face of it. There was nothing for the governor to revoke. The pardon having restored him to the full enjoyment of all the rights of citizenship, such rights could not be taken away by the governor, nor by any authority; and this would be true, whether stated in the pardon or not. We are therefore of opinion that the condition in this character of pardon is void, and the pardon absolute. The court did not err in permitting the witness Hatchett to testify.

Exception was reserved to the action of the court in charging murder in the first degree. There is no merit in this position. In our opinion there was evidence which justified this charge.

The court gave in charge articles 652 and 653 of the Penal Code. Exception was reserved to this, and especially to that portion which says that, if the person inflicting the injury which makes it necessary to call aid in preserving the life of the person injured shall willfully fail or neglect to call such aid, he shall be deemed equally guilty as if the injury were one which would inevitably lead to death. There is no evidence in the record which shows, or tends to show, a state of case calling for this charge; and, the court having limited the consideration of the jury to murder in the first and second degrees, we think it was error. But if we are wrong, then the court should certainly have given

in charge articles 718 and 720 of the Penal Code. In this connection, article 718 provides that "if any injury be inflicted in a cruel manner, though with an instrument not likely under ordinary circumstances to produce death, the killing would be manslaughter or murder, according to the facts of the case." Now, if appellant is guilty of murder, under the facts, it is on account of the fact that with a large rope he inflicted injury in a cruel manner upon the little child. We take it that whipping with a rope, under ordinary circumstances, is not likely to produce death. So, if appellant inflicted the injury with the rope in a cruel manner, although it was not likely, under ordinary circumstances, to produce death, the killing might not be murder. It might be manslaughter, under the statute cited. If the injury was inflicted in a cruel manner, and for the purpose of killing, of course, it would be murder; but if not for the purpose of killing, it might be manslaughter. Under ordinary circumstances, an assault upon a female is aggravated assault; and this being true, the intent to kill being absent, if a killing occur, it would ordinarily be manslaughter. Where the circumstances attending the homicide show an evil or cruel disposition, or that it was the design of the person offending to kill, he is deemed guilty of murder or manslaughter, according to the other facts of the case, though the instrument or means used may not in their nature be such as to produce death ordinarily. Article 720, Pen. Code. In view of these provisions of the Code, we think the court was in error, under the facts of this case, in giving the charge excepted to by appellant, especially as it limited the consideration of the jury to murder in the two degrees. The court, however, should have given articles 718 and 720 of the Penal Code in charge to the jury anyway, in view of the evidence adduced on the trial. Briefly stated, the testimony is that defendant, a few days prior to the death of the girl, inflicted upon her a cruel whipping with a rope, which resulted in serious bodily injury. On the occasion of the death there was no eyewitness to the whipping. The marks upon the body indicated a very cruel and unmerciful beating. One of her hands seemed to have been broken, and one of the finger nails torn off. A rope was found in the house, evidently the one which had been used in the chastisement. It had been recently washed, and was wet from the washing; but there was still blood in its cracks and interstices. The rope was a half inch or more in thickness and several feet in length. Now, a beating was inflicted, and in the most cruel manner; but whether it was done for the purpose of killing, or without such intent, is not shown, but left to deduction from the facts proved on the trial. Of course, if the chastisement was inflicted for the purpose of killing, it would be murder of one of the two degrees; if not for that purpose, it might be manslaughter, under our statute. The court failed to charge

upon manslaughter, but limited the jury to murder in the first and second degrees.

For the errors indicated, the judgment is reversed, and the cause remanded.

BROOKS, J., absent.

MOORE v. STATE.

(Court of Criminal Appeals of Texas. April 19, 1899.)

DEATH OF PRINCIPAL BEFORE TRIAL—DISCHARGE OF ACCESSORY.

Under Pen. Code, art. 90, providing that an accessory may be tried before the principal when the latter has escaped, but if the principal is arrested he shall first be tried, and if acquitted the accessory shall be discharged; and article 87, providing that the brother of a principal cannot be accessory to him,—one indicted as accessory to his brother and another must be discharged, where the other principal dies after arrest but before indictment.

Brooks, J., dissenting.

Appeal from district court, Dallas county; Charles F. Clint, Judge.

Jack Moore was convicted of murder, and he appeals. Reversed.

W. T. Henry, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of being an accessory to murder in the first degree, and his punishment assessed at confinement in the penitentiary for life; hence this appeal.

Appellant assigns a number of errors; but, according to the view we take of the case, there is but one assignment that requires notice. The indictment contained a number of counts,—one charging appellant as a principal, one charging him with being an accomplice, and one charging him with being an accessory. He was tried and convicted under the count which charged the murder to have been committed by E. L. Cady and Lou Moore, and which charged him with being an accessory to the murder so committed by said principals; that is, it charged him with knowing that the said Cady and Moore had committed said offense, and that thereafter he willfully concealed and gave other aid to the said Cady and Moore, in order that they might evade an arrest for said offense. Appellant filed a motion in the nature of a motion to quash, and a plea in abatement to said indictment, setting up the following facts, to wit: That Lou Moore was his brother, and that therefore, under the statute, he could not be an accessory as to him; and that E. L. Cady was dead, having died before he was ever tried for this offense, and before the presentation of any indictment against him. The facts set up were admitted by the state to be true, but the plea and motion to quash were overruled by the court, to which appellant excepted, which appears by his first bill of exceptions. By his bill of exceptions No. 7, appellant fur-

ther objected to all testimony in regard to the guilt of said principals, on the grounds as stated in his former bill. This was also overruled by the court. By his bill No. 18, appellant asked the following instruction: "You are instructed that, the state having admitted that the defendant Jack Moore is a full brother to Lou Moore, with whom he is charged in the indictment with being an accessory, and that E. L. Cady, the other principal charged in the indictment, died while under arrest upon the charge of murder of Addison Pate, and before the presentation of the indictment against this defendant, and the state having elected to submit this case upon the fourth count of the indictment, charging this defendant with being an accessory to Lou Moore and E. L. Cady in the murder of Addison Pate, you will find the defendant not guilty, and so return your verdict." This was refused by the court, and appellant reserved his bill of exceptions. So it would appear that appellant has thoroughly and completely saved the question as to his being an accessory under the facts of this case.

Article 89 of the Penal Code provides "that the accomplice may be arrested and tried and punished before the conviction of the principal offender, and the acquittal of the principal shall not bar a prosecution against the accomplice," etc. Article 90 provides "that the accessory may in like manner be tried and punished before the principal, when the latter has escaped; but if the principal is arrested he shall be first tried, and if acquitted, the accessory shall be discharged." Article 87 provides, among other things, that the brother or sister of the principal offender cannot be an accessory to him. This last-mentioned article effectually disposes of the prosecution of this defendant as an accessory to his brother, Lou Moore. As to E. L. Cady, the other principal, the record shows that he is dead; that he died after his arrest on this charge, and before any indictment found against him. This identical question came before the supreme court of this state in *State v. McDaniel*, 41 Tex. 229, article 90 was construed, and it was there held that the escape of the principal was the only contingency that authorized the prosecution and conviction of an accessory without, in the first instance, the trial and conviction of his principal. We think the reasoning in said case sound, and not only properly construes our statute on the subject, but is in harmony with the common-law decisions and the courts of other states. *Kingsbury v. State* (Tex. Cr. App.) 39 S. W. 385; 1 Whart. Cr. Law. §§ 237 to 244, inclusive; *Edwards v. State*, 80 Ga. 127, 4 S. E. 268; *Ray v. State*, 13 Neb. 55, 13 N. W. 2; *Holmes v. Com.*, 1 Casey, 222; *Starin v. People*, 45 N. Y. 333.

As stated before, it is not necessary to discuss other questions, for the record discloses a number of errors committed during the trial, as the views above expressed effectual-

ly dispose of this case. The judgment is accordingly reversed, and the cause remanded.

BROOKS, J., dissents.

THOMAS v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1899.)

HOMICIDE—PROVOKING DIFFICULTY.

An instruction that, if defendant sought a meeting with the deceased with "intent" to provoke a difficulty with him, he cannot plead self-defense, is erroneous.

Appeal from district court, Bosque county; J. M. Hall, Judge.

Jim Thomas was convicted of murder in the second degree, and he appeals. Reversed.

Lockett & Kimball, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at 14 years' confinement in the penitentiary.

In his motion for new trial appellant complains of the following portion of the court's charge: "You are instructed that if you believe, from the evidence, that the defendant sought a meeting with the deceased with intent to provoke a difficulty with deceased, and, if the deceased resented the provocation, if any, then the defendant intended to take life of the deceased, or do him serious bodily harm, then, in such case, defendant could not plead self-defense; but, if defendant did not have such intention when he and the deceased walked away by themselves, and if deceased made an assault, defendant had the right to defend himself, using such force only as reasonably appeared to him to be necessary for his protection." Appellant's objections to said charge are: (1) Because the right of self-defense cannot be abridged, unless the defendant intended to provoke a felonious difficulty; (2) because said charge assumes that defendant sought deceased to procure a difficulty. This charge is erroneous, and vague and indefinite in its expressions. It is not a violation of law to seek a party for the purpose of provoking a difficulty. The offense is provoking the difficulty. We have held that a party can arm himself, and go to where a person is, but, after reaching there, if he did not provoke the difficulty, or do some act or make some statement reasonably calculated to provoke the difficulty, he could not be convicted of provoking the difficulty. In other words, if the defendant sought deceased for the purpose of having a friendly talk, and in the course of the conversation, in which he was endeavoring to settle the previous trouble, a difficulty arises between defendant and deceased, the mere fact that he sought deceased for the purpose of settling the pre-

vicious trouble would not be evidence of the fact that he provoked the difficulty. On the other hand, if appellant sought deceased for the purpose of having a friendly talk, and then and there provoked the difficulty, the law of provoking the difficulty would apply. We furthermore note that this charge, complained of, does not tell the jury what the defendant would have been guilty of if he provoked the difficulty with intent then and there to take the life of deceased. The court erred in giving this charge, because the same is erroneous in the particulars above pointed out. For a full and complete discussion of the law of provoking the difficulty, we refer to *Airhart v. State* (Tex. Cr. App.) 51 S. W. 214, and also *Ball v. State*, 29 Tex. App. 107, 14 S. W. 1012, and *Shannon v. State*, 35 Tex. Cr. R. 2, 28 S. W. 687.

We do not deem it necessary to discuss the other questions involved in this case, believing that, if there were error in same, it will not probably occur on another trial. For the errors above pointed out in the court's charge, the judgment is reversed, and the cause remanded.

WINTERS v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1899.)

HOMICIDE—INSTRUCTIONS—CONTINUANCE.

1. The fact that a charge was insufficient, in that it failed to instruct the jury as to what act of provocation would deprive defendant of the right of self-defense, is not ground for reversal, where it instructed them that defendant had a right to seek deceased to request an apology for prior insulting conduct, which was the only phase of the case involved in provoking a difficulty.

2. A continuance because of the absence of a witness was properly denied, where the witness had left the state some time prior to the trial, and no attempt had been made to take his deposition, and he had attended a former trial, and had not been placed on the stand by accused, and one or more terms had intervened.

Appeal from district court, Hill county; J. M. Hall, Judge.

George Winters was convicted of murder in the second degree, and he appeals. Affirmed.

Smith, Wear & Phillips, for appellant.
Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for murder in the second degree, punishment being assessed at 14 years' confinement in the penitentiary.

On a former appeal (40 S. W. 303) the judgment of murder in the second degree, assessing the punishment at 25 years' confinement in the penitentiary, was reversed, because of the error of the court in charging the law applicable to provoking a difficulty. It is contended on this appeal that the trial court again erred in regard to this question. The testimony shows that appellant, at the

request of the daughter of deceased, visited her on Sunday prior to the homicide, and deceased ordered him from the place, and in doing so used violent, abusive, and profane language. It seems he was angered because of a horse trade which appellant had made with his son Horace. On the evening of the homicide, appellant, with three companions, were in a public road, and deceased, traveling the road, was in the act of passing them. Appellant requested deceased to apologize for the insulting conduct on the previous Sunday, and was met with a prompt refusal. During the altercation deceased drew his knife, jumped from his horse, and approached appellant, who had also alighted. This meeting terminated in appellant firing several shots into the body of deceased, with fatal results. Appellant's theory was that he accosted deceased for the purpose of asking an apology for his prior insulting conduct, and not for the purpose of producing an occasion for or provoking the difficulty, with the view of killing deceased. The state's theory was supported by evidence to the effect that appellant armed himself, and waited for deceased, anticipating meeting him, and for the purpose of provoking him into a difficulty, with intent to take his life, and in this connection adduced evidence to the effect that he knew the irascible temper of deceased, and that by approaching him in the manner he did deceased would draw a knife, with the view of using it, and, when he did this, he intended killing deceased. The court, in rather general terms, charged the jury that, if appellant sought deceased for the purpose of provoking the difficulty, he would not be permitted to justify upon the ground of self-defense; but, if he had no such purpose in seeking the meeting, his right of self-defense would not be abridged or forfeited. He charged, further, that if defendant requested an apology because of the prior insults, but with no intention of provoking the difficulty, with intent to take the life of deceased, provided deceased resented it, then his right of self-defense was not abridged or forfeited. It may be conceded that the charge as given was rather inartistically drawn, and did not present the issues as strongly in an affirmative manner as the law would have justified. Defendant had a right to request an apology for the insulting conduct, and, unless his manner and acts in doing so were intended to bring on an affray or a deadly conflict, his right of self-defense would not be forfeited. This we understand to be the rule laid down in *Shannon's Case*, 35 Tex. Cr. R. 2, 28 S. W. 687. This doctrine is also recognized in *Cartwright v. State*, 14 Tex. App. 502, *Airhart v. State* (Tex. Cr. App.) 51 S. W. 214, and *Thomas v. State* (decided at present term) 51 S. W. 1109. Unless the court's charge was calculated to injure the rights of appellant in some material character, this court, under the recent act of the 25th legislature, would not be authorized to reverse the judg-

ment. While the court's charge was not sufficient, in that it failed to instruct the jury as to what act of provocation would deprive appellant of the right of self-defense, yet it did instruct them as to appellant's right to seek the deceased for the purpose of requesting an explanation as to his previous conduct towards him; and if he did this in a peaceful manner, and with no intent to provoke a difficulty, and was then attacked by defendant, his right of self-defense was perfect. We think this charge adequately protected defendant on the only possible phase of the case involved in provoking a difficulty, and that the court's previous misdirection on the subject was not of a character to prejudice appellant.

There is another phase of the case which appellant contends should have been recognized in the court's charge. He insists there was testimony tending to show that, after the second shot, deceased abandoned the difficulty, and that appellant continued firing; and in this connection it is evident that at least two of the fatal shots were fired afterwards. To meet this he requested a charge to the effect that, under such circumstances, the killing might be manslaughter. We do not believe this issue is suggested by the testimony. It is true that some of the defense testimony shows, or tends to do so, that, after the second or third shot, deceased was staggering away from appellant; but this seems to be more the result of the already inflicted wounds than of an abandonment of the difficulty by him. We do not think the court erred in refusing to give this charge.

The action of the court refusing the application for continuance was correct. Diligence was utterly wanting. The absent witness had left the state some time prior to the trial which resulted in this conviction, and no attempt had been made to take his depositions. Besides, he had attended a former trial, and had not been placed upon the stand by the accused, and one or more terms of the court had intervened before this conviction.

There are some other questions in regard to the court's charge, as well as the refusal to give requested instructions; but they are, in our judgment, without merit. The judgment is affirmed.

BROOKS, J., absent.

HAMBLIN v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1899.)

Dissenting opinion. For majority opinion, see 50 S. W. 1019.

HENDERSON, J. I agree to the original opinion, but on the motion for rehearing appellant has made a strong assault on the action of the court affirming the case, and par-

ticularly as to the action of the court in admitting the testimony concerning the death of Sallie Raney's baby; and I have been induced to give this matter a more thorough investigation. In order to present my views I here copy the bill of exceptions which raises this question in full: "Be it remembered that on the trial of the above numbered and entitled cause the following proceedings, among others, were had: The state offered to prove by Dr. J. R. George the death of the deceased's baby, a short time prior to the death of deceased; and also offered to prove the circumstances connected with the death of said baby, to which evidence defendant then and there objected, because of its immateriality and its irrelevancy. The court asked the purpose of said proffered testimony, to which the district attorney, James P. Kinard, who was conducting the prosecution, in the presence of the jury, replied that the purpose of said proffered evidence was to show a motive in the defendant for the crime for which she was on trial. The court then and there overruled the objection of defendant, and permitted the state to prove by said witness that he had been called to see the baby of Sallie Raney; that he was called one evening about 5 o'clock; that he did not consider the baby seriously sick, but left four powders to be given it; that he was sent for next morning about 10:30, and went over and found the baby dead,—to which evidence defendant objected, and, the court having overruled said objection, defendant then and there excepted. Be it further remembered that the state offered to prove by Mrs. J. R. George (wife of Dr. George), the death and circumstances of said baby's death, and defendant objected for the same reasons as above set out to Dr. George's evidence on this point. The court overruled defendant's objections, and permitted Mrs. George to testify: That, on the morning after Dr. George had gone over to see the baby in the evening, defendant came over after Dr. George, and, not finding him at home, told her (Mrs. George) to tell Dr. George to come over and see the baby as soon as he came; and defendant said, further, that, while the baby seemed to be better, she (defendant) did not like the looks of the baby's eyes. That, while defendant and witness were talking, some one came in, and, acting upon information received, witness stepped out of her back door, and heard Sallie Raney, in front of defendant's house, screaming. That witness went with defendant, and, when they arrived at the house, the baby was dead. That, before they got there, they saw and heard Sallie Raney run out of the house and exclaim: 'My poor baby is dead!' That, when they got there, she (witness) and some other ladies who had come in took the baby's clothing off, and rubbed it. That they found that it had turned a blue or purple color. That, after rubbing awhile, the natural color came back. That one of the ladies opened the baby's

mouth, and 'We smelled turpentine.' To which ruling of the court defendant then and there excepted. Be it further remembered that the state offered to prove by Mrs. Hunton circumstances connected with the death of said baby, and defendant then and there objected. The court overruled defendant's objections, and permitted the state to prove by said witness that she was at defendant's house on the morning of the death of Sallie Raney's baby; that she, in company with Mrs. George, examined the dead body of said baby, and found it to be blue or purple, and that they rubbed it and worked with it for a considerable length of time, trying to restore life, and its natural color came back; that she took deceased (Sallie Raney) out on the gallery for the purpose of having a conversation with her; that while they were out on the gallery, during a period of about two minutes, Mrs. Hamblin appeared near or passed by them twice; that she could not understand why defendant came about them, but she noticed that, while defendant was near by, deceased would not talk; and that she did not get to talk to deceased on the subject she wanted to,—to which ruling of the court the defendant then and there excepted. Be it further remembered that Dr. George was recalled by the state, and testified, over defendant's objection, that, in his opinion as a physician, several things might have caused the condition the baby's body was said to have been found in (that is, blue or purple); that it might and could have been caused by the air being cut off from the blood, either by choking, or putting something over its head, and smothering it; that it could have been caused by a failure of the heart to act, or any other means that would cut off the air from the blood,—to which ruling of the court defendant then and there excepted. To all of which testimony defendant, at the time it was offered, then and there objected, because of its irrelevancy and immateriality; and, the court having overruled defendant's objections, the defendant then and there, in open court, excepted to the ruling of the court, and here now tenders her bill of exceptions," etc. I understand the opinion of the court to dispose of this question on two grounds: First, that the bill is not sufficient to raise the question; and, secondly, conceding the sufficiency of the bill, that the testimony was admissible to show motive. And in this connection the statement of facts is appealed to to show the connection of appellant with the death of Sallie Raney's baby. I will treat these questions in their order.

The majority opinion insists that the word "relevant" is too general, and in this bill is without meaning. I quote from the opinion as follows: "An inspection of this bill discloses that the only ground of objection urged to this testimony is because the testimony is immaterial and irrelevant. We have repeatedly held that the bill of exceptions must disclose some reason why the testimony is inad-

missible, and the mere allegation that the testimony is immaterial and irrelevant is not sufficient,"—citing *Wade v. State*, 37 Tex. Cr. R. 40, 35 S. W. 663; *McGrath v. State*, 35 Tex. Cr. R. 422, 34 S. W. 127, 941 (the opinion in the latter case being by the writer). In the latter case I note the language used was that the statement "that the testimony was irrelevant and immaterial is entirely too general." The testimony, however, appears to have been admissible, and is so treated. In the former case the same language was used, but the testimony in that case was relevant. No doubt a number of decisions can be found in which this general language, to wit, that objection to testimony that it was irrelevant, or not relevant, is stated to be too general; but I do not recall any discussion of this particular question in any case where the decision was made to turn upon the meaning of the word as applied to the evidence, though there may be such, but they have escaped my observation. Nor am I saying that there might not be cases in which the term "relevant" might be too general, and there are certainly cases in which the term "irrelevant" would not point out the objection. In the general dictionaries the word "relevant" means "to the purpose," "pertinent," "applicable," etc. In law it is defined as being any subject-matter, germane to the controversy, conducive to the proof or disproof of a fact in issue or a pertinent hypothesis. "Irrelevant," the converse of this, is "having no legitimate bearing on the real question." See Cent. Dict. and Rap. & L. Law Dict. According to Steph. Dig. Ev. art. 1, the word "relevant" means that any two facts to which it is applied are so related to each other that according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or nonexistence of the other. "The meaning of the word 'relevant,' as applied to testimony, is that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of it." *Platner v. Platner*, 78 N. Y. 90. "Although, as a rule, testimony should not be excluded as irrelevant on the ground that it may have but little weight, yet the law requires an open and visible connection between the proof and evidentiary facts and the deduction from them, and does not permit a decision to be made on remote inferences. The relevancy of evidence may be established after its admission, and evidence irrelevant when admitted may be made relevant by evidence subsequently introduced." 11 Am. & Eng. Enc. Law (2d Ed.) p. 501, and authorities there cited. Now, testing the question by the rule laid down as above, as to whether the objection presented in the bill, that said testimony concerning the death of Sallie Raney was "irrelevant," let us see how the matter stands. The state offered to prove by certain witnesses certain circumstances con-

nected with the death of Sallie Raney's baby. Of course, said testimony was admissible, under certain circumstances, to show that the death of said baby furnished a motive suggesting that appellant killed said Sallie Raney. But, in order that this be true, there should appear some logical, visible connection between the two killings; otherwise, the former homicide is not evidence in the latter,—that is, it is not relevant. As I understand it, the bill of exceptions sets out the testimony of the witnesses in regard to the death of Sallie Raney's baby, with the environments and conditions claimed by the state to render it admissible. As presented, appellant resisted the introduction of the testimony on the ground of its irrelevancy; that is, the bill fails to show any logical or visible connection between the killing of Sallie Raney and the death of her baby. Looking at this bill, we fail to see that the testimony admitted shows that the baby came to its death by any criminal means or agency, much less by the criminal means or agency of appellant. Grouping the evidence presented, it shows that the baby was sick, evidently at the house of appellant (with whom Sallie Raney and her baby resided); that the doctor was called in to see the baby about 5 o'clock in the evening, did not consider it seriously sick, but left four powders to be given it; that he was sent for the next morning, about 10:30, and went over to appellant's house, and found the baby there dead. Mrs. George, wife of the doctor, came over to see the baby shortly before its death, but stated that she did not like the looks of the baby's eyes. She stepped out of the back door, and directly heard the mother scream that her baby was dead. They found the baby had turned blue or purple in color, and, after rubbing it awhile, the natural color came back; that one of the ladies opened the baby's mouth, and they smelled turpentine. The doctor testified that, in his opinion, several things might have caused the condition of the baby's body; that is, the blue or purple color. It could have been caused by the air being cut off from the blood, either by choking it, or putting something over its head, and smothering it, or it could have been caused by failure of the heart to act, or any other means that would cut off the air from the blood. In this connection, Mrs. Hunton testified that, while they were out on the gallery, shortly after the baby died, talking to the mother, Mrs. Raney, appellant came about them, and she noticed that, while defendant was near deceased, Sallie Raney would not talk. This is all the evidence that it could be claimed tends in the remotest degree to show the death of Sallie Raney's baby by violence; and I submit that it is not sufficient testimony pertinently tending to show the death of said baby by violence, much less by violence committed by appellant, to go to a jury as legal testimony for the purpose of furnishing a motive against appellant for the subsequent homi-

cide of Sallie Raney, which homicide depended wholly on circumstantial evidence. There is not only an utter failure in the bill to show the death of said baby by violence, but there is absolutely no showing that it was by violence committed by appellant; and, more than this, there is nothing to suggest that Sallie Raney, the mother, suspected defendant of being connected with the death of her baby, much less that she accused her of it. The feeble suggestion that Sallie Raney, while standing on the gallery with other persons, shortly after the death of her baby, stopped talking when appellant came near, I do not think is worthy of notice in this connection.

Now, I ask, if the objection that said testimony was not admissible because it was not relevant, or because it was irrelevant, was not sufficient, what objection should have been made to the admissibility of this testimony? The death of Sallie Raney's baby was only relevant as proof of motive. As we have seen above, this evidence could only prove motive if the baby's death was occasioned by the criminal agency of appellant, and she knew that deceased, Sallie Raney, knew of such agency, or suspected her with the death of her baby. These were essential facts to render said testimony admissible. They were affirmative facts, not shown in the bill. But the bill as presented showed clearly that said testimony was irrelevant, and in my opinion this was the only objection that could have been urged to the admission of said testimony. It was clearly irrelevant, because concerning another possible homicide; and, before proof of such other homicide could be made in this case, it was incumbent on the state to show the facts which made such other homicide relevant testimony in the case then being tried. *Cheatham v. Riddle*, 8 Tex. 162; *Stiles v. Giddens*, 21 Tex. 784. A majority of the court insist that these circumstances as detailed, "although remote, indicate, as claimed by the district attorney, the probable motive that appellant had in killing deceased," and then say: "Suppose there was positive proof that appellant had killed deceased's baby; it would certainly not then be seriously contended that the fact could not be used in order to show motive for killing deceased, in order to destroy the witness to her crime. Then, clearly, any circumstance that would go to show that appellant killed the child would have been admissible." I cannot regard this as sound doctrine. On the contrary, I insist that, before proof of another homicide can be made, there must be pertinent testimony tending to connect the appellant on trial with some criminal agency in the perpetration of the former murder. Mr. Wharton lays down the correct rule on this subject. See *Whart. Cr. Ev.* §§ 37, 38; and, also, see the question discussed in *Williams v. State* (Tex. Cr. App.) 41 S. W. 645. But it appears to be contended that we can appeal to the statement of facts, and supple-

ment or supply the defects in the bill; and it is said in the opinion "that appellant, on her cross-examination, admits that she knew she had been accused of killing Sallie Raney's baby, and protested her innocence to the deceased." I quote from the testimony adduced on the cross-examination of said witness, as follows: "No, Mr. Kinnard; I did not kill Sallie's baby by smothering it with a pillow. Pretty soon after its death I heard that I was accused with killing the baby, and Sallie told me what those ladies said about it, and I told her I did not kill her baby, and I would not have done such a thing." This is all in the record that even suggests the subject-matter of the death of the baby having come up between Sallie Raney and appellant; and I submit that this does not convey the idea that defendant was apprehensive that Sallie Raney suspected her with the death of her baby, much less that she feared a prosecution on said account, and that Sallie Raney would be a witness against her. There is other testimony in the record showing the friendly relationship between these parties; and the continuance of Sallie Raney to reside with appellant after the death of her babe would suggest that there could be no fear on the part of appellant of Sallie Raney in regard to the death of said baby. But, as a sufficient answer to this proposition, I do not believe we are authorized to go outside of the bill of exceptions itself. This was a case of circumstantial evidence, and every circumstance adduced against defendant on trial has more or less weight, and it is impossible to tell how much weight the testimony in regard to the death of Sallie Raney's baby, attributed, as it was, to the criminal agency of appellant, may have had with the jury. This is a dangerous character of testimony introduced against appellant; and the reasons for its introduction, I think, should be clearly manifest before it is admitted. It occurs to me that the case should be reversed on account of the improper admission of said testimony. Admitting that appellant is very guilty, yet she is entitled to a fair and impartial trial, and no exigency in the administration of the law should deprive her of this. It is not to be presumed that the jury will fail to discharge their duty on another trial, or that the reversal of this case is necessarily an acquittal on a subsequent trial. But, however that may be, for the reasons advanced I cannot concur in the disposition of the case as made by a majority of the court.

ROBY v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1890.)

BANKS AND BANKING—DEPOSITS AFTER INSOLVENCY—INDICTMENT—STATUTES—TITLE.

1. Acts 25th Leg. p. 130, § 1, declares that "any president, director, manager, cashier, or other officer of any banking institution, or the

owner, agent, or manager of any private bank or banking institution," who shall receive or assent to the reception of any deposit after he has knowledge of the insolvency of the banking institution or the owner thereof, is guilty of a felony, etc. *Held*, that two classes of institutions are referred to,—incorporated banks and private banks; that an indictment under the first class must allege that the bank was a corporation, and an indictment under the second class must allege that the bank was a private institution; and, if a private bank or partnership, that the names of the owners or partners must be alleged, and this though the bank did business under a name that did not disclose that it was a private bank or a partnership.

2. The further provision of the act that the fact that the bank fails is prima facie evidence of knowledge on the part of the officer, agent, etc., of its insolvency when he received the deposit, is nugatory, because the caption of the act makes no mention of any rule of procedure.

Appeal from district court, Smith county; J. G. Russell, Judge.

Edwin Roby was convicted of receiving a deposit into a bank after it had become insolvent, and he appeals. Reversed.

Johnson & Edwards and J. M. Hurt, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The charging part of the indictment is as follows: "That Edwin Roby, * * * being then and there the agent, manager, and president of the Tyler Banking Company, the same being then and there a banking institution doing business in Smith county, Texas, did then and there unlawfully receive and assent to the reception into the said Tyler Banking Company, a deposit of money, to wit, one hundred dollars in lawful money of the United States, of the value of one hundred dollars, from P. E. Arthur, after the said Tyler Banking Company was insolvent and in failing circumstances, and after the said Edwin Roby had knowledge of the fact that the said Tyler Banking Company was insolvent and in failing circumstances; that the Tyler Banking Company did, on the 13th day of December, 1898, fail and suspend payment to its depositors, and cease doing business as a banking institution,—against the peace and dignity of the state." The date of the reception of the money is charged to have been on the 10th day of December, 1898; that is, three days before the alleged suspension of the bank. Motion in arrest of judgment was urged against the indictment upon several grounds.

This indictment was framed under section 1, p. 130, Acts 25th Leg., as follows: "That if any president, director, manager, cashier, or other officer of any banking institution, or the owner, agent, or manager of any private bank or banking institution, or the president, vice president, secretary, treasurer, director, or agent, of any trust company or institution, doing business in this state, shall receive or assent to the reception of any deposit of money or other valuable thing into such bank or banking institution, or trust

company or institution, or if any such officer, owner, or agent of such bank or banking institution, or if any president, vice president, secretary, treasurer, director, or agent, of such trust company or institution, shall create or assent to the creation of any debt, debts, or indebtedness in consideration of or by reason of which indebtedness any money or valuable property shall be received into such bank or banking institution or trust company or institution, after he shall have had knowledge of the fact that such bank, banking institution, or trust company or institution, or the owner or owners of any such private bank, is insolvent or in failing circumstances, he shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the penitentiary for a term of not less than two nor more than ten years: provided, that the failure of any such bank or banking institution, or trust company or institution, shall be prima facie evidence of knowledge on the part of any such officer or person that the same was insolvent or in failing circumstances when the money or property was received on deposit." A casual reading of this section, in our judgment, discloses three characters of institutions or business set out by its terms: First, incorporated or chartered banks; second, private banks; third, trust companies or institutions. Under the first, the punishment is denounced against the "president, director, manager, cashier, or other officer"; under the second, against the "owner, agent or manager of any private bank or banking institution"; and under the third, the "president, vice president, secretary, treasurer, director, or agent of the trust company or institution." It is not necessary to notice the first and third, except incidentally, because it was the second class under which appellant was indicted or sought to be indicted. This indictment includes "the agent, manager, and president." This is an attempt at combining two classes, the first and second, because that which relates to the private bank does not set forth a "president" among those against whom the punishment is denounced. In order to constitute a good indictment under the first class, it should have alleged that the Tyler Banking Company was a corporation; under the second, that it was a private bank or banking institution, and, if a private bank or partnership, the names of the owners or persons composing the partnership must be alleged. Wherever a partnership is sued, it is necessary to set out the names of the persons composing that partnership. Such has been the uniform ruling in Texas, since *Bank v. Simonton*, 2 Tex. 531. This rule is expressly recognized in the late decision of *Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409. In this latter decision this language is used: "The familiar rule that all partners who are jointly bound upon a co-partnership contract must be joined as defendants in a suit upon

It is not affected by the foregoing articles of our statutes [referring to articles 1224, 1346, Rev. Civ. St.]. Partnerships are not thereby invested with any of the characteristics of corporations, nor are they expressly or impliedly authorized to sue or be sued in their firm names, independently of their members." Such has been the ruling, as well, in criminal cases in this state, so far as we are aware. *Nasets v. State* (Tex. Cr. App.) 32 S. W. 698; *White v. State*, 24 Tex. App. 231, 5 S. W. 857; *Thurmond v. State*, 30 Tex. App. 539, 17 S. W. 1096; *Carter v. State*, 35 Tex. Cr. R. 105, 31 S. W. 678; *Colter v. State* (Tex. Cr. App.) 49 S. W. 379; *Crawford v. State* (Tex. Cr. App.) 50 S. W. 378. The fact that the statute in question uses the expression "private bank or banking institution" does not change this rule; nor does the fact that the "Tyler Banking Company" did its business under the name of the "Tyler Banking Company" make that mere name a legal entity; nor does it endow it with a personal existence distinct from or independent of the individuals who compose that banking company. In fact, it was simply a firm name, under which the individuals composing it did their banking business. If the individuals were solvent, the Tyler Banking Company was solvent; if they were insolvent, the Tyler Banking Company was insolvent; and, in order to have a good indictment under the peculiar wording of this statute, it was necessary to allege the names of the persons composing the Tyler Banking Company.

If it were necessary to discuss the question as to the distinction between the first and second clauses, and the fact that the first clause referred to banking institutions, the authorities are at hand to sustain that position. This statute seems to have been taken from the Missouri statute. As originally passed, the Missouri statute provided "that if any president, director, manager, cashier, or other officer of any banking institution, doing business in this state, shall receive or assent to the reception of any deposit of money, etc., into such bank or banking institution, after he shall have had knowledge of the fact that it is insolvent or in failing circumstances, he shall be deemed guilty," etc. Rev. St. 1879, § 1350. In *State v. Kelsey*, 1 S. W. 833, the supreme court of that state held this language did not apply to private banks or banking institutions. To meet this decision the Missouri legislature amended said act, and included this language: "Or the owner, agent or manager of any private bank or banking institution." Laws 1887, p. 162. So the very act, at least in substance, passed by our legislature, had been construed by the supreme court of Missouri before its adoption in Texas, and with that construction before it our legislature enacted our statute. We therefore believe the first clause of the first section of the act applied to incorporated banks, and not to

private banks or banking institutions, and that this indictment sought to charge a violation of the second clause of the act. If it did not, then it would be vicious, because it did not charge a violation of the law under the first clause; so, from either view, it is fatally defective. When we refer to the facts, we find that the Tyler Banking Company was a private bank, composed of the parties whose names are set forth in the bill of sale from Ewing & Thorp to the Edwin E. Roby Company. The instrument recites as follows: "Whereas, D. P. Ewing and E. T. Thorp, doing business at Tyler, Texas, under the style of the Tyler Banking Company, have this day retired, and E. E. Roby & Co., composed of E. E. Roby, E. Wm. Dreiholtz, C. R. Brownell, J. G. Telotte, George Vinson, George Morgan, C. B. Darrall, Jr., and Gus Drews, assume charge of said bank, under the same name of the Tyler Banking Company, and from this day said E. E. Roby & Co. assume all liabilities hereinafter incurred by said Tyler Banking Company," etc.

There are quite a number of errors assigned as having been committed upon the trial with reference to the admission and rejection of testimony, and the giving of certain charges and the refusal of others. Some of these are well taken. We deem it hardly necessary, under the views expressed, to go into a discussion of all these matters, as it would involve more time than we have at our disposal at this late day of the term. We desire to say, however, that in our judgment the court erred in charging the rule of prima facie evidence against appellant. It is true that the statute says that the fact that the bank does fail shall be taken as prima facie evidence of the knowledge of its insolvency. That the legislature may adopt such a rule is conceded; but we do not believe, under this statute, they had that authority, because the caption of the act makes no reference to it, nor, even in the most general terms, to any rule of procedure. If the caption had called for it, either directly or, perhaps, indirectly, the legislature might, without violating the constitutional inhibition, have included this within the terms of the law.

It is also contended the evidence not only does not support the conviction, but refutes the allegation of insolvency. As we understand the statement of facts, it is proved beyond doubt, and is not questioned by the state, that the individuals composing the Tyler Banking Company were not only able to meet every obligation of the concern, but were worth, in excess of all liabilities, including the liabilities of this banking company, over \$100,000, subject to the payment of their liabilities or indebtedness. The indictment being wholly insufficient, the judgment is reversed, and the prosecution ordered dismissed.

BROOKS, J., absent.

FLANIGAN v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1899.)

CRIMINAL LAW—EVIDENCE—APPEAL—EXCEPTIONS.

1. The admission of a conversation between third persons, over accused's objection that it was hearsay, cannot be held error, where the bill of exceptions does not show that accused was not present at the conversation.

2. On trial for assault with intent to commit murder, accused offered to prove, as part of the res gestæ, that about 30 minutes before the assault, and just as he was about to start for the depot, the scene of the difficulty, he said that he was going to the depot to get some gum, and that his wife was expecting to come in at the time of the assault. Held that, where the bill of exception to the rejection of the evidence did not show the relevancy of the declarations, no error was apparent.

Appeal from district court, Clay county; A. H. Carrigan, Judge.

Charley Flanigan was convicted of assault with intent to murder, and he appeals. Affirmed.

Geo. E. Miller and Barrett & Barrett, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of assault with intent to commit murder, and his punishment assessed at two years' confinement in the penitentiary, and he appeals.

Appellant's first bill of exception complains of the action of the court permitting the state's witness Jim Milstead to testify to a conversation between him and Elmo Carpenter, a few hours before the alleged difficulty. Appellant objected to this on the ground that it was hearsay, and in the nature of a threat, and had not been communicated. The bill does not show that said conversation between said parties was in the absence of defendant. The objection that it was hearsay is not a certificate of the judge to that effect.

Appellant's second bill of exceptions shows that he offered to prove by the father and brother of defendant that, about 30 minutes before the alleged assault, and just about the time defendant Charley Flanigan and Elmo Carpenter started to the depot, the scene of the difficulty, they heard defendant Charley Flanigan say that they (defendant Flanigan and Carpenter) were going down to the depot to get a box of chewing gum and hickory nuts; that said Charley Flanigan's wife was expecting to come in by express on the train that came in at the time of the alleged difficulty. The state objected to this on the ground that it was hearsay and self-serving. Counsel for defendant insisted that said testimony was admissible as part of the res gestæ of the act of going to the depot; but the relevancy of this testimony is not otherwise shown. Enough of the facts should have been shown in the bill itself, we think, to have indicated both the relevancy of the act of going to the depot and the expressed

purpose of going there. The relevancy or pertinency of this testimony is not shown. The bill should show it some way, and we are not permitted to look to the statement of facts in that regard.

When the court read his charge to the jury, defendant excepted to that portion of the charge on conspiracy and declarations of conspirators, because not applicable to the facts of the case, and on the weight of the testimony, and also excepted to that part of the charge with reference to defendant provoking the difficulty. With reference to the charge on provoking the difficulty, we have examined the record, and in our opinion there was testimony authorizing the court to charge on the subject of provoking the difficulty. We have also examined the charge given by the court on conspiracy and declarations of conspirators, and in our opinion that was applicable. The court instructed the jury that they could only consider the declarations of Elmo Carpenter, co-defendant with appellant, in case they believed a conspiracy had been established between them to assault Bob Givens, and then they could only consider such declarations if they were made in furtherance or in pursuance of such conspiracy; and the jury were furthermore instructed, "If they believed from the testimony that defendant did enter into a conspiracy with Elmo Carpenter to kill Bob Givens, or do him serious bodily injury, but did not believe that the declarations and acts of Elmo Carpenter, if any were in evidence, were done and made in furtherance of the common purpose and during the pendency of said conspiracy, if any, to discard all such acts and declarations of said Elmo Carpenter as may have been admitted in evidence before you which may have been made or done out of the presence or hearing of defendant." This charge, as given, was as fair as appellant could ask.

We have examined the record carefully, and in our opinion the facts sustain the conviction. The judgment is affirmed.

BROOKS, J., absent.

VICK v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1899.)

CRIMINAL PRACTICE—JURY—NEW TRIAL—INSTRUCTIONS—HARMLESS ERROR.

1. Error in overruling a challenge for cause is harmless, where the juror does not sit in the case.
2. Where a motion for new trial on the ground of newly-discovered evidence is not sworn to, and neither defendant nor his counsel makes affidavit of new discovery, the motion is properly denied.
3. Requests for instructions may be refused, where their substance is sufficiently covered by the general charge.

Appeal from district court, McLennan county; Sam R. Scott, Judge.

Harrison Vick was convicted of horse theft, and he appeals. Affirmed.

G. W. Barcus and J. B. McMahan, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of horse theft. The first count in the indictment charged possession and ownership in John Wiggins. The second charged possession in Allen Hughes, and ownership in John Wiggins. Both counts are in proper form.

Bill of exception was reserved to the action of the court refusing to sustain a challenge for cause to the juror Goree. The juror was asked the question, "If, because of the fact that defendant was charged with having a stolen horse, would it influence his verdict?" The juror replied that it would not; but, if he were proven guilty, he would be in favor of giving a greater punishment than for any other similar crime, because he had a prejudice against any man who would steal a horse. The juror did not sit in the case. This is a sufficient answer to the bill of exceptions.

Among other things, appellant moved for a new trial on the ground of newly-discovered testimony, alleging that one Ward Wiggins had possession of the horse at the time it was stolen. Neither appellant nor his counsel makes affidavit that said testimony was newly-discovered. It is alleged in the motion that these facts were unknown to defendant, but the motion is not sworn to. As presented, this is not a sufficient showing to present the question for revision.

When appellant traded the horse, he gave as an explanation of his possession that he had gotten it from "an old man in the city of Waco, who was a freighter." No evidence in support of this, however, was offered upon the trial; but he did adduce testimony to show that he took the horse from the range, some 9 or 10 miles from the city of Waco, and carried same to the city, claiming it to be the property of George Robinson. Robinson testified that he authorized defendant to ascertain the whereabouts of his horse, which he had lost. Robinson kept the horse in question two or three days, in order to send him back to his range by appellant, but, failing to find appellant, sent the horse back by another party. It is in evidence that the horse was turned upon the range, and subsequently appellant went to the range of the horse, and again took him; claiming that another man, whose name he did not give, had authorized him to do so. He this time carried the horse off and disposed of him. It is asserted the charge did not sufficiently present these issues to the jury. We are of opinion the charge did amply submit these questions. The court instructed the jury with reference to the explanation given by him of his possession

of the property, and, in addition, further charged that if he purchased the property from some person in the city of Waco, or from any one else, they should acquit. It was not necessary, therefore, to give the charges asked by appellant covering this phase of the case.

The testimony is uncontroverted that the horse belonged to John Wiggins, and that he placed him in the possession of Allen Hughes, who worked him during a portion of the summer of 1897, and, after finishing his work, turned him upon the range, and shortly thereafter appellant took the horse and disposed of him. We are of opinion that the testimony amply sustains this conviction, and the judgment is affirmed.

BROOKS, J., absent.

PIPER v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1899.)

AFFRAY—WHAT CONSTITUTES.

Two travelers on a public road became engaged in a quarrel. One challenged the other to fight, and they then engaged in a personal encounter in the presence of a third person; one inflicting a blow that drew blood. *Held*, that it constituted an affray.

Appeal from Burnet county court; Ike D. White, Judge.

Jack Piper was convicted of engaging in an affray, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of an affray, and fined one cent. The indictment is sufficient, and in conformity with the precedents. The evidence shows the parties to the fight were traveling along the public road, and became engaged in a quarrel, which resulted in the challenge by one to the other to fight. The challenge was accepted. They both dismounted, and in the presence of the state's witness engaged in a personal encounter; the defendant inflicting a blow upon the face of his antagonist which caused the blood to flow rather freely. This occurred in the public road. Under *Pollock v. State*, 32 Tex. Cr. R. 28, 22 S. W. 19, and authorities there cited, the evidence is sufficient to support the conviction, and the judgment is affirmed.

BROOKS, J., absent.

HEHN v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1899.)

BURGLARY—ENTRY—CONSENT—INSTRUCTION.

Where accused claimed his mother gave him the key to his father's saloon to get her a bot-

tle of wine, but the evidence showed he broke into the saloon with a companion, and drank all the beer he wanted, and robbed the till, he was not injured by a charge that the consent of the owner's wife to the entry did not prevent its being burglary.

Appeal from district court, Victoria county; James C. Wilson, Judge.

Henry Hehn was convicted of burglary, and he appeals. Affirmed.

Fly & Hill, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at five years' confinement in the penitentiary, and he prosecutes this appeal.

Outside of the motion for new trial, there is no bill of exceptions in the record. The only objection here urged is to that portion of the court's charge as follows: "The term 'entry' includes every kind of entry, but one made by free consent of the occupant or the one authorized to give such consent. The husband has the full and exclusive control and management of the community property of himself and wife, and his consent is essential in burglary; and the consent of the wife to enter said house, if you find the same was entered by force, is immaterial." Appellant contends that, in view of the proof offered by him, such charge was erroneous. The proof on this point made by defendant was substantially to the effect that the saloon in question was the property of the co-partnership consisting of Jack Hehn (the father of defendant) and one C. Sitterle, and that on the night of the alleged burglary the wife of Jack Hehn (appellant's mother) gave him the key to the front door of the saloon, having abstracted it from her husband's pocket, with the request to get her a bottle of wine out of the saloon without any one knowing it. Appellant contends here that the wife of one of the partners could give consent to a clandestine entry of said saloon, so as to acquit appellant of a burglarious entry. Now, if the proof on the part of the state showed that the entry was made in such manner, then we would have the question. But this was not the character of burglary proved. The back door of the saloon was broken open, and the saloon was not entered through the front door with the key, and appellant and his companion, instead of taking a bottle of wine for his mother (after breaking into the saloon), immediately proceeded to drink all the beer they wanted, and to abstract the money from the till. In our opinion, the proof offered did not meet the state's case, and was immaterial and irrelevant; and, without discussing the propriety or impropriety of the court's charge, whatever may be our view on that subject, we fail to see how it injured appellant. We have examined the statement of facts carefully, and, in our opinion, the evi-

dence amply supports the verdict, and the judgment is affirmed.

BROOKS, J., absent.

MARQUEZ v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

CRIMINAL LAW—NEW TRIAL—MOTION—APPEAL—RECORD.

1. The question of newly-discovered evidence cannot be reviewed because of noncompliance with the statute in reference to setting it up, where a motion is filed having attached the affidavit of defendant, claiming a new trial on the ground of newly-discovered evidence, but the affidavit of the person by whom he proposes to prove the newly-discovered facts is not attached, and on the next day defendant files a motion containing the affidavit of the person by whom he expects to prove the newly-discovered evidence, but not his own affidavit.

2. Defendant, not having reserved a bill of exceptions to the action of the court in excluding testimony, cannot have it reviewed.

Appeal from district court, El Paso county; A. M. Walthall, Judge.

Gabino Marquez was convicted of theft, and appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of the theft of cattle, and his punishment assessed at two years' confinement in the penitentiary.

An inspection of the record discloses two motions, both of which are styled, "First Amended Motion for New Trial," filed on the 24th and 25th of February, respectively. The motion filed February 24th has the affidavit of appellant attached, claiming a new trial on the ground of newly-discovered evidence, but the affidavit of the party by whom he proposed to prove the newly-discovered facts is not attached to said motion. The motion filed on the 25th of February contains the affidavit of the party by whom he expects to prove the newly-discovered evidence, but does not contain the affidavit of appellant. The statement of the condition of these two motions shows that the question of newly-discovered evidence cannot be reviewed by us, because appellant does not comply with the statute in reference to setting up the newly-discovered evidence. Furthermore, we find from an inspection of the record that the district attorney filed an affidavit which shows that the absent witness, by whom defendant has discovered he can prove certain facts, was in the city of El Paso several days during and since the trial of this cause; "that said witness is now, and has been for several years last past, a resident of said county of El Paso, and that he has been in this county since the filing of the indictment herein almost continuously; and that he has been absent from this county, if

at all, but temporarily, and days at a time." This would indicate that appellant has not diligence to ascertain what the witness knew about the facts of the case, and therefore conclude that appellant is not entitled to a new trial, on the ground of newly-discovered evidence, is not well taken.

Appellant's first complaint for new trial is to the action of the court in excluding the testimony of the witness Maesa; but, as appellant has not reserved a bill of exceptions to the action of the court, we cannot review it.

Appellant's second complaint is that the court erred in failing to charge the jury on the full extent on the question of intent existing in the mind of the defendant at the time he took the cattle. Appellant's third complaint is that the court erred in failing to charge the jury on the question of intent existing in the mind of the defendant, in failing to charge the jury on the question of fraud. We do not think either of said errors were caused by the evidence.

His fourth complaint is that the jury is contrary to the law in its verdict, unsupported by the evidence. We think it is necessary to review the entire case. Appellant's defense was fully submitted, and there is no error on the part of the state supported by the evidence, and, the jury having seen the state's theory of the case, and having found it proved, we cannot disturb their finding.

Appellant's sixth complaint is that the court erred in failing to instruct the jury to find defendant not guilty because he failed to prove venue. An inspection of the record shows that venue was properly proved, and, furthermore, under Code Cr. Proc. art. 1897, p. 11, venue cannot be raised by motion. We have carefully reviewed appellant's assignments of error, and find no error in the record, the judgment is affirmed.

SEARCY v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

INTOXICATING LIQUORS—SUNDRY ARTICLES—CONSTITUTIONAL LIMITATIONS.

Pen. Code, art. 199, declares it unlawful for any trader in any business who sells, or has in his possession, for sale, any article of merchandise, day, and article 200 declares that the provisions shall not apply to markets or public places, nor to the sale of burial material, newspapers, ice, ice cream, or to the sending of telegraph or telephone messages, nor to keepers of drug stores, boarding houses, restaurants, live houses, or ice dealers. *Held*, on appeal, that the sale of liquor, not sold by a druggist, is not an article of merchandise; that said articles were not exempted from taxation; the exemption not being in favor of certain articles that are prohibited from dealing in, but being in favor of certain articles of merchandise and necessities.

Appeal from Karnes county court; F. Theodore Barnes, Judge.

G. L. Searcy appeals from a conviction. Affirmed.

Graves & Bell, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted under article 199, Pen. Code, for selling liquor, being goods, on Sunday, and his punishment assessed at a fine of \$20, and he appeals.

The court properly overruled appellant's motion for continuance. No diligence was shown.

Appellant made a motion to quash the indictment and in arrest of judgment, on the ground that the statute constituting this an offense, together with the succeeding statute (article 200, Id.), making certain exemptions, is unconstitutional, in that it is class legislation. In other words, he insists that the exemption from the operation of the law of keepers of drug stores, etc., is a personal exemption in favor of such citizens, and authorizes them to deal in goods, wares, and merchandise that other citizens are inhibited from dealing in. If this were a correct construction and interpretation of the law, his contention would be sound. But we do not so regard it. The exemption, as we construe it, is in favor of the article sold by the persons who deal in such articles; and it was not only competent for the legislature to pass a Sunday law (*Ex parte Sundstrom*, 25 Tex. App. 133, 8 S. W. 207), but the legislature was also authorized, under its police power, to exempt certain articles of merchandise as common necessities, the sale of which should not be forbidden by law. Drugs and medicines were very properly placed in this category, and the keeper of a drug store is authorized to sell drugs and medicines, but not other goods that do not belong in this class. We might take judicial cognizance that certain articles are drugs or medicines, but this is often a question of proof. *Todd v. State*, 30 Tex. App. 667, 18 S. W. 642. Whisky is not ordinarily placed in this category, but is regarded as a beverage, and comes within the inhibited articles. *Day v. State*, 21 Tex. App. 213, 17 S. W. 262. There is no pretense here that same was sold as a medicine or by a druggist.

The fact that article 187 of the Code of 1876 was not brought forward by the codifiers in the new Code makes no difference in the construction above placed on said article. It is our duty, even if there were any difficulty as to the construction of this article, to uphold it as constitutional, if the matter is of doubtful import, as it will be presumed that the legislature did not intend to violate the constitution in passing the article in question, and that construction should be given it which will uphold its constitutionality. *Bish. St. Req.* 93. We do not believe, however, there is any difficulty in regard to the con-

struction which we have placed on this article; and, in our view, the court did not err in overruling the motion to quash or in arrest of judgment on the ground that the act was unconstitutional. There being no error in the record, the judgment is affirmed.

CLARK v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1899.)

CRIMINAL LAW—APPEAL—RECORD.

1. In the absence of a statement of facts in the record, the refusal of charges cannot be reviewed.

2. There being no bill of exceptions in the record, action of the court in the admission and rejection of testimony cannot be considered.

Appeal from district court, Bexar county; Robert B. Green, Judge.

Roy Clark was convicted of theft, and appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with the theft of \$1,000, and his punishment assessed at two years' imprisonment in the penitentiary. Numerous grounds are assigned in the motion for new trial why this judgment should be reversed. They relate to the charge of the court, refusal of the court to give special charges requested, and allege errors with reference to questions of evidence. The charge, tested by the allegations of the indictment, is not subject to the criticisms. The record does not contain a statement of the facts, and therefore we are unable to revise the action of the court in regard to charges refused. No bills of exception are contained in the record, and the alleged errors committed with reference to the admission and rejection of testimony cannot be revised. The judgment is affirmed.

BROOKS, J., absent.

SPARKS v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1899.)

KEEPING DISORDERLY HOUSE—HEARSAY—INSTRUCTIONS.

1. Testimony of the judge in regard to a conversation between him and J., another witness, in regard to J. making the affidavit against defendant, charging him with keeping a disorderly house, it appearing that the judge advised her not to make the affidavit if defendant would go on her bond, she being at the time in jail, charged with the same offense; that, under the judge's advice, she wrote to the parties to make the bond, but failed to receive any reply from them, and then made the affidavit,—is hearsay.

2. As, under the statute, one cannot be guilty of keeping a disorderly house except as lessee or tenant, a charge that if defendant was not the lessee or tenant, or was not concerned in keeping a disorderly house, but if the disorderly

house was kept, and he only loaned J. some money, "and had no other connection with the house," he was not guilty, is erroneous, as authorizing a conviction if defendant was in any manner concerned in keeping a disorderly house.

3. Failure to give a charge on accomplice testimony in a misdemeanor case, none having been prepared and presented to the court by defendant, is not error.

Appeal from Limestone county court; A. J. Harper, Judge.

Bob Sparks was convicted of keeping a disorderly house, and appeals. Reversed.

Bell & Scruggs and Hurt, Stine & Watts, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of keeping a disorderly house, and his punishment assessed at a fine of \$200, and he appeals.

Appellant objected to certain testimony of the judge delivered before the jury. This testimony was in regard to a conversation that occurred between the judge and Lillian Jester, another witness, in regard to said witness making the affidavit against defendant. From the statement in the bill of exceptions, it seems that the judge advised the witness not to make the affidavit if appellant would go on her bond, she being at the time in jail, charged with the same offense; that, under the judge's advice, she wrote to the parties to make the bond, but failed to receive any reply from them, and then made the affidavit. This testimony was objected to on the ground that it was hearsay, and was calculated to prejudice appellant, in that the testimony of the judge lent credit to the witness Lillian Jester. In our opinion, it was clearly hearsay testimony, and we are not prepared to say that it did not give strength to the testimony of said witness.

Appellant also excepted to the court's charge, and asked a special instruction. The charge requested is as follows: "You are charged that if Lillian Jester rented or bought the house in question from Matt Ransom for herself and in her own name, and that defendant was not a party to such purchase or renting, then defendant was not the owner, tenant, or lessee of such house, and you should acquit him." It is contended that the instruction given in the general charge sufficiently presented appellant's defense, said instruction being as follows: "You are further instructed that if you believe from the evidence that defendant was not the lessee or tenant as charged, and that he was not concerned in keeping a disorderly house, but that if the disorderly house was kept as charged; that he only loaned Lillian Jester about sixty-five dollars in money, and had no other connection with the house,—then he would not be guilty." We do not think this charge embodies a correct proposition of law, and it certainly does not present the phase of the case covered by appellant's special requested instruction. The charge given by the court

authorized the jury, if they believed that defendant was concerned in keeping a disorderly house, not as a tenant or lessee, but in any manner, to find him guilty. As we interpret the statute, he can only be guilty for keeping the house as lessee or tenant, or by being concerned in keeping the house as lessee or tenant. Appellant offered proof that the house was not rented by him, but was rented or bought from Matt Ransom by Lillian Jester; and he requested an instruction on this phase of the case, which should have been given.

The court did not err in failing to give a charge on accomplice testimony, inasmuch as this was a misdemeanor case, and no charge was prepared by appellant and presented to the court on that subject. The judgment is reversed, and the cause remanded.

BROOKS, J., absent.

DUNN v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1899.)

CRIMINAL LAW—APPEAL—STATEMENT OF FACTS.

A statement of facts made up entirely of questions and answers, being violative of the supreme court rules, will be stricken out.

Appeal from district court, Nueces county; Stanley Welch, Judge.

John Dunn appeals from a conviction. Affirmed.

H. Grass and W. B. Dunham, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of an assault with intent to commit the offense of robbery. The statement of facts consists entirely of questions and answers. The assistant attorney general moves to strike out same because it is violative of the rules prescribed by the supreme court, prohibiting the making up of statement of facts in this manner. An examination of the record sustains the statement that said statement of facts is so made up, and the authorities cited by the assistant attorney general sustain his motion to strike out the statement (Emmons v. State, 34 Tex. Cr. R. 98, 29 S. W. 474, 475; Butler v. State, 33 Tex. Cr. R. 232, 26 S. W. 201); and in support of the proposition that the statement of facts must be made up in accordance with said rule, see same authorities, and Ratcliff v. State, 29 Tex. App. 248, 15 S. W. 596. The motion is sustained, and the statement of facts stricken out. With the record in this condition, the matters complained of on the appeal cannot be intelligently revised. No error appearing in the record, the judgment is affirmed.

BROOKS, J., absent.

WOODARD v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

HOMICIDE—EVIDENCE—PROVOKING DIFFICULTY.

1. Testimony of W. that, a few minutes before the difficulty between deceased and defendant, defendant came to W., and tried to raise a difficulty with him, not being connected with the difficulty with deceased, is inadmissible.

2. Testimony of deceased's wife that at her suggestion he carried his pistol with him on the day of the difficulty, and that she gave the advice because of an anticipated difficulty with defendant, against whom deceased was a witness in a case, is hearsay.

3. Evidence of an angry conversation between defendant and another about another than deceased, half an hour before the difficulty between defendant and deceased, in no way connected with such difficulty, is hearsay, and not admissible to prove character.

4. The issue of provoking a difficulty is not raised by testimony of the state that defendant, when he met deceased, engaged him in conversation, using language calculated to bring about a difficulty, which deceased resented by striking him, whereupon they were separated, and defendant left, conveying the idea that he would soon return, and renew the difficulty, and that he returned in a few minutes, with his pistol, and, as he approached, began firing at deceased; and defendant's evidence that in the conversation deceased called him names, and struck him, and he left, securing his pistol, to defend himself from any further attack of deceased, and returned, to get his dinner, and, as he approached, deceased began drawing his pistol, and they fired about the same time.

Appeal from district court, Navarro county; L. B. Cobb, Judge.

Oliver Woodard appeals from a conviction. Reversed.

Callcutt & Call, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and given 10 years in the penitentiary.

The state proved by Tom Willson that, just a few minutes before the first difficulty between deceased and defendant, defendant came to witness, looking mad, and tried to raise a difficulty with him. Witness told defendant he did not have time to talk with him, that he had to go to the courthouse as a witness. Several objections were urged to this evidence. This testimony was clearly inadmissible. Any hard feelings that may have existed between Willson and defendant certainly were not evidence against defendant in the difficulty between defendant and deceased, Vance. There was no attempt to connect these matters, so as to make the testimony admissible.

The state introduced Mrs. Vance, wife of deceased, and proved by her that deceased, at her suggestion, and under her advice, carried his pistol with him to Corsicana on the day of the fatal difficulty; and the reason she advised him to do so was on account of an anticipated difficulty with Williamson, against whom deceased was a witness in

some case, and had gone to Corsicana on that very day for the purpose of testifying in that case. Several objections were urged to this testimony. That this was hearsay cannot be questioned. *Murphy v. State* (Tex. Cr. App.) 40 S. W. 978; *Johnson v. State*, 22 Tex. App. 206, 2 S. W. 609.

The state was permitted to prove a conversation between the witness Granthum on one side and defendant and Ivy on the other, in regard to Hightower and Allen, who were opposing candidates for sheriff at the then approaching election, in which appellant and Ivy denounced Allen as being a damned rascal, and no better than a cow thief, and, besides, other abusive language concerning Allen. It is further shown that in this conversation Granthum informed defendant that Allen was his friend, and interdicted any further abusive language on the part of appellant and Ivy. To this defendant stated that the sidewalk belonged to him as much as to the witness, and he would say what he damned pleased. This conversation occurred about half an hour before the difficulty between defendant and deceased. There is no attempt to connect this with the difficulty between defendant and deceased. It was clearly hearsay, and a matter occurring between the parties to the conversation, and in no way applicable to or binding upon defendant. This character of testimony, if sought to prove character, was inadmissible.

The court charged the jury with regard to the law of provoking a difficulty. The facts bearing upon this issue, if in fact the issue was in the case, are about as follows: Hard feelings existed between the parties. Threats had been made. On the day of the homicide, the parties, evidently without knowledge on the part of either that the other would be there, went to the town of Corsicana. Deceased, with two or three friends, were standing in front of the restaurant, when defendant and two of his friends resorted there for the purpose of ordering dinner. Upon reaching the front of the restaurant, appellant engaged deceased in conversation, in which he used, according to the state's version, such language as was calculated to bring about a difficulty. It is not necessary to repeat it here. This insulting language was promptly resented by deceased striking defendant twice with his fist. The parties were separated, and defendant immediately left, conveying the idea that he would soon return, and renew the difficulty. He returned within from 5 to 20 minutes with his pistol, and, as he approached, began firing at deceased. This, in substance, is the state's theory. The defendant's evidence shows that in the conversation when they first met in front of the restaurant deceased called him a damn cow thief, and then struck him; that defendant left, secured his pistol, for the purpose of defending himself from any further attack of deceased, and returned to the restaurant for the purpose of getting his dinner; and, as he

approached, deceased began drawing his pistol, and they fired about the same time. Under this state of case we are of opinion that the issue of provoking a difficulty was barely suggested, if at all. Appellant reserved an exception to the court's charge on this matter, and requested a charge submitting the issue of manslaughter in case the difficulty was provoked only for the purpose of engaging in a fist fight. The whole issue of provoking the difficulty, from any view of it, must be predicated upon the first meeting. So, if there was a provoking of the difficulty at all, the court should have charged the jury, in that connection, that if the difficulty was provoked only for the purpose of engaging in a fist fight, and defendant was driven to kill in self-defense, he would be guilty of no higher degree of homicide than manslaughter. But the writer does not think the issue of provoking the difficulty was raised in this case, and should not have been given in the court's charge.

There are other questions suggested for revision, but, as presented in this record, they will not likely occur upon another trial. But, for the errors discussed, the judgment is reversed, and the cause remanded.

HARGROVE v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

CRIMINAL LAW — POSTPONEMENT — IMPEACHING EVIDENCE.

1. One who claims that he left the place of the burglary on the night thereof, but prior thereto, and that on the way he met and talked with a person, whom he cannot recall, is not entitled to postponement of his trial for theft, in connection therewith, to ascertain who it was, and to obtain his testimony; there being a want of diligence, he having been subjected to an examining trial, indicted twelve days before the trial, and two days theretofore convicted of the burglary.

2. One who, on his trial for theft in connection with a burglary, has testified that J. pleaded guilty to the identical offenses, may, for the purpose of impeachment, be asked if he had not been convicted for the same burglary.

Appeal from district court, Mills county; John M. Furman, Judge.

Tom Hargrove was convicted of theft, and appeals. Affirmed.

D. W. Wilcox and Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of the theft of property over the value of \$50, and his punishment assessed at two years' confinement in the penitentiary.

When the case was called for trial, appellant asked for a postponement in order that he might have time to ascertain whether he could find witnesses who would swear to an alibi. As shown by the motion, there is an utter want of diligence. He had been sub-

jected to an examining trial. The indictment had been subsequently returned on the 15th of March, and on the 27th of the same month he was placed upon trial and convicted. Two days prior to making this application he had been convicted of burglary, a part and parcel of this same transaction, being for the theft of property from the burglarized house. No process was issued. His contention is that he left the town of Goldthwaite, the scene of the burglary, prior to, but on the night of, the burglary; had gone to Brownwood: thence to Comanche by rail. He asserted in the motion that, in passing from the depot of one railroad to that of the other, he met or spoke to some one on the street in Brownwood, whom he could not recall, and asked for time to ascertain who that was; that he went from Brownwood to the town of Comanche, where he spent the remainder of the night in a house of prostitution. He asked for no process for these women, so far as the motion shows, nor does he seek a postponement to secure their testimony. But he does desire the testimony of a hotel keeper at Comanche, at whose house he stopped two or three days thereafter. We do not think there was any error in overruling this motion. If defendant was not connected with the burglary at Goldthwaite, and left that town prior to its commission, then he was fully aware of it; was aware of it when he was arrested and at the examining trial; was aware of it when he was arrested under the indictment; was aware of it at the time he was tried for the burglary; and, being charged with this offense, it was his duty to ascertain who his witnesses were, and his failure here seems to consist in the fact that he had not been able to recall the facts until after his conviction for the burglary. There is no merit in this application.

While on the witness stand in his own behalf, appellant testified, in answer to questions of his counsel, that he knew Oscar Johnson had been indicted and tried for the offense of which appellant was then on trial. He also testified that Oscar Johnson had pleaded guilty to the identical offense herein charged against him as well as the burglary growing out of the same transaction. In this connection the district attorney asked him if it was not a fact that he had been convicted a few days ago for the same burglary for which Oscar Johnson was convicted. He answered in the affirmative. This was objected to on various grounds. The court limited this evidence in his charge to the question of impeachment. For this purpose we think the evidence was admissible, under the repeated decisions of this court.

Appellant also contends that the evidence is not sufficient to support the conviction. We believe the evidence shows, beyond any question, the guilty participation of appellant in the burglary. The judgment is affirmed.

HARGROVE v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

INDICTMENT—SERVICE—STATEMENT OF COUNSEL—CONTINUANCE.

1. Under the statute providing that a certified copy of the indictment shall be made out by the clerk, which shall be delivered to the sheriff, together with the writ directed to such sheriff, commanding him forthwith to deliver such certified copy to defendant, it is immaterial that delivery of the copy to defendant is by another than such sheriff, and out of his county.

2. Where defendant testified that J. had moved for a severance, so that defendant could be tried first, and that J. was the one guilty of the burglary, and he knew nothing of the transaction, there is no error in the prosecuting counsel in his closing speech referring to the fact that J. would have been tried first but for his motion in which he made oath that he believed defendant could clear him, and that defendant had gone on the stand and said J. was the guilty one, and he was innocent.

3. Continuance to obtain testimony of a witness merely that he saw J. give some of the stolen goods to defendant a week after the robbery is properly denied, this testimony not militating against the state's case.

Appeal from district court, Mills county; John M. Furman, Judge.

Tom Hargrove was convicted of burglary, and appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary, and his punishment assessed at 3½ years' confinement in the state penitentiary.

When the case was called for trial, appellant urged that he had not been properly served with a copy of the indictment. A contest arose over this question, and the bill of exceptions shows that a certified copy of the indictment, together with the writ commanding the sheriff to serve the same, was directed and given to the sheriff of Mills county; that he carried these papers with him to Ft. Worth, where appellant was confined, and there handed the certified copy of the indictment to the sheriff of Tarrant county, who caused said copy to be delivered to appellant, the sheriff of Mills county making the return upon the writ of the service of said indictment. The certified copy of the indictment was in fact served upon appellant. The contention of appellant seems to be that, in order to make out a legal service, it was necessary that the sheriff of Mills county should execute the writ and make the service in person, and that this must be performed in Mills county. This we understand to be his contention. We do not believe this is correct. The importance of the writ is chiefly to furnish record evidence that the copy has been delivered to defendant; and, if this has been in fact done, no right of his is prejudiced by the neglect or failure of the clerk to issue the writ. *Barrett v. State*, 9 Tex. App. 33; *Bonner v. State*,

29 Tex. App. 223, 15 S. W. 821. The statute provides that a certified copy of the indictment shall be made out by the clerk, which shall be delivered to the sheriff, together with the writ directed to such sheriff, commanding him forthwith to deliver such certified copy to the defendant. We understand that, under the decisions, if in fact the defendant has had the certified copy delivered to him in time for preparation for the trial, it would not be material that it should be done by the sheriff in person. If in fact the certified copy has been delivered to him, although by some one else than the sheriff, still it would be sufficient under the statute.

The district attorney, in his closing speech, stated: "I refer to the sworn motion of Oscar Johnson in his case, which was first upon the docket, and would have been tried first had he not said under oath that he believed this defendant could clear him, if defendant was first cleared; and yet defendant goes on the stand in his own behalf and says poor Oscar is the guilty one, and poor Tom is innocent as a lamb, and don't know enough about this burglary to do Oscar or anybody else any good or harm." Appellant reserved an exception to these remarks on the ground that this action of Oscar Johnson should have no weight against defendant, and could only prejudice the jury against him. It seems that appellant took the stand in his own behalf, and testified that Oscar Johnson had made a motion for a severance, so that defendant could be first tried; and he further testified, in substance, that Oscar Johnson was the party guilty of the burglary and theft, and that he knew nothing of the transaction, but subsequently did receive some of the stolen property from said Johnson. These matters are made to appear in two bills of exception. We are of opinion the remarks of the district attorney were legitimate under this state of case.

Appellant also moved for a continuance for the testimony of Galloway, by whom he expected to prove that he was present in Ft. Worth about a week subsequent to the alleged burglary and theft which was committed in Mills county, and saw Oscar Johnson deliver to appellant some of the property taken from the burglarized house. The diligence was not complete; but, if it was, this testimony is too remote. This could have occurred, and yet not militate against the state's case in any material manner. The evidence discloses that Johnson and appellant were together in the town of Goldthwaite and in the burglarized house late on the evening prior to the burglary at night, looking at and pricing some shoes, and clothing. The very clothing and shoes inspected by them in the evening were stolen that night, together with quite a number of other articles. Defendant while on the stand stated, in substance, that he suspected Johnson, and parted company with him on the night of but prior to the burglary, went to the

depot at Goldthwaite, took the train to Brownwood, where he took another train, and went to Comanche, and spent the remainder of the night in a house of prostitution with some lewd women, and the next day went to Ft. Worth. After reaching Ft. Worth, he returned to Comanche, spent the night at a hotel near the depot, and returned again the following day to Ft. Worth, and a few days later met Johnson in Ft. Worth, who gave him a part of the stolen goods. No process was issued for any of the trainmen on either of the railroads upon which defendant says he traveled on the night of the burglary; nor was the testimony of the lewd women sought; nor, so far as the record shows, did he seek to have any testimony, outside of his own, to prove his alibi on the night of the burglary. He had been under arrest for several months for this burglary before he was placed upon trial, and had been served with a copy of the indictment nearly two weeks prior to the trial, and yet, so far as the record shows, the only witness sought by him was Galloway, to prove his reception of some of these goods about a week after the burglary. It may be true that Galloway saw Johnson deliver to appellant some goods about the time stated, yet this would not militate against the state's case. If the statements of appellant were in any manner truthful as to his movements on that night some of the parties on the train, or these lewd women, should have been sought. We see no merit in this application for continuance or postponement. We think the testimony is amply sufficient to support this judgment, and it is accordingly affirmed.

BRYANT v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1899.)

CRIMINAL LAW—NEW TRIAL.

New trial to enable defendant to get the testimony of his co-defendant, who, since defendant's trial, has been acquitted of the same offense, will be denied; the discrepancies in their statements as to their movements the night of the attempted burglary, as to time and place, and the inducements and reasons of the co-defendant to falsify rendering it improbable that the jury would take a different view of defendant's guilt on another trial.

Appeal from district court, Galveston county; E. D. Cavin, Judge.

Ernest Bryant was convicted of an attempt to commit burglary, and appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of an attempt to commit burglary. The first ground of the motion for new trial sets up the fact that his co-defendant, Huff, had,

since appellant's trial, been acquitted of the same offense, and upon this ground the court was asked to set aside the conviction, in order to obtain the testimony of said Huff. We do not believe the court erred in this matter. This character of testimony, in order to entitle appellant to a new trial, should be of such character as would probably lead to a different result as to appellant's case on another trial. The evidence adduced for the state shows that on the night in question appellant, Huff, and another party went to the burglarized house, and broke two window panes from a window, and, as the officer approached, hurriedly made their departure. Huff and defendant were well known to the officer, and he identified them positively. Defendant took the stand in his own behalf, and testified that about 8 o'clock that night he went west on Strand and Twenty-First streets, thence to the western part of the city to the residence of his aunt (this aunt was not introduced as a witness); that he came back about 10 o'clock, and went to the saloon run by Gray, and engaged in a game of "coon-can" with a boy named Bennie Harris until 12 o'clock; thence went to the market, and got a lunch. He states, in this connection, that "on my way to the market I met Donald Huff, and we both went in and got a lunch together, and it was there that we saw Officer McGuire the second time that night." Bennie Harris testified that they played their game from 9 until 12, and left the saloon about 12. The affidavit of Huff states that he was in company with defendant on the night of the burglary, but not later than 9 o'clock, and at that time appellant left him, stating he was going to the residence of his aunt; that he did not see Bryant any more after that until he met him in the meat market at a coffee stand, some time after 12 o'clock the same night, at which time he saw Officer McGuire, who was also eating a lunch. He also states that he was not at the burglarized house at 11:10 o'clock, or at any other time, on the night of the burglary. As before stated, the officer testifies that they were together, and they were about the burglarized house, and, when they left it as he approached, they all three went into Gray's Saloon. Taking the discrepancies in the statements of the defendant and Huff in regard to their movements that night as to time, place, etc., their separation and getting together again, and the inducement and reasons of Huff to falsify with reference to his connection with the transaction, render it unlikely and improbable that the jury would take a different view of the matter as to defendant's guilt upon another trial. Rucker v. State, 7 Tex. App. 549; Jones v. State, 23 Tex. App. 621, 8 S. W. 801. The judgment is affirmed.

BROOKS, J., absent.

JANNIN v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1899.)

DUE PROCESS OF LAW—MONOPOLIES—POLICE POWER—DELEGATION OF LEGISLATIVE AUTHORITY—CRIMINAL LAW.

1. Laws 1893, p. 97, making it a penal offense for any other person than the agent of a railroad company to sell its tickets, deprives no one of his property without due process of law, a ticket not being "property," in the general sense of that word.

2. Nor does the act create a monopoly.

3. On the contrary, it is a valid exercise of the police power.

4. The act is invalidated, however, by the further provision that it shall not apply to tickets on which it is not plainly printed that it is a penal offense for the holder to transfer the same, since it is left optional with each railroad company whether it will make the unauthorized sale of its tickets an offense.

Brooks, J., dissenting.

Appeal from district court, Bexar county; T. F. Shields, Special Judge.

C. C. Jannin was convicted of an offense, and he appeals. Reversed.

R. L. Summerlin and Ed. Haltom, for appellant. Upson, Bergstrom & Newton, W. W. Walling, and Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of selling a railroad ticket, not being the agent of any railroad company, and authorized thereto, under the act of the 23d legislature (Laws 1893, p. 97), and his punishment assessed at a fine of five dollars, and he appeals.

The indictment sets out by exhibit the ticket alleged to have been sold, which is as follows: "Issued by Galveston, Harrisburg & San Antonio Ry. Co. Excursion Ticket. 5/4. Good for one first-class passage San Antonio to Houston (Depot). This ticket is not good for stop-over privilege, and will not be honored for any part of the trip after midnight of May 7th, 1894. Nounce. It is a penal offense for the purchaser or holder of this ticket to sell, barter, or transfer the same for a consideration, and this ticket, or any unused part thereof, is redeemable by the company at any ticket office of the company when presented for redemption within ten days after the right to use the same has expired by limitation of time, as stipulated herein. L. J. Parks, Asst. G. P. & T. A. One-way rate, \$6.30; round-trip rate, \$——. Form S. B." It is alleged substantially that appellant, without lawful authority, sold said railroad ticket to one E. A. Metcalfe, he, the said Jannin, not being the agent of the said Galveston, Harrisburg & San Antonio Railway Company for the purpose of selling tickets, and having no certificate of authority to make the sale of the same, etc. No objection was urged to the indictment, but it is insisted that the law of the 23d legislature, making it a penal offense for any other person than the agent of a railroad company to sell passage tick-

ets, is unconstitutional (1) because the law prohibiting the selling of tickets by persons not having a certificate of authority to sell is not a police regulation adopted by the legislature in the legitimate exercise of the police power; (2) the law is invalid, in this: it delegates to railway companies the power to make the sale of tickets lawful or unlawful; (3) a railroad transportation ticket is property. In this connection, appellant contends that said act is violative of section 19 of the bill of rights, as follows: "No citizen of this state shall be deprived of life, liberty, property, immunities, * * * except by the due course of the law of the land." Section 26: "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." These questions have all been so thoroughly discussed under similar laws of other states that it would appear to be a work of supererogation to reiterate what other courts have said on this subject, and, in the face of a number of able decisions of other states, we would not undertake to add anything new to the discussion of the questions here involved. See *Com. v. Wilson*, 14 Phila. 354; *Fry v. State*, 63 Ind. 560; *Burdick v. People*, 149 Ill. 600, 36 N. E. 948; *State v. Corbett*, 57 Minn. 345, 59 N. W. 317; *State v. Bernheim* (Mont.) 49 Pac. 441; *People ex rel. Tyroler v. Warden of City Prison*, 26 App. Div. 228, 50 N. Y. Supp. 56, and reported in the court of appeals of New York, 51 N. E. 1006. By reference to the above cases, it will be seen that this constitutional question with reference to scalpers' tickets, in one shape or another, has been before the courts of the several states mentioned, and the holding was in favor of the constitutionality of the law in all of said states except New York. In *Tyroler's Case*, from that state, it was held, on a proceeding in habeas corpus to the appellate division of the supreme court, by a unanimous court, that the scalpers' law of that state was constitutional, in that it did not deprive a citizen of his property without due course of the law of the land, nor did it confer an exclusive privilege upon any class of persons so as to be a monopoly, and it was within the police power of the state legislature to pass such a law. It was, moreover, held that it was not violative of any provision of the constitution or laws of the United States with reference to interstate commerce. This case was taken to the court of appeals of said state, and there, by a divided court of four to three, the law was held to be unconstitutional. In that case the learned chief justice appears to consider that the passage ticket of a railway company is property, and any law which attempts to restrain or inhibit the disposition and sale of same is pro tanto a violation of the constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law. Again, that opinion holds that the attempt of the legislature to

confine the sale of railroad passage tickets to the agents named in the act was the creation of a monopoly, and that the legislation in question inhibited by said provisions of the constitution of New York did not come within the police power of the legislature. A number of cases are cited in favor of the opinion. It will be observed, however, that there is a marked distinction between the New York law and our statute on this subject, in that the New York statute, by the construction placed on it by Judge Parker, authorized, not only the agents of the particular corporation to make sales of such tickets, but the agents of all other transportation companies, and in the opinion the learned judge lays stress on this construction of the statute as class legislation and creating a monopoly. As stated before, the opinion of the New York court of appeals on this subject runs counter to all of the authorities that have come under our observation. That court itself was divided on the subject, and, in our opinion, the very able discussion by Judge Parker is more than answered by the dissenting opinions of Justices Bartlett and Martin. These treat a passage ticket on a railroad company, not as property, in its general sense, but as a token of the purchaser's right to be transported on the railroad between the points named in the ticket. We quote as follows: "The ticket is the property of the railroad company, and is a part of the means by which it conducts its business. It is delivered to the passenger, to be held by him temporarily for a special purpose, and he, to that extent, acquires a special property in it. When the journey is ended, or about to end, it is to be delivered to the conductor. It serves a threefold purpose: It is evidence in the passenger's hands that he has paid his fare, and has a right within the cars; it insures the payment of the passage money by all who take seats; and, when it is redelivered to the company, it becomes a voucher in its hands against the office or agent who issued it in the adjustment of its accounts. It thus appears that the original and legitimate function of the ticket is to carry out a transaction between the carrier and the passenger. The ticket being the property of the carrier, still the passenger is entitled to retain it in his possession until the completion of his journey." And again: "Railroad and steamboat tickets can, in no proper sense, be regarded as property in which third persons have any vested interest. They are mere tokens or evidences of a right to transportation, in which even the traveler who has purchased one has but a special interest, and to which the companies have title and the ultimate right of possession." They hold, in accordance with the views of other courts, that the act of the legislature, restricting the right of sale to the agents prescribed in the act, was within the police power of the state, and not violative of any provision of the

constitution; that, in the exercise of its police power, the state was authorized to prevent the pursuit of the occupation of ticket brokers, upon the ground that it was harmful to the public, and the difficulty in circumventing the fraud was so great that no other efficient means could be found.

We hold, in accordance with what we conceive to be the current of authority and the sounder view on this subject, that the legislature was authorized, as was done in this act, to confine the sale of passage tickets on railroad companies to the agents of such companies, and to make it penal for any other person to make a sale of same; that the ticket of a railroad company is not "property," in the general acceptance of the term, but the purchaser has only a special property in the ticket, as evidencing his right to passage on the road; that common carriers within this state are peculiarly subject to regulation; and that to preserve and protect both the passenger and the company itself against fraud is within the province of the police power of the state, and not violative of any provisions of the constitution, nor can it be said that such regulation is any wise the creation of a monopoly. Unlike the New York statute, our act confines the sale of passage tickets to the agents of the railroad company itself, and does not authorize the agents of other companies to make the sale of the same, unless such agents be also the agents of the company in question. This is simply authorizing the railroad company to conduct its own business. And again, it cannot be urged that the act in question deprives the citizen of his property without due course of law. It does not seek to confiscate his property. It says to the citizen, if he desires to be transported on any railroad, he can go to one of the agents and buy a ticket for that purpose, and pursue his journey. If, from any cause, he should fail to pursue his journey in whole or in part, it authorizes him to call on an agent of the company and have his money refunded. It occurs to us as absurd to say that a regulation of this character cannot be adopted, both on behalf of the railroad companies and of the general public, under the police power of the state, without violating some sacred provision of the constitution.

However, appellant raises what we consider a more serious question. He contends that the act leaves it optional with railroad companies as to whether or not they will make the sale of passage tickets a penal offense, inasmuch as it is left optional with each railroad company in the sale of tickets whether or not they will indorse on same the following provision of the act: "Provided, that the provisions of this act shall not apply to any person holding a ticket upon which is not plainly printed that it is a penal offense for him or her to sell, barter or transfer said ticket for a consideration." Laws 1903, p. 97, § 3. In reply to this, it is urged

that the act makes it the duty of each railroad company to print said proviso conspicuously across the face of every ticket sold by its duly-authorized agent. While it is true the act in this section requires this, yet is it a sufficient answer to the proposition that it is still optional with the railroad company to make the sale of passage tickets a penal offense. It will be observed that no penalty is attached to the failure of the railroad company to print across the face of its ticket said proviso. It is merely made a duty, which they may comply with or not as they see fit. It would have been a very easy matter for the legislature to have confined the sale of all passage tickets to the agents of the railroad companies, without any requirement as to the form of the ticket. But this course was not pursued. As it is, every railroad company has the option to issue a passage ticket with this proviso or not, as it may see proper. If it issues a ticket without this proviso, it is not a penal offense, and in every such case scalpers and all others may deal in such passage tickets without any violation of the law. We accordingly hold that because the legislature left it optional with the railroad companies whether or not, in the issuance of tickets, they would create a penal offense, the act of the legislature is without authority of law; is violative of the law, in that it does not define with certainty an offense; does not itself create an offense, but delegates its authority to another agency to make the sale of railroad tickets a violation of the law. In this respect it would appear to be violative of section 28 of our bill of rights, which says: "No power of suspending laws in this state shall be exercised except by the legislature." See *Suth. St. Const.* § 69. We therefore hold that the sale of railroad passage tickets in this case is not a violation of law. The judgment is reversed, and the prosecution ordered dismissed.

BROOKS, J., dissents from the conclusion reached by the majority of the court.

MEMORANDUM DECISIONS.

BRYAN et al. v. LOUISVILLE & N. R. CO. (Court of Appeals of Kentucky. June 13, 1899.) Appeal from circuit court, Simpson county. "Not to be officially reported." Action by W. H. Bryan and others against the Louisville & Nashville Railroad Company to recover an excess of freight charged. Judgment for defendant, and plaintiffs appeal. Reversed. Goodnight & Roark, for appellants. James A. Mitchell and Walker D. Hines, for appellee.

HOBSON, J. The question presented in this case is the same as that determined in the case

of *Conn v. Railroad Co.* (this day decided) 51 S. W. 617; the court below having in this case sustained a demurrer to the jurisdiction of the court as in that case, and the facts being substantially the same. For the reasons given in that opinion, the judgment of the court below is reversed, and the cause remanded, with directions to overrule the demurrer to the petition and for further proceedings.

DEAN et al. v. BAUGHMAN et al. (Court of Appeals of Kentucky. June 7, 1899.) Appeal from circuit court, Knox county. "Not to be officially reported." Action by Milton Dean and others against A. F. Baughman and others to quiet title to land. Judgment for defendants, and plaintiffs appeal. Affirmed. N. B. Hays, for appellants. A. J. Cook, for appellees.

HOBSON, J. Appellants sued to have their title quieted to a small piece of land, alleged to be a part of a patent issued to Burns & Myers June 17, 1798, for 968 acres. The evidence is very conflicting as to whether the land is embraced within the patent. The court below, upon a full hearing, gave judgment for the defendant; and, after a careful investigation of the record, we are not inclined to disturb his judgment. The proof is very clear that Daniel Dean, under whom appellants claim, located the corner of the Burns & Myers patent at a point that would not include this land. It is also clear that at his death appellants did not consider this land a part of his estate, and that, when all the rest of his land was sold to pay his debts, a considerable balance of indebtedness was left unpaid, because, as they supposed, he had no other property. The plats of the original survey of this patent and the two adjoining patents show very clearly that the two sycamores on the river stood in a bend of the river where it crooked to the north, and not in a crook towards the south. These plats are strong evidence that these two sycamores stood above the mouth of Parrott Branch, and, if we locate this corner there, it throws the other corner about where Daniel Dean said it was, and makes the line running out from the river longer, when by the survey of appellants it is only a little over half as long as it ought to be from the river to the patent corner of Burns & Myers. This is more trustworthy evidence than the marks on the line M. B. on the plat, or on the line B. C; for no other corner was found at C or D, and, if the line B. C, was prolonged but slightly, it would take in a large part. If not all, the land in controversy. It is very hard to locate these old patents satisfactorily, and we are inclined to think that the river, as laid down on the original plats, the creeks therein indicated, and the dividing ridge, are the best evidence in the record as to the location of these lines. This evidence is confirmed by the fact that Daniel Dean allowed the walnut timber cut off this land, and certainly had no very clear idea that it belonged to him. Judgment affirmed.

FRANKFORT CHAIR CO. v. JANER'S EX'X. (Court of Appeals of Kentucky. May 24, 1899.) Appeal from circuit court, Franklin county. "Not to be officially reported." Action by M. Janer's executrix against A. D. Martin. Intervention by the Frankfort Chair Company, claiming property levied on under an attachment, and the Frankfort Chair Company appeals from a judgment subjecting the attached property. Reversed. L. J. Crawford, for appellant. Cromwell & Franklin, for appellee.

PAYNTER, J. The facts in this case are substantially the same as in the case of *Chair Co. v. Buchanan*, in which an opinion was this day delivered. 51 S. W. 179. Neither party demanded a jury, and the case was tried by the

judge. The proof is uncontradicted that the contract which Martin had with the sinking-fund commissioners was assigned and transferred to the Frankfort Chair Company. According to the testimony of the warden of the penitentiary, the chair company was in possession of the warerooms where the chairs were stored. The chairs which were manufactured under the Martin contract were actually delivered to the chair company. We do not think there is any evidence to support the judgment of the court, and it is reversed for proceedings consistent with this opinion.

FRANKFORT CHAIR CO. v. RANSOM. (Court of Appeals of Kentucky. May 24, 1899.) Appeal from circuit court, Franklin county. "Not to be officially reported." Action by F. Ransom against A. D. Martin. Intervention by the Frankfort Chair Company, claiming property levied on under an attachment, and the Frankfort Chair Company appeals from a judgment subjecting the attached property. Reversed. W. H. Holt and L. J. Crawford, for appellant. Cromwell & Franklin, for appellee.

PAYNTER, J. The facts in this case are the same as in the case of Chair Co. v. Buchanan, in which an opinion was this day delivered. 51 S. W. 179. The court gave the jury a peremptory instruction to find for the plaintiff, F. Ransom. We think the court erred in so instructing the jury. Therefore the case is reversed for proceedings consistent with this opinion.

HAZELDON et al. v. THOMPSON et al. (Court of Appeals of Kentucky. May 27, 1899.) Appeal from circuit court, Garrard county. "Not to be officially reported." Action by J. R. Hazeldon and others against Martin Thompson and others to enforce a mechanic's lien. Judgment for defendants, and plaintiffs appeal. Reversed. R. H. Tomlinson and G. B. Swinebroad, for appellants. W. I. Williams, for appellees.

GUFFY, J. The appellants instituted this action in the Garrard circuit court, seeking to obtain a judgment and enforcement of a mechanic's and material man's lien upon certain property in Lancaster, Garrard county, claimed to be the property of the appellee Mary or Martha Thompson; it being alleged that Mary and Martha Thompson are one and the same person. Several other persons were made parties to the suit. Martha and J. C. Thompson filed a special and general demurrer to each paragraph of the plaintiffs' petition, which demurrer was sustained by the court; and, plaintiffs failing to amend, their action was dismissed, and from that judgment they prosecute this appeal. It is insisted for appellees that the several plaintiffs failed to file in the clerk's office such a description of the property, together with such descriptions of their lien, as is required by law to be done before they were entitled to a lien. The pleadings and exhibits are so voluminous that we deem it unnecessary to copy the same, but after a careful consideration of the pleadings, including the exhibits, and the statute under which the proceeding was instituted, we are of the opinion that the petition, nothing else appearing, showed a right to some relief, and for that reason the court erred in sustaining a general demurrer to the petition, and thus denying plaintiffs' right to recover any sum whatever, or to have a lien enforced for any amount. It may be that the defendants may have a substantial defense that will defeat a recovery, but, taking the pleadings as they now stand, it is our opinion that the court erred in sustaining the demurrer and dismissing the petition. The judgment appealed from is reversed, and the cause remanded, with directions to overrule the demurrer, and for further proceedings consistent herewith.

ROBINSON v. TENNELLY et ux. (Court of Appeals of Kentucky. May 23, 1899.) Appeal from circuit court, Daviess county. "Not to be officially reported." Action by William Tennelly and wife against Z. T. Robinson to rescind a contract of sale. Judgment for plaintiffs, and defendant appeals. Affirmed. Wilfred Carico, for appellant. Sweeney, Ellis & Sweeney, for appellees.

WHITE, J. The appellees, Tennelly and wife, brought this action against appellant, the assignee, and one Katchum, payee of a certain note and mortgage for \$300 executed by appellees for the purchase price of a piano; seeking to have the contract of bargain and sale rescinded, and the note and mortgage canceled. The reason urged and assigned for the rescission of the contract and cancellation of the note and mortgage is that the mind of appellee William Tennelly was so impaired by disease at the date of the execution of the note that he did not have capacity to contract, and that he was overreached by Katchum, and was overpersuaded against his will to purchase the piano, which, as to appellees, was of no value, benefit, or advantage. The answer constituted a denial of these allegations. Much proof was taken on this issue, and the court below, on hearing, granted the relief sought, rescinded the contract, and canceled the note and mortgage. From that judgment this appeal is prosecuted. We have carefully read the testimony in the record, and have arrived at the conclusion that the finding of the chancellor is not against the weight of the testimony. Judgment affirmed.

SEIVERS, CARSON & CO. v. CURD. (Court of Appeals of Kentucky. June 1, 1899.) Appeal from circuit court, Whitley county. "Not to be officially reported." Action by Seivers, Carson & Co. against Mrs. A. J. Curd on an account. Judgment for defendant, and plaintiff appeals. Reversed. Strother & Gordon, for appellant. R. D. Hill, for appellee.

BURNAM, J. Appellant, a corporation, instituted this suit against appellee to recover a balance of \$202.40 alleged to be due for merchandise on an account running from August 26, 1890, to March 10, 1892. Appellee does not controvert the correctness of the account, but pleads, by way of set-off and counterclaim, that plaintiff is indebted to her in the sum of \$450, which she alleges is due to her from a 7½ per cent. dividend declared on the 1st day of July, 1890, on 60 shares of capital stock owned by her in plaintiff corporation, which she alleges has never been paid or credited to her on account. Appellant, by way of reply, denies that any dividend was made or declared on July 1, 1890, but states that defendant's husband, A. J. Curd, at the time of his death, on the 30th day of July, 1887, was the owner of 100 shares of stock in the corporation, and at that time he was indebted thereto for a balance of \$1,891.93; that in July, 1888, a dividend of 7½ per cent. was declared upon the capital stock of the company, but by carelessness of the bookkeeper it was not credited to the stockholders, but that on the 31st day of January, 1888, his dividend was deducted from the account of A. J. Curd, and a draft, proven as required by law, for the balance of \$1,192.52, drawn upon defendant, as administrator of the estate of the deceased, which was paid. The trial resulted in a verdict and judgment for appellee on her counterclaim for \$267.60, which we are asked to reverse upon the ground that there is no evidence to sustain the verdict. From a careful examination of the record, it seems that the whole controversy in the case grows out of the gross negligence of appellant in keeping its books. The facts, as disclosed by the testimony, are that appellant was a private corporation, engaged in conducting a wholesale hardware business in the city of Louisville, having a capital

stock of \$91,500; that A. J. Curd was conducting a general retail store in Williamsburg, Ky., and was a large customer of appellant; and that he was the owner of 100 shares of its capital stock. C. J. Selvers, the president and treasurer of plaintiff corporation, testifies that the company went into liquidation about March, 1892, its assets being placed in the hands of the Columbia Finance & Trust Company; that A. J. Curd at the time of his death, July 30, 1887, owed the company a balance of \$1,891, but that this balance was entitled to a credit of \$750 on account of a 7½ per cent. dividend which the stockholders had agreed to declare for the year ending June 30, 1886; and which had never been credited up to the accounts of stockholders, or paid to them; that after the death of A. J. Curd this dividend of \$750 was deducted from the balance due by him to the company, and a statement of the balance due for \$1,192.52 was presented to his administrator for payment, which was paid by her; that there never was any cash dividend agreed upon or declared subsequent to the 7½ per cent. dividend declared June 30, 1886; that the entries squaring up the accounts were not made until July, 1890; that appellee became a customer of the company in her own right in February, 1888, and continued to be a customer up until March, 1892; that after the death of her husband the stock owned by him was divided, appellee receiving a certificate for 60 shares thereof, but that no dividend was made subsequent to her acquisition of the stock in question. Appellant files itemized statements of the accounts of deceased with it from its beginning, in July, 1884, until the time when it began to liquidate, in 1892, the correctness of which appellee does not dispute; and they show that on July 1, 1886, A. J. Curd was actually credited by a 7½ per cent. dividend on 100 shares of stock, amounting to \$750, and leaving a balance due the company as of that date of \$1,382.69; and the correctness of this statement is shown by a letter filed by appellee, dated August 4, 1886, addressed to A. J. Curd, at Williamsburg, Ky., and signed by C. J. Selvers, in which, after giving a statement of the business of the concern, he says: "Now, we declare a dividend of 7½% on stock shown, and credit you by same on statement inclosed, viz. on \$10,000.00, making \$750.00, leaving you owing on the 1st day of July, \$1,382.69, as per statement, and would like for you to send us check for same, as we have large import bills coming in." These statements of Selvers are not controverted by any witness, but are corroborated by the testimony of Carson, Weaver, and Hill, and also by the exhibits filed by L. P. Curd, who testified for appellee. Some confusion was created by the failure of appellant to enter the dividend of 7½ per cent. declared in July, 1886, at the proper date, and by the temporary loss of one of the ledgers of the company, which had been delivered to the liquidating agent; but it seems clear from the evidence that no dividend was actually declared upon the stock of appellant as of July 1, 1890, and that appellee's husband received credit for the \$750 dividend declared for the year ending June 30, 1886, and that the verdict and judgment are flagrantly against the evidence. For reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

SMITH v. CROW et al. (Court of Appeals of Kentucky. May 17, 1899.) Appeal from circuit court, McLean county. "Not to be officially reported." Contest by G. H. Crow and others over the will of Mrs. Fannie Eaves. Verdict and judgment for contestants, and Willis Smith, the propounder, appeals. Affirmed. Reuben A. Miller, Little & Little, W. T. Ellis, W. A. Taylor, and L. P. Tanner, for appellants. Jonson & Wickliffe and Wm. B. Noe, for appellees.

GUFFY, J. This is an appeal from a verdict and judgment of the McLean circuit court adjudging that a certain writing was not the last will and testament of Mrs. Fannie Eaves. It appears that a writing upon three separate sheets of paper, which reads as follows: "This indenture witnesseth that I, Fannie Eaves, of the town of Livermore, county of McLean, and state of Kentucky, being of sound mind, direct my executors, E. M. Hackett and Willis Smith, to sell at public or private sale, and to the best advantage, a tract of land conveyed me by N. Worthington in 1859, containing about four hundred (403¼) and three and one-fourth acres, and lying in McLean county, across Green river from Livermore, Kentucky. Twenty-five hundred dollars (\$2,500) of the proceeds of said land I give and bequeath to the elders composing the session of the Cumberland Presbyterian Church of Livermore, McLean County, Kentucky, and their successors, in trust to be used and appropriated in the erection and construction of a nice brick church house for the use and benefit of the Cumberland Presbyterian Church at Livermore, Kentucky; but this bequest is made upon the condition that the congregation of said church give or secure not less than one thousand dollars to be used in erecting said church building, in addition to the aforesaid two thousand five hundred dollars, thereby making the cost of said church building not less than three thousand five hundred dollars, and the further condition that said church building shall be erected within two years from the time of sale of said land. In the event the above condition shall not be complied with, then the aforesaid two thousand five hundred dollars, instead of being paid over to the elders composing the session of said church (Presbyterian Church at Livermore) shall by said executors be paid over to the trustees of Cumberland University of Lebanon, Tenn., in trust for the permanent endowment of the theological department of said university, and the remaining proceeds of said tract of land, exclusive of said two thousand five hundred dollars, I give and bequeath to the trustees of said university for the permanent endowment of the theological department of said university; and this last bequest is without regard to whether or not the said two thousand five hundred dollars shall ever revert to the said trustees of the said university by reason of noncompliance on the part of said church at Livermore with the conditions above set forth. The foregoing bequests to the said church at Livermore and the trustees of Cumberland University I make because of my affection for the Cumberland Presbyterian Church, of which I am a member, and my great desire for an educated ministry. In testimony of which I hereunto subscribe my hand and seal this 19th day of December, 1892. Fannie Eaves. E. M. Hackett, Willis Smith, Witnesses."—was presented to the McLean county court as the last will and testament of said Fannie Eaves, and by said court was admitted to probate as such will, and from that judgment an appeal was prosecuted to the McLean circuit court. The appellees contested in the county court. It is claimed: (1) That the paper presented and probated was not a legally executed will, for the reason that it was on several separate and wholly detached pieces of paper, and not connected in any way so as to make and form an instrument. (2) That the paper is not the will of Fannie Eaves, because not the free voluntary expression of her mind; that said paper was written and drafted by the Rev. Willis Smith, who is and was at the time an able and learned minister of the Cumberland Presbyterian Church, of which church said Fannie Eaves was a member; that said deceased was an aged widow, living alone, and that said Smith was her religious and spiritual adviser, and there existed between the draftsman of the paper and deceased the confidential relation of spiritual adviser and layman, and that the de-

ceased had unbounded and unusual confidence in her said adviser, and that by reason thereof said Willis Smith had and exercised an undue influence over the mind and will of said Fannie Eaves to such an extent as to induce her to attempt to convey or bequeath to himself in trust for his church the 403¼ acres of land, which was about the whole of her estate, to the exclusion of her heirs at law; that the influence thus had and exercised over the mind of the deceased by the said Willis Smith was re-enforced, increased, and greatly strengthened by the Rev. J. R. Crawford and the Rev. J. S. Grider, both of whom were influential members of the Cumberland Presbyterian Church, and were also to a great extent her religious and spiritual advisers, and stood in the same confidential relation to her as did the Rev. Willis Smith, the draftsman, and they both had conversation with her, and advised her in person and by letter, concerning the disposition of her property to the Cumberland Presbyterian Church and its theological seminary; and the influence thus exercised over her mind was undue, and the papers offered are not her will.

(3) That the whole is invalid because it attempts to pass title to the Cumberland Presbyterian Church and its theological seminary to the 403¼ acres of land; that the said church is a church and society of Christians, and that said seminary is owned by said society, and said church cannot take title, legal or equitable, to the 403¼ acres of land, because inhibited by the statute of the state of Kentucky which is pleaded and relied on. It is further contended by the contestants that Mrs. Eaves had not mental capacity to make a will at the time of the execution of the paper aforesaid. After the issues were fully made up, a jury trial resulted in the verdict and judgment aforesaid, holding that the paper was not the will of the said Eaves. The appellant (propounder in the court below) filed grounds, and moved the court for a new trial, which grounds are, in substance, as follows: (1) Misconduct of J. E. Rowe in his argument to the jury. (2) Misconduct by three of the jurors, in this: that, having formed and expressed an opinion as to the merits of this case before being called as jurors, after being called they denied having formed or expressed an opinion, when examined as to their qualifications. (3) That the verdict of the jury is not sustained by sufficient evidence. (4) That the verdict is contrary to law. (5) Error of the court in instructing the jury. (6) Error of the court in refusing instructions offered by appellants. (7) Error of the court in allowing the contestants to offer incompetent evidence on the trial. (8) Error of the court in rejecting competent evidence offered by the propounders. (9) Verdict of the jury was the result of passion and prejudice. As to the first ground, it is sufficient to say that it does not appear that the statements of Rowe were objected to or excepted to at the time; hence we cannot inquire into the propriety or the impropriety of the statements alleged to have been made. As to the second ground, there is nothing in the record to sustain the charge made against the jurors. It is true that the testimony is conflicting, but we are not prepared to say that the verdict is not sustained by sufficient evidence, or that it is contrary to law. We are of the opinion that the rulings of the court as to the admission and rejection of testimony offered by the several parties were fully as favorable to the propounders of the will as they were entitled to. There is nothing in this record to indicate that the verdict of the jury was the result of passion or prejudice. It is, however, very earnestly insisted for appellants that the court erred in refusing the instructions offered by appellants, and also erred in giving the instructions given by the court. We are not inclined to hold that there was any error committed by the court in refusing the instructions offered by appellants, and we are clearly of the opinion that the in-

structions given by the court were favorable to the appellants as to. The evidence in this case is in dispute, and we are not disposed to give a synopsis thereof. Suffice it to say that the testimony as to the want of mental capacity of Mrs. Eaves to make a will, and the facts and circumstances surrounding the execution of the paper, was sufficient to authorize a jury to find that subject, as well as the facts and circumstances. We are further of the opinion that the undue influence was such as to require the court to set aside the verdict upon that subject, and to weigh and determine the weight of the evidence thereon. It has often been said that it is the peculiar province of a jury to weigh and consider the testimony, and it may be further remarked that it was well fitted to ascertain the weight of the evidence as to the capacity of Mrs. Eaves to make a will, and the jury having heard the witnesses before them, and the paper in controversy being the will and testament of Mrs. Eaves, we feel authorized to disturb the verdict affirmed.

WEST v. CHAMBERLIN. Appeals of Kentucky, June 1887. "To be officially reported." Action against Chamberlin and others against judgment for plaintiffs, and motion to dismiss and to set aside. Denied. J. N. Sharp for appellant. W. S. Pryor, for appellee.

HAZELRIGG, C. J. It is for want of proper bill, therefore considered on this appeal excepted. These, however, seem to present the question whether the patent relied on of the appellees is not invalid for want of a description of the invention. In view of the decisions of this court in *Pugett*, 81 Ky. 366, and in *similar import*, the doctrine of the court to have been overruled in *the present case*, apparently departed from in *some of the questions* presented by the present case, sufficiently important to be argued on brief of counsel, and summarily on motion. The court is authorized to affirm as a delay case.

WHITAKER v. HOWARD. (Court of Appeals of Kentucky.) Appeal from circuit court. "Not to be officially reported." J. Whitaker, as next friend of Lander Howard, against Lander Howard, to recover timber cut by defendant, and Howard against W. J. Whitaker, damages for trespass upon land of Lander Howard, and W. J. Whitaker against Lander Howard. Affirmed. John L. Scott, for C. Bach, for appellee.

BURNAM, J. The question of these cases is the location of a line between the farms of the appellant and the appellee. In *the case of* *the appellant* No. 241 was instituted by the next friend of Armina Frazier against the appellee, for the value of the timber which it had been wrongfully cut and appropriated from the land of the appellee. In this suit was pending, appellant instituted suit No. 240, charging the appellee with a similar trespass upon land, and asking damages. The case having been submitted to the court below, the judgment was given in favor of the appellee, in accordance with the contention of the appellee, adjudging that the timber in

upon his side of the line. While these cases were tried on the equity side of the docket, the question involved is purely one of fact, the only inquiry being as to the true location of the boundary line between the respective tracts of land. The proof is quite conflicting. That offered by appellant, if it stood alone, is sufficient to support his contention, while, on the other hand, that offered by appellee makes out a case for him. The chancellor, who knew all of the witnesses, held that the weight of the evidence preponderated in favor of the contention of appellee; and, after having very carefully read and considered the testimony, we cannot say that he is wrong in his conclusions. The judgment in both cases is therefore affirmed.

HOLMES v. LEATHE. (Supreme Court of Missouri, Division No. 2. May 9, 1899.) Appeal from St. Louis circuit court; Jacob Klein, Judge. Action by John M. Holmes against Samuel H. Leathe to recover attorney's fees. From an order overruling defendant's motion to vacate an award of arbitrators, he appeals. Affirmed. R. M. Nichols, for appellant. Kehr & Tittmann, for respondent.

GANTI, P. J. This is an appeal from a judgment affirming an award. The parties here-to entered into an agreement to arbitrate their differences as to the amount due plaintiff, as an attorney and counselor at law, for certain legal services rendered defendant. Messrs. Given Campbell, Samuel N. Holliday, and John J. O'Brien were selected as arbitrators. They duly qualified, heard the evidence, and rendered their award. In due time, notice was given of the motion to make the award a judgment of the court. Thereupon defendant moved to vacate the award. The award was rendered by consent of the parties upon the same testimony heard in Koerner v. Leathe, 51 S. W. 96, the appeal in which latter case was heard at the same time with this appeal. The questions are identical. For the reasons given in Koerner v. Leathe, the judgment in this cause is also affirmed. **SHERWOOD and BURGESS, JJ., concur.**

STORRIE v. WOESSNER. (Supreme Court of Texas. June 19, 1899.) Error to court of civil appeals of First supreme judicial district. Action by R. C. Storrie against Charles Woessner. A judgment for defendant was affirmed by the court of civil appeals (47 S. W. 837), and plaintiff brings error. Affirmed. Ewing & Ring, for plaintiff in error. Hutcheson, Campbell & Myer, for defendant in error.

BROWN, J. The plaintiff alleged, and the undisputed evidence established, the following facts, except that there is controversy as to the regularity of some of the proceedings,—which, however, is unimportant, in the view that we take of the case. Woessner owned lot No. 5 and part of lot No. 11 in block 128 in the city of Houston, which fronted on McKinney avenue; and in the year 1891 the city council passed a resolution by which that avenue, embracing the part in front of the property of Woessner, was designated for improvement. By a two-thirds vote of all the aldermen, the council declared the improvement of the street to be necessary to the public interest, and in the adoption of the resolution complied in all respects with the charter. The third section of the resolution reads as follows: "Sec. 3. That the cost of constructing said improvements, except as to street intersections, together with the cost of collecting the same, shall be defrayed by the owner or owners of the lot or lots, block or blocks, or tracts of land, when not laid out into lots and blocks, abutting upon the portion of the said streets to be improved, as provided for in section 23a et sequitur of the charter of the city of Houston, and the said improvements shall be

paid for in five annual installments." Notice of the adoption of the resolution was published, after which the city engineer prepared specifications for the work, which were approved and filed. By order of the council, advertisement was made for bids; and, among other things, the advertisement stated that the work would be paid for in improvement certificates. Storrie filed a bid, which was accepted, and a contract entered into between him and the city, in which the price of the work was stated; and in payment for the work the city agreed to issue and deliver to Storrie improvement certificates, with a lien upon the property in front of which the work was done. The city engineer made out a roll of ownership of property abutting upon the avenue, including that of Woessner, which, in accordance with the provisions of the charter, showed the cost of the work in front of the property. The roll was duly approved and filed with the secretary of the city, who gave notice by publication in the newspapers and by mailing a copy of the notice to each property owner of the filing of the roll. Woessner entered no protest against the assessment or any part of the proceedings had. Storrie did the work in accordance with the contract, for which the city council issued to him the improvement certificates sued on in this case. The certificates provided that, in case the owner failed to pay any installment of the assessment for "sixty days after suit has been instituted thereon," the whole amount should become due at the option of the holder. Woessner failed to make payment after suit was brought, and by amendment plaintiff sought to foreclose the lien for the whole amount upon the lot and part of lot above described. The case was tried before the court without a jury, and judgment rendered for the defendant, which judgment was affirmed by the court of civil appeals. The certificate sued upon in this case represents an assessment made by the city of Houston upon the lots described in plaintiff's petition to pay the cost of a public improvement made in front of the said lots in a public avenue of the said city. The facts are practically the same as in the case of *Hutcheson v. Storrie* (this day decided by this court), 51 S. W. 848; and, for the reasons assigned in the opinion filed in that case, we hold that the assessment was a nullity, and created neither personal liability against Woessner nor a lien upon his property. No other judgment could have been properly entered in this case than that which the court rendered, and, without regard to errors in the proceeding, the judgment must be affirmed, and it is so ordered.

CRAWFORD v. STATE. (Court of Criminal Appeals of Texas. May 31, 1899.) Appeal from Atascosa county court; N. R. Wallace, Judge. James A. Crawford was convicted of unlawful assembly, and he appeals. Reversed. John W. Preston and F. H. Burmeister, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a companion case to cause No. 1,629 (*Bradford v. State*, 51 S. W. 379) and No. 1,633 (*Rutledge v. State*, Id. 1133) just decided. For the reasons indicated in the opinion in *Bradford v. State*, the judgment is reversed, and the prosecution ordered dismissed.

Ex parte EASLEY. (Court of Criminal Appeals of Texas. June 14, 1899.) Appeal from district court, Bowie county; J. M. Talbot, Judge. Sam Easley, held under bail to answer a criminal charge, petitioned for habeas corpus, and from a judgment denying the petition he appeals. Affirmed. Joe E. Cook and Estes & King, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was arrested under a complaint charging him with the theft of cattle. At an examining trial his bail was

fixed in the sum of \$500. He resorted to the writ of habeas corpus to secure his release. The evidence makes it somewhat doubtful, if appellant took the cow, whether it was in Texas or Arkansas, as the transaction occurred, if at all, near the line. Some of the testimony shows that the cow ran with Grant's cattle in Texas. The defendant himself lived in Arkansas. The venue is a mooted question. We do not feel authorized to disturb the finding of the judge upon this issue. We decline to discuss the facts as to defendant's connection with the animal. In our view of the evidence, however, we do not feel justified in setting aside the action of the trial judge in requiring bail of relator. The judgment is affirmed.

FIKES et al. v. STATE. (Court of Criminal Appeals of Texas. May 3, 1899.) Appeal from Karnes county court; F. Theodore Barnes, Judge. J. H. Fikes and another were convicted of violating the local option law, and they appeal. Dismissed. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellants were convicted for selling intoxicating liquors in justice precinct No. 4 of Karnes county, in violation of the local option law then in force. Each of the parties entered into recognizance, and the form of each is the same as that in cause No. 1,492 (Fikes v. State, 51 S. W. 243), just decided. The recognizances were entered into subsequent to the time that the acts of the 25th legislature went into operation. For the reasons indicated in cause No. 1,492 (Fikes v. State), the appeal in this case, as to both appellants, is dismissed.

LAGUAI v. STATE. (Court of Criminal Appeals of Texas. May 10, 1899.) Appeal from district court, Harris county; E. D. Cavin, Judge. Emile Laguai was convicted of assault with intent to murder, and he appeals. Affirmed. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for assault with intent to murder. The record contains neither a statement of the facts, bill of exceptions, nor motion for new trial. The indictment is in the usual form, and the charge of the court is applicable to a state of facts provable under the indictment. Finding no error in the record, the judgment is affirmed.

MCQUERY v. STATE. (Court of Criminal Appeals of Texas. May 17, 1899.) Appeal from Brown county court; Charles Rogan, Judge. Criminal prosecution by the state of Texas against Dr. William McQuery. From a judgment of conviction, defendant appeals. Reversed. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, J. The information in this case is similar to that in *West v. State*, 51 S. W. 247, and *McQuery v. State*, Id., just decided. For the reasons indicated in those cases, the information herein is fatally defective. In this case, as in cause No. 845 (*McQuery v. State*), the information also alleges that the prescription was given to a party who was not actually sick, and without a personal examination. The evidence showed that the examination was made of the applicant by appellant, and the prescription given after making such examination. The allegation is that the prescription was given without making such examination. The proof does not conform to the allegation. This judgment would be reversed upon this ground, if the information was good. But, the information being fatally defective, the judgment is reversed, and the prosecution ordered dismissed.

MALONE v. STATE. (Court of Criminal Appeals of Texas. May 31, 1899.) Appeal

from Hamilton county court; J. C. Main, Judge. Charles Malone was convicted of violating the local option law, and he appeals. Reversed. J. A. Eidson, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail. This is a companion case to cause No. 1,619 (*Malone v. State*, 51 S. W. 381), just decided, and for the reasons stated in the opinion in that case the judgment herein is reversed, and the cause remanded.

MORRISON v. STATE. (Court of Criminal Appeals of Texas. May 24, 1899.) Appeal from district court, Bexar county; Robert B. Green, Judge. Tip Morrison was convicted of manslaughter, and he appeals. Affirmed. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at four years' confinement in the penitentiary. This is the second appeal of this case. 47 S. W. 369. We find no bills of exception in the record, and the motion for new trial neither criticises the charge of the court nor raises any issue that would authorize a new trial under the statute. The court's charge presents the issue of murder in the second degree and manslaughter. Appellant admits committing the homicide, but contends that he took deceased's life in his necessary self-defense, and because of the fact of the undue intimacy between deceased and his wife. The state's evidence controverts both of appellant's defenses. The evidence amply supports the verdict of the jury, and the judgment is affirmed.

RUTLEDGE v. STATE. (No. 1,630.) (Court of Criminal Appeals of Texas. May 31, 1899.) Appeal from Atascosa county court; N. R. Wallace, Judge. Garrett Rutledge was convicted of unlawful assembly, and he appeals. Reversed. John W. Preston and F. H. Burmeister, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted, under article 309 of the Penal Code, of engaging in an unlawful assembly with intent to interfere with the occupation and employment of another, and his punishment assessed at a fine of \$25. This is a companion case to cause No. 1,629 (*Bradford v. State*, 51 S. W. 379), just decided. Appellant filed a motion herein to quash the affidavit and information. We think the motion is well taken, and for our reasons refer to *Bradford v. State*. The judgment is accordingly reversed, and the prosecution ordered dismissed.

RUTLEDGE v. STATE. (No. 1,632.) (Court of Criminal Appeals of Texas. May 31, 1899.) Appeal from Atascosa county court; N. R. Wallace, Judge. Charles Rutledge was convicted of unlawful assembly, and he appeals. Reversed. John W. Preston and F. H. Burmeister, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted under article 309 of the Penal Code. This is a companion case to cause No. 1,629 (*Bradford v. State*, 51 S. W. 379), just decided, and the same defect exists in the indictment in this case upon which we reversed that case. The judgment is accordingly reversed, and the prosecution ordered dismissed.

RUTLEDGE v. STATE. (No. 1,633.) Court of Criminal Appeals of Texas. May 31, 1899.) Appeal from Atascosa county court; N. R. Wallace, Judge. Eli Rutledge was convicted of unlawful assembly, and he appeals. Reversed.

ed. John W. Preston and F. H. Burmeister, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a companion case to cause No. 1,629 (Bradford v. State, 51 S. W. 379), just decided. This information is similar to the one in that case. For the reasons indicated in that case, the judgment herein is reversed, and the prosecution ordered dismissed.

WILLIAMS v. STATE. (Court of Criminal Appeals of Texas. May 17, 1899.) Appeal from district court, Travis county; R. E. Brooks, Judge. Runnels Williams was convicted of murder in the second degree, and he appeals. Affirmed. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and his punishment assessed at five years' confinement in the penitentiary. The record does not contain a statement of the facts nor bill of exceptions. Four grounds of the motion for new trial urge that the verdict is not supported by the evidence, and is contrary to the law and the charge of the court. The fifth ground is based upon the action of the court permitting the state to prove that defendant had been convicted for killing a white man, and refusing to allow defendant to state the circumstances of the killing. A bill of exceptions was not reserved to the ruling of the court permitting the introduction of the testimony. Therefore these matters cannot be revised. The judgment is affirmed.

ANDERSON v. SILLIMAN et al. (Court of Civil Appeals of Texas. May 4, 1899.) Appeal from district court, Anderson county; W. H. Gill, Judge. Action by Julia C. Silliman against Susan C. Blackaby, and others. From a judgment for plaintiff, defendant Archibald E. Anderson appeals. Affirmed. Anderson & Woolworth and Thos. B. Greenwood & Son, for appellant. A. W. Gregg and Word & Gooch, for appellees.

WILLIAMS, J. All of the questions of fact involved are disposed of by the statement accompanying the questions certified to the supreme court, and the questions of law are settled by the answers to the questions. 50 S. W. 576. We adopt that statement as our conclusions of fact, and the opinion of the supreme court as conclusions of law. This necessitates an affirmation of the judgment, which is ordered. Affirmed.

BRAGASSA et al. v. PEOPLE'S BUILDING & LOAN ASS'N. (Court of Civil Appeals of Texas. Dec. 31, 1898.) Appeal from district court, Tarrant county; Irby Dunklin, Judge. Action by the People's Building & Loan Association against J. B. Bragassa and others. Judgment for plaintiff. Defendants appeal. Affirmed without opinion. W. S. Essex, for appellants. Fruit & Smith, for appellee.

Motion for Conclusions of Fact and Law.

TARLTON, C. J. His honor who tried this case filed conclusions of fact upon all the issues embodied in this motion. This is manifest from the conclusions embodied in the judgment of the district court on page 17 of the record, and in the additional findings of fact to be found on page 21 et seq. of the record. He also filed conclusions of law, to be found on pages 23 and 24 of the record. These conclusions of fact and law we heretofore adopted in our judgment entered in this case on December 3, 1898,¹ thus affirming the judgment after careful consideration of all the assignments of error urged in the able brief of appellants' counsel. This disposition of

¹ No written opinion filed.

the appeal is, as we think, sufficient, and dispenses with the necessity, on our part, of filing or finding other conclusions of fact or law than those to be found in the record and adopted by this court. Hence this motion is overruled.

CRENSHAW v. HUBBARD.¹ (Court of Civil Appeals of Texas. April 19, 1899.) Appeal from Grayson county court; J. H. Wood, Judge. Action by Charles Crenshaw against Henry Hubbard. From a judgment for plaintiff, he appeals. Affirmed. C. S. Vowell, for appellant. J. K. Jamison, for appellee.

JAMES, C. J. The suit was brought by appellant against appellee on a note for \$28 and a rent note, the unpaid balance of which was \$72.45. Appellee pleaded to the rent note partial failure of consideration, and that the payments that had been made on it overpaid it; also a counterclaim for work done on the rented premises, and damages for wrongfully suing out a distress warrant in this suit. The case was tried on appeal in the county court, and the verdict was as follows: "We, the jury, find for the plaintiff in the sum of ten dollars." It is evident, from the issues and verdict, that the jury found against plaintiff on the rent note, and also for a sum sufficient to reduce the \$28 note to \$10. The point upon which the case is brought here is that the court should have given judgment against the sureties on the bond given by defendant to replevy the property. The distress warrant and the replevy bond related only to the rent note; and, no judgment appearing to be recovered in reference to such note, the court did not err in its ruling. Affirmed.

HOLLON v. CARPENTER.² (Court of Civil Appeals of Texas. April 22, 1899.) Error from district court, Lamar county; E. D. McClellan, Judge. Action by Elizabeth Carpenter against D. P. Hollon. Motion by plaintiff in execution to set aside satisfaction entered in pursuance of execution sale. Motion granted, and defendant brings error. Affirmed. Dudley & Moore and H. D. McDonald, for plaintiff in error. Hale & Hale, for defendant in error.

BOOKHOUT, J. This is a companion case with the case of Hollon v. Hale (this day decided) 51 S. W. 900. The facts are substantially the same in both cases. We adopt the conclusions of fact and law filed in that case for this case. In accordance with the opinion in that case, the judgment in this case is affirmed.

JOSEPH W. MOON BUGGY CO. v. PERKINS. (Court of Civil Appeals of Texas. May 24, 1899.) Appeal from district court, Morris county; J. M. Talbot, Judge. Action by Joseph W. Moon Buggy Company against W. E. Perkins. From a judgment of dismissal, plaintiff appeals. Reversed. Henderson & Robinson, for appellant. R. D. Hart and Sheppard, Jones & Bolin, for appellee.

JAMES, C. J. The evidence in this record is not such as will reasonably support a finding that the value of the mortgaged property exceeded \$200, and therefore the court should not have dismissed the action for want of jurisdiction. Reversed and remanded.

WALLIS et al. v. STUART. (Court of Civil Appeals of Texas. Feb. 9, 1899.) Appeal from Galveston county court; Morgan M. Mann, Judge. Action by A. E. Stuart against Wallis, Landes & Co. There was a judgment for plaintiff, and defendants appeal. Affirmed. Davidson, Minor & Hawkins, for appellants. W. F. Hays, for appellee.

¹ Rehearing denied May 24, 1899.

² Writ of error denied by supreme court.

GARRETT, C. J. On September 18, 1894, the appellants recovered a judgment against the appellee in the county court of Galveston county in a suit for the value of merchandise sold by them to the latter. The appellee filed this suit on May 31, 1897, to set aside that judgment. The only ground alleged in the petition for setting the judgment aside is that appellee was a minor at the time of the rendition thereof, and that the merchandise sold to him by the appellants was not necessities, but was bought by him for the purpose of carrying on business as a merchant. The petition shows that the appellee became of age on May 14, 1897, and that for some time prior thereto he had not had possession of said goods, nor any of the proceeds thereof. Demurrers to the petition were overruled by the court, and judgment was rendered in favor of the appellee on the evidence after the verdict of a jury. Judgments against infants are voidable only, and not void. They can only be reversed or set aside on appeal or writ of error, or other direct proceeding. It is the duty of the court, when a suit is brought against a minor, to appoint a guardian ad litem to represent his interest and defend the suit in his behalf. But if the court should fail to do so, and judgment should be rendered against the minor without the appointment of a guardian ad litem to represent him, the judgment would be voidable only in a direct proceeding, and not subject to collateral attack, although the record should show that he was a minor for whom no guardian ad litem had been appointed. *Montgomery v. Carlton*, 56 Tex. 361; *Martin v. Weyman*, 26 Tex. 468; 10 Enc. Pl. & Prac. 702, 703. And although the record should fail to disclose, as in the case now before the court, that the defendant was a minor, the rule would be the same. This suit, however, is not a collateral attack upon the judgment which the appellee sought to set aside. It is a direct proceeding, and as such finds recognition in the practice in the courts of this state. *Heidenheimer v. Loring*, 6 Tex. Civ. App. 560, 28 S. W. 99; *Best v. Nix*, 6 Tex. Civ. App. 349, 25 S. W. 130. It may be maintained by a party when a judgment has been obtained against him by fraud, upon showing such fact, and that he has a good defense to the suit, or a meritorious cause of action. In this case all that the appellee relied upon to have the judgment against him set aside was the fact of his minority at the time it was rendered, and at the time that he purchased the goods. Freeman, in his work on Judgments, says: "If an

absolute decree is made against an infant, he is as much bound as a person of full age, and will not be permitted to dispute the decree, except upon the same grounds which would be available if he were an adult." (4th Ed.) § 151. Also, at section 513, in discussing relief in equity: "But the better opinion is that an infant defendant is as much bound by a decree in equity as a person of full age. Therefore, if there be an absolute decree made against a defendant who is under age, he will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed it,—such as fraud, collusion, or error." See, also, the case of *Cohoe v. Baer*, 134 Ind. 375, 32 N. E. 920. According to the practice in this state, the judgment may be attacked for fraud, collusion, accident, or mistake by a petition in the nature of a bill of review to set it aside. For error it may be reversed on appeal or writ of error prosecuted under the statute. It has been said that infancy is a plea of personal privilege, and may be waived. 10 Enc. Pl. & Prac. 692, and note 3. It follows that the court below should have sustained the appellants' general demurrer. An examination of the evidence adduced on the trial fails to disclose any fact which, if found to be true by the jury, would sustain a judgment in the appellee's favor. No fraud whatever was practiced upon him in the procurement of the judgment. He was 18 years of age,—above the age of discretion,—and was engaged in business as a retail merchant; and, although the appellants may have known that he was a minor when they sold him the goods and when they brought their suit, they practiced no fraud upon him, for he was duly served with process, and knew that he was bound to answer and plead his minority if he wished to avail himself of the defense. Such being the state of the case, there is no reason why it should be remanded for a new trial. The judgment of the court below will therefore be reversed, and judgment will be here rendered in favor of the appellants. Reversed and rendered.

On Motion for Rehearing.

(May 4, 1899.)

Pending a motion for a rehearing in this case, we certified the questions therein to the supreme court for decision. The answers of that court were favorable to the appellee. See opinion of the supreme court, delivered April 10, 1899. 50 S. W. 567. The motion for a rehearing will therefore be granted, and the judgment of the court below will be affirmed. Affirmed.

END OF CASES IN VOL. 51.

INDEX.

ABANDONMENT.

Of homestead, see "Homestead," § 4.

ABATEMENT AND REVIVAL

Survival of action for causing death, see "Death," § 2.

§ 1. Death of party and revival of action.

A complaint is properly dismissed where complainant has failed to revive the action against defendant's successor, under Mansf. Dig. Ark. § 5246, within a year after his death was suggested of record.—*Bell v. Eddy* (Ind. T.) 959.

ABSENCE.

Suspension of running of statute of limitation, see "Limitation of Actions," § 2.

ABUTTING OWNERS.

Assessments for expenses of public improvements, see "Municipal Corporations," § 6.

ACCESSORIES.

Discharge of on death of principal before indictment, see "Criminal Law," § 1.

ACCIDENT.

Ground for new trial, see "New Trial," § 1.

ACCOMPLICES.

Testimony, see "Criminal Law," § 12.

ACCORD AND SATISFACTION.

See "Compositions with Creditors."

The payment of half a debt is no consideration for a release of the other half.—*Cox v. Adelsdorf* (Ky.) 616.

The payment of a smaller sum than is unquestionably due, with no other element of accord in the transaction, is not a satisfaction of the debt, even though accepted as such at the time.—*Wetmore v. Crouch* (Mo.) 738.

ACCOUNT.

Accounting between partners, see "Partnership," § 8.

ACCRUAL.

Of right of action, see "Limitation of Actions," § 2.

ACKNOWLEDGMENT.

Of indebtedness barred by limitation, see "Limitation of Actions," § 3.

§ 1. Nature and necessity.

A faulty acknowledgment *held* not to affect the conveyance between the parties themselves.—*Staples v. Shackelford* (Mo.) 1032.

51 S.W.—72

§ 2. Taking and certificate.

Under Sayles' Civ. St. art. 4817, acknowledgment of a deed by a corporation, by its vice president and secretary, *held* a substantial compliance with the statute.—*Zimbleman v. Stamps* (Tex. Civ. App.) 341.

Conveyance being regular on its face, improper taking of wife's acknowledgment cannot affect one taking mortgage from grantee.—*Forbes v. Thomas* (Tex. Civ. App.) 1097.

ACTION.

See "Pleading"; "Removal of Causes"; "Trial."

Accrual, see "Limitation of Actions," § 2.

Against corporation, see "Corporations," § 2.

—state, see "States," § 3.

By or against infant, see "Infants," § 2.

Cancellation of written instrument, see "Cancellation of Instruments."

Civil damages for sale of liquors, see "Intoxicating Liquors," § 4.

Commencement within period of limitation, see "Limitation of Actions," § 2.

Conspiracy as cause of action, see "Conspiracy," § 1.

Counterclaim, see "Set-Off and Counterclaim."

Criminal prosecutions, see "Criminal Law."

Dismissal of, see "Dismissal and Nonsuit," § 1.

Establishment and enforcement of trust, see "Trusts," § 4.

For breach of contract, see "Contracts," § 4.

—of sale, see "Sales," § 5.

For breach of covenants, see "Covenants," § 2.

—of promise of marriage, see "Breach of Marriage Promise."

—of warranty of sale of goods, see "Sales," § 6.

Foreclosure of mortgage, see "Mortgages," § 8.

For false imprisonment, see "False Imprisonment," § 1.

—representations, see "Fraud," § 2.

For partition, see "Partition," § 1.

For personal injuries, see "Master and Servant," § 8.

For rent, see "Landlord and Tenant," § 5.

For specific performance, see "Specific Performance," § 1.

For taking of or injury to property in exercise of power of eminent domain, see "Eminent Domain," § 3.

For wrongful execution, see "Execution," § 6.

Limitation by statutes, see "Limitation of Actions."

Malicious actions, see "Malicious Prosecution."

Necessity to revive action upon death of party, see "Abatement and Revival," § 1.

Notice of action, see "Process," § 1.

On bill or note, see "Bills and Notes," § 4.

On bonds, see "Bonds," § 3.

On insurance policy, see "Insurance," § 9.

On judgment, see "Judgment," § 11.

Partnership accounting, see "Partnership," § 8.

Personal injuries, see "Railroads," § 4.

Proceedings incident to action, see "Continuance"; "Execution."

—to set aside judgment, see "Judgment," § 6.

Reformation of written instrument, see "Reformation of Instruments."

Review of proceedings, see "Appeal and Error"; "New Trial."

Set-off, see "Set-Off and Counterclaim."

Setting aside fraudulent conveyance, see "Fraudulent Conveyances," § 3.
 Submission of controversy to court without action, see "Submission of Controversy."
 Suits in equity, see "Equity."
 — in justices' courts, see "Justices of the Peace," § 2.
 To recover taxes, see "Taxation," § 8.
 To try title to land, see "Trespass to Try Title."

§ 1. **Grounds and conditions precedent.**
 A receiver having refused to sue the sureties of his predecessor, the court was authorized, under Civil Code Prac. § 25, to empower one of the creditors to sue for himself and the other creditors, who were numerous.—*H. B. Clafin Co. v. Gibson* (Ky.) 439.

§ 2. **Consolidation.**
 The consolidation of certain actions *held* proper, as being intimately connected.—*Herring v. Herring* (Tex. Civ. App.) 865.

ACTION ON THE CASE.

See "Trespass," § 1.

ADJUDICATION.

Operation and effect of former adjudication, see "Judgment," §§ 9, 10.

ADMINISTRATION.

Of estate assigned for benefit of creditors, see "Assignments for Benefit of Creditors," § 3.
 — of decedent, see "Executors and Administrators."
 — of ward, see "Guardian and Ward," § 2.
 Of property by receiver, see "Receivers," § 2.

ADMISSIONS.

As evidence, see "Evidence," § 5.

ADULTERY.

The variance is fatal where the indictment charges adultery without living together, and the proof shows it by living together.—*Wood v. State* (Tex. Cr. App.) 235.

ADVANCEMENTS.

See "Descent and Distribution," § 2.

ADVERSE POSSESSION.

See "Limitation of Actions."

§ 1. **Nature and requisites.**
 Though the husband, for 30 years after the execution to him of a deed by commissioners pursuant to a judgment allowing him land belonging to his wife, was in possession of the land, yet as it does not clearly appear that he did not during the lifetime of his wife claim the land by virtue of his marital right, and after her death by virtue of his title by curtesy, his possession cannot be regarded as adverse.—*Black v. Black* (Ky.) 453.

One who has open, continuous, and notorious possession for over 10 years, and who claimed the land, *held* to have acquired title by adverse possession, though the defendant allowed adjoining owners to cultivate a part of its right of way, and did not consider such use adverse unless so notified.—*Texas & P. Ry. Co. v. Maynard* (Tex. Civ. App.) 255.

That adverse possession was under mistaken belief that land was covered by deed *held* immaterial.—*Jayne v. Hanna* (Tex. Civ. App.) 293.

ADVERTISEMENT.

Publication of process, see "Process," § 1.

AFFIDAVITS.

Sufficiency of affidavit of attachment, see "Attachment," § 1.

AFFRAY.

Personal rencounter in a public road *held* an affray.—*Piper v. State* (Tex. Cr. App.) 1118.

AFTER-ACQUIRED TITLE.

Estoppel to assert, see "Estoppel," § 2.

AGENCY.

See "Principal and Agent."

AIDER BY VERDICT.

In civil actions, see "Pleading," § 8.

ALIMONY.

See "Divorce," § 2.

ALLOWANCE.

To surviving wife, husband, or children of decedent, see "Executors and Administrators," § 3.

AMENDMENT.

Of indictment, see "Indictment and Information," § 4.
 Of pleading, see "Pleading," § 4.
 Of process, see "Process," § 2.
 Of statute, see "Statutes," § 4.

AMOUNT IN CONTROVERSY.

As affecting jurisdiction on appeal, see "Appeal and Error," § 1.

ANIMALS.

Injuries from operation of railroad, see "Railroads," § 4.

ANSWER.

In pleading, see "Pleading," § 2.

APPEAL AND ERROR.

See "Exceptions, Bill of"; "New Trial."
 Appeal from forfeiture of bail bond, see "Bail," § 1.
 Jurisdiction of supreme court to review certiorari proceedings, see "Certiorari," § 1.
 Review of criminal prosecutions, see "Criminal Law," §§ 29-33; "Homicide," § 12.

§ 1. **Decisions reviewable.**
 A judgment as to part of the defendants only *held* not final and appealable.—*Case v. Ingie* (Ind. T.) 958.

No appeal can be taken from an order sustaining a demurrer.—*Case v. Ingie* (Ind. T.) 958.

Under Act Cong. March 1, 1895 (28 Stat. 695), plaintiff cannot appeal from a judgment of a United States commissioner dismissing his action, though the amount sued for exceeded \$20.—*Baldwin v. Farris* (Ind. T.) 1077.

Plaintiff cannot appeal from a judgment of a United States commissioner that he take noth-

ing, and that defendant recover costs, under Act Cong. March 1, 1895 (28 Stat. 695).—*Morrow v. Burney* (Ind. T.) 1078.

As the law fixing the minimum jurisdiction of the court of appeals at \$200 took effect in June, 1898, no appeal lies from a judgment for less than \$200 rendered in October, 1898.—*Caldwell's Adm'r v. Hampton* (Ky.) 174.

No appeal lies from an order granting a new trial, the order not being a final one.—*Kemery's Adm'r v. Louisville & N. R. Co.* (Ky.) 804.

An order setting aside a nonsuit is appealable, under Rev. St. 1889, § 2246, authorizing an appeal from "an order granting a new trial."—*Coatney v. St. Louis & S. F. Ry. Co.* (Mo.) 1036.

Decree held not final and appealable.—*Fisher v. Fisher* (Tenn. Ch. App.) 967.

§ 2. Presentation and reservation in lower court of grounds of review.

The objection that the damages are excessive cannot be urged on appeal where not made a ground of the motion for a new trial.—*Sparks v. Robinson* (Ark.) 460.

Objection to a special judge on the ground that he was not properly selected is waived, unless made in the lower court.—*Salzer v. Napier* (Ky.) 10.

A judgment will not be reversed because it was rendered before the action stood regularly for trial, where no motion to vacate it was made in the lower court within the time required by Civ. Code, § 519.—*Wooldridge v. Harding* (Ky.) 162.

A judgment in an action in equity, though upon legal issues, may be reviewed on appeal without a motion for new trial.—*McCormick Harvesting Mach. Co. v. Martin* (Ky.) 315.

Though statements of counsel as to the wealth of defendant corporation were improper, as defendant, though objecting, did not ask the court to make any ruling on the matter, and, as the statement did not affect the verdict, a new trial will not be granted.—*Louisville & N. R. Co. v. McEwan* (Ky.) 619.

Where no objection was made to remarks of counsel in argument, because the presiding judge was temporarily absent from the court room, an agreement recited in the bill of exceptions that the objection shall be considered as having been made does not authorize the court to consider the remarks of which complaint is made.—*Shelbyville & Eminence Turnpike Co. v. Louisville & N. R. Co.* (Ky.) 805.

A judgment in an action in equity, though upon legal issues, may be reviewed on appeal without a motion for new trial.—*McCormick Harvesting Mach. Co. v. Martin* (Ky.) 1021.

Error in awarding a change of venue cannot be corrected unless excepted to in the court which ordered the change.—*State ex rel. Herriford v. McKee* (Mo.) 421.

There being no exceptions on the trial, no motion for a new trial or in arrest, and no exception to overruling a motion to recall an execution and for a receiver, these proceedings cannot be reviewed by writ of error sued out over three years afterwards.—*Bethune v. Cleveland, St. L. & K. O. Ry. Co.* (Mo.) 465.

Admission of unnecessary evidence held not error, where no objection was made thereto.—*May v. Crawford* (Mo.) 693.

That no objections were taken to the petition before judgment will incline the court not to sustain an objection taken thereafter that it was insufficient to warrant recovery.—*Bialek v. Richmond* (Tex. Civ. App.) 47.

Failure to require jury to itemize their verdict cannot be complained of, where no request was

made or objection taken.—*Jones v. Roach* (Tex. Civ. App.) 549.

Insufficiency of the evidence to support the verdict will not be considered, where the attention of the trial court was not, in the motion for a new trial, called to such deficiency.—*Herring v. Herring* (Tex. Civ. App.) 865.

§ 3. Parties.

Persons interested who file a remonstrance in such proceeding, as provided by Ky. St. § 2390, become parties to the proceeding, and are necessary parties to an appeal to the circuit court, and must be served with process.—*In re Wilson* (Ky.) 149.

Where the plaintiff in a judgment dies after an appeal has been granted therefrom, the defendant may abandon that appeal, and have an appeal granted by the clerk, against plaintiff's executor, without revivor.—*Magee v. Frazier's Ex'r* (Ky.) 174.

Where the plaintiff died pending an appeal from a judgment in her favor, it was not error, after reversal of the judgment, to revive the action in the name of her administrator, although more than a year had elapsed since her death; the delay being due to the failure of defendant to file the mandate promptly.—*Harrison v. Taylor's Adm'r* (Ky.) 193.

Assignees of an interest in the cause of action, to whom the court has ordered the judgment shall be paid to the extent of their interest, held proper parties to a writ of error on the judgment.—*Gulf, C. & S. F. Ry. Co. v. Mitchell* (Tex. Civ. App.) 662.

§ 4. Requisites and proceedings for transfer of cause.

Record held to show that a motion for new trial was filed within four days after trial, as required by Rev. St. 1889, § 2243.—*Young v. Downey* (Mo.) 751.

A writ of error dismissed for failure to proceed in time.—*Kendall v. State* (Tex. Civ. App.) 1102.

§ 5, 6. Record and proceedings not in record—Matters to be shown by record.

Filing a bill of exceptions without a statement of the record and proceedings in the cause is insufficient, under Rev. St. 1889, § 2263.—*Lawson v. Mills* (Mo.) 678.

Where the bill of exceptions was filed after the trial term, the transcript of the record on appeal must show that the time for filing it was extended.—*Lawson v. Mills* (Mo.) 678.

§ 7. — Scope and contents of record.

Evidence in the transcript held not a part of the record, when not incorporated in bill of exceptions.—*Brown v. Woolsey* (Ind. T.) 965.

A motion in arrest of judgment cannot be considered on appeal, where it is not set forth in a bill of exceptions, and the record does not show when it was filed or when it was overruled.—*Young v. Downey* (Mo.) 751.

A judgment overruling defendant's plea of privilege will not be revised where the evidence is not preserved by bill of exceptions.—*Campbell v. Cates* (Tex. Civ. App.) 268.

§ 8. — Necessity of bill of exceptions case, or statement of facts.

The ruling of a trial court on motion to dismiss cannot be reviewed in the absence of a bill of exceptions.—*Bell v. Eddy* (Ind. T.) 959.

The refusal to submit a jury case on special issues cannot be reviewed in the absence of a bill of exceptions.—*Galveston, H. & S. A. Ry. Co. v. Cody* (Tex. Sup.) 320.

The exception noted in the judgment refusing a continuance will not supply the place of a proper bill of exceptions.—*Simpson v. Texas Tram & Lumber Co.* (Tex. Civ. App.) 655.

An assignment of error will be overruled where the statement of facts is insufficient to show whether injury resulted from the matter complained of.—*Herring v. Herring* (Tex. Civ. App.) 865.

§ 9. — Contents, making, and settlement of case or statement of facts.

While the record proper must show the filing of the bill of exceptions, the record entries need not be set out in full in the abstract; a narrative of the several steps taken is sufficient.—*Ricketts v. Hart* (Mo.) 825.

Where appellant files statement in time, and court prepares one after many months, it will be disregarded, and judgment reversed.—*Walton v. Prigmore* (Tex. Civ. App.) 352.

Evidence held insufficient to show diligence excusing failure to file statement of facts until two days after the statutory time.—*Moody v. First Nat. Bank* (Tex. Civ. App.) 523.

A statement of facts on appeal will not be stricken as unnecessarily voluminous, where the prevailing party refuses to agree to a shorter statement, which plaintiff in error tenders him.—*Gulf, C. & S. F. Ry. Co. v. Mitchell* (Tex. Civ. App.) 662.

§ 10. — Abstracts of record.

Where no printed abstract has been filed, as required by supreme court rules, the appeal will be dismissed.—*Foster v. Vernon County* (Mo.) 725.

§ 11. — Questions presented for review.

Record on appeal held insufficient to justify the court in saying the trial court erred in entering judgment in condemnation proceedings without deducting the amount already paid.—*St. Louis & K. C. Ry. Co. v. Russell* (Mo.) 1030.

Supreme court, on motion for rehearing, after answering a question certified by the court of civil appeals as to the construction of Rev. St. art. 1333, held to have no jurisdiction to determine whether amendment of May 12, 1899, should be applied as the law of the case.—*Galveston, H. & S. A. Ry. Co. v. Jackson* (Tex. Sup.) 330.

Where the evidence in a proceeding for reinstatement of a case is not in the record, the order reinstating the case cannot be reviewed, although the reasons given by the court may not seem sufficient.—*Ragdale v. Groos* (Tex. Civ. App.) 256.

Error in refusing continuance cannot be considered, where the record does not show application, and that it was called to the court's attention.—*Bumpass v. Anderson* (Tex. Civ. App.) 1103.

§ 12. Assignment of errors.

An objection that there is no evidence to sustain a finding cannot be considered when not assigned as error.—*Galveston, H. & S. A. Ry. Co. v. Clark* (Tex. Civ. App.) 276.

An assignment of error dealing with two distinct propositions cannot be considered.—*Fouke v. Brengle* (Tex. Civ. App.) 519.

In a suit to foreclose tax lien, the question of sufficiency of description of property will not be considered when first raised on appeal, without assignment of error.—*Turner v. City of Houston* (Tex. Civ. App.) 642.

The appellate court may show a reason not relied on by appellant in the assignment of errors in his brief, against the giving of a certain instruction.—*Abilene Live-Stock Co. v. Guinn* (Tex. Civ. App.) 885.

§ 13. Briefs.

Failure of plaintiff in error to file his brief within the time required held not ground for dismissing the appeal.—*Gulf, C. & S. F. Ry. Co. v. Mitchell* (Tex. Civ. App.) 662.

§ 14. Dismissal, withdrawal, or abandonment.

Where no appeal bond was filed with the clerk of the circuit court, as required by Ky. St. § 2306, it was proper to dismiss an appeal from an order of the county court in a proceeding to appoint viewfinders to view a proposed drainage ditch.—*In re Wilson* (Ky.) 149.

Where defendant executes a supersedeas bond reciting that he "has taken an appeal," but fails to file the transcript in time, the court will, where the judgment does not show that an appeal was granted, presume that it was granted by a separate order, for the purpose of taking jurisdiction of a motion by appellee to dismiss the appeal.—*Dearing v. Wilcoxon* (Ky.) 159.

Where the question of the sufficiency of a guardian's bond is at issue, a motion by a creditor to dismiss the writ of error because his claim against the estate has since been paid will be overruled, as the claim against the estate was never in controversy.—*Less v. Ghio* (Tex. Sup.) 502.

Where attorney wishes to withdraw motion to dismiss, he must do so by motion, and the scratching off of his name by the clerk is insufficient.—*Kendall v. State* (Tex. Civ. App.) 1102.

§ 15. Hearing and rehearing.

It is too late, on a motion for rehearing of the appeal from a dismissal of a bill against defendants in adverse possession, to complain that the cause was not transferred to law docket.—*Burke v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 458.

§ 16. Review—Scope and extent in general.

Where a directed verdict is proper, it makes no difference that a wrong reason was assigned for directing it.—*Wolten v. American Union Life Ins. Co.* (Tex. Civ. App.) 1105.

§ 17. — Parties entitled to allege error.

A plaintiff, stating that he believed that he was not entitled to certain relief, cannot complain of the court's failure to give it.—*Cotton v. Rand* (Tex. Civ. App.) 55.

§ 18. — Presumptions.

Where bill of exceptions fails to present all the evidence, presumption is that the judgment was supported by the evidence.—*Brown v. Woolsey* (Ind. T.) 965.

Where addition to note after delivery of name of signer will release sureties, their consent will be presumed in support of a judgment against them, there being no finding as to such consent.—*Connor v. Thornton* (Tex. Civ. App.) 354.

In the absence of a statement of facts, it will be presumed that facts relied on by appellant were not proved.—*Missouri, K. & T. Ry. Co. of Texas v. Cock* (Tex. Civ. App.) 354.

Every intendment in favor of a judgment must be indulged where there is no statement of the facts in evidence nor the judge's conclusions of facts or law in the transcript on appeal from a refusal to set it aside.—*Colbert v. Brown* (Tex. Civ. App.) 521.

Where there is no statement of fact in the record, every presumption will be indulged in favor of proof of facts necessary to support judgment.—*Turner v. City of Houston* (Tex. Civ. App.) 642.

When the bill of exceptions fails to set forth the grounds of a ruling excluding an amendment to the pleadings, the presumption is that the court's discretion was properly exercised.—*Hurd v. Texas Brewing Co.* (Tex. Civ. App.) 883.

§ 18½. — Discretion of lower court.

The action of the trial court in setting aside the swearing of a jury, and permitting an amended petition to be filed, and continuing the cause, will not be disturbed unless there has

been an abuse of discretion.—Chesapeake & O. R. Co. v. Smith (Ky.) 12.

Applications for continuance are addressed to the discretion of the trial court, with the exercise of which the revisory courts will not interfere, unless it is abused.—Cooley v. Kansas City, P. & G. R. Co. (Mo.) 101.

A judgment refusing to set aside a default decree will be affirmed where the evidence for the motion does not show abuse of discretion.—Colbert v. Brown (Tex. Civ. App.) 521.

Refusal of an amendment after the parties have announced themselves ready for trial will not be reviewed if abuse of discretion does not clearly appear, under Sayles' Civ. St. art. 1188.—Hurd v. Texas Brewing Co. (Tex. Civ. App.) 883.

§ 19. — Questions of fact, verdicts, and findings.

While the court in cases of serious doubt is not inclined to disturb the judgment of a chancellor on appeal, yet the rule applicable to the verdict of a jury that the finding will not be disturbed unless palpably against the evidence does not apply in equity cases.—Boll v. Irwin (Ky.) 444.

While some weight will be given on appeal to the finding of the chancellor on a question of fact, yet the court will consider the evidence, and adjudge for itself the correctness of the judgment appealed from.—Bardmaker v. Johnson (Ky.) 452.

The weight of evidence will not be reviewed in an action at law, if the declarations of law are correct.—Johnson v. Bowlware (Mo.) 109.

On appeal in an equity case, the supreme court will review the evidence if it is before them, and reach its own conclusions on the facts, though the trial court has made special findings of fact.—Courtney v. Blackwell (Mo.) 668.

Where the only question is whether the evidence, as a matter of law, sustains the conclusion reached by the trial court, the supreme court will not interfere, unless the judgment is wholly unsupported by substantial testimony.—Cornwall v. McFarland Real-Estate Co. (Mo.) 736.

Where proof of a material point is not clear and satisfactory, the court will affirm a decree assuming it unproved, where, under findings and the evidence, it appears no injustice was done appellant.—Ford v. Lawrence (Tenn. Ch. App.) 1023.

A concurrent finding of a master and chancellor on an accounting is conclusive, if there is material evidence to support it.—Nance v. Calender (Tenn. Ch. App.) 1025.

As to issues not submitted, the statute resolves every fact in favor of the judgment.—Ragsdale v. Groos (Tex. Civ. App.) 256.

A verdict is conclusive on the issue of negligence and contributory negligence, where the evidence would have justified a finding either way on both issues.—Houston & T. C. R. Co. v. Smith (Tex. Civ. App.) 506.

§ 20. — Harmless error in general.

A curtailing of the cross-examination of a witness held not reversible error.—Cooley v. Kansas City, P. & G. R. Co. (Mo.) 101.

A failure to postpone the entry of a decree after trial on a count until after the trial on another count, as directed by Rev. St. 1889, § 2135, held harmless error.—Courtney v. Blackwell (Mo.) 668.

A defendant offering to pay what was due, held not harmed by a judgment for a less sum, to be satisfied only out of certain land.—Cotton v. Rand (Tex. Civ. App.) 55.

Where land owned by co-tenants was adjudged subject to the payment of services, held,

that a mistaken finding as to the amount each co-tenant's interest was harmless.—v. Rand (Tex. Civ. App.) 55.

An erroneous sustaining of a challenge to a juror is not reversible error, where appellant did not intend to permit the challenged to sit in the case.—Houston & T. C. R. Co. v. Smith (Tex. Civ. App.) 506.

§ 21. — Harmless error in ruling on pleadings.

Where it is manifest that a verdict was entered under the first paragraph of the petition immaterial whether the second paragraph was a cause of action.—Ingram v. Turner (Ky.)

A party amending after demurrer sustained cannot complain of the sustaining of the demurrer.—Simpson v. Texas Tram & Lumber Co. (Tex. Civ. App.) 655.

§ 22. — Harmless error in admission or exclusion of evidence.

Permitting defendant to read a witness' money given on a former occasion where there is no variance between that given on the occasions, and none is claimed, is harmless error.—Hogan v. Citizens' Ry. Co. (Mo.) 473.

Defendant, in an action for slander, is not harmed by plaintiff's testimony that he failed to procure employment by reason of the slander where no special damages are allowed by the verdict.—Courtney v. Blackwell (Mo.) 668.

Where defendant, sued on a judgment, asks the rendition of the judgment, error in admitting an imperfect transcript thereof is harmless.—Wonderly v. Lafayette County (Mo.) 745.

Admission of secondary evidence without laying predicate held harmless.—Ridgeway v. Herbert (Mo.) 1040.

It is not reversible error for a chancellor to reject evidence offered to sustain an immaterial issue.—Duffield v. Spence (Tenn. Ch. App.)

The erroneous admission of evidence is harmless where the result would be the same if the evidence was rejected.—National Wall-Paper Co. v. Fourth Nat. Bank (Tenn. Ch. App.) 1

Where defendant's witness testified that the schedule time for defendant's train might have been 30 miles per hour, evidence on cross-examination that, according to the schedule of the year before, not shown to be the same, it was a little less than 30 miles per hour, is harmless.—Galveston, H. & S. A. Ry. Co. v. Clark (Tex. Civ. App.) 276.

Testimony of one not shown to be acquainted with the rules of defendant railroad company as to its rules, is harmless, where there is no testimony to the same effect.—Galveston, H. & S. A. Ry. Co. v. Clark (Tex. Civ. App.) 276.

Error in admitting testimony is harmless where there is other competent testimony to the same effect.—Galveston, H. & S. A. Ry. Co. v. Clark (Tex. Civ. App.) 276.

Error in admitting evidence is not prejudicial where the same facts were testified to by another.—Campbell v. Antis (Tex. Civ. App.) 348.

Admission of evidence will not be reviewed where it is not shown to be prejudicial.—Shannon v. Texas Tram & Lumber Co. (Tex. Civ. App.) 655.

There was no harm in permitting a witness' deposition to be read, where he afterwards appeared and testified.—Missouri, K. & T. Ry. Co. v. St. Clair (Tex. Civ. App.) 666.

Admission of evidence of an injury not pleaded held harmless, no recovery being allowed therefor.—Ft. Worth & R. G. Ry. Co. v. White (Tex. Civ. App.) 855.

Admission of immaterial evidence held harmless error.—Blackman v. Schierman (Tex. Civ. App.) 886.

Error in admitting a deed in trespass to try title beyond the common source *held* harmless.—*Bumpass v. Anderson* (Tex. Civ. App.) 1103.

§ 23. — Harmless error in giving or refusing instructions.

An error in instructions as to the measure of damages on defendant's counterclaim was harmless, where the jury found that he was not damaged at all.—*Taulbee v. Moore* (Ky.) 564.

Error in a charge was harmless where the jury could not, under the evidence, have arrived at any other verdict.—*King v. C. M. Hapgood Shoe Co.* (Tex. Civ. App.) 532.

Where the court submits a case to the jury on an erroneous theory, which is embodied in the requested instructions of appellant, the error is unavailable.—*Croft v. Smith* (Tex. Civ. App.) 1089.

§ 24. — Subsequent appeals.

The opinion on a former appeal is not the law of the case on a second appeal as to issues made for the first time after the return of the case to the lower court.—*Bridges v. McAlister* (Ky.) 603.

The appellate court cannot, on a subsequent appeal, go behind an order granting a former appeal, to determine the sufficiency of the affidavit for appeal.—*Cooley v. Kansas City, P. & G. R. Co.* (Mo.) 101.

§ 25. Determination and disposition of cause—Reversal.

On an appeal from a decree canceling a contract of sale in a suit to enforce it, the court may reverse the decree of cancellation, and enforce the contract in a manner contrary to appellant's contention.—*Hoover v. Binkley* (Ark.) 73.

Unless a trial by jury to which a party is entitled under Const. U. S. Amend. art. 7, is waived in one of the ways prescribed by Mansf. Dig. § 5148, a judgment without a jury, against a party who demanded it, will be reversed.—*Warwick v. Kingman* (Ind. T.) 1076.

Where a judgment dismissing plaintiff's petition, the effect of which was to discharge an attachment issued in the action, was not superseded for more than a year, a garnishee who in the meantime had paid to defendant the amount garnished in his hands cannot, on the reversal of the judgment, be required to account to plaintiff therefor.—*Stephens v. Willis* (Ky.) 9.

The allowance of interest from July, 1891, when interest from July, 1896, only was prayed for, is a clerical misprision, which may be corrected on motion at any time, and for which, therefore, there can be no reversal.—*Salzer v. Napier* (Ky.) 10.

The reversal of a judgment which has not been superseded does not give a right of action for damages for acts done in obedience to the judgment while in force, the extent of liability being the duty to make restitution of what has been received under the judgment.—*Bridges v. McAlister* (Ky.) 603.

When a petition falls to state facts sufficient to constitute a cause of action, it is error on the face of the record for which judgment will be reversed, though no objection was made by motion in arrest or for new trial in the trial court.—*State ex rel. Ziegenhein v. Thompson* (Mo.) 98.

A judgment will be rendered on appeal for liquidated damages for breach of contract, where uncontradicted evidence on two trials in the court below showed a breach of the contract.—*May v. Crawford* (Mo.) 693.

Evidence as to value of building and loan association stock *held* to raise issue of fact, preventing entry of judgment in supreme court.—

Leary v. People's Building, Loan & Saving Ass'n (Tex. Sup.) 836.

The supreme court cannot enter judgment upon a controverted issue of fact.—*Leary v. People's Building, Loan & Saving Ass'n* (Tex. Sup.) 836.

A judgment disallowing a counterclaim, one dollar of which should have been allowed, will not be reversed for such error.—*Wilson v. Vick* (Tex. Civ. App.) 45.

The appellate court cannot, on a reversal of a judgment entered on a general verdict for defendant in an action on a claimant's bond, enter a judgment for plaintiff, in the absence of a finding of the value of the property described in the bond.—*Taylor v. St. Louis Type Foundry* (Tex. Civ. App.) 304.

The valuation placed upon property by the sheriff in proceedings by a third person to gain possession by means of a claimant's bond is not sufficient to authorize an appellate court to enter judgment thereon.—*Taylor v. St. Louis Type Foundry* (Tex. Civ. App.) 304.

§ 26. — Mandate and proceedings in lower court.

Where a judgment by default has been reversed on defendant's appeal because writ was not served on him, the cause will be remanded to the lower court to proceed as if writ had been served.—*Flowers v. Jackson* (Ark.) 462.

An omitted jurat to an affidavit on which an appeal is granted, under Rev. St. § 2114, may be supplied by the trial court after judgment of reversal.—*Cooley v. Kansas City, P. & G. R. Co.* (Mo.) 101.

On the second trial of a case after an appeal, the trial court is bound by the opinion of the supreme court as the law of the case.—*May v. Crawford* (Mo.) 693.

APPEARANCE.

The defendants, in a counterclaim and cross petition, entered their appearance by filing a demurrer thereto.—*Salzer v. Napier* (Ky.) 10.

By filing a general demurrer to the petition at the same time he filed a special demurrer to the jurisdiction, defendant entered his appearance, and waived objection to the jurisdiction of his person.—*Standard Furniture Co. v. Stanley* (Ky.) 611.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 2.

APPOINTMENT.

Of executor or administrator, see "Executors and Administrators," § 1.
Of receiver, see "Receivers," § 1.

ARBITRATION AND AWARD.

§ 1. Award.

Award for attorney's fees *held* sufficient, without separately stating amounts due from defendant in different capacities.—*Koerner v. Leathe* (Mo.) 96.

ARGUMENT OF COUNSEL.

In criminal prosecutions, see "Criminal Law," § 20.

ARREST OF JUDGMENT.

In criminal prosecutions, see "Criminal Law," § 27.

ARSON.

In a prosecution for burning a school house, parol evidence that the property was a school house, and who was county judge, is sufficient proof of ownership, under Rev. St. arts. 3909, 3984.—*Hester v. State* (Tex. Cr. App.) 932.

ASSAULT AND BATTERY.

Assault with intent to kill, see "Homicide," § 3.

§ 1. Criminal responsibility.

Evidence held to justify a verdict of aggravated assault.—*Scroggins v. State* (Tex. Cr. App.) 232.

A charge that there was no present ability to commit a battery held properly refused.—*Bristow v. State* (Tex. Cr. App.) 393.

Approaching another in a threatening manner with the hand in the pocket, and challenging him to defend himself, held an assault.—*Bristow v. State* (Tex. Cr. App.) 393.

Exclusion of accused's testimony to disprove motive held error.—*Skelton v. State* (Tex. Cr. App.) 943.

ASSESSMENT.

Of compensation for property taken for public use, see "Eminent Domain," § 2.

Of damages, see "Damages," § 6.

Of expenses of public improvements, see "Municipal Corporations," § 6.

Of tax, see "Taxation," § 2.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 12; "Criminal Law," § 32.

ASSIGNMENTS.

Of insurance policy, see "Insurance," § 5.

Of lease, see "Landlord and Tenant," § 3.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.**§ 1. Requisites and validity.**

The failure of an assignor to state the amount of his indebtedness to each preferred creditor mentioned in the deed will not of itself invalidate the assignment.—*Wiley v. Reynolds* (Ind. T.) 972.

Deed held not invalidated by stipulation requiring release as a condition of preference.—*Robinson v. Belt* (Ind. T.) 975.

An assignment held not a partial one because by mistake it exempts property not belonging to the assignor.—*Robinson v. Belt* (Ind. T.) 975.

A deed of assignment held not fraudulent because of a claim of exemption.—*Robinson v. Belt* (Ind. T.) 975.

Instrument construed, and held a general assignment.—*Westchester Fire Ins. Co. v. Blackford* (Ind. T.) 978.

The fact that insolvent partners, after their stock of goods was destroyed by fire, did not again engage in business in their own names, tends to show that payments made by them out of the proceeds of insurance on the property were made in contemplation of insolvency.—*Cheek v. Grahn* (Ky.) 311.

It will be presumed that insolvent debtors knew of their insolvency at the time of making payments to creditors.—*Cheek v. Grahn* (Ky.) 311.

Payments by insolvent partners to their individual creditors with intention to prefer them

to the exclusion of others will operate as an assignment for the benefit of creditors.—*Cheek v. Grahn* (Ky.) 311.

The fact that insolvent partners paid their local creditors to the exclusion of foreign creditors tends to show that they intended to give the local creditors a preference.—*Cheek v. Grahn* (Ky.) 311.

A creditor is entitled to avail himself of a trust deed executed in his behalf and that of another creditor, though he could have discovered with ordinary diligence that the claim of the latter was fictitious.—*Weaver v. Goodman* (Tex. Civ. App.) 860.

§ 2. Construction and operation in general.

Policies of life insurance, having no withdrawal or pecuniary value at the date of a general assignment by the insured for the benefit of his creditors, did not pass thereunder.—*Barbour's Adm'r v. Larue's Assignee* (Ky.) 5.

§ 3. Administration of assigned estate.

Assignee cannot sue without giving the bond and filing the inventory required by statute.—*Westchester Fire Ins. Co. v. Blackford* (Ind. T.) 978.

The county court had no power to accept a bid for property after the assignee had reported that he had failed to receive a bid equal to the upset price fixed by the court, but the court should have ordered the property to be again offered for sale.—*Smith v. Sulzer Mach. Co.'s Assignee* (Ky.) 449.

Under Ky. St. § 88, an appeal lies to the circuit court from an order of the county court overruling a motion to set aside an order of the court accepting a bid for property without the consent of the assignee.—*Smith v. Sulzer Mach. Co.'s Assignee* (Ky.) 449.

An instruction that a creditor preferred by a trust deed would not be affected, as against other creditors, by his knowledge that the claims of other creditors were fictitious, held erroneous.—*Weaver v. Goodman* (Tex. Civ. App.) 860.

A question whether a creditor preferred by a trust deed had notice that the claims of other creditors were fictitious held for the jury.—*Weaver v. Goodman* (Tex. Civ. App.) 860.

§ 4. Rights and remedies of creditors.

Where a fund held by a bank, as trustee, has been mingled with the general assets of the bank, the beneficiaries of the fund have no lien upon the assets of the bank therefor, and, under a general assignment by the bank for the benefit of its creditors prior to the act of March, 1894, regulating voluntary assignments, such beneficiaries are not entitled to priority in the distribution of the assigned estate.—*New Farmers' Bank's Trustee v. Cockrell* (Ky.) 2.

§ 5. Accounting, settlement, and discharge of assignee.

In an action by the assignee to settle the assigned estate, a creditor who has been appointed to represent all creditors of the classes to which he belongs is not entitled to the allowance of an attorney's fee out of the fund coming to such creditors, where the conflicting rights of the different classes of creditors have been presented by the assignee in his petition.—*McDowell v. Columbia Building, Loan & Savings Ass'n's Assignee* (Ky.) 1013.

ASSUMPTION.

Of risk by employé, see "Master and Servant," § 6.

ATTACHMENT.**§ 1. Proceedings to procure.**

Statutory service of writ and petition may be waived by defendant's appearing and pleading.—*Winningham v. Trueblood* (Mo.) 399.

An affidavit stating that defendant is about to convert certain crops into money for the purpose of placing it beyond reach of plaintiff *held* good, under Rev. St. art. 186, subd. 11.—*Smith v. Dye* (Tex. Civ. App.) 858.

§ 2. Levy, lien, and custody and disposition of property.

The lien of an attachment dates from the filing of the abstract of attachment in the recorder's office.—*Winningham v. Trueblood* (Mo.) 399.

A sheriff's return of a writ of attachment is sufficient, though it fails to state that the levy was made to satisfy "any debts or damages and costs," since Rev. St. 1889, § 543, requires only that the sheriff shall attach a sufficient amount of land "to satisfy," etc.—*Winningham v. Trueblood* (Mo.) 399.

The abstract of attachment required by Rev. St. § 543, to be filed in the recorder's office, is sufficient notice if filed on the date of the levy, though not recorded on that day.—*Winningham v. Trueblood* (Mo.) 399.

Laches in moving for a distribution of proceeds in court cannot be imputed to one attaching creditor, whereby another acquires priority over him.—*State ex rel. Burnham v. Hickman* (Mo.) 680.

In a suit by subsequent attaching creditors to establish the priorities of their liens, the court cannot hold that prior attaching creditors, not parties, have lost their liens.—*State ex rel. Burnham v. Hickman* (Mo.) 680.

The three-years limitation for the lien of a judgment provided by Rev. St. 1889, § 6012, does not apply to funds in court.—*State ex rel. Burnham v. Hickman* (Mo.) 680.

The rule that equity will reward the diligent does not apply to attachments of unequal priority.—*State ex rel. Burnham v. Hickman* (Mo.) 680.

A second levy by notifying the officer making the first levy, who was in possession and who consented thereto, *held* valid.—*National Wall-Paper Co. v. Fourth Nat. Bank* (Tenn. Ch. App.) 1002.

A levy of an attachment on goods transferred in fraud of creditors, and in possession of the transferee, must be made by taking possession of the goods, under Rev. St. arts. 200, 2349.—*Kessler v. Half* (Tex. Civ. App.) 48.

A creditor of an insolvent corporation may by attachment procure a lien on defendant's property prior to other creditors.—*Mallette v. Ft. Worth Pharmacy Co.* (Tex. Civ. App.) 859.

Giving new deed to correct description *held* not to affect attachment prior thereto.—*Pierson v. Sanger* (Tex. Civ. App.) 869.

§ 3. Proceedings to support or enforce. Where affidavit alleges indebtedness of \$5,000, and makes no claim for interest and attorney's fees, it is error to foreclose for a greater amount, covering such items.—*Moody v. First Nat. Bank* (Tex. Civ. App.) 523.

Amended petition in attachment, alleging that certain parties are setting up fraudulent claims to the premises levied on, *held* sufficient, as against general demurrer, to allow proof that such parties were claiming under attachment defendant.—*Moody v. First Nat. Bank* (Tex. Civ. App.) 523.

§ 4. Quashing, vacating, dissolution, or abandonment.

In a contest between attachment creditors, the correctness of the return of the officer making the first levy may be attacked.—*National Wall-Paper Co. v. Fourth Nat. Bank* (Tenn. Ch. App.) 1002.

An affidavit for attachment is not traversable for the purpose of vacating the lien.—*Mallette v. Ft. Worth Pharmacy Co.* (Tex. Civ. App.) 859.

A lien creditor is not entitled to the vacation of a prior attachment lien on the sole ground that the attaching creditor had no reasonable grounds for believing the affidavit for attachment to be true.—*Mallette v. Ft. Worth Pharmacy Co.* (Tex. Civ. App.) 859.

An attachment creditor cannot assail a prior attachment as having been obtained by a false affidavit, in the absence of fraud or collusion between the prior attaching creditor and the debtor.—*Mallette v. Ft. Worth Pharmacy Co.* (Tex. Civ. App.) 859.

§ 5. Claims by third persons.

Rev. St. art. 5311, making a claim to property in the hands of an officer a release as to him, *held* not to release as to the parties ordering him to levy.—*City Nat. Bank of Gatesville v. Colgin* (Tex. Civ. App.) 856.

§ 6. Liabilities on bonds or undertakings.

Attorney's fees may be recovered as part of the damages in an action on an attachment bond, to the extent that they were for services rendered in defending the attachment alone, as distinguished from the action itself.—*McClure v. Renaker* (Ky.) 317.

Replevy bond in attachment *held* discharged by decree adjudging the property exempt.—*Hall v. Miller* (Tex. Civ. App.) 36.

§ 7. Wrongful attachment.

The measure of damages for a wrongful attachment of a stock of goods that had been previously conveyed in trust for the benefit of other creditors is the market value of the goods, with 6 per cent. interest from time of levy.—*Weaver v. Goodman* (Tex. Civ. App.) 860.

ATTENDANCE.

Of juror, see "Jury," § 2.

ATTORNEY AND CLIENT.

Arguments and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 20.

Attorneys in fact, see "Principal and Agent."

§ 1. Retainer and authority.

An attorney has no right to compromise his client's claim, and take less than the full amount, without special authority.—*Cox v. Adelsdorf* (Ky.) 616.

An inquiry by a plaintiff of his attorney as to the probability of getting "a fifty per cent. cash settlement" did not authorize the attorney to make a settlement on that basis.—*Cox v. Adelsdorf* (Ky.) 616.

§ 2. Compensation and lien of attorney.

Where the client agreed to pay his attorney a fee "equal to the net one-half of any sum of money recovered by suit or compromise," the attorney has a lien on a judgment recovered by him for the client for one-half the amount thereof, which cannot be defeated to any extent by a compromise made by defendant with the client without the attorney's consent.—*Louisville & N. R. Co. v. Procter* (Ky.) 591.

In addition to the lien for his own fee, the attorney has a lien for one-half the fee of additional counsel which he has paid, where the client was to pay one-half of such fee.—*Louisville & N. R. Co. v. Procter* (Ky.) 591.

AUTHORITY.

Of agent, see "Principal and Agent," § 3.
Of attorney, see "Attorney and Client," § 1.

AWARD.

See "Arbitration and Award," § 1.

BAIL.**§ 1. In criminal prosecutions.**

A surety in a bail bond is not bound where his name is signed by another without written authority.—*Commonwealth v. Belt* (Ky.) 431.

Where one of two sureties in a bail bond is not bound because his name was signed by another without written authority, the other surety is not bound, though he knew the name of his co-surety was signed without written authority, as he had the right to rely upon the officer taking the bond to see that his co-surety's name was signed in such a way as to bind him.—*Commonwealth v. Belt* (Ky.) 431.

An appeal from a forfeiture of a bail bond will be dismissed unless the transcript is filed within 90 days after the filing of the appeal bond, as required by Rev. St. art. 1015.—*Hollenbeck v. State* (Tex. Cr. App.) 373.

BANKS AND BANKING.**§ 1. Banking corporations and associations.**

Indictment under Acts 25th Leg. p. 130, § 1, for receiving deposit after insolvency, must allege whether bank was incorporated, and, if a partnership, must allege names of partners.—*Roby v. State* (Tex. Cr. App.) 1114.

§ 2. Functions and dealings.

A check drawn before, though not presented until after, an attachment lien was created on the deposit, has priority over the attachment.—*Winchester Bank v. Clark County Nat. Bank* (Ky.) 315.

Where plaintiff made a deposit, with direction to pay it out on checks drawn by J., payable to certain persons, payment of the checks named on J.'s forged indorsement constitutes no defense to action against the bank to recover the deposit.—*Rice v. Citizens' Nat. Bank* (Ky.) 454.

Where a bank received a check by mail, with directions to send "cash for same," it should have adopted the usual method of transmitting money to the point indicated, which was by registered package; and therefore the deposit of the money in the post office, without having the package registered or taking a receipt for it, did not constitute a payment, though the bank may have notified the postmaster that it wished to have the package registered.—*Clay City Nat. Bank v. Conlee* (Ky.) 615.

The maker cannot set off against a note to a bank, due when the bank assigned for creditors, the amount of his part payment after the assignment as co-surety, of an amount due a depositor.—*Storts v. George* (Mo.) 489.

A guarantor of a bank's note cannot set off against his note to it, due when it assigned for creditors, money paid as guarantor after the assignment.—*Storts v. George* (Mo.) 489.

BAR.

Of action by former adjudication, see "Judgment," § 9.

BASTARDS.

Issue of white man and Indian woman, living together in Missouri, in accordance with Indian customs, without lawful marriage, cannot inherit from father.—*Banks v. Galbraith* (Mo.) 105.

BATTERY.

See "Assault and Battery," § 1.

BAWDY HOUSE.

See "Disorderly House."

BENEFICIAL ASSOCIATIONS.

That section does not exempt corporations organized for charitable purposes from the duty of filing in the office of the secretary of state a statement signed by its president or secretary, giving the location of its office, and the name of its agent thereat upon whom process can be served.—*Johnson v. Mason Lodge No. 33* (Ky.) 620.

Ky. St. § 883, part of the act relating to corporations organized for charitable purposes, which provides that corporations "organized under this act" shall not be subject to any of the laws relating to corporations having a capital stock or organized for pecuniary profit, "except that requiring an agent on whom process may be executed," applies to corporations organized for charitable purposes, whether organized before or after the passage of the act.—*Johnson v. Mason Lodge No. 33* (Ky.) 620.

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 4.

BETTING.

See "Gaming."

BIAS.

Of juror, see "Jury," § 3.
Of witness, see "Witnesses," § 4.

BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

Necessity of, for purpose of review, see "Appeal and Error," § 8.

Necessity of incorporating matter sought to be reviewed in bill of exceptions, see "Appeal and Error," § 7.

— motions sought to be reviewed in bill of exceptions, see "Appeal and Error," § 7.

BILLS AND NOTES.

Validity of note placed in escrow in hands of bona fide purchaser, see "Escrows."

§ 1. Construction and operation.

A note signed in one state, but delivered to the payee in another, for money loaned there, is a contract made in the latter state, and is subject to the laws thereof.—*Kelly v. Telle* (Ark.) 633.

§ 2. Rights and liabilities on indorsement or transfer.

The fact of the obligor's insolvency is not sufficient to fix the assignor's liability, but the assignee must with due diligence obtain a return of no property.—*Pritchett v. Hape* (Ky.) 608.

A delay of more than four months to have execution issued on a judgment on an assigned note discharged the assignor from liability.—*Pritchett v. Hape* (Ky.) 608.

A person taking a note indorsed in blank by the payee, by her attorney in fact, he being also the president of the maker corporation, held an innocent purchaser.—*German-American Bank v. Carondelet Real-Estate Co.* (Mo.) 691.

Paper taken as collateral in exchange for other collateral given when the debt was created is taken for value in due course of business, and without notice.—*Newman v. Aultman, Miller & Co.* (Tenn. Ch. App.) 198.

A corporation taking a note as collateral *held* not chargeable with notice of equities known to the debtor, because one of its officers was an officer of the debtor corporation.—*Newman v. Aultman, Miller & Co.* (Tenn. Ch. App.) 198.

Purchasers of property, giving notes for the price on assurance that its debts amounted to a certain sum, and forced to pay more than the notes to protect the purchase, *held* not liable on the notes.—*Smith v. Roach* (Tex. Civ. App.) 292.

A failure of consideration is no defense to a note as against one acquiring it, without notice thereof, in payment of a pre-existing debt.—*Raatz v. Gordon* (Tex. Civ. App.) 651.

§ 3. Presentment, demand, notice, and protest.

Notice to prior indorsers of the dishonor of a bill is not necessary in order to hold the last indorser liable.—*Lyddane v. Owensboro Banking Co.* (Ky.) 453.

§ 4. Actions.

Where no demand is alleged, a note payable on demand bears interest only from the date of the filing of the petition.—*Cooke v. Clark's Committee* (Ky.) 316.

An error in allowing interest on a note may be corrected without awarding a new trial.—*Cooke v. Clark's Committee* (Ky.) 316.

Where persons whose names were signed as sureties to a renewal note without their authority pleaded non est factum, whereupon plaintiff filed an amended petition setting up the original note, and asking judgment thereon in the event the renewal should be adjudged invalid, an answer pleading payment of the original note was not good, it appearing that the execution of the renewal note was relied on as a payment.—*Bright v. First Nat. Bank* (Ky.) 442.

Where defendant pleads non est factum to a renewal note sued on, the plaintiff may, without admitting the truth of that plea, set up the original note by amended petition, and ask judgment thereon in the event it shall be adjudged that the renewal note is void.—*Bright v. First Nat. Bank* (Ky.) 442.

It is sufficient to allege that the payees indorsed the bill sued on by writing their names across the back, and that the plaintiff is the owner and holder thereof, without alleging that the indorsement was to plaintiff.—*Lyddane v. Owensboro Banking Co.* (Ky.) 453.

Such averments, coupled with the averment of a promise by the acceptor to pay, are sufficient to hold the indorser liable.—*Lyddane v. Owensboro Banking Co.* (Ky.) 453.

Whether one not the payee, writing his name on the back of a note, is a maker, *held* to depend on the circumstances.—*Kingman & Co. v. Cornell-Tebbetts Machine & Buggy Co.* (Mo.) 727.

Petition must allege that note was placed in attorney's hands for collection, in order that judgment by default can include attorney's fees, as stipulated.—*Smith v. Board* (Tex. Civ. App.) 520.

BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.
Of land, see "Vendor and Purchaser," § 5.

BONDS.

Bail bonds, see "Bail," § 1.
Liabilities on attachment bond, see "Attachment," § 6.
— on clerk's bond, see "Clerks of Courts."
— on official bonds, see "Officers," § 1.
— on receiver's bond, see "Receivers," § 4.

— on replevin bond, see "Replevin," § 1.
Sufficiency of surety on guardian's bond, see "Guardian and Ward," § 1.

§ 1. Construction and operation.

Bond of county treasurer *held* valid as a common-law obligation, though defective under statute.—*Edmiston v. Concho County* (Tex. Civ. App.) 353.

§ 2. Performance or breach of condition.

Ky. St. § 4609, providing that "if the plaintiff in any bond having the force of a judgment shall, at any time for the space of a year, whilst he is entitled to have execution, fail to issue execution," the surety in such bond shall be released from liability, does not apply to a bond payable to the master commissioner, who has no authority to collect it without an order of court.—*Turner v. Eastin* (Ky.) 567.

§ 3. Actions.

In an action on a contract to indemnify plaintiff for any pecuniary loss sustained by it by reason of any fraudulent or dishonest acts of B., one of its employes, in which the defense was that the shortage in B.'s accounts occurred prior to the term covered by the bond, it was error to require plaintiff to file a bill of particulars on the trial of the cause, none having theretofore been required.—*Standard Oil Co. v. Fidelity & Casualty Co. of New York* (Ky.) 571.

In action to indemnify plaintiff for fraudulent acts of B., an employe, entries in books kept by B. were admissible as evidence for plaintiff.—*Standard Oil Co. v. Fidelity & Casualty Co. of New York* (Ky.) 571.

In action on indemnity insurance, plaintiff could show reception and indorsement of checks by his employe.—*Standard Oil Co. v. Fidelity & Casualty Co. of New York* (Ky.) 571.

Petition on bond of county treasurer *held* to justify recovery as upon a common-law obligation.—*Edmiston v. Concho County* (Tex. Civ. App.) 353.

BOUNDARIES.

§ 1. Description.

A description which began at a fixed monument, and closed by the words, "thence west twenty rods, to the place of beginning," whereas it should have been "east," to reach the beginning point, *held* sufficient.—*Johnson v. Bowlware* (Mo.) 109.

A call in a survey as "thence south 1,850 poles, crossing said creek, to Cumberland Mountain, thence along said mountain," construed.—*Duffield v. Spence* (Tenn. Ch. App.) 492.

Where the entry and the grant call for natural and well-known marks, they will control over the call for so many poles.—*Duffield v. Spence* (Tenn. Ch. App.) 492.

§ 2. Ascertainment and establishment.

A repugnant part of a description in a deed may be rejected, and the intention of parties thereto ascertained from what remains, if possible.—*Johnson v. Bowlware* (Mo.) 109.

District Court Rule No. 47 (20 S. W. xv.), does not require that an agreement, between parties to a pending suit for the settlement of a boundary dispute, that the line shall be surveyed, which is done, shall be in writing.—*Masterson v. Bokel* (Tex. Civ. App.) 39.

BREACH.

Of condition, see "Insurance," § 7.
Of contract, see "Contracts," § 3.
Of warranty, see "Sales," § 8.

BREACH OF MARRIAGE PROMISE.

A claim for damages cannot be based on the refusal of a female minor 18 years of age to perform a marriage contract.—*Wells v. Hardy* (Tex. Civ. App.) 503.

BREACH OF THE PEACE.

See "Affray"; "Unlawful Assembly."

BRIEFS.

Effect of failure to file brief in time, see "Appeal and Error," § 13.

BUILDING AND LOAN ASSOCIATIONS.

A building association organized on the mutual plan under Rev. St. 1879, c. 21, art. 9, cannot contract that shares of stock shall reach a par value within a fixed time.—*Schell v. Equitable Loan & Investment Ass'n* (Mo.) 406.

Formal tender of the fee for cancellation of a building association mortgage need not be shown, in an action for cancellation, where there is an absolute denial by defendant of the right on the ground that the debt has not been paid.—*Taylor v. Farmers' Savings & Building & Loan Ass'n* (Tenn. Ch. App.) 1008.

Evidence held insufficient to show that borrower was misled as to time in which loan would be paid.—*Taylor v. Farmers' Savings & Building & Loan Ass'n* (Tenn. Ch. App.) 1008.

Evidence held insufficient to show intent to practice fraud on borrowers by destruction of old pamphlets and substitution of new pamphlets, where such pamphlets were notice of change of methods favorable to borrowers.—*Taylor v. Farmers' Savings & Building & Loan Ass'n* (Tenn. Ch. App.) 1008.

On foreclosure of loan to member, not due by its terms, for default in payment of installments, defendant held entitled to credit for value of his stock.—*Leary v. People's Building, Loan & Savings Ass'n* (Tex. Sup.) 836.

Representation of agent of building and loan company as to the maturity of stock held inadmissible, as contradictory of the contract.—*Interstate Building & Loan Ass'n v. Hunter* (Tex. Civ. App.) 530.

Company held not estopped by representation of its agent that stock would mature within a certain time, when by-laws provided when it shall mature.—*Interstate Building & Loan Ass'n v. Hunter* (Tex. Civ. App.) 530.

BURDEN OF PROOF.

In civil actions, see "Evidence," § 2.
In criminal prosecutions, see "Criminal Law," § 5.

BURGLARY.

§ 1. Offenses, and responsibility therefor.

The slightest force, such as the opening of a door or the turning of a lock, is sufficient to constitute a burglarious entry.—*Hedrick v. State* (Tex. Cr. App.) 252.

§ 2. Prosecution and punishment.

Indictment held sufficient.—*Wilks v. State* (Tex. Cr. App.) 902.

Instructions held not prejudicial to accused.—*Hehn v. State* (Tex. Cr. App.) 1118.

CALLS.

Control of natural marks over calls, see "Boundaries," § 1.

CANCELLATION OF INSTRUMENTS.

Prerequisites to action to cancel building association mortgage, see "Building and Loan Associations."

§ 1. Right of action and defenses.

Evidence held insufficient to warrant setting aside deed as obtained by fraud and misrepresentation.—*Driver v. White* (Tenn. Ch. App.) 994.

A deed made to defraud creditors, which was never delivered, though recorded by one having no authority to do so, will be canceled at suit of administrator of the grantor dying in possession.—*Blackman v. Schierman* (Tex. Civ. App.) 886.

The rule that, where the rights of creditors are not involved, equity will not permit a grantor to invalidate his deed as fraudulent, has no application where it appears that it was never delivered.—*Blackman v. Schierman* (Tex. Civ. App.) 886.

§ 2. Proceedings and relief.

In an action against a building association for cancellation of a trust deed on the ground of compliance with its obligations, an issue of usury held not to be in the case, not being raised by the pleading.—*Schell v. Equitable Loan & Investment Ass'n* (Mo.) 406.

In an action to cancel a deed, an instruction to the effect that, if the grantee did not accept the conveyance during the lifetime of the grantor, he cannot recover, held not erroneous.—*Blackman v. Schierman* (Tex. Civ. App.) 886.

A judgment that plaintiff recover the land held authorized by the pleadings in an action to cancel a deed, where defendant set up an affirmative claim.—*Blackman v. Schierman* (Tex. Civ. App.) 886.

CARNAL KNOWLEDGE.

See "Rape."

CARRIERS.

§ 1. Control and regulation of common carriers.

Under Const. § 218, the fact that competition exists will not authorize a common carrier to charge more for a short than for a long haul.—*Louisville & N. R. Co. v. Commonwealth* (Ky.) 164, 1012.

On the trial of a prosecution against a railroad company for charging more for a short than for a long haul the report of the railroad commission that defendant had been repeatedly guilty of the offense was admissible as evidence.—*Louisville & N. R. Co. v. Commonwealth* (Ky.) 167.

§ 2. Carriage of goods.

The measure of damages on error in shipment of goods determined.—*Little Rock & Ft. S. Ry. Co. v. Miller Coal Co.* (Ark.) 1054.

The delay of a carrier in furnishing a barge to transport lumber, and in transporting the lumber after it was loaded, was the proximate cause of the loss of the lumber by a flood which wrecked the barge.—*Plotz v. Miller* (Ky.) 176.

An action against a common carrier to recover damages for loss of property resulting from breach of a contract to carry the property was properly brought in the county in which plaintiff resides, that being a county into which the carrier passes, and also the county into which the contract was made and the injury occurred.—*Plotz v. Miller* (Ky.) 176.

Under Civ. Code Prac. § 72, an action against a common carrier to recover an excess of freight charged may be brought in the county in which

the contract of shipment was made, though the freight was not paid there.—*Conn v. Louisville & N. R. Co. (Ky.)* 617.

The facts that a connecting carrier did not acquiesce in the through contract made by the initial carrier does not relieve the latter from liability.—*Gulf, C. & S. F. Ry. Co. v. Short (Tex. Civ. App.)* 261.

Petition against connecting lines, urging a joint liability, *held* presumptively made in good faith.—*Gulf, C. & S. F. Ry. Co. v. Short (Tex. Civ. App.)* 261.

A carrier *held* not a connecting line, within Rev. St. arts. 331a, 331b.—*Gulf, C. & S. F. Ry. Co. v. Short (Tex. Civ. App.)* 261.

A station agent is presumed to have authority to contract for shipment over his line.—*Gulf, C. & S. F. Ry. Co. v. Short (Tex. Civ. App.)* 261.

Carrier *held* not liable on contract made with shipper by agent having no authority to make it, where carrier did not learn of it.—*Gulf, C. & S. F. Ry. Co. v. Dinwiddie (Tex. Civ. App.)* 353.

§ 3. Carriage of live stock.

Where evidence was conflicting as to whether a contract was written or verbal, it was error to direct verdict for defendant.—*Caldwell v. Felton (Ky.)* 575.

Where plaintiff sets up a verbal contract, and defendant alleges a written contract, which plaintiff claims had been signed by mistake, plaintiff can testify as to the terms of verbal contract.—*Caldwell v. Felton (Ky.)* 575.

Where plaintiff sued for breach of verbal contract for the shipment of live stock, and defendant by its answer relied on a written contract, which plaintiff alleged he signed by mistake, the court erred in overruling plaintiff's motion to require defendant to file the written contract.—*Caldwell v. Felton (Ky.)* 575.

Evidence considered, and *held* sufficient to sustain a verdict for \$2,000 for injuries to cattle.—*Texas & P. Ry. Co. v. Truesdell (Tex. Civ. App.)* 272.

Facts recited in citation considered, and *held* sufficient to indicate the claim of plaintiff.—*Texas & P. Ry. Co. v. Truesdell (Tex. Civ. App.)* 272.

Interest is properly allowable on the damages recovered for injuries to live stock by a carrier, from the time the injuries were received.—*Texas & P. Ry. Co. v. Truesdell (Tex. Civ. App.)* 272.

§ 4. Carriage of passengers—Performance of contract of transportation.

In action against carrier for failure to convey passenger to his station, he is entitled to recover an attorney's fee.—*St. Louis & S. F. Ry. Co. v. Neal (Ark.)* 1060.

Under Sand. & H. Dig. § 6284, a railroad company running a local freight, carrying passengers, must carry the passenger to a place not unreasonably distant from the station platform.—*St. Louis & S. F. Ry. Co. v. Neal (Ark.)* 1060.

§ 5. — Personal injuries.

As the ground on which plaintiff sought to charge defendant railroad company was that the conductor had, by putting plaintiff's intestate in fear, caused him to jump from a rapidly moving train, what plaintiff's intestate and his companion said before getting on the train, about riding on it without pay, was inadmissible as evidence.—*Louisville & N. R. Co. v. Alumbaugh's Adm'r (Ky.)* 18.

Though a street car has been stopped without a signal, yet where the driver sees a passenger about to leave the car, when he ought to know that such is her purpose, it is negligence on his part to start the car before she has had time to

alight.—*Louisville Ry. Co. v. Rammacker (Ky.)* 175.

Evidence that it is customary for passengers to leave the car while in motion is not admissible to excuse the act of the driver in starting a car before a passenger has alighted.—*Louisville Ry. Co. v. Rammacker (Ky.)* 175.

A railroad company is liable for an injury to a passenger from a shot fired by a fellow passenger, who was one of a number of disorderly negroes whom the conductor negligently allowed to roam at will through the cars.—*Louisville & N. R. Co. v. McEwan (Ky.)* 619.

In an action for the death of a street-car passenger, through the car in which he was colliding with an obstruction on the track, *held*, that the question of the gripman's negligence was for the jury.—*Sweeney v. Kansas City Cable Ry. Co. (Mo.)* 682.

An instruction in an action for the death of a passenger through the car colliding with an obstruction in the street *held* not erroneous as requiring the stopping of the car when the gripman saw the obstruction.—*Sweeney v. Kansas City Cable Ry. Co. (Mo.)* 682.

In an action for the death of a passenger, an instruction *held* properly refused because it prohibited a recovery in spite of the carrier's failure to exercise the greatest care.—*Sweeney v. Kansas City Cable Ry. Co. (Mo.)* 682.

In an action for the death of a passenger, an instruction *held* properly refused because it assumed that the passenger had voluntarily taken a position which was dangerous.—*Sweeney v. Kansas City Cable Ry. Co. (Mo.)* 682.

An instruction in an action for the death of a passenger through negligence *held* not erroneous as enlarging the issues.—*Sweeney v. Kansas City Cable Ry. Co. (Mo.)* 682.

An instruction that a street railroad is liable if its servants are guilty of even slight negligence *held* proper.—*Sweeney v. Kansas City Cable Ry. Co. (Mo.)* 682.

In an action for the death of a passenger through the carrier's negligence, an instruction *held* not erroneous in assuming that there was an obstruction on the track.—*Sweeney v. Kansas City Cable Ry. Co. (Mo.)* 682.

It is not error in an instruction to assume a fact conceded by the other party.—*Sweeney v. Kansas City Cable Ry. Co. (Mo.)* 682.

A street-car passenger has the right to assume that he will be carried safely, and that the gripman will see an obstruction on the track in time to prevent an injury.—*Sweeney v. Kansas City Cable Ry. Co. (Mo.)* 682.

Complaint concerning condition of switch where accident happened for which suit was brought *held* to justify evidence that one rail was three-eighths of an inch out of line with the rail of the main line.—*Houston, E. & W. T. Ry. Co. v. Summers (Tex. Sup.)* 324.

A railroad company which does not stop its train at a station long enough to permit a passenger to alight with safety is guilty of negligence.—*Texas & P. Ry. Co. v. Goldman (Tex. Civ. App.)* 275.

Duty of carrier to stop a reasonably sufficient time to enable passengers to alight safely determined.—*Texas & P. Ry. Co. v. Lee (Tex. Civ. App.)* 351.

Instruction as to degree of care required by carriers *held* not erroneous as requiring them to foresee any and all possible dangers.—*Missouri, K. & T. Ry. Co. of Texas v. Scarborough (Tex. Civ. App.)* 356.

A person who goes to station to meet a passenger *held* not a trespasser; hence the company must exercise due diligence to secure his safety.

—Gulf, C. & S. F. Ry. Co. v. Williams (Tex. Civ. App.) 653.

A railway company *held* not to have abandoned a station, to which it sold tickets and permitted passengers to get on and off, although it kept no agent there.—Gulf, C. & S. F. Ry. Co. v. Williams (Tex. Civ. App.) 653.

Testimony of plaintiff, explaining why he placed his hand on the car seat when thrown down by the jolt of the car, *held* competent.—Ft. Worth & R. G. Ry. Co. v. White (Tex. Civ. App.) 855.

§ 6. — Contributory negligence of person injured.

A passenger confronted with sudden danger while on a car is not guilty of contributory negligence merely because he fails to exercise what might have seemed to others the best judgment to avoid the danger.—Sweeney v. Kansas City Cable Ry. Co. (Mo.) 682.

A street-car passenger, riding on a footboard used in getting on and off the car, *held* not guilty of contributory negligence.—Sweeney v. Kansas City Cable Ry. Co. (Mo.) 682.

Passenger alighting from moving train cannot recover unless he did so at invitation of defendant's agents, and in so doing acted as a person of ordinary prudence would act.—International & G. N. Ry. Co. v. Rhoades (Tex. Civ. App.) 517.

Jumping off a moving train under direction of the conductor *held* not negligence *per se*.—International & G. N. Ry. Co. v. Rhoades (Tex. Civ. App.) 517.

CERTIFICATE.

Certified copies, see "Evidence," § 8.

CERTIORARI.

§ 1. Proceedings and determination.

Supreme court has no jurisdiction to review certiorari proceedings against commissioners of charitable institutions of St. Louis.—Bristol v. Fischel (Mo.) 678.

CHALLENGE.

To juror, see "Jury," § 3.

CHAMPERTY AND MAINTENANCE.

A deed conveying land in the adverse possession of another is not void, but voidable merely, at the instance of the parties in adverse possession; and, therefore, if the grantee buys in the adverse titles, a purchaser from him cannot complain of his title.—Ft. Jefferson Imp. Co. v. Dupoyster (Ky.) 810.

CHANCERY.

See "Equity."

CHANGE OF POSSESSION.

Necessity as against creditors of grantor, see "Fraudulent Conveyances," § 1.

CHANGE OF VENUE.

In criminal prosecutions, see "Criminal Law," § 2.

Of civil action, see "Venue," § 2.

CHARACTER.

Of witness, see "Witnesses," § 4.

CHARGE.

Of legacies on property by will, see "Wills," § 4.
To jury in civil actions, see "Trial," § 6.
— in criminal prosecutions, see "Criminal Law," § 22.

CHARTER.

Of municipal corporations, see "Municipal Corporations," § 1.

CHattel MORTGAGES.

§ 1. Requisites and validity.

A writing purporting to be a bill of sale, but reserving to the seller the right to take possession of and sell the property in case the purchaser shall make default as to payments, will be enforced as a chattel mortgage.—Baldwin v. Owens (Ky.) 438.

A writing purporting to be a bill of sale would be treated as a chattel mortgage where it appears that such was the intention.—Boli v. Irwin (Ky.) 444.

§ 2. Filing, recording, and registration.

Where personal property was conveyed to a trustee for creditors, with power to sell same and pay certain debts, the purchaser from the trustee acquired a perfect title as against a prior mortgage which was not recorded until after the deed of trust was executed and recorded, the purchaser having no actual notice of the mortgage at the time of his purchase.—Baldwin v. Owens (Ky.) 438.

§ 3. Rights and liabilities of parties.

Under Mansf. Dig. § 4754, a chattel mortgagee is entitled to possession of the chattels, though the mortgagor has paid a large part of the mortgage.—Webb v. McCain (Ind. T.) 957.

One holding a mortgage on a stock of goods, and withholding it from registration, can have no relief against one who, without notice, buys the goods, though all the latter gives therefor is credit on an antecedent debt.—Boze v. Nichols (Tenn. Ch. App.) 122.

CHEAT.

See "False Pretenses"; "Fraud."

CHILD.

See "Guardian and Ward"; "Infants."

CITATION.

See "Process."

CITIES.

See "Municipal Corporations."

CIVIL DAMAGE LAWS.

See "Intoxicating Liquors," § 4.

CIVIL RIGHTS.

See "Constitutional Law," § 4.

An indictment against a railroad company for failing to furnish separate coaches for white and colored passengers, and failing to have each car bear appropriate words indicating the race for which such car was intended, states but a single offense.—Chesapeake & O. R. Co. v. Commonwealth (Ky.) 160.

The statute requiring railroad companies to furnish separate coaches for white and colored passengers does not violate the commerce clause

of the federal constitution, or the fourteenth amendment.—*Chesapeake & O. R. Co. v. Commonwealth (Ky.)* 160.

CLAIM AND DELIVERY.

See "Replevin."

CLAIMS.

Against estate of decedent, see "Descent and Distribution," § 2.
— school district, see "Schools and School Districts," § 1.
— state, see "States," § 2.
To property levied on, see "Attachment," § 5.
— subjected to garnishment, see "Garnishment," § 6.

CLERKS OF COURTS.

Clerk of county court cannot defend on bond against liability for proceeds of sale of land, on the ground of invalidity of the sale.—*Ferrell v. Grigsby (Tenn. Ch. App.)* 114.

District clerk is entitled to only 10 cents per 100 words for making transcript on appeal.—*Kabelmacher v. Kabelmacher (Tex. Civ. App.)* 353.

COLLATERAL ATTACK.

On judgment, see "Judgment," § 7.

COLLATERAL UNDERTAKING.

See "Guaranty."

COLLECTION.

Of estate of decedent, see "Executors and Administrators," § 2.
Of taxes, see "Taxation," § 3.

COMBINATIONS.

See "Conspiracy"; "Monopolies."

COMMERCE.

Carriage of goods and passengers, see "Carriers."

COMMISSIONERS.

See "United States Commissioners."

COMMON CARRIERS.

See "Carriers."

COMMON LAW.

Only such principles and rules as constituted a part of the common law prior to March 24, 1807, are in force in Kentucky.—*Ætna Ins. Co. v. Commonwealth (Ky.)* 624.

COMMUNITY PROPERTY.

See "Husband and Wife," § 4.

COMPENSATION.

For property taken for public use, see "Eminent Domain," § 1.
Of agent, see "Principal and Agent," § 2.
Of juror, see "Jury," § 2.
Of receiver, see "Receivers," § 3.
Of witness, see "Witnesses," § 1.

COMPETENCY.

Of juror, see "Jury," § 3.
Of witnesses in general, see "Witnesses," § 2.

COMPOSITIONS WITH CREDITORS.

Record of attachment proceedings *held* inadmissible as against one who was not a party thereto.—*Hill v. Wertheimer-Swarts Shoe Co. (Mo.)* 702.

A composition giving a debtor an extension of time is not broken, as between the creditors, by one of them attaching before the end of the extension, where the debtor was guilty of fraud.—*Hill v. Wertheimer-Swarts Shoe Co. (Mo.)* 702.

In an action for a breach of a composition, an issue as to whether the debtor's fraud justified the breach *held* not raised, where defendant did not allege such a defense by special plea.—*Hill v. Wertheimer-Swarts Shoe Co. (Mo.)* 702.

A composition between several creditors *held* binding on them, though there were other creditors who did not execute it.—*Hill v. Wertheimer-Swarts Shoe Co. (Mo.)* 702.

COMPOUNDING FELONY.

A mortgage, part of the consideration of which was assignment of mortgagee's claim against agent for embezzlement, *held* not void, as compounding a felony.—*Loud v. Hamilton (Tenn. Ch. App.)* 140.

COMPROMISE AND SETTLEMENT.

See "Accord and Satisfaction"; "Compositions with Creditors."

COMPUTATION.

Of period of limitation, see "Limitation of Actions," § 2.

CONCLUSION.

Of witness, see "Evidence," § 10.

CONCURRENT JURISDICTION.

Of courts, see "Courts," § 4.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONFESSION.

Admissibility in evidence, see "Criminal Law," § 13.

CONFIDENTIAL RELATIONS.

Disclosure of communications, see "Witnesses," § 2.
Of parties to contract or conveyance, see "Fraudulent Conveyances," § 1.

CONNECTING CARRIERS.

See "Carriers," § 2.

CONSIDERATION.

Of contract, see "Contracts," § 1.

CONSOLIDATION.

Of actions, see "Action," § 2.

CONSPIRACY.

Evidence of acts and declarations of conspirators, see "Criminal Law," § 9.

§ 1. Civil liability.

A seller *held* to have no cause of action for the price against a third person, who conspired with the buyer to sell the goods and divide the proceeds.—*Kessler v. Halff* (Tex. Civ. App.) 48.

One who conspires with a debtor to defraud his creditors, and purchases his property from a trustee for less than it is worth, is liable to the creditors for the difference between the value and the amount paid, though the trustee has applied the proceeds to the payment of bona fide claims.—*Kosminsky v. Hamburger* (Tex. Civ. App.) 53.

§ 2. Criminal responsibility.

Neither under Ky. St. § 3915, nor under the common law, is it an offense to combine for the purpose of maintaining rates of insurance.—*Etina Ins. Co. v. Commonwealth* (Ky.) 624.

CONSTITUTIONAL LAW.

Special or local laws, see "Statutes," § 2.
Subjects and titles of statutes, see "Statutes," § 3.

§ 1. Distribution of governmental powers and functions.

Laws 1893, p. 97, defining an offense, *held* invalid, as leaving it optional with railroad companies whether the act should apply in particular instances.—*Jannin v. State* (Tex. Cr. App.) 1126.

§ 2. Police power in general.

Laws 1893, p. 97, making it an offense for others than railroad agents to sell tickets, is a valid exercise of police power.—*Jannin v. State* (Tex. Cr. App.) 1126.

§ 3. Obligation of contracts.

Joint resolution of March 8, 1879, *held* not unconstitutional, as impairing contracts or depriving of property without due process.—*Weekes v. City of Galveston* (Tex. Civ. App.) 544.

§ 4. Equal protection of laws.

The amendment to Civ. Code, § 764, requiring insurance corporations to pay 10 per cent. damages on the affirmation of judgments against them, whether or not a supersedeas bond has been executed, is unconstitutional, as being an unjust discrimination.—*Mutual Fire Ins. Co. v. Hammond* (Ky.) 151.

Pen. Code, arts. 199, 200, *held*, on prosecution for sale of liquor on Sunday, not unconstitutional.—*Searcy v. State* (Tex. Cr. App.) 1119.

§ 5. Due process of law.

Const. § 218, prohibiting common carriers from charging more for a short than for a long haul, does not deprive them of their property without due process of law.—*Louisville & N. R. Co. v. Commonwealth* (Ky.) 164, 1012.

Under Const. art. 1, § 19, and Const. U. S. Amend. 14, § 1, the legislature cannot empower a municipal corporation to assess the cost of a public improvement on abutting property in excess of the benefits derived by the property.—*Hutcheson v. Storrie* (Tex. Sup.) 848.

Laws 1893, p. 97, making it an offense for others than railroad agents to sell tickets, deprives no one of property without due process of law.—*Jannin v. State* (Tex. Cr. App.) 1126.

CONSTRUCTIVE TRUSTS.

See "Trusts," § 1.

CONTEST.

Of election, see "Elections," § 4.

CONTINUANCE.

In criminal prosecution, see "Criminal Law," § 16.

Application for continuance because of absent witnesses *held* properly denied, no diligence being shown.—*Missouri, K. & T. Ry. Co. v. Elliott* (Ind. T.) 1067.

Stipulation for continuance signed by one only of several plaintiffs does not necessitate continuance.—*Missouri, K. & T. Ry. Co. v. Elliott* (Ind. T.) 1067.

An order refusing a continuance for an absent witness will not be disturbed, where his testimony was cumulative.—*Cooley v. Kansas City, P. & G. R. Co.* (Mo.) 101.

Where defendants were misled and surprised by a petition not such as to naturally apprise them of an effort to hold them as partners, they should be allowed a continuance to amend.—*Kessler v. First Nat. Bank* (Tex. Civ. App.) 62.

CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."

By married women, see "Husband and Wife," § 2.

Damages for breach, see "Damages," § 4.

Laws impairing obligation of, see "Constitutional Law," § 3.

Of guaranty, see "Guaranty."

Of insurance, see "Insurance."

Of minors, see "Infants," § 1.

Of municipalities, see "Corporations," § 5.

Particular contracts, see "Bonds."

Traffic contracts between railroads, see "Railroads," § 2.

§ 1. Requisites and validity.

An agreement, without consideration, to extend, without interest, an installment of rent due on a lease, is invalid.—*Randolph v. Mitchell* (Tex. Civ. App.) 297.

Contract by which defendant was to sell no other goods than those of plaintiff *held* in restraint of trade, so that plaintiff could not recover for goods furnished.—*S. S. White Dental Mfg. Co. v. Hertzberg* (Tex. Civ. App.) 355.

In the absence of duress or fraud, ignorance of law in execution of contract, without mistake of fact, is no ground for relief.—*Graham v. Billings* (Tex. Civ. App.) 645.

A contract not to teach music in H. *held* enforceable, and not void as an unlawful agreement to restrict a business, under Rev. St. art. 5313.—*Patterson v. Crabb* (Tex. Civ. App.) 870.

§ 2. Rescission and abandonment.

A statement in a representation as to the money and rental value of property, to the effect that the property had actually been sold for a certain sum, is to be considered as a circumstance tending to show the rental value of the property, which is a matter of opinion.—*Cornwall v. McFarland Real-Estate Co.* (Mo.) 786.

Representations as to the money and rental value of property, which was open to observation, and where both the money and rental value might have been ascertained, are mere matters of opinion.—*Cornwall v. McFarland Real-Estate Co.* (Mo.) 786.

§ 3. Performance or breach.

Evidence *held* to show that the purchaser of goods had broken his contract not to use certain words in advertising the purchase.—*May v. Crawford* (Mo.) 693.

§ 4. Actions for breach.

Under an agreement by defendant to furnish money to pay plaintiff's board, plaintiff cannot recover board for the future according to her expectancy of life.—*Duvall v. Duvall* (Ky.) 791.

Upon failure of one to keep his part of an agreement to execute a note and mortgage for money loaned to him, a cause of action arises in favor of the lender upon the receipt of the money by the borrower, and no notice of rescission is necessary.—*Winningham v. Trueblood* (Mo.) 399.

A contract to pay B., S., or G. a sum of money in trust for a public purpose is joint, and all the obligees must join in an action thereon.—*Slaughter v. Davenport* (Mo.) 471.

In an action alleging two breaches of a contract, an instruction to find for defendant if he was not guilty of one of the breaches held error.—*May v. Crawford* (Mo.) 693.

In an action for the breach of a contract, it is error to submit to the jury a question as to whether there was a breach, where there was uncontradicted evidence of a breach, and none of the witnesses were impeached.—*May v. Crawford* (Mo.) 693.

It is error to instruct to find for plaintiff on an implied contract, where the plaintiff has alleged an express contract.—*International & G. N. Ry. Co. v. Masterson* (Tex. Civ. App.) 644.

An instruction that, if defendant contracted with plaintiff for the performance of services, he can recover for the reasonable value thereof, held proper under the pleadings.—*International & G. N. Ry. Co. v. Masterson* (Tex. Civ. App.) 644.

CONTRADICTION.

Of witness, see "Witnesses."

CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 2.

Of person injured, see "Carriers," § 6.

Of servant, see "Master and Servant," § 7.

CONVEYANCES.

See "Chattel Mortgages"; "Deeds."

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

Of public lands, see "Public Lands," § 1.

CORONERS.

A physician is entitled to compensation for making an autopsy, at the request of a justice holding an inquest, to determine whether deceased was standing up or lying down at the time he was shot, while being arrested, under Code Cr. Proc. art. 1024a.—*Polk County v. Phillips* (Tex. Civ. App.) 535.

CORPORATIONS.

See "Municipal Corporations"; "Telegraphs and Telephones."

Beneficial, see "Beneficial Associations."

Building or loan associations, see "Building and Loan Associations."

Right of corporation to become surety on bond, see "Guardian and Ward," § 1.

Sufficiency of acknowledgment of corporation by officer, see "Acknowledgment," § 2.

§ 1. Members and stockholders.

Fact of a secured creditor of a corporation being a stockholder therein held immaterial.—*Kingman & Co. v. Cornell-Tebbetts Machine & Bugzy Co.* (Mo.) 727.

§ 2. Corporate powers and liabilities.

Answer held to admit that defendant was a corporation.—*Missouri, K. & T. Ry. Co. v. Elliott* (Ind. T.) 1067.

Where a firm was agent for a corporation, service of process on one member of the firm was

a service on the agent.—*Kenton Ins. Co. v. Osborne* (Ky.) 306.

In an action on an insurance policy, service of process on the agent who issued the policy and with whom the contract was made was prima facie sufficient, as the burden was on defendant to show that there was a higher officer in the county.—*Kenton Ins. Co. v. Osborne* (Ky.) 306.

Under Civ. Code Prac. § 72, an action against a corporation, other than such actions as are excepted therefrom, may be brought in any county in which the corporation has an office or place of business and an agent.—*Louisville & N. R. Co. v. Procter* (Ky.) 591.

One who sued upon a contract which he has made with a corporation is estopped to deny the power of the corporation to make the contract.—*Johnson v. Mason Lodge No. 33* (Ky.) 620.

A by-law of a corporation providing for the purchase of its own stock held valid.—*Howe Grain & Mercantile Co. v. Jones* (Tex. Civ. App.) 24.

Rev. St. 1895, art. 665, held not to prevent a corporation from purchasing its own stock.—*Howe Grain & Mercantile Co. v. Jones* (Tex. Civ. App.) 24.

An allegation of incorporation could be added by amendment to a petition without making it a new proceeding.—*Nelson v. Brenham Compress Oil & Mfg. Co.* (Tex. Civ. App.) 514.

Individual directors, or a majority of stockholders, acting separately, cannot bind a corporation to pay for an improvement on its land.—*Nicholstone City Co. v. Smalley* (Tex. Civ. App.) 527.

The execution of new notes for an indebtedness existing when a new member came into the corporation is not the creation of a new debt, within an agreement that no new debt shall be created without the consent of four-fifths of all the stock.—*King County Land & Live-Stock Co. v. Thomson* (Tex. Civ. App.) 890.

In action on notes of a corporation, the burden is on the defendant to show that they were given in violation of an agreement between the stockholders prohibiting the creation of a new debt without the consent of four-fifths of all the stockholders.—*King County Land & Live-Stock Co. v. Thomson* (Tex. Civ. App.) 890.

§ 3. Insolvency and receivers.

A preference of creditors by a corporation will be set aside at the instance of a claimant of the property, though the result defeats the claims of all creditors.—*Rogers v. Southern Pine Lumber Co.* (Tex. Civ. App.) 26.

A person not a creditor of a corporation, but claiming property transferred by it in preference of creditors, may attack the conveyance.—*Rogers v. Southern Pine Lumber Co.* (Tex. Civ. App.) 26.

§ 4. Foreign corporations.

The consent of a foreign insurance company to service of process on the insurance commissioner includes the summons on an indictment.—*Aetna Ins. Co. v. Commonwealth* (Ky.) 624.

CORRECTION.

Of judgment, see "Judgment," § 5.

COSTS.

§ 1. Nature, grounds, and extent of right in general.

Taxation of costs against a creditor who was defeated in a suit for the vacation of prior attachment liens held proper.—*Mallette v. Ft. Worth Pharmacy Co.* (Tex. Civ. App.) 859.

CO-TENANCY.

See "Tenancy in Common."

COUNCIL.

See "Municipal Corporations," § 3.

COUNTERCLAIM.

See "Set-Off and Counterclaim."

COUNTERFEITING.

See "Forgery."

The state courts have jurisdiction of the offense of counterfeiting.—*Stroube v. State* (Tex. Cr. App.) 357.

A requested charge *held* covered by one given.—*Stroube v. State* (Tex. Cr. App.) 357.

COUNTIES.

See "Municipal Corporations."

County attorneys, see "District and Prosecuting Attorneys."

§ 1. Government and officers.

The provision of Const. § 144, that where, for county governmental purposes, a city is by law separated from the remainder of the county, the commissioners composing the fiscal court may be elected from the part of the county outside of such city, applies only to counties in which the city was at the time of the adoption of the constitution separated from the county for county governmental purposes, and therefore does not apply to Jefferson county.—*Joyes v. Jefferson County Fiscal Court* (Ky.) 435.

§ 2. Liabilities.

A county *held* liable for fees of physician secured in an inquest to determine whether deceased was lying down or standing when shot.—*Polk County v. Phillips* (Tex. Sup.) 328.

In view of Code Cr. Proc. art. 1094, *held*, that a county where an offense was committed was not liable for expenses of keeping the offender in another county, where he was apprehended.—*McConnell v. Coleman County* (Tex. Civ. App.) 526.

§ 3. Fiscal management.

Claims allowed by the fiscal court for one year cannot be paid out of the levy for a subsequent year.—*Cooper v. Wait* (Ky.) 161.

The county treasurer is not required to pay interest on claims allowed by the fiscal court where no provision has been made therefor.—*Cooper v. Wait* (Ky.) 161.

The act of 1888 creating a board of county commissioners for Jefferson county, to manage the fiscal affairs of the county, has been repealed, and the fiscal court now consists of the county judge and the eight justices of the peace of the county.—*Joyes v. Jefferson County Fiscal Court* (Ky.) 435.

COURTS.

Jurisdiction of supreme court to review certiorari proceedings, see "Certiorari," § 1. Justices' courts, see "Justices of the Peace." Mandamus to inferior courts, see "Mandamus," § 1.

Trial by court without jury, see "Trial," § 8.

§ 1. Establishment, organization, and procedure in general.

Circumstances *held* to justify a refusal to adhere to a decision on the ground of stare decisis.—*Young v. Downey* (Mo.) 751.

51 S.W.—73

Under Rev. St. art. 1168, an order changing the terms of the county court within a year after a previous order is not void where the new terms are to commence after the expiration of the year.—*Frickie v. State* (Tex. Cr. App.) 394.

§ 2. Courts of appellate jurisdiction.

A suit to enjoin a sale under a trust deed because, through defendant's neglect, an insurance policy on the premises had been invalidated, resulting in a loss sufficient to pay the debt, *held* not to involve the title to realty, so as to give the supreme court jurisdiction of an appeal.—*Gay v. Missouri Guarantee Savings & Building Ass'n* (Mo.) 403.

An admission of counsel in court of appeals that he raised a constitutional question in order to oust that court of jurisdiction does not show that it was a sham.—*State ex rel. Ridge v. Smith* (Mo.) 713.

Overruling by court of appeals of every contention of a party *held* not to justify inference that raising a constitutional question was a mere sham.—*State ex rel. Ridge v. Smith* (Mo.) 713.

Action *held* not to involve title to realty, giving the supreme court jurisdiction, under Const. art. 6, § 12.—*Cox v. Barker* (Mo.) 1051.

§ 3. United States courts.

Defendant *held* not guilty of laches in suing to set aside a judgment in a federal court obtained by collusive assignment.—*Wonderly v. Lafayette County* (Mo.) 745.

Action of owner of bonds in assigning them to a nonresident, to confer jurisdiction on a federal court, *held* a fraud on such court.—*Wonderly v. Lafayette County* (Mo.) 745.

§ 4. Concurrent and conflicting jurisdiction, and comity.

While the state court may not be able to attach a fund in the custody of the United States court, it can compel a trustee, of whose person it has jurisdiction, and who has control of the fund, to exercise his control in the interests of justice.—*Darling v. Hanks* (Ky.) 792.

A district court cannot enjoin sale under execution of county court.—*Lincoln v. Anderson* (Tex. Civ. App.) 278.

COVENANTS.**§ 1. Construction and operation.**

Where a deed grants only right acquired under a certain deed, a covenant of warranty is confined to the interest conveyed.—*Bumpass v. Anderson* (Tex. Civ. App.) 1103.

§ 2. Actions for breach.

Attorney's fees and expenses necessarily incurred in defending a title are recoverable against the grantor who had timely notice to defend and refused, in an action for breach of covenant to warrant and defend.—*Hazelett v. Woodruff* (Mo.) 1048.

COVERTURE.

See "Husband and Wife."

CREDITORS' SUIT.

A petition in a creditors' suit which avers that plaintiff is informed and believes certain facts thereafter recited, which are essential to plaintiff's case, is demurrable.—*Nichols & Shepard Co. v. Hubert* (Mo.) 1031.

CRIMINAL LAW.

See "Adultery"; "Affray"; "Arson"; "Assault and Battery," § 1; "Burglary"; "Conspiracy," § 2; "Counterfeiting"; "Disorderly House"; "False Pretenses"; "Forgery"; "Gaming," §

1; "Homicide"; "Incest"; "Intoxicating Liquors," §§ 2, 3; "Larceny"; "Perjury"; "Rape"; "Robbery"; "Seduction," § 1; "Threats"; "Unlawful Assembly."

Bail, see "Bail," § 1.

Indictment, information, or complaint, see "Indictment and Information."

Pardon, see "Pardon."

Prosecutions against corporations, see "Corporations," § 4.

— for failing to supply separate coaches for white and colored persons, see "Civil Rights."

— for failure to remove fences, see "Fences."

— for unlawful removal of fences, see "Fences."

— for violation of provisions against rate discriminations, see "Carriers," § 1.

§ 1. Parties to offenses.

An erroneous definition of a principal *held* reversible error.—Joy v. State (Tex. Cr. App.) 933.

An instruction that one may be guilty as principal, though he was not actually present when the offense was committed, is erroneous.—Joy v. State (Tex. Cr. App.) 935.

Under Pen. Code, art. 90, *held*, an accessory must be discharged, his principal dying after arrest, but before indictment.—Moore v. State (Tex. Cr. App.) 1108.

§ 2. Venue.

Statute requiring application for change of venue to be founded on affidavits of two citizens is not complied with by furnishing affidavit of defendant and offering oral testimony.—State v. Headrick (Mo.) 99.

Feeling against defendant, and his removal by sheriff to other county for safe-keeping, are insufficient grounds for change of venue in homicide case, where the feeling is entirely local, and among relatives and friends of deceased.—State v. Headrick (Mo.) 99.

Change of venue because of prejudice *held* properly refused.—State v. Hudspeth (Mo.) 483.

The fact that a trial cannot be had at the current term of court to which the venue is sought to be changed is no reason for a refusal to change the venue.—Hamilton v. State (Tex. Cr. App.) 217.

Prosecution for counterfeiting coin may be in any county where coins were passed, under Code Cr. Proc. art. 226.—Stroube v. State (Tex. Cr. App.) 357.

Refusal of an application for a change of venue because of prejudice against accused *held* not an abuse of discretion.—Mott v. State (Tex. Cr. App.) 368.

Special veniremen testifying for the state on a motion to change the venue because of prejudice *held* no ground for complaint, in the absence of a bill of exceptions.—Mott v. State (Tex. Cr. App.) 368.

A change of venue granted in 1894, under an indictment then pending, on the ground of prejudice, is not res judicata, where a new indictment is presented in 1897.—Luttrell v. State (Tex. Cr. App.) 930.

An agreement that the court would authorize a continuance if no motion for change of venue would be made at the succeeding term does not estop the accused from making such motion.—Luttrell v. State (Tex. Cr. App.) 930.

§ 3. Former jeopardy.

A former acquittal of an attempt to commit rape is not a bar to a prosecution for an attempt to commit burglary for the purpose of committing rape, involving the same offense.—Byas v. State (Tex. Cr. App.) 923.

§ 4. Pleas.

A special plea, alleging an agreement with the state whereby accused is not to be prosecut-

ed if he testifies against others, should be tried to the court.—Turney v. State (Tex. Cr. App.) 243.

Striking a plea of a former conviction of a lesser offense is error, where afterwards a conviction was had of a degree less than that charged, and to which the plea would have been a bar.—Reagan v. State (Tex. Cr. App.) 914.

A plea of former acquittal may be stricken out by the court where the indictments show that the former acquittal was for a distinct offense, other than that for which the accused is on trial.—Byas v. State (Tex. Cr. App.) 923.

§ 5. Evidence—Judicial notice, presumptions, and burden of proof.

Where accused interposes a special plea alleging an agreement that he is not to be prosecuted if he testifies against others, the burden of establishing such defense is on accused.—Turney v. State (Tex. Cr. App.) 243.

It will not be presumed that the accused authorized his attorney to bribe a witness.—Luttrell v. State (Tex. Cr. App.) 930.

§ 6. — Facts in issue and relevant to issues, and res gestæ.

Evidence of the act of defendant, on the day of the killing, in sending a messenger for a mutual friend to come and make peace between himself and the deceased, *held* not part of the res gestæ.—State v. Hudspeth (Mo.) 483.

A statement by the deceased two minutes after the killing *held* part of the res gestæ.—State v. Hudspeth (Mo.) 483.

Where defendant and another raised a difficulty, evidence of such other's acts during its continuance is admissible against defendant as res gestæ.—Carpenter v. State (Tex. Cr. App.) 227.

Evidence that deceased appeared in a "calm and pacific mood" before his altercation with accused *held* proper.—Turner v. State (Tex. Cr. App.) 366.

A homicide growing out of accused's attentions to deceased's daughter, proof of objections of other girls' fathers to accused's attentions *held* incompetent.—Turner v. State (Tex. Cr. App.) 366.

Statement of prosecutrix, after the birth of the child, that accused was its father, *held* not part of the res gestæ, and inadmissible.—Poyner v. State (Tex. Cr. App.) 376.

It was error to allow the state to prove by a witness that the city marshal had arrested him on the previous day, where no connection between the arrest and any issue in the case is shown.—Luttrell v. State (Tex. Cr. App.) 930.

It is proper to reject evidence where its relevancy is not shown.—Luttrell v. State (Tex. Cr. App.) 930.

It is reversible error to permit a witness to testify that the attorney for defendant attempted to bribe him, where it is not shown that defendant authorized his attorney so to do.—Luttrell v. State (Tex. Cr. App.) 930.

After the court has overruled a motion for continuance for want of testimony of an absent witness, *held* not error to exclude as evidence the subpoena, and sheriff's return thereon, showing the date of the issuance and service on such witness.—Face v. State (Tex. Cr. App.) 953.

§ 7. — Other offenses, and character of accused.

It was error to compel accused to testify on cross-examination as to his conviction of various misdemeanors, and to give the details of his escape from jail some months before the killing charged, and how, after his escape by force, he had by force taken a gun from the possession of another.—Pennington v. Commonwealth (Ky.) 818.

In a prosecution for murder, evidence that the slayer of defendant's brother had been killed, and that defendant had been arrested, but not indicted, on a suspicion of having killed such slayer, is inadmissible.—*Pryor v. State* (Tex. Cr. App.) 375.

One accused of forgery may be asked if another case was pending against him, in which he was charged with a similar crime.—*Colter v. State* (Tex. Cr. App.) 945.

§ 8. — Admissions, declarations, and hearsay.

A prosecutor's testimony that he notified two deputy sheriffs of accused's whereabouts prior to his arrest is not inadmissible as being hearsay.—*Clay v. State* (Tex. Cr. App.) 212.

Evidence of a witness that he saw certain officers doing certain things, and heard them make a certain remark, is hearsay.—*Wilson v. State* (Tex. Cr. App.) 916.

Accused's statement to the officer who arrested him is inadmissible to rebut testimony that he had previously made a different statement, tending to admit guilt.—*Croomes v. State* (Tex. Cr. App.) 924.

A witness cannot testify to what others have told him in regard to matters connected with the offense.—*Luttrell v. State* (Tex. Cr. App.) 930.

Evidence that one who had witnessed the murder had afterwards identified accused from among a number of prisoners is inadmissible.—*Murphy v. State* (Tex. Cr. App.) 940.

Admission of hearsay evidence connecting accused with the crime *held* error, though part of the conversation was brought out by accused. *Skelton v. State* (Tex. Cr. App.) 943.

Testimony of one partner as to the terms of a written contract made by his partner with a third person, based on information received from his partner, and not from an examination of the contract, is inadmissible, because hearsay.—*Chowning v. State* (Tex. Cr. App.) 946.

Evidence on a trial for murder *held* hearsay and inadmissible.—*Bruce v. State* (Tex. Cr. App.) 964.

Evidence *held* erroneously admitted as hearsay.—*Woodard v. State* (Tex. Cr. App.) 1122.

§ 9. — Acts and declarations of conspirators and co-defendants.

Statements of one conspirator, made after the crime has been committed, and in the absence of the others, are inadmissible against the latter.—*State v. Harris* (Mo.) 481.

§ 10. — Documentary evidence.

The tariff sheet posted at a railroad station as required by law is not a private paper, and its production by an agent of the company may therefore be compelled upon the trial of a criminal prosecution against the company.—*Louisville & N. R. Co. v. Commonwealth* (Ky.) 167.

Letters bearing on the alleged offense *held* admissible, though their date was subsequent to its commission.—*Collins v. State* (Tex. Cr. App.) 216.

Accused is not entitled to have incriminating letters written by him produced by the prosecution for his inspection before the trial.—*Morrison v. State* (Tex. Cr. App.) 358.

Incriminating letters written by accused are not inadmissible merely because other letters between the same parties are not produced.—*Morrison v. State* (Tex. Cr. App.) 358.

Incriminating letters written by accused are not inadmissible merely because produced for the first time at the trial, when counsel for accused are so occupied that they have no opportunity to explain them.—*Morrison v. State* (Tex. Cr. App.) 358.

§ 11. — Opinion evidence.

Expert knowledge is not requisite to enable one to testify that for several hours after the rape the injured person was very sick at her stomach and vomited.—*State v. Harris* (Mo.) 481.

Witness' opinion that tracks found near the burned building were made by defendant's horse *held* inadmissible.—*Hester v. State* (Tex. Cr. App.) 932.

§ 12. — Testimony of accomplices and co-defendants.

Where the court, after putting the witnesses under rule, permitted one who was jointly indicted with accused to remain in the court room, supposing that he was not to be used as a witness, it was error to refuse to permit him for that reason to testify for accused, he being the only eyewitness besides accused offered on his behalf.—*Parker v. Commonwealth* (Ky.) 573.

One or more of several defendants jointly indicted are to be treated as accomplices, so that one of them may not be convicted upon the uncorroborated testimony of the others.—*Gilbert v. Commonwealth* (Ky.) 804.

An accomplice cannot be corroborated by proving statements made by him in the absence of the party against whom he is testifying.—*Clay v. State* (Tex. Cr. App.) 212.

§ 13. — Confessions.

Owner of stolen property *held* a person in authority, within principle that confession obtained by inducement held out by such a one is inadmissible.—*Sullivan v. State* (Ark.) 828.

Where a conversation between a prosecuting witness and a sheriff was admitted to show that the witness was a detective and not an accomplice, an instruction should be given limiting the consideration of the evidence to such purpose only.—*Clay v. State* (Tex. Cr. App.) 212.

It is not necessary to show that a defendant between 9 and 13 years of age understands the criminal nature of the act charged against him, before his confession is admissible.—*Grayson v. State* (Tex. Cr. App.) 246.

The court ought not to receive the confession of one who could not qualify as a witness under the provisions of Code Cr. Proc. art. 768.—*Grayson v. State* (Tex. Cr. App.) 246.

A warning to accused, while under arrest, that a statement might be used "for or against" him, *held* insufficient, under Code Cr. Proc. art. 750, to render a confession subsequently made admissible.—*Pryor v. State* (Tex. Cr. App.) 375.

A confession made after arrest is not admissible against a co-principal.—*Pryor v. State* (Tex. Cr. App.) 375.

§ 14. — Evidence at former trial.

Where portion of a co-defendant's testimony given on a former trial was admitted to impeach defendant in a robbery case, balance thereof *held* not admissible, under Code Cr. Proc. art. 791.—*Ford v. State* (Tex. Cr. App.) 935.

§ 15. — Weight and sufficiency.

Where the evidence is circumstantial, it must point with moral certainty to defendant's guilt, and exclude every reasonable hypothesis consistent with his innocence.—*Hester v. State* (Tex. Cr. App.) 932.

Evidence *held* to warrant a conviction of knowingly permitting a minor to remain in a billiard hall.—*Wuertemburg v. State* (Tex. Cr. App.) 944.

§ 16. Time of trial and continuance.

Accused was not entitled to a continuance to enable him to give notice and get up the necessary affidavits for a motion for a change of venue, though he had been informed by his attorney that his case would be assigned to a later day of the term, as he had ample time to take the steps necessary to make the applica-

tion for a change of venue.—*McNamara v. Commonwealth* (Ky.) 786.

Accused cannot complain that he was tried when there was great feeling against him, where the verdict is moderate, on the testimony as given, and no reason appears why all the facts might not have been shown on the trial.—*McNamara v. Commonwealth* (Ky.) 786.

Motion for continuance for absent witnesses must show materiality of evidence, and that accused believes the facts to be proven true.—*State v. Rice* (Mo.) 78.

Where there is only one continuance by the state, accused is not entitled to a discharge, under Rev. St. 1880, § 4222.—*State v. Mollineux* (Mo.) 462.

A refusal of a continuance in a criminal case because of the absence of a witness will be sustained where in the light of the record the expected testimony is not probably true.—*Clay v. State* (Tex. Cr. App.) 212.

The hearing and granting of a change of venue on the same day, but after the granting of a motion for a continuance, is equivalent to a setting aside of the continuance.—*Hamilton v. State* (Tex. Cr. App.) 217.

Continuance because of absent witness *held* properly refused.—*Williams v. State* (Tex. Cr. App.) 224.

An application for a continuance in a criminal case on the ground of the absence of a witness is properly refused, where the application does not show diligence, and the expected testimony is not probably true.—*Shilling v. State* (Tex. Cr. App.) 240.

A refusal to grant a continuance in a criminal case will not be reviewed in the absence of a bill of exceptions.—*May v. State* (Tex. Cr. App.) 242.

A refusal of a continuance on account of the absence of a witness is proper where the testimony expected to be procured is contradictory to the witness' affidavits presented to the grand jury.—*O'Toole v. State* (Tex. Cr. App.) 244.

A refusal of a continuance on account of the absence of a witness is proper where it is doubtful if he can ever be secured.—*O'Toole v. State* (Tex. Cr. App.) 244.

It was not error to refuse to allow accused to withdraw his announcement of readiness for trial on certain incriminating letters being produced by the prosecution, if it does not appear that accused was surprised, or that he could have disproved the letters if a continuance had been granted.—*Morrison v. State* (Tex. Cr. App.) 358.

A reasonable time in which to prepare and file a motion for a continuance is all that can be demanded by the defendant.—*Roberts v. State* (Tex. Cr. App.) 383.

Continuance on the ground of the absence of witnesses will be refused for lack of diligence, where the witnesses were not subpoenaed until a short time before the trial, although ample time had been given.—*Roberts v. State* (Tex. Cr. App.) 383.

Absence of attorney is no ground for a continuance, where defendant was represented by able and experienced attorneys, and ample time was given them to prepare.—*Roberts v. State* (Tex. Cr. App.) 383.

A motion for a continuance on the ground of absent witnesses will not be granted where the evidence is cumulative, and where the necessary statutory requirements are not set out in the motion.—*Roberts v. State* (Tex. Cr. App.) 383.

Diligence or reasonable expectation of securing attendance of an absent witness *held* not to have been shown, sufficient for a continuance.—*Jackson v. State* (Tex. Cr. App.) 389.

Motion for continuance properly denied where it appears that defendant expected to prove facts by an unknown witness which would send the latter to the penitentiary.—*Burns v. State* (Tex. Cr. App.) 905.

Motion for continuance properly denied, where defendant had used no diligence to procure an unknown witness, except to issue a process for him, returned by sheriff, not executed, three days before trial.—*Burns v. State* (Tex. Cr. App.) 905.

Defendant *held* not injured by the overruling of a motion for a continuance on account of sickness of his attorney.—*Johnson v. State* (Tex. Cr. App.) 911.

A second application for a continuance, which does not show that the applicant could not secure the desired testimony from some other source, is properly overruled.—*Matthews v. State* (Tex. Cr. App.) 915.

A continuance *held* properly denied.—*Highsmith v. State* (Tex. Cr. App.) 919.

A motion for a continuance is properly refused where diligence is not exercised.—*Luttrell v. State* (Tex. Cr. App.) 930.

Where an application for continuance to procure witnesses shows due diligence, and there is no showing that such witnesses could not be procured, it is error to refuse it.—*Murphy v. State* (Tex. Cr. App.) 940.

An application for continuance for testimony of a witness is properly overruled where it shows no diligence to obtain the desired evidence.—*Pace v. State* (Tex. Cr. App.) 953.

Continuance for absent witness *held* properly denied for lack of diligence.—*Winters v. State* (Tex. Cr. App.) 1110.

A continuance *held* properly denied for want of diligence.—*Hargrove v. State* (Tex. Cr. App.) 1123.

Continuance to obtain evidence not affecting the case of the state is properly denied.—*Hargrove v. State* (Tex. Cr. App.) 1124.

§ 17. Trial—Preliminary proceedings.

It is immaterial that delivery of copy of indictment to defendant is made by another than the sheriff, and out of his county.—*Hargrove v. State* (Tex. Cr. App.) 1124.

§ 17½. — Course and conduct of trial in general.

An accused, having voluntarily absented himself from the court room without the court's knowledge while the jury were impaneled, is bound by an express waiver of a reimpanelment of the jury made on his return.—*O'Toole v. State* (Tex. Cr. App.) 244.

A judgment will not be reversed for remarks of the judge made when the petit jury for the week was impaneled, in the absence of any showing that defendant was prejudiced thereby.—*Holt v. State* (Tex. Cr. App.) 907.

Improper remarks of the judge in impaneling the regular jury for the week are not available as error, where the jurors, on being impaneled for the case, were not examined as to whether they had been influenced by such remarks.—*Furlow v. State* (Tex. Cr. App.) 938.

Improper remarks of the judge in impaneling the regular jury for the week are not available as error, where the jurors, on being impaneled, were not examined as to whether they had been influenced by such remarks.—*Murphy v. State* (Tex. Cr. App.) 940.

§ 18. — Reception of evidence.

Since the placing of witnesses under the rule is within the discretion of the trial court, a conviction will not be reversed merely because a witness was permitted to testify without being placed under the rule.—*Hedrick v. State* (Tex. Cr. App.) 252.

§ 19. — Objections to evidence, motions to strike out, and exceptions.

Error in the admission of testimony *held* waived by a failure to raise the question in the record, though a conviction in a companion case was reversed for the admission of the same testimony.—*Sullivan v. State* (Tex. Cr. App.) 375.

§ 20. — Argument and conduct of counsel.

Where an affidavit for a continuance was admitted as the testimony of an absent witness, it was error to permit the prosecuting attorney to state in argument that the testimony of the absent witness was only what the defendant swore in an affidavit for continuance.—*Redmond v. Commonwealth* (Ky.) 565.

The prejudicial effect of improper remarks of counsel to the jury was not removed by the court saying to the jury, when counsel objected, "You will consider the proof before you."—*Gilbert v. Commonwealth* (Ky.) 804.

It was improper and prejudicial to accused for the prosecuting attorney to state in argument that he could have proven certain things if he had thought it necessary, and to refer to testimony as having been given at the examining trial which was not given.—*Gilbert v. Commonwealth* (Ky.) 804.

Where an affidavit for continuance was permitted to be read to the jury as the deposition of absent witnesses, it was improper for the prosecuting attorney to comment on the fact in argument to the jury.—*Gilbert v. Commonwealth* (Ky.) 804.

Code Cr. Proc. art. 823, providing that a former conviction of the offense shall not be alluded to in argument on the new trial, applies also to proceedings at the trial.—*Hamilton v. State* (Tex. Cr. App.) 217.

An offer by the prosecuting attorney to prove that accused was a prostitute was not prejudicial error, where the court instructed the jury to disregard the statement.—*Monticue v. State* (Tex. Cr. App.) 236.

Remarks of prosecuting attorney in his argument to the jury *held* not improper.—*Morrison v. State* (Tex. Cr. App.) 358.

It was not error to permit the prosecuting attorney to read authorities in his closing argument, after he had notified counsel for defense of his intention in time for them to comment on such authorities in their argument.—*Morrison v. State* (Tex. Cr. App.) 358.

Improper remarks of counsel cannot be taken advantage of on appeal if appellant did not tender a special charge instructing the jury to disregard the remarks.—*Morrison v. State* (Tex. Cr. App.) 358.

An objection to a remark of the district attorney during the trial of a criminal case, that the remark is unauthorized by law, is too general.—*Mott v. State* (Tex. Cr. App.) 368.

A remark by the district attorney *held* not prejudicial as referring to accused's failure to testify.—*Mott v. State* (Tex. Cr. App.) 368.

A reference by prosecutor in his argument to accused's former conviction, being violative of Code Cr. Proc. art. 823, *held* reversible error.—*Pickett v. State* (Tex. Cr. App.) 374.

A defendant's counsel has no right to contradict a prosecuting witness about what he had testified to previously, unless he desires to do so as a sworn witness.—*Johnson v. State* (Tex. Cr. App.) 911.

In a prosecution for theft, a remark of counsel that the evidence, beyond question, "shows that this defendant is the thief, and society is entitled at your hands to protection from all thieves and violations of the law," is not improper.—*Matthews v. State* (Tex. Cr. App.) 915.

Remarks to jury by district attorney in his argument *held* not improper.—*Franklin v. State* (Tex. Cr. App.) 951.

Remarks by the district attorney to the defendant's attorney intended to belittle his exceptions should not be allowed.—*Franklin v. State* (Tex. Cr. App.) 951.

Remarks of prosecuting attorney *held* no ground for reversal.—*Hargrove v. State* (Tex. Cr. App.) 1124.

§ 21. — Province of court and jury in general.

An issue whether a confession was freely made *held* not raised, though an officer was present when it was made, and did not hear the warning or the confession.—*Sullivan v. State* (Tex. Cr. App.) 375.

§ 22. — Necessity, requisites, and sufficiency of instructions.

It was prejudicial error to instruct the jury that they could not convict defendants upon confessions made out of court unless corroborated by other evidence, where there was no evidence of any confession.—*Spicer v. Commonwealth* (Ky.) 802.

It is the duty of the court, in a criminal case, to instruct the jury, though not requested so to do.—*State v. Rufus* (Mo.) 80.

It was error to instruct that if the jury believed any statements of defendant have been proved by the state, and not denied by defendant, they are taken as true.—*State v. Hudspeth* (Mo.) 483.

An instruction based on a hypothesis not supported by evidence is properly refused.—*State v. Hudspeth* (Mo.) 483.

It is proper to submit the issue of an accomplice to the jury's consideration.—*Clay v. State* (Tex. Cr. App.) 212.

It was error for the court to fail to charge on the weight of accomplice's testimony, where the prosecution could not have been maintained but for the testimony of two persons claimed to have been accomplices.—*Collins v. State* (Tex. Cr. App.) 216.

An error in an instruction defining an assault *held* cured by a correct definition in another instruction.—*Monticue v. State* (Tex. Cr. App.) 236.

An instruction unsupported by evidence was properly refused.—*Jackson v. State* (Tex. Cr. App.) 389.

There is no error in an instruction, if, construed with others given, it is correct.—*Jackson v. State* (Tex. Cr. App.) 389.

In a criminal prosecution for violation of a local prohibition law it is error to refuse to submit to the jury a theory of defendant's defense which has some evidence to support it, though such evidence be of slight weight.—*Ladwig v. State* (Tex. Cr. App.) 390.

The fact that part of a paragraph of the charge is objectionable is no ground for a reversal, when, taken in connection with the entire paragraph, it is correct.—*Morgan v. State* (Tex. Cr. App.) 902.

Where the prosecution has proved a confession, a request for a charge on circumstantial evidence is properly overruled.—*Matthews v. State* (Tex. Cr. App.) 915.

It was error to refuse a charge directing the jury to disregard testimony erroneously admitted.—*Wilson v. State* (Tex. Cr. App.) 916.

A charge on the law of accomplice testimony should be given, on request, where there is evidence of complicity in the crime.—*Wilson v. State* (Tex. Cr. App.) 916.

A charge on alibi should be given where defendant swears that he was at another place

at the time of the alleged crime.—*Wilson v. State* (Tex. Cr. App.) 916.

Defendant's denial that he was at the place where the burglary was committed does not, of itself, require a charge on alibi.—*Byas v. State* (Tex. Cr. App.) 923.

Failure to instruct to limit impeaching evidence to the purpose for which it was admitted held error.—*Joy v. State* (Tex. Cr. App.) 933.

An instruction that one may be guilty as principal, though not actually present when the offense was committed, is erroneous.—*Joy v. State* (Tex. Cr. App.) 933.

A refusal to instruct on the law of alibi is error, where the evidence raises the issue.—*Joy v. State* (Tex. Cr. App.) 935.

§ 23. — Requests for instructions.

There is no error in refusing an instruction covered by those already given.—*State v. Harper* (Mo.) 89.

A refusal of special charges is not error, where they had been given in the general charge in so far as they are applicable.—*Segars v. State* (Tex. Cr. App.) 238.

A charge covered by that given is properly refused.—*Mozee v. State* (Tex. Cr. App.) 250.

Where the court's instructions contained all the law applicable to the facts, a conviction will not be reversed for failure to give an instruction asked by accused.—*Morrison v. State* (Tex. Cr. App.) 358.

It was not error to refuse instructions fully covered by those given.—*Morrison v. State* (Tex. Cr. App.) 358.

A refusal to instruct the jury to disregard remarks of counsel is not error, in the absence of a written request for such instruction.—*Matthews v. State* (Tex. Cr. App.) 915.

An instruction is properly refused where its substance has been fully given in other charges.—*Woodson v. State* (Tex. Cr. App.) 918.

An instruction is properly refused where it is substantially given in the main charge.—*Pace v. State* (Tex. Cr. App.) 953.

A requested instruction is properly refused where it is not supported by the evidence.—*Bruce v. State* (Tex. Cr. App.) 954.

The refusal of an instruction is not erroneous, where, in so far as applicable, it was given in the main charge.—*Bruce v. State* (Tex. Cr. App.) 954.

Requests for instructions may be refused where their substance is sufficiently covered by the general charge.—*Vick v. State* (Tex. Cr. App.) 1117.

Failure to charge on accomplice testimony in a misdemeanor case, no instruction having been presented, held not error.—*Sparks v. State* (Tex. Cr. App.) 1120.

§ 24. — Objections to instructions or refusal thereof, and exceptions.

Where there is no exception to the charge of the court in the bill of exceptions or in the motion for new trial, it cannot be reviewed.—*Roberts v. State* (Tex. Cr. App.) 383.

§ 25. — Custody, conduct, and deliberations of jury.

Misconduct of jury in use of intoxicants held not ground for reversal.—*McClendon v. State* (Ark.) 1062.

Misconduct of the jury in use of liquor held to justify severe punishment.—*McClendon v. State* (Ark.) 1062.

A judgment of conviction cannot be reversed on the ground that the verdict was made by lot.—*Milstead v. Commonwealth* (Ky.) 451.

It was not an abuse of discretion to keep the jury together after they had reported a failure

to agree, the entire time they were kept together being less than 30 hours.—*Gilbert v. Commonwealth* (Ky.) 590.

Where the sheriff, after the jury was placed in his charge at night, to be kept together until the next day, permitted a sick juror to go to his home, and the court on the next day discharged the panel because the attendance of the sick juror could not be secured, accused being unwilling to fill the panel, there was no ground for a plea of former jeopardy on a subsequent trial.—*Hilbert v. Commonwealth* (Ky.) 817.

Locking four sick jurors in the jury room while the sheriff took the others to a meal held not a separation requiring a reversal.—*Walker v. State* (Tex. Cr. App.) 234.

Testimony that the jury arrived at their verdict in the belief that it would be a good thing to send accused to a reformatory does not show such misconduct as will authorize a new trial.—*Grayson v. State* (Tex. Cr. App.) 246.

The jury may, with leave of court, take to the jury room any evidence which has been admitted.—*Grayson v. State* (Tex. Cr. App.) 246.

Failure of the sheriff to post notices of the appointment of his deputies is not ground for setting aside a verdict of a jury which was in the custody of one of such deputies.—*Woodson v. State* (Tex. Cr. App.) 918.

A conviction will not be set aside on the ground that before the jury was sworn, or the panel completed, one of the jurors was permitted to leave the jury box for a short time.—*Woodson v. State* (Tex. Cr. App.) 918.

§ 26. — Verdict.

A verdict which reads, "Wee the jury agree and find the defendant guilty as charged in the indite and assess his find at \$100 dollars. Isaa Clouse," is good, the intention of the jury being manifest.—*Mitchell v. Commonwealth* (Ky.) 17.

§ 27. Motions for new trial and in arrest.

The judgment should be arrested where defendant was not arraigned before the jury was impaneled and sworn.—*Dansby v. United States* (Ind. T.) 1063.

The separation of one of the jury before the introduction of any evidence, where such juror was not subject to improper influence while separated, is not a ground for a new trial.—*State v. Williams* (Mo.) 88.

Alleged newly-discovered evidence held not to entitle accused to a new trial.—*State v. Bybee* (Mo.) 470.

Evidence held to show accused lacking in diligence in procuring evidence which he claimed was newly discovered, justifying a new trial.—*State v. Ernest* (Mo.) 688.

Refusal to grant new trial of a criminal case for newly-discovered evidence cannot be reviewed where the motion was not verified by appellant.—*Carpenter v. State* (Tex. Cr. App.) 227.

A new trial for newly-discovered evidence held properly denied where the testimony was known to accused for a year preceding the trial.—*Monticue v. State* (Tex. Cr. App.) 236.

Newly-discovered evidence in a criminal case is no ground for a new trial where there are affidavits of witnesses for the prosecution showing that the evidence is not probably true.—*Shilling v. State* (Tex. Cr. App.) 240.

Newly-discovered evidence that tends to contradict and impeach a prosecuting witness is no ground for a new trial.—*Shilling v. State* (Tex. Cr. App.) 240.

A new trial will not be granted for newly-discovered evidence to be given by certain witnesses, where it appears that others, for whom no process was issued, could have attended the trial

and testified to the same facts.—*Austin v. State* (Tex. Cr. App.) 249.

It is improper to make a motion for new trial in the form of an argument.—*Jackson v. State* (Tex. Cr. App.) 389.

An accused, on motion for new trial for newly-discovered evidence, must show that the evidence relied on came to his knowledge after the trial.—*Frickie v. State* (Tex. Cr. App.) 394.

An accused is not entitled to a new trial for newly-discovered evidence consisting of facts within the knowledge of his own witnesses.—*Wynne v. State* (Tex. Cr. App.) 909.

New trial is properly refused where newly-discovered evidence is merely in impeachment of prosecuting witness.—*Ford v. State* (Tex. Cr. App.) 935.

New trial for newly-discovered evidence is properly refused, where no diligence is shown.—*Ford v. State* (Tex. Cr. App.) 935.

Motion for new trial on ground of newly-discovered evidence must be sworn to, or affidavit be made of new discovery.—*Vick v. State* (Tex. Cr. App.) 1117.

Question of newly-discovered evidence cannot be reviewed where motion has attached the affidavit of defendant, but not that of the person by whom the newly-discovered facts are to be proved, and thereafter another motion is filed, with affidavit of such person, but not that of defendant.—*Marquez v. State* (Tex. Cr. App.) 1119.

New trial to obtain testimony of co-defendant who has been acquitted *held* properly denied, where the discrepancies as to statements of their actions is great, and inducements of co-defendant to falsify render a different verdict improbable.—*Bryant v. State* (Tex. Cr. App.) 1125.

§ 28. Judgment, sentence, and final commitment.

Under Ky. St. § 1130, providing that every person convicted a third time for felony shall be confined in the penitentiary for life, evidence of former convictions alleged in the indictment is admissible before the jury has found accused guilty of the offense charged, there being no provision for a separate trial of the fact of former convictions.—*Hall v. Commonwealth* (Ky.) 814.

The increased penalty by reason of former convictions must be fixed by the jury, and not by the court.—*Hall v. Commonwealth* (Ky.) 814.

§ 29. Appeal and error, and certiorari—Presentation and reservation in lower court of grounds of review.

Where the record does not show that any exception was taken to an order overruling a motion for a new trial, only the record proper can be reviewed.—*State v. Gray* (Mo.) 85.

Instructions not reviewable unless mentioned in motion for new trial.—*State v. Headrick* (Mo.) 99.

Where the record contains no bill of exceptions, and the charge of the court is not excepted to in the motion for new trial, an instruction cannot be reviewed.—*Edmonds v. State* (Tex. Cr. App.) 393.

An assignment of error to a part of a charge will not be considered in absence of bill of exceptions.—*Pike v. State* (Tex. Cr. App.) 395.

The admission of evidence cannot be reviewed where no bill of exceptions was reserved.—*Morgan v. State* (Tex. Cr. App.) 902.

Without a bill of exceptions, the refusal of a continuance because of the absence of a material witness cannot be reviewed.—*Wilks v. State* (Tex. Cr. App.) 902.

An objection to testimony that it is immaterial is too indefinite.—*Barfield v. State* (Tex. Cr. App.) 908.

An error alleged to have been committed by the trial court will not be noticed by the appellate court unless a bill of exceptions is reserved.—*Tuttle v. State* (Tex. Cr. App.) 911.

An assignment of error in the admission of evidence will not be considered when no bill of exceptions was reserved.—*Woodson v. State* (Tex. Cr. App.) 918.

Under Code Cr. Proc. art. 723, objections to charge not presented by bill of exceptions or in motion for new trial cannot be reviewed on appeal.—*Ford v. State* (Tex. Cr. App.) 935.

An exception to rejection of evidence, part of which is not admissible, should point out that which is.—*Ford v. State* (Tex. Cr. App.) 935.

A bill of exceptions to the remarks of the county attorney will not be considered, where accused did not ask for the withdrawal of the remarks, nor reserve any exceptions.—*Colter v. State* (Tex. Cr. App.) 945.

Where the general charge of the court is objected to neither in the bill of exceptions nor motion for new trial, it cannot be reviewed.—*Jones v. State* (Tex. Cr. App.) 949.

Where defendant does not preserve bill of exceptions to exclusion of testimony, it cannot be reviewed.—*Marquez v. State* (Tex. Cr. App.) 1119.

§ 30. — Proceedings for transfer of cause, and effect thereof.

A recognizance entered into after the expiration of the term of court at which conviction was had is insufficient to give the appellate court jurisdiction.—*Donnelly v. State* (Tex. Cr. App.) 228.

A recognizance which does not state the punishment assessed against the appellant is not sufficient, under Acts 25th Leg. p. 5.—*Donnelly v. State* (Tex. Cr. App.) 228; *Peck v. State* (Tex. Cr. App.) 229.

If the recognizance filed at the time of taking an appeal is defective, accused cannot prevent a dismissal by filing a valid recognizance.—*Peck v. State* (Tex. Cr. App.) 229.

A recognizance which does not state the amount of punishment assessed against appellant is insufficient to support his appeal.—*Howard v. State* (Tex. Cr. App.) 229; *Perry v. Same*, Id.

A recognizance on appeal *held* not to confer jurisdiction on the appellate court, unless entered into at the term at which the conviction is had.—*Mundelino v. State* (Tex. Cr. App.) 235.

A recognizance reciting that defendant was convicted of "selling liquor in violation of the local option law" does not recite any offense against the law.—*Fikes v. State* (Tex. Cr. App.) 248.

A recognizance entered subsequent to the passage of Acts 25th Leg., without following the form prescribed by the act, or reciting the amount of punishment, is fatally defective, precluding the attachment of jurisdiction on appeal.—*Fikes v. State* (Tex. Cr. App.) 248.

Where the recognizance does not set forth the punishment assessed against the appellant, as required by Code Cr. Proc. art. 887 (Acts 1897, p. 5), the appeal will be dismissed.—*Sessum v. State* (Tex. Cr. App.) 373.

§ 31. — Records and proceedings not in record.

The assignment of remarks of the prosecuting attorney as a ground for a new trial, and setting them out in the motion, does not make them a part of the record, so as to be reviewable.—*State v. Rufus* (Mo.) 80.

On appeal in a criminal case the transcript should show the organization of the court, the

impaneling of the grand jury, the return of the indictment, and the arraignment.—*State v. Harris* (Mo.) 481.

A conviction will not be reversed on appeal on the ground that the complaint was made prior to the commission of the offense, in the absence of a statement of facts.—*Shaw v. State* (Tex. Cr. App.) 214.

The sufficiency of evidence to sustain a conviction cannot be reviewed in the absence of a statement of facts.—*Shaw v. State* (Tex. Cr. App.) 214.

Sufficiency of evidence to support a conviction cannot be reviewed where the record does not contain the evidence.—*Flowers v. State* (Tex. Cr. App.) 216.

Refusal to grant a new trial for error in denying a continuance cannot be reviewed where no bill of exceptions was reserved, and the record does not contain the evidence.—*Flowers v. State* (Tex. Cr. App.) 216.

Granting change of venue held not shown to be error, the record being incomplete.—*Hamilton v. State* (Tex. Cr. App.) 217.

The bill of exceptions should be so full as to show all the proceedings involved in the motion for a change of venue, where the granting of such change is alleged as error.—*Hamilton v. State* (Tex. Cr. App.) 217.

In the absence of a bill of exceptions, rulings on evidence will not be revised.—*Taylor v. State* (Tex. Cr. App.) 237.

Alleged error in refusing to give certain instructions will not be considered where the evidence does not suggest any issue to which they would apply.—*Bush v. State* (Tex. Cr. App.) 238.

A recitation in a bill of exceptions that the state offered accused's confession in evidence is not sufficient. It must show that it was admitted, and it must be set out as introduced.—*Stroube v. State* (Tex. Cr. App.) 357.

Where the trial judge desires to incorporate explanations of his rulings in the bill of exceptions, he need not make up a separate bill, but may include the explanations in the bill presented by appellant.—*Morrison v. State* (Tex. Cr. App.) 358.

Where there is no statement of facts in the record, alleged error in refusing a continuance cannot be considered.—*Holt v. State* (Tex. Cr. App.) 907.

An assignment that a verdict of guilty is contrary to the law and the evidence will not be considered, in the absence of a statement of facts.—*Croomes v. State* (Tex. Cr. App.) 924.

A district judge has no authority to file a statement of facts as of a date within 10 days allowed by his order for filing, where it was not presented within such time.—*Croomes v. State* (Tex. Cr. App.) 924.

An accused's attorney held not to have shown diligence in attempting to file a statement of facts in time.—*Croomes v. State* (Tex. Cr. App.) 924.

Error in overruling a challenge of a juror for cause is unavailing, where appellant's bill does not show that he had exhausted his peremptory challenges.—*Murphy v. State* (Tex. Cr. App.) 940.

Where the record contains no statement of facts, a refusal to give a special instruction will not be reviewed.—*Jones v. State* (Tex. Cr. App.) 949.

Where there is no statement of facts, and defendant did not complain until his motion for a new trial, and the lowest punishment under the law was assessed, it will not be assumed on appeal that an improper charge on impaneling the petit jury injured defendant.—*Jones v. State* (Tex. Cr. App.) 949.

Bill of exception held bad for not showing relevancy of rejected evidence.—*Flanigan v. State* (Tex. Cr. App.) 1116.

An objection to evidence as hearsay does not dispense with the necessity of showing that the evidence was hearsay by bill of exception.—*Flanigan v. State* (Tex. Cr. App.) 1116.

In the absence of a statement of facts, refusal of instructions cannot be reviewed.—*Clark v. State* (Tex. Cr. App.) 1120.

A statement of facts made up entirely of questions and answers will be stricken out.—*Dunn v. State* (Tex. Cr. App.) 1121.

§ 32. — Assignment of errors.

An assignment of error in a criminal case to which no bill of exceptions was reserved cannot be reviewed.—*Carpenter v. State* (Tex. Cr. App.) 227.

An assignment of error cannot be considered when no exceptions are preserved to the ruling of the court.—*Homan v. State* (Tex. Cr. App.) 237.

§ 33. — Review.

It was harmless error to require defendant, in a criminal prosecution, to produce evidence against itself, where the offense was otherwise made out.—*Louisville & N. R. Co. v. Commonwealth* (Ky.) 167.

There can be no reversal in a criminal case for an error in overruling a motion for a new trial.—*Flannery v. Commonwealth* (Ky.) 572.

A judgment of conviction cannot be reversed on the ground that it is not supported by the evidence, if there is any evidence conducing to show guilt.—*Gilbert v. Commonwealth* (Ky.) 590.

It was harmless error to permit the prosecuting attorney to propound to a witness questions which assumed that property found in the possession of accused was taken from the house he was accused of breaking.—*Gilbert v. Commonwealth* (Ky.) 590.

It was harmless error to overrule a challenge to a juror for cause, and thus to compel accused to use one of his peremptory challenges to excuse the juror, as all of his peremptory challenges were not exhausted.—*Gilbert v. Commonwealth* (Ky.) 590.

There can be no reversal in a criminal case for an error in overruling a challenge to a juror.—*Gilbert v. Commonwealth* (Ky.) 590.

Accused held not prejudiced by refusal of continuance for absent witnesses to establish a defense without merit.—*State v. Rice* (Mo.) 78.

Refusal of continuance will not be reviewed where discretion of court was not abused.—*State v. Rice* (Mo.) 78.

The appellate court will not interfere with a verdict approved by the trial court, on the ground that it is unusual and severe, in the absence of a showing that it was the result of prejudice.—*State v. Rufus* (Mo.) 80.

The appellate court will not reverse a conviction because of the insufficiency of the evidence, where there is substantial evidence of defendant's guilt.—*State v. Hibler* (Mo.) 85.

Denial of application for change of venue, on ground of insufficiency of affidavits, where it is subsequently heard on proper affidavits, is harmless error.—*State v. Headrick* (Mo.) 99.

An instruction, though technically incorrect, if not calculated to injure the rights of appellant, will not be ground for reversal.—*Homan v. State* (Tex. Cr. App.) 237.

Refusal to grant a continuance for absent witnesses is without prejudice, where the facts expected to be proved by such witnesses are shown, and not controverted by the state.—*Bush v. State* (Tex. Cr. App.) 238.

An instruction that if defendant got the property, alleged to have been stolen, by purchase or gift, to acquit him, does not prejudice defendant, though there was no evidence that he got said property by gift.—*Johnson v. State* (Tex. Cr. App.) 911.

An instruction in a criminal case which imposes on the state an additional burden of proof cannot be complained of by defendant.—*Tuttle v. State* (Tex. Cr. App.) 911.

Error in remarks of counsel *held* harmless, when provoked by remarks of opposite counsel.—*Matthews v. State* (Tex. Cr. App.) 915.

Improper remarks of the prosecuting attorney are not ground for reversal, when they were provoked by similar remarks of defendant's attorney concerning defendant's family.—*Furlow v. State* (Tex. Cr. App.) 938.

Where a motion for change of venue on account of local prejudice is not accompanied by the affidavits of compurgators, the allowance of such change on the court's own motion is within the discretion of the court, and a refusal to do so is not reviewable.—*Murphy v. State* (Tex. Cr. App.) 940.

Error in admitting testimony as to the meaning of a forgery *held* harmless.—*Colter v. State* (Tex. Cr. App.) 945.

Where the court, in a prosecution for theft, erroneously charges on circumstantial evidence, the error is harmless, where the case is not one depending on circumstantial evidence.—*Pace v. State* (Tex. Cr. App.) 953.

An instruction, if erroneous, *held* not reversible error, under Code Cr. Proc. art. 723.—*Bruce v. State* (Tex. Cr. App.) 954.

Error in overruling a challenge for cause is harmless, where the juror does not sit in the case.—*Vick v. State* (Tex. Cr. App.) 1117.

CROSS-EXAMINATION.

See "Witnesses," § 3.

CUSTODY.

Of child, see "Divorce," § 3.
Of jury, see "Criminal Law," § 25.

DAMAGES.

Breach by buyer of contract for sale of goods see "Sales," § 5.

Compensation for property taken for public use, see "Eminent Domain," § 1.

For false representations, see "Fraud," § 2.

For wrongful attachment of goods, see "Attachment," § 7.

In actions for causing death, see "Death," § 2.

Recoverable for trespass, see "Trespass," § 1.

§ 1. Grounds and subjects of compensatory damages.

A railroad company *held* liable for mental anguish suffered by a passenger, caused by her having received the wrong ticket.—*Texas & P. Ry. Co. v. Armstrong* (Tex. Sup.) 835.

The allegations of a complaint *held* to justify a charge that plaintiff may recover for damages arising from mental suffering to be borne in the future.—*Texas & P. Ry. Co. v. Goldman* (Tex. Civ. App.) 275.

A girl 11 years old may recover for mental suffering caused by disfigurement resulting from an injury occurring when she was 17 months old.—*Galveston, H. & S. A. Ry. Co. v. Clark* (Tex. Civ. App.) 276.

Where there is evidence of physical injury justifying submission of injury from mental suffering, the amount of mental damages need not be proved.—*International & G. N. Ry. Co. v. Rhoades* (Tex. Civ. App.) 517.

§ 2. Liquidated damages and penalties.

A party to a contract *held* entitled to recover \$5,000 fixed by a contract as liquidated damages for a breach thereof.—*May v. Crawford* (Mo.) 693.

A question whether a sum provided in a contract for its nonobservance is a penalty or liquidated damages is for the court.—*May v. Crawford* (Mo.) 693.

A penalty prescribed for a breach of a composition *held* not liquidated damages, the damages being susceptible of definite ascertainment.—*Hill v. Wertheimer-Swarts Shoe Co.* (Mo.) 702.

Damages in a bond *held* liquidated, and not penal.—*Copeland v. Holloman* (Tex. Civ. App.) 257.

§ 3. Exemplary damages.

The remission of actual damages before entry of judgment by one who had recovered a verdict for actual and exemplary damages deprives the court of power to render judgment for exemplary damages.—*Smith v. Dye* (Tex. Civ. App.) 858.

§ 4. Measure of damages.

Where there is a substantial compliance with a building contract, the principal breach consisting in failing to make the inside of a brick wall as smooth as the outside, the measure of damage is the difference between the value of the building constructed as it is and what it would have been if constructed according to the contract.—*Taulbee v. Moore* (Ky.) 564.

In an action for the value of trees destroyed by defendant under contract for right of way, the measure of damages *held* to be the value of the trees, where plaintiff had conveyed the soil to defendant reserving title to the trees.—*Cooley v. Kansas City, P. & G. R. Co.* (Mo.) 101.

§ 5. Inadequate and excessive damages.

A verdict for \$12,000 for an injury to a woman from a gunshot wound causing great pain and suffering, and affecting the spinal column, will not be set aside as excessive, a former verdict for a larger amount having previously been set aside.—*Louisville & N. R. Co. v. McEwan* (Ky.) 619.

A verdict of \$11,750 for loss of left arm and part of left leg by man 42 years old, theretofore able-bodied and healthy, with earning capacity of \$75 to \$100 per month, who knows no business but farming and railroad, and who was confined to his bed three months by the injury, is not excessive.—*San Antonio & A. P. Ry. Co. v. Brooking* (Tex. Civ. App.) 537.

§ 6. Pleading, evidence, and assessment.

A complaint in an action for the value of trees destroyed, under contract for right of way, *held* not insufficient in failing to allege ownership.—*Cooley v. Kansas City, P. & G. R. Co.* (Mo.) 101.

In an action for a breach of a contract, evidence showing mitigation of damages *held* inadmissible, where plaintiff was entitled to liquidated damages for the breach as fixed by the contract.—*May v. Crawford* (Mo.) 693.

An instruction "that if from the evidence the jury find for plaintiff, then, in estimating her damages, they will take into consideration the physical injury," is not erroneous, as assuming that physical injury was inflicted, where the jury could not find for the plaintiff unless physical injuries were sustained.—*Young v. City of Webb City* (Mo.) 709.

Where plaintiff in an action for personal injuries has exhibited them to the jury, and physicians have testified in relation to them, defendant is entitled to have an examination by experts of its own selection.—*Chicago, R. I. & T. Ry. Co. v. Langston* (Tex. Sup.) 331.

It is reversible error to charge a jury to take into consideration damages resulting from a loss

of time, where there is neither allegation nor proof of the value of such lost time.—*Texas & P. Ry. Co. v. Goldman* (Tex. Civ. App.) 275.

Allegation in complaint held to support recovery for decreased earning capacity.—*Galveston, H. & S. A. Ry. Co. v. Clark* (Tex. Civ. App.) 276.

Testimony that plaintiff, the night she was injured, said that she tasted blood, held admissible.—*Texas & P. Ry. Co. v. Lee* (Tex. Civ. App.) 351.

Complaint for personal injuries held to authorize proof of reasonableness of physician's bill.—*Texas & P. Ry. Co. v. Lee* (Tex. Civ. App.) 351.

The scope of evidence admissible to prove the earning capacity of one suing for a personal injury, to determine his loss where totally disabled, set forth.—*Missouri, K. & T. Ry. Co. of Texas v. St. Clair* (Tex. Civ. App.) 666.

Refusal to require a physical examination in a personal injury case was not error, where plaintiff expressed a willingness to be examined, but his counsel opposed it.—*Ft. Worth & R. G. Ry. Co. v. White* (Tex. Civ. App.) 855.

DEATH.

Of party to action ground for abatement, see "Abatement and Revival," § 1.

§ 1. Evidence of death and of survivorship.

Presumption of death, after absence unheard of for 20 years, held not affected by the fact that a suit had been brought within the time, making him defendant by publication as a non-resident.—*Ferrell v. Grigsby* (Tenn. Ch. App.) 114.

One who has left the country where he and his relatives lived for 20 years, and has never been heard from, is presumed to be dead.—*Ferrell v. Grigsby* (Tenn. Ch. App.) 114.

§ 2. Actions for causing death.

A right of action for wrongfully killing a husband and father survives in his widow and heirs.—*Missouri, K. & T. Ry. Co. v. Elliott* (Ind. T.) 1067.

Where a petition filed by an administrator states a good cause of action, under Ky. Const. § 241, for causing the death of plaintiff's intestate by negligence, the fact that it is alleged that the negligence was willful does not require that the action should be regarded as brought under section 3 of chapter 57 of the General Statutes.—*Louisville & N. R. Co. v. Alumbaugh's Adm'r* (Ky.) 18.

In an action by a wife for the wrongful death of her husband, the jury may give such damages as they think proportioned to the injury resulting from his death.—*Houston & T. C. R. Co. v. Loeffler* (Tex. Civ. App.) 536.

An instruction on the measure of damages in an action by a wife for the wrongful death of her husband held erroneous.—*Houston & T. C. R. Co. v. Loeffler* (Tex. Civ. App.) 536.

What the jury should consider in determining the damages suffered by a wife for the wrongful death of her husband, set forth.—*Houston & T. C. R. Co. v. Loeffler* (Tex. Civ. App.) 536.

Verdict for \$15,000 for death of brakeman held not excessive.—*Ft. Worth & R. G. Ry. Co. v. Kime* (Tex. Civ. App.) 558.

Evidence held material, as tending to show whether defendant should have known at whom he was shooting.—*Croft v. Smith* (Tex. Civ. App.) 1089.

In an action under Sayles' Rev. Civ. St. arts. 3017, 3020, evidence in regard to any action that may have been taken by plaintiff or the grand jury in connection with criminal pro-

ceedings is inadmissible.—*Croft v. Smith* (Tex. Civ. App.) 1089.

In an action by parents to recover for the wrongful killing of their son, testimony that they may have brought the action simply to investigate the circumstances of the homicide is irrelevant and prejudicial.—*Croft v. Smith* (Tex. Civ. App.) 1089.

The apprehension which moved defendant to shoot deceased in self-defense must be judged from the standpoint in which defendant was at the time.—*Croft v. Smith* (Tex. Civ. App.) 1089.

Where the evidence shows that the killing was intentional, to escape liability the defendant must show that it was done under a reasonable apprehension of fear of death or serious bodily harm.—*Croft v. Smith* (Tex. Civ. App.) 1089.

Where it appears that defendant shot deceased intentionally, but claimed to have done so in the belief that deceased was about to attack him, it is error to submit the case to the jury on the theory of negligence.—*Croft v. Smith* (Tex. Civ. App.) 1089.

DECEDENTS.

Estates, see "Descent and Distribution."

Testimony as to transactions with persons since deceased, see "Witnesses," § 2.

DECEIT.

See "Fraud."

DECLARATIONS.

As evidence in civil actions, see "Evidence," § 6. — in criminal prosecutions, see "Criminal Law," § 8.

DEEDS.

Admissions by grantor, see "Evidence," § 5. Cancellation, see "Cancellation of Instruments." Covenants in deeds, see "Covenants."

Effect of faulty acknowledgment as between the parties, see "Acknowledgment," § 1.

Estoppel by deed, see "Estoppel," § 2.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

Of public lands, see "Public Lands," § 1; "Mortgages."

Reformation, see "Reformation of Instruments." Requisites and validity of deeds of assignment, see "Assignments for Benefit of Creditors," § 1.

§ 1. Requisites and validity.
A consideration named in a deed is presumed to be the true consideration, in the absence of evidence to the contrary.—*Hoover v. Binkley* (Ark.) 73.

Where the name of a grantee in a deed is left blank, with authority to be filled, the insertion of a wrong name by mistake of scrivener confers no title, but, upon insertion of the correct name, the instrument for the first time becomes complete.—*Thummel v. Holden* (Mo.) 404.

A deed describing grantees as heirs of certain persons, but not naming them, held sufficient.—*Hill v. Jackson* (Tex. Civ. App.) 357.

Description referring to other instruments held insufficient.—*Pierson v. Sanger* (Tex. Civ. App.) 869.

The recording of a deed by one not authorized to do so by the grantor will not be given the effect of a delivery of the deed.—*Blackman v. Schierman* (Tex. Civ. App.) 886.

§ 2. Construction and operation.

An instrument without consideration declaring a trust in certain lands held not a deed conveying interest therein.—*Griffith v. Maxfield* (Ark.) 832.

A deed conveying land to V. "and his children," to have and to hold to him "and his children," conveys to V. the fee, and not merely a life interest.—*Viley v. Frankfort & C. Ry. (Ky.)* 173.

A deed from a city to a railroad company construed to convey an entire strip of ground owned by the city by virtue of a condemnation proceeding, and not merely so much of it as was designated for the railroad track.—*Long v. Louisville & N. R. Co. (Ky.)* 807.

The discretion to B. of allotting the lands "as he may see proper" contemplates an equal division, and gives B. merely the discretion to designate the location of each child's share.—*Ft. Jefferson Imp. Co. v. Dupoyster (Ky.)* 810.

A deed to B. which recites that "it is expressly agreed and understood that said second party is to deed or will said lands to the bodily heirs of J.,—in other words, the title and possession of said lands is only invested in said second party during his natural lifetime, then to said heirs of J.; and said second party has the discretion of allotting said lands between said heirs as he may see proper,"—vests in B. only a life estate, remainder to the children of J., which vests in the firstborn child, and opens up to let in the afterborn children.—*Ft. Jefferson Imp. Co. v. Dupoyster (Ky.)* 810.

Description of a town lot by a map executed but not recorded until after the deed held sufficient.—*Zimbleman v. Stamps (Tex. Civ. App.)* 341.

In construing a deed, the court will consider the whole instrument, and, when the calls in a deed lead to conflicting results, that construction must be adopted which is most consistent with the intent apparent on its face.—*Hitchler v. Boyles (Tex. Civ. App.)* 648.

A deed of several blocks of land separated by streets as laid out by the grantor conveys the title to the intervening streets as effectually as if they had been expressly included.—*Emerson v. Bedford (Tex. Civ. App.)* 889.

§ 3. Pleading and evidence.

From the execution and record of a deed, delivery is presumed.—*McReynolds v. Grubb (Mo.)* 822.

A petition held to sufficiently aver the delivery of a deed.—*McReynolds v. Grubb (Mo.)* 822.

A deed not acknowledged so as to be entitled to record if improperly recorded can be proved according to the common law, but not by a certified copy.—*Heintz v. Thayer (Tex. Sup.)* 640.

Evidence held to authorize a submission to the jury of the question of the identity of land described in a deed.—*Hitchler v. Boyles (Tex. Civ. App.)* 648.

Deeds which do not identify the lands described will be received in evidence, when by the aid of extrinsic evidence the land conveyed can be identified.—*Hitchler v. Boyles (Tex. Civ. App.)* 648.

DEFAMATION.

See "Libel and Slander."

DEFAULT.

Judgment by, see "Judgment," § 2.

DELEGATION OF POWER.

Invalidity of penal statute delegating legislative power, see "Constitutional Law," § 1.

DELIVERY.

Of deed, see "Deeds," § 1.

DEMURRER.

To evidence, see "Trial," § 5.

DEPOSITIONS.

Objection that witness, though living out of the state, was frequently within the state, made first after commencement of trial, held too late.—*Missouri, K. & T. Ry. Co. v. Elliott (Ind. T.)* 1067.

Deposition by employé of railroad, frequently within the jurisdiction of the court, though residing in another state, held not excluded by *Mansf. Dig. § 2921*.—*Missouri, K. & T. Ry. Co. v. Elliott (Ind. T.)* 1067.

A deposition taken in a case before intervention, subsequently admitted, but limited in its purpose to the original parties, cannot then be read in evidence by the intervener.—*Shields v. Ord (Tex. Civ. App.)* 298.

Where attorneys prepared the envelope for returning depositions, the indorsements on it are made the notary's act by his adoption thereof in using it.—*Missouri, K. & T. Ry. Co. of Texas v. St. Clair (Tex. Civ. App.)* 666.

DEPOSITS.

In bank, see "Banks and Banking," § 2.

DEPOSITS IN COURT.

A court held authorized to order taxes on property sold under decree to be paid out of proceeds within the court's jurisdiction.—*Kahler v. Betterton (Tex. Civ. App.)* 289.

DESCENT AND DISTRIBUTION.

§ 1. Nature and course in general.

A vendee of land holding a bond for a title, after having paid a part of the price, has a beneficial estate, which is descendible by inheritance, precisely as if it were an absolute estate of inheritance.—*Strauss v. White (Ark.)* 64.

§ 2. Rights and liabilities of heirs and distributees.

Payments made by the ancestor for the tuition of the children of a deceased son, and for a house and lot conveyed to their mother, are not chargeable as advancements against the grandchildren, though entries were made by the ancestor in a book kept by him to the effect that they were to be considered as advancements.—*Boone v. Thornsby (Ky.)* 563.

A creditor who, through ignorance of the death of his debtor, failed to present his claim to the administrator for allowance within the time limited by law, held barred, as against the heirs and distributees.—*Beekman v. Richardson (Mo.)* 689.

DESCRIPTION.

Of property conveyed, see "Boundaries," § 1.

DIRECTING VERDICT.

In civil actions, see "Trial," § 5.

DISABILITIES.

Contributory negligence of persons under disability, see "Negligence," § 2.

DISCHARGE.

From liability as guarantor, see "Guaranty," § 4.

— liability as surety, see "Principal and Surety," § 2.

— service as juror, see "Jury," § 2.

DISCRETION OF COURT.

In criminal prosecutions, see "Criminal Law," § 33.
Review in civil actions, see "Appeal and Error," § 18½.

DISMISSAL AND NONSUIT.

Dismissal of appeal or writ of error, see "Appeal and Error," § 14.

§ 1. Involuntary.

Where an order of dismissal was proper, plaintiff cannot have a new trial because he did not consent to the order as recited therein.—*Hoffman v. Hoffman* (Ky.) 176.

The dismissal of an action on demurrer held premature.—*Sparks v. McHugh* (Tex. Civ. App.) 873.

DISORDERLY HOUSE.

Evidence held sufficient to show that a disorderly house was conducted by accused, and not by another, who owned the house and furniture and rented it to accused.—*Carlton v. State* (Tex. Cr. App.) 213.

Instruction as to what constitutes keeping disorderly house held erroneous.—*Sparks v. State* (Tex. Cr. App.) 1120.

DISSOLUTION.

Of injunction, see "Injunction," § 4.

DISTRESS.

For rent, see "Landlord and Tenant," § 5.

DISTRIBUTION.

Of estate of decedent, see "Descent and Distribution."

DISTRICT AND PROSECUTING ATTORNEYS.

Sayles' Civ. St. art. 2495c, entitling county attorneys of certain counties to only a part of the fees attached to their office, is not repugnant to Const. art. 5, § 21.—*Hare v. Grayson County* (Tex. Civ. App.) 658.

Under Sayles' Civ. St. arts. 2495c, 2495d, county attorneys in counties having cast 7,500 votes in the presidential election of 1896 are entitled to \$2,500 out of the fees attached to their office, and one-fourth of those remaining after deducting the \$2,500.—*Hare v. Grayson County* (Tex. Civ. App.) 656.

DIVERSION.

Of water course, see "Waters and Water Courses," § 1.

DIVORCE.

§ 1. Jurisdiction, proceedings, and relief.

A judgment of divorce cannot be annulled except upon a petition verified by the parties in person so requesting it, as provided by Civ. Code Prac. § 426.—*Bristow v. Bristow* (Ky.) 819.

§ 2. Alimony, allowances, and disposition of property.

Though the husband's estate consists only of a small tract of land, which is incumbered, and which yields little or no returns, yet, as he receives a salary of \$125 per month, an al-

lowance of \$25 per month for the support of the wife and her infant daughter is not excessive.—*Bristow v. Bristow* (Ky.) 819.

It is always in the power of the chancellor, if the conditions change, to change the amount of alimony to conform to the necessities of the case.—*Bristow v. Bristow* (Ky.) 819.

§ 3. Custody and support of children.

Where a judgment of divorce awarded to the mother the custody of the children of the marriage, giving the father the right to visit the children at reasonable times, it was in the sound discretion of the chancellor to subsequently make further provision for the father seeing his children, but a particular order made was an unreasonable interference with the mother's supervision.—*McFerran v. McFerran* (Ky.) 307.

Where the court had denied a husband a divorce, and granted the custody of a child to the wife, order cannot be entered against the husband for a monthly payment for the child's support.—*Defee v. Defee* (Tex. Civ. App.) 274.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 8.
— in criminal prosecutions, see "Criminal Law," § 10.

DONATIONS.

See "Gifts," § 1.

DUE PROCESS OF LAW.

See "Constitutional Law," § 5.

EASEMENTS.

§ 1. Creation, existence, and transfer.

Though the law might imply the reservation of an existing notorious passway "as a way of necessity" over land conveyed for the benefit of land retained by the vendor, yet the vendor may, by verbal agreement, waive such right of way.—*Lebus v. Boston* (Ky.) 609.

EJECTMENT.

See "Trespass to Try Title."

§ 1. Right of action and defenses.

Under Ky. St. § 212, the defendant in ejectment may, under the general issue, prove that he was in adverse possession of the land in controversy at the time of plaintiff's purchase, and thus defeat the action.—*Shaw v. Revel* (Ky.) 566.

In ejectment by a judgment creditor claiming the land by a sale under execution sale against the heirs of the debtor's mother to whom he had deeded, a mere "claim" that the debtor bought the land with his mother's money held no defense.—*Johnson v. Bowlware* (Mo.) 109.

§ 2. Pleading and evidence.

An answer praying for equitable relief will not support a decree based upon it, where the facts show a question of a legal title under the general issue.—*Thummel v. Holden* (Mo.) 404.

An allegation in answer that previous action of ejectment had been decided against plaintiff held material on question of enjoining further litigation.—*Ridgeway v. Herbert* (Mo.) 1040.

§ 3. Trial, judgment, enforcement of judgment, and review.

The validity of attachment proceedings by which the defendant in ejectment came into possession of the land may be considered.—*Winningham v. Trueblood* (Mo.) 399.

ELECTIONS.

§ 1. Ballots.

An election for county clerk was void where the incumbent, who was the successful candidate for re-election, was guilty of fraud in so arranging the ballot as to deceive voters, but candidates for other offices who were not responsible for the irregularity are not affected thereby.—*Creesh v. Davis* (Ky.) 428; *Hurst v. Ingram, Id.*; *Kirby v. Woollum, Id.*; *Renfro v. Green, Id.*

§ 2. Conduct of election.

The decision of election officers as to the qualifications of voters is not final.—*Tunks v. Vincent* (Ky.) 622.

§ 3. Count of votes, returns, and canvass.

The returns of precinct election officers, stating the number of votes received by the Democratic and Republican candidates, respectively, for a particular office, are sufficient, without stating the names of the candidates.—*Tunks v. Vincent* (Ky.) 622.

Under Const. 1875, art. 6, § 37, held, the legislature could not authorize a county court nor the mayor of a city to decide in case of a tie for justices of the peace.—*State ex rel. Crow v. Kramer* (Mo.) 716.

§ 4. Contests.

The averment in a notice to contest an election that the contestant was the Democratic candidate, and was "duly and legally elected," is sufficient, without an express averment of his eligibility.—*Tunks v. Vincent* (Ky.) 622.

The statement in the notice of the number of illegal votes polled, for whom polled, and when and where polled, is sufficient, without specifying the names of the illegal voters, in the absence of a motion to make more specific.—*Tunks v. Vincent* (Ky.) 622.

An inquiry in an election contest as to how illegal votes were cast, does not violate the secrecy of the ballot; and every illegal vote should be thrown out, if it appears by competent evidence for whom it was cast.—*Tunks v. Vincent* (Ky.) 622.

The declarations of an illegal voter as to how he voted are inadmissible, as being mere hearsay.—*Tunks v. Vincent* (Ky.) 622.

Where the ballot of an illegal voter which was kept out of the ballot box was counted, the testimony of the election officers as to the candidate for whom it was counted was competent.—*Tunks v. Vincent* (Ky.) 622.

The testimony of an illegal voter that he was a Republican, coupled with the fact that he was prevented only by the objection of the contestee, the Republican candidate, from testifying how he voted, affords prima facie ground for concluding that he voted for contestee.—*Tunks v. Vincent* (Ky.) 622.

EMINENT DOMAIN.

§ 1. Compensation.

Instructions as to the measure of recovery for injury to property by the construction and operation of a railroad approved.—*Chesapeake & O. R. Co. v. Smith* (Ky.) 12.

A verdict for \$300 as damages to the easement of a turnpike company by a railroad crossing was not too small.—*Shelbyville & Eminence Turnpike Co. v. Louisville & N. R. Co.* (Ky.) 805.

§ 2. Proceedings to take property and assess compensation.

A consent order entered in a condemnation proceeding instituted by a city releasing title of the city to a part of a strip of land condemned was void for want of authority in the city at-

torney to give such consent.—*Long v. Louisville & N. R. Co.* (Ky.) 807.

A consent order entered in a condemnation proceeding construed not to release any part of a strip of ground conveyed for a railroad right of way, but merely to give the original owners full access to the remainder of their property notwithstanding the building of the railroad.—*Long v. Louisville & N. R. Co.* (Ky.) 807.

§ 3. Remedies of owners of property.

Instruction held to confine the jury, in determining compensation, to the damages caused by construction of road.—*Chesapeake & O. R. Co. v. Smith* (Ky.) 12.

On appeal by defendant to the circuit court from an order of the county court overruling exceptions of both parties to the report of commissioners assessing damages in a condemnation proceeding instituted by a railroad company, the burden of proof is on the company, and it is entitled to the concluding argument to the jury, as judgment would be rendered against it for the damages assessed if no proof were introduced by either party.—*Shelbyville & Eminence Turnpike Co. v. Louisville & N. R. Co.* (Ky.) 805.

Though the testimony of plaintiff himself fails to show any obstruction of the ingress and egress to and from his property from the construction of a street railway by defendant, yet as the testimony of other witnesses tends to show such obstruction, and the jury would be authorized to determine from common observation that there is some obstruction, the question should be submitted to the jury.—*Ashland & C. St. Ry. Co. v. Faulkner* (Ky.) 806.

The acquiring of land by a railroad for right of way and station grounds is an appropriation to a public use, within Rev. St. 1889, § 6772, preventing limitations running against land so appropriated.—*Hannibal & St. J. R. Co. v. Totman* (Mo.) 412.

ENTRY.

Of judgment, see "Judgment," § 4.

EQUITY.

See "Specific Performance," § 1; "Trusts." Equitable estoppel, see "Estoppel," § 3.

§ 1. Jurisdiction, principles, and maxims.

Equity will relieve against a forfeiture where the damages resulting from nonperformance are readily ascertainable, and the penalty fixed cannot, therefore, be regarded as liquidated damages.—*Allison v. Cocke's Ex'rs* (Ky.) 593; Same v. *Preston's Ex'rs, Id.*

§ 2. Pleading.

Where there is unity of interest between defendants, an answer and a successful defense on the part of one defendant inures to the benefit of others not answering.—*Driver v. White* (Tenn. Ch. App.) 994.

§ 3. Hearing, submission of issues to jury, and rehearing.

A petition to rehear must be filed during the term at which the decree complained of is rendered.—*Dunn v. Dunn* (Tenn. Ch. App.) 119.

A petition to rehear cannot be entertained after an appeal has been allowed, and appellant has taken the oath prescribed for poor persons, in lieu of giving bond.—*Dunn v. Dunn* (Tenn. Ch. App.) 119.

ERROR, WRIT OF.

See "Appeal and Error."

ESCHEAT.

Under Rev. St. 1895, arts. 1821, 1822, declaring under what conditions the district or county attorney shall file a petition to escheat lands, an action to escheat an estate, where administration is pending, cannot be maintained.—*State v. Black's Estate* (Tex. Civ. App.) 555.

ESCROWS.

A note placed in escrow, to be delivered on conditions not apparent on its face, is valid, as against the maker, in the hands of an innocent purchaser for value.—*Garrett v. Campbell* (Ind. T.) 956.

ESTABLISHMENT.

Of highways, see "Highways," § 1.
Of public schools, see "Schools and School Districts," § 1.
Of trusts, see "Trusts," § 4.

ESTATES.

Created by will, see "Wills," § 3.
Decedents' estates, see "Descent and Distribution."
A mortgage given to a guardian of the estate of mortgagor's children to secure a loan *held* not to merge in the fee inherited by them.—*Bassett v. O'Brien* (Mo.) 107.

ESTOPPEL.

By judgment, see "Judgment," § 10.

§ 1. By record.

An administrator is estopped to deny that there was a sale, where he has procured a judgment for the purchase price, and foreclosure of vendor's lien.—*Miller v. Anders* (Tex. Civ. App.) 897.

§ 2. By deed.

Where a purchaser at a tax sale conveys by warranty deed, he can acquire no rights against his first grantee by a subsequent execution of the tax deed to him, on the assumption that he had not conveyed.—*Tupy v. Kocourek* (Ark.) 69.

Deed *held* not to create estoppel, its recitals being merely admissible as evidence.—*East Tennessee, V. & G. Ry. Co. v. Nashville, C. & St. L. Ry. Co.* (Tenn. Ch. App.) 202.

§ 3. Equitable estoppel.

One having interest in land *held* estopped, by representation, from asserting title thereto.—*Gilbert v. Richardson* (Tenn. Ch. App.) 134.

A purchaser of a state grant of land *held* not equitably estopped from claiming all the land embraced therein because of statements by grantors as to the amount included.—*Duffield v. Spence* (Tenn. Ch. App.) 492.

Defendant, who had acknowledged that another had title to land, *held* estopped to deny it.—*Hitchler v. Boyles* (Tex. Civ. App.) 648.

An agreement by a lien claimant *held* to estop him from asserting the invalidity of another lien on the property.—*Cain v. Texas Building & Loan Ass'n* (Tex. Civ. App.) 879.

An agreement by a mechanic's lien holder *held* to estop him from asserting that his lien was prior to that of another.—*Cain v. Texas Building & Loan Ass'n* (Tex. Civ. App.) 879.

EVIDENCE.

See "Depositions"; "Witnesses."

Admissibility of evidence under pleading, see "Pleading," § 7.

Applicability of instructions to evidence, see "Trial," § 6.

In action for slander, see "Libel and Slander," § 2.

— for causing death, see "Death," § 2.

— for damages, see "Damages," § 6.

— for personal injuries, see "Master and Servant," § 8.

In criminal prosecutions, see "Criminal Law," §§ 5-15.

In prosecutions for larceny, see "Larceny," § 3.

— for murder, see "Homicide," §§ 6-8.

— for offenses against liquor laws, see "Intoxicating Liquors," § 3.

— for rape, see "Rape," § 2.

Of fraud, see "Fraud," § 2.

Of payment, see "Payment," § 1.

Proving deeds, see "Deeds," § 3.

Questions of fact for jury, see "Trial," § 5.

Reception at trial, see "Criminal Law," § 18;

"Trial," § 4.

Review on appeal or writ of error, see "Appeal and Error," § 19.

§ 1. Presumptions.

In absence of evidence to the contrary, it will be presumed that the law as to compounding felony is the same in the state in which the contract was made as in that in which it is sought to be enforced.—*Loud v. Hamilton* (Tenn. Ch. App.) 140.

Where clerk recorded instrument, it will be presumed that certificate of acknowledgment duly attested was annexed, it being necessary for recordation, so as to render certified copy admissible.—*Caudle v. Williams* (Tex. Civ. App.) 560.

§ 2. Burden of proof.

The burden of proof was on the plaintiff, every fact entitling him to recover being denied.—*Kenton Ins. Co. v. Osborne* (Ky.) 306.

§ 3. Relevancy, materiality, and competency in general.

Where the defense in an action for breach of marriage promise was that plaintiff had voluntarily discharged defendant from his promise, and had given back to him their engagement ring, declarations of plaintiff subsequent to the return of the ring as to her purpose in returning it were not admissible as a part of the *res gestæ*.—*Heft v. Masden* (Ky.) 574.

Declarations of the deceased, made some minutes after he was injured, in response to inquiries made by a witness, are admissible as part of the *res gestæ*.—*Houston & T. O. R. Co. v. Loeffler* (Tex. Civ. App.) 536.

§ 4. Best and secondary evidence.

Contents of records in office of defendant's train master without the state may be proved by secondary evidence, defendant having failed to produce, on notice.—*Missouri, K. & T. Ry. Co. v. Elliott* (Ind. T.) 1067.

Parol evidence *held* admissible as to writings that have been destroyed or lost, or that defendant refuses to produce on notice.—*Missouri, K. & T. Ry. Co. v. Elliott* (Ind. T.) 1067.

Where no rule was taken requiring plaintiff to file his books of account, secondary evidence as to their contents *held* admissible.—*Standard Oil Co. v. Fidelity & Casualty Co. of New York* (Ky.) 571.

§ 5. Admissions.

The declarations of the agent of a common carrier to deliver a barge as to the disposition and management of the barge were admissible as evidence against the principal.—*Plots v. Miller* (Ky.) 176.

Declarations of the grantor are not admissible against the grantee to show that a conveyance was executed with intent to defraud creditors.—*Boli v. Irwin* (Ky.) 444.

A grantor may testify, as against his grantee, that he had actual notice of an adverse title to part of the land at the time he purchased.—*Campbell v. Antis* (Tex. Civ. App.) 343.

§ 6. Declarations.

Testimony that deceased told witness what his salary was, *held* competent in action for his death.—*Missouri, K. & T. Ry. Co. v. Elliott* (Ind. T.) 1067.

§ 7. Hearsay.

What plaintiff, suing as administrator for the death of his son, said soon after his son died was inadmissible, as it did not contradict his testimony, and he had no personal knowledge of the facts.—*Louisville & N. R. Co. v. Alum-baugh's Adm'r* (Ky.) 18.

§ 8. Documentary evidence.

Minutes of the county commissioners court *held* admissible, though not signed by the judge or attested by the clerk.—*Ladwig v. State* (Tex. Cr. App.) 390.

Under Rev. St. art. 2306, a certified copy of an order of the commissioners' court for a local option election is admissible in evidence.—*Frickie v. State* (Tex. Cr. App.) 394.

In an action for personal injury, evidence that plaintiff was totally disabled warranted the admission of evidence of his life expectancy.—*Missouri, K. & T. Ry. Co. of Texas v. St. Clair* (Tex. Civ. App.) 666.

§ 9. Parol or extrinsic evidence affecting writings.

Parol evidence *held* admissible to show a condition precedent to a legal delivery of the note sued on.—*Mehlin v. Mutual Reserve Fund Life Ass'n* (Ind. T.) 1063.

In an action on a note, an answer setting up a contemporaneous oral contract *held* not demurrable, as contradictory of a written contract.—*Peel v. Giesen* (Tex. Civ. App.) 44.

In an action to recover an interest in land, parol evidence that plaintiff did not include it as part of his assets in filing a petition in bankruptcy *held* competent, though the schedule itself was not accounted for.—*Clark v. Clark* (Tex. Civ. App.) 337.

Where a deed described a town lot according to a map executed, but not then recorded, parol evidence *held* admissible to show that no other map except the one referred to had ever been recorded in that county.—*Zimbleman v. Stamps* (Tex. Civ. App.) 341.

It is competent to show by parol evidence that plaintiff did not authorize an averment in the original petition which is at variance with the allegations of an amended petition on which he seeks to recover.—*San Antonio & A. P. Ry. Co. v. Brooking* (Tex. Civ. App.) 537.

Extraneous evidence to aid description in deed *held* inadmissible.—*Pierson v. Sanger* (Tex. Civ. App.) 869.

§ 10. Opinion evidence.

Where the parties differ essentially as to the terms of a verbal building contract, for breach of which damages are sought to be recovered, the contractor, after giving his version of it, may testify that the work has been performed in accordance therewith.—*Taulbee v. Moore* (Ky.) 564.

While evidence as to the custom of brakemen to sit at the side of a car with their feet hanging down, and as to the reasons for the custom, is admissible, the opinion of a witness that it is not improper for a brakeman to occupy such a position is inadmissible, that being a question for the jury.—*Louisville & N. R. Co. v. Milliken's Adm'r* (Ky.) 796.

In an action for a breach of a contract by the proprietor of a department store not to advertise certain goods as having been purchased from

a rival, the testimony of such proprietor, denying that he made such advertisements, is not admissible as stating a conclusion.—*May v. Crawford* (Mo.) 693.

Whether train stopped at station long enough for plaintiff to alight *held* an issue of fact for the jury.—*Texas & P. Ry. Co. v. Lee* (Tex. Civ. App.) 351.

It is not error to permit a witness to testify that there was no connection between plaintiff's hurt and a switch, where such testimony is a statement of fact, and not a conclusion.—*San Antonio & A. P. Ry. Co. v. Brooking* (Tex. Civ. App.) 537.

One who has had long service in the railroad business in various capacities is competent to give an opinion as to whether or not a track was safe.—*San Antonio & A. P. Ry. Co. v. Brooking* (Tex. Civ. App.) 537.

Where plaintiff testified that a car he was climbing on when he was hurt was a medium-sized coal car, it was proper for a competent witness to testify to the width of that kind of a car.—*Missouri, K. & T. Ry. Co. of Texas v. St. Clair* (Tex. Civ. App.) 666.

§ 11. Evidence at former trial or in other proceeding.

A statement of facts, prepared in contemplation of an appeal after a former trial, and not containing the detailed testimony of the witnesses, is inadmissible to prove the testimony of an absent witness.—*Houston & T. O. R. Co. v. Smith* (Tex. Civ. App.) 506.

A mere statement of counsel that a witness is absent, and that his whereabouts could not be ascertained, is insufficient to justify proof of the witness' testimony at a former trial.—*Houston & T. O. R. Co. v. Smith* (Tex. Civ. App.) 506.

EXAMINATION.

Of witnesses in general, see "Witnesses," § 3.

EXCEPTIONS.

Necessity of excepting to instructions in criminal prosecutions, see "Criminal Law," § 24. To pleading, see "Pleading," § 3.

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see "Appeal and Error," § 8.

Requisites and sufficiency of an appeal in criminal prosecutions, see "Criminal Law," § 81.

§ 1. Nature, form, and contents in general.

Matters which are certified by the judge in the minutes of the court need not be incorporated into a bill of exceptions, and certified by him, in order to receive the consideration of the appellate court.—*Crossland v. Admire* (Mo.) 463.

A plat attached to a bill of exceptions, and referred to therein as an exhibit, is sufficiently incorporated therein, under Rev. St. 1889, § 2304, providing that evidence shall be incorporated in the bill.—*Carlin v. Wolff* (Mo.) 679.

§ 2. Settlement, signing, and filing.

A bill of exceptions which has been signed in vacation, and never filed in open court, cannot be considered, though signed pursuant to an order extending the time for filing to a day in vacation.—*Craft v. Allen* (Ky.) 169.

A bill of exceptions filed at a term subsequent to that at which a trial was had, *held* filed in time, where the cause had been continued on motions for new trial and in arrest of judgment.—*Young v. Downey* (Mo.) 751.

A bill of exceptions not approved by the trial judge will not be considered on appeal.—*Mis-*

souri, K. & T. Ry. Co. of Texas v. Cock (Tex. Civ. App.) 354.

EXCESSIVE DAMAGES.

See "Damages," § 5.

EXCUSABLE HOMICIDE.

See "Homicide," § 4.

EXECUTION.

§ 1. Property subject to execution.

The interest of a vendor in lands, after having given a bond for a title on the receipt of a part of the price, is not vendible under execution.—Strauss v. White (Ark.) 64.

The assignment of a leasehold by the tenant to his wife with intent to defraud his creditors does not prevent the sale of the leasehold under execution against the tenant.—Smith v. Scanlan (Ky.) 152.

The leasehold of a tenant, though he has sublet the property, is subject to sale under execution for his debts.—Smith v. Scanlan (Ky.) 152.

§ 2. Lien, levy or extent, and custody of property.

A description of the lands in the levy held void for uncertainty.—Hayes v. Gallaher (Tex. Civ. App.) 280.

§ 3. Sale.

Purchaser at execution sale, thereafter receiving the amount of the judgment, held estopped to enforce the sheriff's deed against the party paying judgment.—Custer v. Russey (Tenn. Ch. App.) 126.

Title to land held not deraigned through an execution sale, but through a subsequent purchase by the execution purchaser of the judgment debtor.—Campbell v. Antis (Tex. Civ. App.) 343.

§ 4. Return.

Plaintiff cannot defeat defendant's title to property acquired at execution sale in a prior suit by claiming that the levy was defective, since that would be a collateral attack on the officer's return.—Sparks v. McHugh (Tex. Civ. App.) 873.

§ 5. Payment, satisfaction, and discharge.

Execution creditor purchasing at his sale may have the satisfaction of his judgment set aside upon its appearing that he acquired no title to the property purchased, although he had notice of the facts at time of sale.—Hollon v. Hale (Tex. Civ. App.) 900.

§ 6. Wrongful execution.

Loss of profits cannot be recovered for a wrongful levy on a stock in trade, in the absence of proof that the goods could not have been readily replaced.—Summers v. Heard (Ark.) 1057.

To recover special damages for the loss of business through a wrongful levy, the amount thereof must be pleaded and proved.—Summers v. Heard (Ark.) 1057.

In an action for a wrongful levy, an instruction authorizing a recovery for loss of profits held erroneous.—Summers v. Heard (Ark.) 1057.

In an action for a wrongful levy, evidence as to special damages held inadmissible, as too vague and indefinite.—Summers v. Heard (Ark.) 1057.

EXECUTORS AND ADMINISTRATORS.

See "Wills."

§ 1. Appointment, qualification, and tenure.

Issue of letters of administration by the county court is conclusively presumed, on collateral

attack, to have been done on sufficient information.—Ferrell v. Grigsby (Tenn. Ch. App.) 114.

§ 2. Collection and management of estate.

An administrator is not interested in purchase of land sold by him as such, though the firm of which he is a member has a claim against the estate.—Griffith v. Maxfield (Ark.) 832.

A contract by a foreign executor for the sale of land in Kentucky before he had qualified in Kentucky was voidable merely, and his subsequent qualification related back, so that the purchaser, having failed to repudiate the contract before that time, could not thereafter do so.—Allison v. Cocke's Ex'rs (Ky.) 593; Same v. Preston's Ex'rs, Id.

A will held to empower the executor to sell all of the estate not specifically devised during the lifetime of testator's widow.—Holmes v. Sanders (Tex. Civ. App.) 333.

Where homestead rights of a husband vest in wife, a child who is devisee of a remainder cannot question executor's power to sell homestead to pay debts and legacies.—Holmes v. Stone (Tex. Civ. App.) 518.

Taking judgment for purchase price of sale and foreclosure of lien is equivalent to taking mortgage in first instance.—Miller v. Anders (Tex. Civ. App.) 897.

Failure of an administrator to take a mortgage to secure deferred payments on sale of land will not operate to retain superior title in the estate, where the statutes in effect at the time of the transaction do not so provide.—Miller v. Anders (Tex. Civ. App.) 897.

Waiver of taking of mortgage and election to enforce vendor's lien by administrator is binding on estate and heirs.—Miller v. Anders (Tex. Civ. App.) 897.

§ 3. Allowances to surviving wife, husband, or children.

A wife, though forced by her husband's cruelty to abandon him, held entitled to have set aside, as exempt, property which the husband acquired after such abandonment.—Linares v. Linares (Tex. Civ. App.) 510.

§ 4. Sales and conveyances under order of court.

Statement of administrator, suing to enjoin sale of land to pay debt, that creditor had not made a legal demand of administrator to seek to petition for sale, held insufficient to overcome presumption that order of court was within its jurisdiction.—Blevins v. Case (Ark.) 65.

The chancellor properly confirmed a sale of land made by an executor, though the sale was made after suit brought against him for a settlement of the estate; it appearing that the land brought a fair price, and that the executor acted in good faith.—Hamilton v. Hamilton's Ex'r (Ky.) 170.

Gen. St. 1865, p. 498, requiring notice of a proposed sale of a decedent's land to be published four weeks before the first day of the term, is not complied with where the first publication was less than 28 days before said first day, and a sale thereon is void.—Young v. Downey (Mo.) 751.

Bill by widow and heirs of deceased, alleging insufficiency of personal property to pay debts, and asking for a sale of certain standing timber, construed, and the amount of timber decreed to be sold determined.—Williams v. Clark (Tenn. Ch. App.) 180; Clark v. Williams, Id.

Decree for sale of merchantable trees of certain kinds, on certain land, construed, and held, that it was complete as to all merchantable trees of the kind named, and that all the bene-

ficial interest passed to the purchaser.—*Williams v. Clark* (Tenn. Ch. App.) 180; *Clark v. Williams*, Id.

Evidence *held* sufficient to warrant delivery of administrator's deed.—*Miller v. Anders* (Tex. Civ. App.) 897.

§ 5. Accounting and settlement.

Judgment settling estate and discharging executor *held* final judgment, which can be set aside, after term, only by direct proceedings in equity, with service of summons.—*Smith v. Hauger* (Mo.) 1052.

A finding that final settlement by executor was acquiesced in by legatee "under a misapprehension of fact" is erroneous, where the complaint only claims that if it was founded upon "a verbal agreement" which had not been lived up to.—*Smith v. Hauger* (Mo.) 1052.

EXEMPLARY DAMAGES.

See "Damages," § 3.

EXEMPTIONS.

See "Homestead."

§ 1. Nature and extent.

Exemptions *held* improperly allowed, in an action to recover specific personalty or its value, where the defendant had gone to another state and died there.—*Reeves v. Reeves* (Ind. T.) 1079.

To entitle a debtor to have other property set apart to him as exempt, in lieu of provisions and provender not on hand, it is not sufficient to allege that he has not the requisite quantity of provisions and provender, but he must show the extent of the deficit.—*Lawson v. S. T. Barlow Co.* (Ky.) 314.

Improvements erected by a debtor on the land of his wife are not personalty, within the meaning of the statute providing that "other personal property" may be set apart to a debtor as exempt in lieu of provisions and provender not on hand.—*Lawson v. S. T. Barlow Co.* (Ky.) 314.

Two colts, only one of which has been broken, may be claimed as exempt, under Rev. St. 1895, art. 2365.—*Hall v. Miller* (Tex. Civ. App.) 36.

§ 2. Protection and enforcement of rights.

Where officer levying attachment does not request defendant to select exemptions, the latter may do so at the trial.—*Hall v. Miller* (Tex. Civ. App.) 36.

FALSE IMPRISONMENT.

§ 1. Civil liability.

An admission coupled with a denial of harsh treatment of plaintiff by defendants *held* not an admission of an allegation that they were responsible for the condition of the cell in which plaintiff was confined.—*Bishop v. Lucy* (Tex. Civ. App.) 854.

FALSE PRETENSES.

Evidence *held* not to constitute a variance from the allegations of a complaint in a prosecution for swindling.—*Tuttle v. State* (Tex. Cr. App.) 911.

It is not a crime to draw and get cashed a check on a bank where the maker has no money deposited, where there are no deceitful means resorted to to induce the person cashing the check to do so.—*Blackwell v. State* (Tex. Cr. App.) 919.

51 S.W.—74

FALSE SWEARING.

See "Perjury."

FEDERAL COURTS.

See "Courts," § 3.

FEES.

Of county attorney, see "District and Prosecuting Attorneys."
Of juror, see "Jury," § 2.

FELLOW SERVANTS.

See "Master and Servant," § 5.

FELONY.

See "Compounding Felony."

FENCES.

An information under Pen. Code, art. 798, for failure to disconnect and remove a fence from the lands of another, must allege that the fence was not removed within 10 days after the expiration of 6 months' notice to remove it.—*Elkins v. State* (Tex. Cr. App.) 372.

In a prosecution for the unlawful removal of a part of a fence belonging to defendant, an instruction to disregard remarks of defendant's counsel that the other part owner is trying to steal defendant's part and is backed by the county attorney, that there is no issue as to whether the county attorney is party to a theft, and that he is a good citizen and should not be discredited, *held* erroneous.—*Natho v. State* (Tex. Cr. App.) 898.

In a prosecution for cutting fences the possessory ownership may be proved by parol.—*Joy v. State* (Tex. Cr. App.) 933.

FILING.

Bill of exceptions, see "Exceptions, Bill of," § 2.

FINAL JUDGMENT.

Decisions and orders reviewable, see "Appeal and Error," § 1.

FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 19.

FIRES.

See "Arson."

FORCIBLE DEFILEMENT.

See "Rape."

FORCIBLE ENTRY AND DETAINER.

§ 1. Civil liability.

Evidence that plaintiff has title of original landlord *held* admissible.—*Brown v. Woolsey* (Ind. T.) 965.

In an action for unlawful detainer a judgment that plaintiff is entitled to possession, and awarding damages to defendant, *held* erroneous.—*Pybos v. McLaughlin* (Ind. T.) 1075.

FORECLOSURE.

Of mortgage, see "Mortgages," §§ 7, 8.

FOREIGN CORPORATIONS.

See "Corporations," § 4.

FORGERY.

An instrument in the form of an order to pay money, required to be stamped under the internal revenue stamp law, is the subject of forgery, though not stamped.—*Thomas v. State* (Tex. Cr. App.) 242.

An unacknowledged deed of a homestead *held* not shown to be the subject of forgery.—*Johnson v. State* (Tex. Cr. App.) 382.

One altering an unacknowledged deed of a homestead *held* not guilty of forgery.—*Johnson v. State* (Tex. Cr. App.) 382.

Refusal of instruction that, if forgery occurred more than 10 years before the indictment, defendant should be acquitted, *held* error.—*Pitts v. State* (Tex. Cr. App.) 906.

Although an indictment charges in separate counts the forgery of an instrument and the uttering of the same, a conviction cannot be had for both offenses.—*Pitts v. State* (Tex. Cr. App.) 906.

Indictment *held* insufficient, in failing to explain meaning of alterations in an instrument.—*Polk v. State* (Tex. Cr. App.) 909.

In a prosecution for forging an order, evidence that the purported drawer at the time of the alleged forgery would have been willing to have indorsed paper for defendant to the amount of the order is inadmissible.—*Colter v. State* (Tex. Cr. App.) 945.

In a prosecution for forging an order, evidence that the purported drawer had customarily authorized his tenants and employes to sign his name in drawing similar orders is inadmissible, where defendant was not an employe or a tenant.—*Colter v. State* (Tex. Cr. App.) 945.

FORMER ADJUDICATION.

See "Judgment," § 10.

FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 3.

FORNICATION.

See "Incest"; "Seduction."

FRAUD.

See "False Pretenses."

§ 1. Deception constituting fraud, and liability therefor.

Where grantor was young and dissipated, and grantee overreached him, the deed was set aside.—*Ridgeway v. Herbert* (Mo.) 1040.

§ 2. Actions.

A complaint for deceit must show that the alleged false representations were material; that plaintiff was ignorant of their falsity, and was actually deceived thereby.—*Carson v. Houssels* (Tex. Civ. App.) 290.

Evidence that the property was worth more than the price, and that the buyer would have taken it had he known its condition, is admissible on the issue of the materiality of the false representations.—*Carson v. Houssels* (Tex. Civ. App.) 290.

The measure of damages for false representations respecting a herd of cattle *held* the difference between its actual value and its value as represented.—*Carson v. Houssels* (Tex. Civ. App.) 290.

In an action for false representations, an instruction on the burden of proof *held* erroneous.—*Carson v. Houssels* (Tex. Civ. App.) 290.

An instruction on the measure of damages *held* erroneous, as authorizing the jury to infer an incorrect measure of damages.—*Carson v. Houssels* (Tex. Civ. App.) 290.

An instruction *held* erroneous as ignoring testimony in the case.—*Carson v. Houssels* (Tex. Civ. App.) 290.

FRAUDS, STATUTE OF.

§ 1. Agreements not to be performed within one year.

A contract to devise property to another is not within the statute of frauds, being possible of performance within a year.—*Thomas v. Fesse* (Ky.) 150.

§ 2. Real property, and estates and interests therein.

A parol agreement between adjoining owners that a survey of the boundary line shall be made, which is done, is not within the statute of frauds, and can be enforced.—*Masterson v. Bokel* (Tex. Civ. App.) 39.

A contract wherein an agent employed to sell lands is to receive his compensation from the proceeds of sales is not void, under the statute.—*Cotton v. Rand* (Tex. Civ. App.) 55.

FRAUDULENT CONVEYANCES.

§ 1. Transfers and transactions invalid.

Where one who had a contract for the entire output of chairs manufactured at a state penitentiary assigned the contract to another, to whom the chairs were actually delivered, the transaction was valid as against creditors of the assignor.—*Frankfort Chair Co. v. Buchanan* (Ky.) 179.

Where a debtor at the time he sold and conveyed his interest in a tract of land owned jointly by him with others resided on the land with his family, he was entitled to a homestead therein; and, his interest being worth less than \$1,000, his conveyance was not fraudulent as to creditors, though in the subsequent division of the land the dwelling house was not allotted to the purchaser of his interest.—*Thomas v. Payne* (Ky.) 450.

Where a grandfather advanced money for his granddaughter for the purchase of a stock of goods jointly with her husband, intending to retain in himself the title to her interest in trust for her, he may assert that interest as against the husband's creditors, though the business was conducted in the husband's name.—*Hoover v. Hawks* (Ky.) 606.

Trust deed securing several creditors *held* good as to those accepting before attaching creditors intervene.—*Kingman & Co. v. Cornell-Tebbetts Machine & Buggy Co.* (Mo.) 727.

Where a debtor attempts to prefer a creditor by a mortgage, fraud in its execution cannot be predicated on the latter's failure to accept it.—*Kingman & Co. v. Cornell-Tebbetts Machine & Buggy Co.* (Mo.) 727.

Evidence *held* sufficient to sustain a decree canceling a deed to a wife as void against subsequent creditors.—*Lander v. Ziehr* (Mo.) 742.

A voluntary deed from a husband to a wife, without any pecuniary consideration moving from the wife, is void as against all existing creditors of the husband.—*Lander v. Ziehr* (Mo.) 742.

§ 2. Rights and liabilities of parties and purchasers.

One who has conveyed his property to another to hinder and delay his creditors cannot afterwards set up the statute of frauds in avoidance

of the conveyance, in a suit by his grantee.—*Shields v. Ord* (Tex. Civ. App.) 208.

Nor can his wife, who has intervened in the action, making a claim of her separate property, set up the statute of frauds. Such claim can only be made by creditors of the grantor.—*Shields v. Ord* (Tex. Civ. App.) 208.

Evidence considered, and *held* sufficient to go to the jury, on the question of the bona fides of a wife's claim to property.—*Shields v. Ord* (Tex. Civ. App.) 208.

§ 3. Remedies of creditors.

A judgment creditor cannot maintain an action to set aside a fraudulent conveyance by one of several joint judgment debtors, unless the others are sureties or are insolvent.—*Euclid Ave. Nat. Bank v. Judkins* (Ark.) 632.

A sale cannot be set aside as fraudulent as to creditors, though the purpose of the seller to use the proceeds in paying one creditor to the exclusion of others be known to the buyer; the only remedy of the excluded creditors being to have the transaction declared to operate as an assignment under the statute.—*Hoover v. Hawks* (Ky.) 606.

A trust conveyance by a husband and wife, though voluntary or made with intent to defraud the husband's existing creditors, cannot be impeached by subsequent creditors with record notice.—*Monday v. Vance* (Tex. Civ. App.) 346.

Trustee *held* entitled to the possession of property conveyed in trust during the continuance of the trust as against subsequent grantees of the beneficiaries.—*Monday v. Vance* (Tex. Civ. App.) 346.

GAMING.

§ 1. Criminal responsibility.

Evidence *held* insufficient to convict under an indictment for playing cards at a public place, where people assembled for amusement and to dance, or where people commonly resorted for gaming.—*Harper v. State* (Tex. Cr. App.) 217.

An information for gaming in a public place *held* insufficient.—*McCarley v. State* (Tex. Cr. App.) 373.

GARNISHMENT.

§ 1. Nature and grounds.

The measure of damages for breach of warranty is the purchase money and interest from the ouster, which is sufficiently certain to support attachment and garnishment.—*Fleming v. Pringle* (Tex. Civ. App.) 553.

§ 2. Proceedings to procure.

Variance between petition and writ *held* not to exist.—*Fleming v. Pringle* (Tex. Civ. App.) 553.

§ 3. Writ or summons and notice, service, and return.

Under 1 Sayles' Civ. St. art. 1239, *held*, a return of service on a garnishee could be amended during the trial.—*Fleming v. Pringle* (Tex. Civ. App.) 553.

§ 4. Lien of garnishment and liability of garnishee.

Where a deposit was not sufficient to pay an outstanding check of which the bank had notice, and also a debt of the depositor, to secure which the bank had been served as garnishee, the bank, though it has paid out a part of the deposit on checks subsequently drawn, is liable as garnishee for the difference between the amount of the deposit and the amount of the check outstanding at the time it was served as garnishee.—*Winchester Bank v. Clark County Nat. Bank* (Ky.) 315.

§ 5. Proceedings to support or enforce.

Answer of one garnished as creditor of S., that it had funds belonging to one Mrs. S., *held*

not demurrable.—*Ragsdale* (Tex. Civ. App.) 256.

When plaintiff has no rights in hands of a garnishee, he cannot maintain judgment disposing of the fund.—*Ragsdale v. Groos* (Tex. Civ. App.) 256.

Defendant cannot complain against a garnishee on the ground that the garnishee owes only the firm of a member, and which is not the same.—*Skidmore* (Tex. Civ. App.) 256.

Where a garnishee had been served in his wife's name to garnish her.—*Fleming v. Pringle* (Tex. Civ. App.) 553.

Where garnishment plaintiff brought another action between himself and the garnishee, *held*, the issue was the same as though the garnishments remained.—*Fleming v. Pringle* (Tex. Civ. App.) 553.

Plaintiff in garnishment cannot recover on stock pledged to garnishee when the surplus applied to was not sufficient to pay.—*Hamilton v. San Antonio* (Tex. Civ. App.) 1104.

§ 6. Claims by third parties.

Holder of check drawn by one who had been accepted by another, which had been accepted by a third party, entitled to intervene in garnishment.—*Ragsdale v. Groos* (Tex. Civ. App.) 256.

GIFTS.

§ 1. Inter vivos.

Where money deposited in bank by depositor, placed to the credit of another, who accepts the deposit, there is a gift of the money deposited, though the cashier not to pay out without notifying him.—*Eversole* (Ky.) 169.

Validity of gift to minors *held* to be a fact that mother at the time of the gift was the donor for the amount.—*Thompson v. Caruthers* (Tex. Civ. App.) 1104.

GOOD FAITH.

Of purchaser, see "Bills and Notes."

GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

§ 1. Requisites and validity.

A guaranty of a debt created by a school district is estopped to be set aside on the ground that the power to create the debt had previously been exceeded, unless he affirmatively shows that the power was exceeded.—*Perry v. School District* (Ky.) 169.

§ 2. Construction and effect.

A guaranty to refund advances made by a salesman for expenses, in excess of the amount of his employment, *held* to be a continuing guaranty.—*Bacco Co. v. Waller* (Ark.) 320.

§ 3. Discharge of guaranty.

A continuing guaranty, revoked by the guarantor, is revoked by the death of the guarantor, if his estate is not liable for the debt thereafter sold on the faith of the guaranty without notice of his death.—*Lang's Adm'r* (Ky.) 154.

§ 4. Remedies of creditors.

Parol evidence *held* inadmissible to limit terms of unambiguous written guaranty.—*West-Win-free Tobacco Co. v. Waller* (Ark.) 320.

§ 5. Rights and remedies of guarantor.

Whether one indorsing a note was a maker or indorser, *held* a matter between him and the payee.—*Kingman & Co. v. Cornell-Tebbetts Machine & Buggy Co.* (Mo.) 727.

GUARDIAN AND WARD.**§ 1. Appointment, qualification, and tenure of guardian.**

Laws 25th Leg. p. 52, amending Rev. Civ. St. art. 2801, declaring that any bond required by a guardian may be made by a corporation organized in this state to issue surety bonds, is not in conflict with Gen. Laws 25th Leg. c. 165, p. 244, authorizing corporations named therein to become sureties upon various classes of bonds, and embracing both domestic and foreign corporations; and a foreign corporation authorized to do business in the state may become surety on a guardian's bond.—*Less v. Ghio* (Tex. Sup.) 502.

§ 2. Custody and care of ward's person and estate.

A receipt of a guardian *held* inadmissible to show ratification by the ward of void sale by administrator.—*Young v. Downey* (Mo.) 751.

§ 3. Sales and conveyances under order of court.

An appearance by a mother for her infant child in probate court is not binding on the child, where the mother has not been appointed as legal guardian, and is not cured by subsequent appointment.—*Young v. Downey* (Mo.) 751.

HABEAS CORPUS.**§ 1. Jurisdiction, proceedings, and relief.**

Five hundred dollars in each of three cases for cattle stealing *held* not so excessive bail as to justify the reversal of a refusal to discharge on habeas corpus, in the absence of a statement of facts.—*Ex parte Clay* (Tex. Cr. App.) 241.

Appeal from a refusal to enlarge a person held without bail to answer a criminal charge will be dismissed where he is afterwards indicted for the charge and arrested on a capias.—*Ex parte Cannon* (Tex. Cr. App.) 914.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," §§ 20-23.

In criminal prosecutions, see "Criminal Law," § 36.

HEARSAY EVIDENCE.

In civil actions, see "Evidence," § 7.

In criminal prosecutions, see "Criminal Law," § 8.

HIGHWAYS.**§ 1. Establishment, alteration, and discontinuance.**

A railroad, having maintained a crossing for 40 years over a road, *held* estopped to say the public had not acquired a prescriptive right therein.—*Galveston, H. & S. A. Ry. Co. v. Baudat* (Tex. Civ. App.) 541.

Building of a railroad across a highway *held* not to prevent the public acquiring title by prescription.—*Galveston, H. & S. A. Ry. Co. v. Baudat* (Tex. Civ. App.) 541.

Evidence *held* to show title in the public to a road by prescription.—*Galveston, H. & S. A. Ry. Co. v. Baudat* (Tex. Civ. App.) 541.

§ 2. Regulation and use for travel.

A court of equity will not grant an injunction to prevent the obstruction of a highway on vague, uncertain, and contradictory evidence.—*Carlin v. Wolff* (Mo.) 679.

Evidence of loss of profits *held* proper in action against a railroad for cutting off plaintiff's access to market by closing a crossing.—*Galveston, H. & S. A. Ry. Co. v. Baudat* (Tex. Civ. App.) 541.

A railroad having wrongfully closed a crossing and cut off plaintiff's access to market, *held*, he was justified in putting in his crop in the belief the crossing would be reopened.—*Galveston, H. & S. A. Ry. Co. v. Baudat* (Tex. Civ. App.) 541.

HOMESTEAD.**§ 1. Nature, acquisition, and extent.**

Insurance on a homestead for the benefit of the owner is not exempt from garnishment in a suit to enforce payment of a note by the owner of the homestead for money loaned him for the purpose of purchasing the homestead.—*Acruman v. Barnes* (Ark.) 319.

A covenant of warranty in a deed creates a liability as of the date of the deed, and not as of the date of eviction, and therefore, as against that liability, the grantor cannot claim a homestead in land purchased after the deed was executed.—*Benge's Adm'r v. Bowling* (Ky.) 151.

A homestead purchased with the proceeds of insurance on another homestead is exempt as against all debts against which the former homestead was exempt.—*Rule v. Murphy* (Ky.) 312; *Same v. Beadles*, *Id.*

A debtor is entitled to a homestead, as against a debt created after he acquired and occupied the property.—*Rule v. Murphy* (Ky.) 312; *Same v. Beadles*, *Id.*

Though a debtor was not entitled to a homestead as against a vendor's lien, yet, as the vendor permitted the proceeds, which were sufficient, after setting apart a homestead, to satisfy his lien, to be applied to the payment of inferior liens, as against which the debtor was entitled to a homestead, he cannot subject the homestead to pay the balance of his claim.—*Ralls v. Prather* (Ky.) 318.

Owner of land *held* to have no homestead right therein.—*St. Louis Brewing Ass'n v. Howard* (Mo.) 1046.

Evidence *held* to establish a residence homestead.—*King v. C. M. Hapgood Shoe Co.* (Tex. Civ. App.) 532.

Evidence *held* to show abandonment of a business homestead.—*King v. C. M. Hapgood Shoe Co.* (Tex. Civ. App.) 532.

Under Const. 1876, art. 16, § 51, a city lot used for raising vegetables and fruits for use of owner's family is part of the homestead.—*Anderson v. Sessions* (Tex. Civ. App.) 874.

On death of married man leaving wife only, *held*, that she was entitled to exemption of a business homestead.—*Evans v. Pace* (Tex. Civ. App.) 1094.

Evidence *held* insufficient to show a business homestead.—*Evans v. Pace* (Tex. Civ. App.) 1094.

§ 2. Transfer or incumbrance.

A grantor of land conveyed in fraud of creditors *held* to have an interest therein subject to execution.—*Alkire Grocery Co. v. Jackson* (Ark.) 459.

Mortgage *held* good as against homestead, where owner makes colorable conveyance, and grantee obtains a mortgage thereon.—*Forbes v. Thomas* (Tex. Civ. App.) 1097.

§ 3. Rights of surviving husband, wife, children, or heirs.

Where the widow has for several years used as a homestead the land on which the husband resided with his family at his death, she must be deemed to have elected to hold it as a homestead, and her vendee will not be allowed to claim an allotment of dower for her as against the infant children.—*Deboe v. Rushing* (Ky.) 613.

The widow, by selling and conveying the homestead of the decedent, cannot defeat the right of the infant children to its occupancy during their minority.—*Deboe v. Rushing* (Ky.) 613.

§ 4. Abandonment, waiver, or forfeiture.

Where the defendant failed to claim a homestead in a proceeding to subject land fraudulently conveyed to his wife, the judgment subjecting the land is a bar to his right to a homestead.—*Buffington v. Mosby* (Ky.) 192.

Where a homesteader fits up a part of his residence homestead for a store and rents it, it loses its residence homestead character.—*King v. C. M. Hapgood Shoe Co.* (Tex. Civ. App.) 532.

Changing uses of a city lot from one homestead purpose to another does not constitute an abandonment, or deprive it of its homestead character.—*Anderson v. Sessions* (Tex. Civ. App.) 874.

§ 5. Protection and enforcement of rights.

An answer averring that defendant is the owner of a homestead in the land claimed by plaintiff, and that he is a housekeeper with a family residing on the land, is not good on demurrer; there being no averment that defendant is the owner of the land, and it appearing that he could not have derived the homestead through his wife, as she is still living.—*Buffington v. Mosby* (Ky.) 192.

HOMICIDE.

§ 1. The homicide.

The refusal of deceased to permit an amputation of a limb, made necessary by a wound not necessarily fatal, *held* not to exonerate defendant of felonious homicide, under Pen. Code, arts. 652, 653.—*Franklin v. State* (Tex. Cr. App.) 951.

§ 2. Murder.

The common-law rule that an intent to kill is not necessary to constitute the offense of murder or manslaughter has not been changed by statute in Kentucky.—*Pence v. Commonwealth* (Ky.) 801.

Evidence *held* sufficient to support a conviction of murder in the first degree.—*Hedrick v. State* (Tex. Cr. App.) 252.

Evidence *held* sufficient to show that the murder was committed in the perpetration of a burglary.—*Hedrick v. State* (Tex. Cr. App.) 252.

Defendant is a principal, and not an accomplice with another who shot and killed a person through a window, after it had been agreed that defendant was to shoot him if he went out of the door.—*Pryor v. State* (Tex. Cr. App.) 375.

One convicted of murder in the second degree cannot complain of an instruction "that at the time defendant formed the design to take the life of deceased his mind was calm and deliberate," etc.—*Jackson v. State* (Tex. Cr. App.) 389.

§ 3. Assault with intent to kill.

One who shoots an officer to prevent the arrest of an offender is guilty of malicious shooting and wounding with intent to kill.—*Marcum v. Commonwealth* (Ky.) 803.

Evidence *held* sufficient to show an assault with intent to commit murder.—*Monticue v. State* (Tex. Cr. App.) 236.

An assault with intent to kill *held* not reduced to an aggravated assault because of language used by prosecutor.—*Mozee v. State* (Tex. Cr. App.) 250.

In a prosecution for an assault with intent to murder, an instruction that defendant had a right to act in self-defense, if prosecutor made the "first demonstration" against him, is not error.—*Wynne v. State* (Tex. Cr. App.) 909.

§ 4. Excusable or justifiable homicide.

Where it appeared that accused interfered to protect a woman against an assault by deceased, it was error to give an instruction limiting the right of accused to defend himself in the event the jury should believe he provoked the difficulty by wrongfully assaulting deceased.—*Brown v. Commonwealth* (Ky.) 171.

The court should have instructed the jury that it was the duty of an officer and his posse, in making an arrest, to make known their intention, and to use no more force than was necessary to make the arrest.—*Pennington v. Commonwealth* (Ky.) 818.

Where defendant was where he had a right to be, and did no overt act, *held*, that he was not required to flee, though he could have done so safely.—*State v. Hudspeth* (Mo.) 483.

Mere words, however opprobrious or insulting, cannot justify a killing.—*State v. Hudspeth* (Mo.) 483.

The fact that accused sought deceased, intending to assault him, does not preclude accused from availing himself of the law of self-defense, if deceased made the first assault without provocation.—*Airhart v. State* (Tex. Cr. App.) 214.

That one seeks to provoke a difficulty *held* not to deprive him of the right of self-defense.—*Mozee v. State* (Tex. Cr. App.) 250.

An instruction in a criminal case *held* erroneous, as submitting a case on the theory that deceased had made an attack, as defendant did not have to wait until deceased had actually assaulted him.—*Stewart v. State* (Tex. Cr. App.) 907.

Serious bodily injury, within Pen. Code, art. 679, is not necessarily such as may eventuate in death.—*Bruce v. State* (Tex. Cr. App.) 954.

§ 5. Indictment and information.

Indictment charging murder *held* to sufficiently allege that it was feloniously committed.—*State v. Rice* (Mo.) 78.

An indictment for murder by the administration of poison need not specially allege that accused knew that the drug was deadly, or that the quantity given was sufficient to cause death.—*Morrison v. State* (Tex. Cr. App.) 358.

An indictment charging accused with killing deceased by a poison is sufficient without an allegation that the act was unlawfully done.—*Morrison v. State* (Tex. Cr. App.) 358.

§ 6. Evidence—Admissibility in general.

Declarations of the deceased prior to the killing, not made in the presence of accused, were not admissible as evidence.—*Parker v. Commonwealth* (Ky.) 573.

While previous threats by deceased, and the fact of his going armed and lying in wait, may be shown by accused, the court should not single out any of these facts, and tell the jury that they would give the accused the right to slay the deceased.—*Parker v. Commonwealth* (Ky.) 573.

Declarations of deceased and other facts tending to show a criminal intimacy between deceased and the wife of accused were inadmissible as evidence, those facts being unknown to accused at the time of the assault.—*Pence v. Commonwealth* (Ky.) 801.

Though the defense was that accused had reason to believe that deceased had come to his home for the purpose of debauching his wife, evidence that deceased "was a bad man after women" was not admissible.—Pence v. Commonwealth (Ky.) 801.

Where defendant denied the writing of an anonymous letter causing the trouble with the deceased, evidence of certain facts offered by him to show the occasion therefor was inadmissible.—State v. Hudspeth (Mo.) 483.

On trial of one accused of killing another for libeling accused's wife, proof of wife's reputation as a virago and quarrelsome woman *held* incompetent.—Williams v. State (Tex. Cr. App.) 220.

On trial of one accused of killing another for libeling accused's wife, proof of the wife's reputation for chastity *held* incompetent.—Williams v. State (Tex. Cr. App.) 220.

Evidence of truth of a libel *held* competent, under Pen. Code, art. 747, subd. 2, in a trial of one accused of killing the libellant.—Williams v. State (Tex. Cr. App.) 220.

Evidence of declarations of accused before the killing *held* to show general malice, and to embrace deceased within their terms.—Williams v. State (Tex. Cr. App.) 220.

Statement of a conspirator after the killing *held* incompetent.—Williams v. State (Tex. Cr. App.) 224.

In prosecution for killing the publisher of a paper containing a libel, *held* error to admit proof that deceased did not write the libel.—Williams v. State (Tex. Cr. App.) 224.

In a prosecution for murder committed while accused was burglarizing a smoke house, evidence was admissible to show that in a conversation a month prior to the offense accused stated to witness that he was going to "rustle" his living, and knew a smoke house that he could easily get at.—Hedrick v. State (Tex. Cr. App.) 252.

Where a witness testified that he received from a certain person the shell from which the ball which killed deceased was fired, the court properly refused to allow accused to show that the person from whom the shell was received had committed a robbery.—Hedrick v. State (Tex. Cr. App.) 252.

In a prosecution for murder by poisoning, in which it was contended in defense that deceased died from a disease or by her own hand, evidence was admissible to show that deceased was apparently healthy and of a contented disposition.—Morrison v. State (Tex. Cr. App.) 358.

Where accused formed the design of killing his wife and manufacturing sufficient evidence of wealth to induce another to marry him, deeds and letters of recommendation forged by accused *held* admissible to show the motive.—Morrison v. State (Tex. Cr. App.) 358.

In a prosecution for murder by poisoning, in which the defense was that deceased died from a disease, evidence of deceased's statements that she did not suffer from such disease, made some time prior to her death, and in the absence of accused, was admissible.—Morrison v. State (Tex. Cr. App.) 358.

In a prosecution for murder by strychnine, in which witnesses testified as to the symptoms of deceased in her last sickness, the opinion of physicians as to the cause of death may be based on the testimony of the witnesses.—Morrison v. State (Tex. Cr. App.) 358.

In a prosecution for murder by poisoning, in which it was contended that deceased died from a disease or by her own hand, friends and neighbors of the deceased were competent to testify that she was apparently healthy and of a contented disposition.—Morrison v. State (Tex. Cr. App.) 358.

In a prosecution for murder the court admitted evidence of a forgery by accused, to show the motive of the crime. *Held* not erroneous, as proving an independent crime, where the court instructed that the jury should only consider the evidence in determining the motive.—Morrison v. State (Tex. Cr. App.) 358.

Where certain incriminating letters were introduced, it was not error to permit a witness to whom they were addressed to explain who accused meant by a certain person referred to therein.—Morrison v. State (Tex. Cr. App.) 358.

A homicide growing out of deceased's objections to accused's attentions to his daughter, proof of accused's attentions to others *held* incompetent.—Turner v. State (Tex. Cr. App.) 366.

Though accused be on trial for manslaughter only, his threats against deceased may be shown, notwithstanding they tend to prove murder.—Turner v. State (Tex. Cr. App.) 366.

Evidence of bruises on deceased's body, inflicted with a blunt instrument, *held* admissible as part of the *res gestae*, though the charge was by killing with a knife.—Mott v. State (Tex. Cr. App.) 368.

Where the theory of the defense involves a mutual combat, evidence that accused was the larger and stronger man is admissible.—Mott v. State (Tex. Cr. App.) 368.

The declaration of accused, on the day preceding the difficulty, that he feared he would have trouble with deceased, is admissible.—Mott v. State (Tex. Cr. App.) 368.

Testimony in a prosecution for murder *held* competent to show defendant's condition of mind immediately preceding the homicide.—Clay v. State (Tex. Cr. App.) 370.

In a prosecution for murder, evidence that deceased and another had killed defendant's brother is admissible to show motive.—Fryor v. State (Tex. Cr. App.) 375.

In a prosecution for an assault with intent to murder, evidence that defendant had a knife in his pocket *held* immaterial, where he did not draw it.—Wynne v. State (Tex. Cr. App.) 909.

In a prosecution for an assault with intent to murder, evidence that defendant had been afraid of prosecutor prior to the difficulty *held* inadmissible.—Wynne v. State (Tex. Cr. App.) 909.

Evidence of experiments *held* competent to show whether a shot could be fired from a certain point with the result accomplished.—Martin v. State (Tex. Cr. App.) 912.

On question of provocation, *held*, jury could consider insults offered accused's wife prior to the time of the killing.—Martin v. State (Tex. Cr. App.) 912.

Evidence that defendant had stated that he would stop the laying out of a road across his land, with a gun, *held* admissible, where the shooting took place while the road was being laid out.—Furlow v. State (Tex. Cr. App.) 938.

Declarations made by deceased some days after he was shot *held* inadmissible.—Franklin v. State (Tex. Cr. App.) 951.

Witness *held* incompetent to give an opinion that deceased's death was caused by a beating with a rope.—Taylor v. State (Tex. Cr. App.) 1106.

On trial for beating a stepdaughter to death, evidence that accused's wife was a small woman, and he an able-bodied man, *held* inadmissible.—Taylor v. State (Tex. Cr. App.) 1106.

Evidence of angry conversation between defendant and another shortly before a difficulty *held* inadmissible.—Woodard v. State (Tex. Cr. App.) 1122.

Testimony that before the difficulty defendant tried to create difficulty with another is

inadmissible.—Woodard v. State (Tex. Cr. App.) 1122.

Testimony of deceased wife that at her suggestion he carried his pistol on the day of the difficulty *held* admissible.—Woodard v. State (Tex. Cr. App.) 1122.

§ 7. — Dying declarations.

The dying declaration of deceased that he had no pistol was admissible in rebuttal.—Redmond v. Commonwealth (Ky.) 565.

Where the deceased was killed while in the act of entering the store of accused, his dying declaration that he had been sent to the store to make a purchase was admissible to show that he did not go there to renew a previous difficulty.—Redmond v. Commonwealth (Ky.) 565.

A dying declaration *held* incompetent, as a conclusion.—Williams v. State (Tex. Cr. App.) 220.

Statements by deceased between 30 and 60 minutes after he was stabbed *held* admissible as part of the res gestæ.—Freeman v. State (Tex. Cr. App.) 230.

§ 8. — Weight and sufficiency.

Evidence *held* to justify verdict of murder in the second degree.—McClendon v. State (Ark.) 1062.

Manslaughter in the second degree is not sustained by evidence of the killing by defendant of deceased while in the act of striking defendant's father, defendant having no knowledge of the cause of any quarrel between his father and deceased, or who began the difficulty.—State v. Harper (Mo.) 89.

Evidence *held* sufficient to justify conviction for murder in the first degree.—State v. Headrick (Mo.) 99.

Evidence *held* to support verdict of murder in second degree.—State v. Mollineaux (Mo.) 462.

Evidence considered, and *held* that issue of provoking the difficulty was presented.—Mozee v. State (Tex. Cr. App.) 250.

Under an indictment charging accused with administering strychnine to deceased, accused can be convicted on evidence showing that he laid the strychnine where deceased could get it.—Morrison v. State (Tex. Cr. App.) 358.

A confession *held* sufficiently corroborated to sustain a conviction of murder.—Sullivan v. State (Tex. Cr. App.) 375.

Evidence *held* sufficient to sustain a conviction of an assault with intent to murder.—Bean v. State (Tex. Cr. App.) 946.

Evidence *held* not to raise issue of provoking the difficulty.—Woodard v. State (Tex. Cr. App.) 1122.

§ 9. Trial—Conduct in general.

Where the killing occurred in a difficulty arising from a dispute as to the ownership of a broom, it was error to admit testimony in rebuttal contradicting the testimony of accused as to the ownership of the broom, which had been brought out by the commonwealth on cross-examination.—Redmond v. Commonwealth (Ky.) 565.

Since it is only in capital cases that the court is required to appoint counsel for indigent defendant, a conviction will not be reversed for refusal to appoint counsel for defendant, charged with murder in the second degree.—Austin v. State (Tex. Cr. App.) 249.

§ 10. — Questions for jury.

On question of adequate cause, and whether sudden passion engendered thereby was the cause of the killing, *held*, the jury could look to all the facts.—Martin v. State (Tex. Cr. App.) 912.

§ 11. — Instructions.

Where deceased was killed by accused in a difficulty which arose from the interference by ac-

cused to protect a woman against an assault by deceased, accused was entitled to an instruction as to his right to kill deceased in defense of the woman.—Brown v. Commonwealth (Ky.) 171.

The jury being instructed that the accused might use such means as appeared to him necessary or apparently necessary to protect himself from impending danger, it was not necessary to further instruct them that he had the right, being in his own house, to stand his ground.—Redmond v. Commonwealth (Ky.) 565.

Accused was not entitled to an instruction as to his right to eject deceased from his home if he had reason to believe he was there for the purpose of debauching his wife, as deceased was not asked to leave until after he was assaulted.—Pence v. Commonwealth (Ky.) 801.

Upon trial for shooting with intent to kill, defendant was not entitled to an instruction warranting acquittal if he shot in the defense of a companion whom an officer was attempting to arrest, there being nothing to show that there was any reason for the apprehension of danger to his companion at the hands of the officer.—Marcum v. Commonwealth (Ky.) 803.

Upon evidence that defendant took the life of one who was in the act of striking his father with a fence rail, without knowing the cause of the difficulty, or who began it, an instruction that if the father began the quarrel, but the taking of the life of deceased was necessary to save the father's life or to prevent great bodily harm, it was manslaughter in the fourth degree, is erroneous; it being necessary only that defendant should have good reason to believe, and did believe, that he was justified in using such force to save his father from impending peril.—State v. Harper (Mo.) 89.

Under the statutory definition of manslaughter in the second degree, it is not necessary to show that the killing was necessary to prevent a felony.—State v. Harper (Mo.) 89.

Court need not grant request for instructions already given.—State v. Headrick (Mo.) 99.

A charge on manslaughter *held* insufficient.—Williams v. State (Tex. Cr. App.) 224.

A defendant *held* entitled to a charge on the doctrine of principals as applied to a killing by the other defendant.—Williams v. State (Tex. Cr. App.) 224.

An instruction as to self-defense *held* too broad, as not stating the circumstances which would authorize defendant to arm himself and seek his adversary.—Bush v. State (Tex. Cr. App.) 238.

To justify a homicide on the ground of self-defense, either with or without threats, the danger must be apparently or really immediate, imminent, and unavoidable.—Bush v. State (Tex. Cr. App.) 238.

Where one shot merely to scare another, he was not guilty of assault with intent to kill.—Mozee v. State (Tex. Cr. App.) 250.

Where murder was committed in the perpetration of a burglary, the court properly refused to instruct on the law of self-defense.—Hedrick v. State (Tex. Cr. App.) 252.

Where, in addition to circumstantial evidence showing the guilt of accused, there was direct evidence of his confession, the court did not err in refusing to instruct on the law of circumstantial evidence.—Hedrick v. State (Tex. Cr. App.) 252.

An instruction defining murder in the first degree *held* not erroneous.—Hedrick v. State (Tex. Cr. App.) 252.

In a prosecution for murder committed in the perpetration of a nighttime burglary, the court properly instructed on the law of nighttime burglary.—Hedrick v. State (Tex. Cr. App.) 252.

Where a murder was committed in the perpetration of a burglary, the court properly refused to instruct on the law of manslaughter.—Hedrick v. State (Tex. Cr. App.) 252.

In a prosecution for murder it was not error to refuse an instruction that defendant's failure to take the stand in his own behalf should not be considered against him.—Morrison v. State (Tex. Cr. App.) 358.

In prosecution for assault with intent to kill, *held*, that charge on aggravated assault should have been given.—Chavana v. State (Tex. Cr. App.) 380.

A charge on murder in the second degree *held* unnecessary, though the evidence was circumstantial.—Morgan v. State (Tex. Cr. App.) 902.

In a prosecution for assault with intent to murder, it is not error to define "malice," instead of "malice aforethought."—Bean v. State (Tex. Cr. App.) 946.

On a trial for murder, an instruction limiting accused's right of self-defense to greatly superior physical strength of deceased *held* not erroneous.—Bruce v. State (Tex. Cr. App.) 954.

Where a child was beaten so that death resulted, *held*, that it might have been manslaughter merely.—Taylor v. State (Tex. Cr. App.) 1106.

An instruction that, if defendant sought a meeting with the deceased with "intent" to provoke a difficulty with him, he cannot plead self-defense, is erroneous.—Thomas v. State (Tex. Cr. App.) 1109.

§ 12. Appeal and error.

Where counsel for accused asked a witness if he did not go to another witness to get him to change his testimony given before the coroner, and the witness testified that he went because he believed that the other witness had not told all he knew, accused cannot complain of the witness' statement of his reason for going to the other witness.—Hedrick v. State (Tex. Cr. App.) 252.

Error in exhibiting deceased's children to the jury is not available where not excepted to.—Furlow v. State (Tex. Cr. App.) 938.

Challenges to jurors opposed to capital punishment in cases of circumstantial evidence *held* proper, in absence of showing that the case was one of purely circumstantial evidence.—Franklin v. State (Tex. Cr. App.) 951.

Insufficiency of instruction as to provoking difficulty *held* immaterial.—Winters v. State (Tex. Cr. App.) 1110.

HUSBAND AND WIFE.

See "Divorce"; "Marriage."

Right of wife to compensation for improvements made on husband's estate, see "Improvements."

§ 1. Mutual rights, duties, and liabilities.

Where land intended to be conveyed by a husband and wife was not her separate property, and she could only convey as prescribed by statute, a deed defectively executed by her, or not describing the land, cannot be corrected in equity, though she retains a consideration, she having been incompetent to contract when it was executed.—McKeynolds v. Grubb (Mo.) 822.

That a wife did not join in the execution of a deed is not material, where, outside of the land conveyed, grantor had real estate amounting in value to more than \$1,000, upon which he was living, and occupying as a home.—Driver v. White (Tenn. Ch. App.) 994.

A check signed by a wife alone, with her husband's consent, is valid.—Ragsdale v. Groos (Tex. Civ. App.) 256.

§ 2. Disabilities and privileges of coverture.

Though a note purports to be the joint obligation of husband and wife, the wife may show that she is a surety merely, and thus avoid liability thereon; a married woman not being personally liable as surety, under the act of March 15, 1894.—Skinner v. Lynn (Ky.) 167.

Under a decree empowering a married woman to contract and be contracted with as a feme sole, she had power to become surety for her husband; and having done so prior to the act of March 15, 1894, regulating the property rights of married women, she is liable on a renewal of the note thereafter executed.—Skinner v. Carr (Ky.) 799.

§ 3. Wife's separate estate.

Though Ky. St. § 2127, provides that the husband shall have no interest in the wife's property, it cannot be assumed that a crop raised by the husband on the wife's land is her property.—Sharp v. Wood (Ky.) 15.

Where a creditor of the husband seeks to subject the wife's land to the payment of the husband's debt on the ground that the husband paid for the land, the mere fact that the wife cannot show where every dollar came from that she used in paying for the land does not entitle plaintiff to the relief sought.—Ambrose v. Noell (Ky.) 570.

Evidence *held* insufficient to show that a husband had given the house and lot in question to his wife as a marriage settlement.—Branham v. Scott (Tex. Civ. App.) 88.

No presumption arises that land was purchased with the wife's separate means because the conveyance, made after the husband's death, recites that the consideration was paid by her.—Clark v. Clark (Tex. Civ. App.) 337.

§ 4. Community property.

A wife, who is a simple creditor of her husband, cannot by an equitable proceeding of receivership sequester his separate property from a fraudulent vendee, and have it applied to her debt.—Holloway v. Shuttles (Tex. Civ. App.) 296.

Evidence *held* to establish that a business of the husband was his separate property.—Holloway v. Shuttles (Tex. Civ. App.) 296.

A judgment creditor may sell merely the interest of the husband in the community property, where the husband does not object, notwithstanding the wife's share is liable under the judgment.—Campbell v. Antis (Tex. Civ. App.) 343.

Where property presumptively community is taken on execution against the husband, the burden is on the wife to prove it is her separate estate acquired during coverture.—Simpson v. Texas Tram & Lumber Co. (Tex. Civ. App.) 655.

Where a husband and wife actually separate for good, a division of their community property fairly consummated is effectual, and what each obtains becomes separate property.—Batia v. Batia (Tex. Civ. App.) 664.

Where a husband and wife separated for good, and divided their community property, the mere fact that they years afterwards began living together again did not convert it into community property.—Batia v. Batia (Tex. Civ. App.) 664.

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 8.

IMPEACHMENT.

Of witness, see "Witnesses," § 4.

IMPRISONMENT.

See "False Imprisonment."

IMPROVEMENTS.

On premises demised, see "Landlord and Tenant," § 4.
Public improvements, see "Municipal Corporations," § 6.

Where a wife expends her separate means on the improvement of land of her husband's father, on the faith that he would allow her an interest therein, and on his advice, she will be protected to the extent that the improvements enhance the land.—*Dunn v. Dunn* (Tenn. Ch. App.) 119.

IMPUTED NEGLIGENCE.

See "Negligence," § 2.

INCEST.

Evidence held sufficient to sustain conviction.—*State v. Kimes* (Mo.) 104.

Cross-examination of a witness for the state held not to make evidence that prosecutrix never charged any one but defendant with the paternity of the child admissible.—*Poyner v. State* (Tex. Cr. App.) 376.

Cross-examination of prosecutrix held not to make her statement, after the birth of the child, that accused was its father, admissible.—*Poyner v. State* (Tex. Cr. App.) 376.

The admission of a statement of accused that accused was the father of the child held prejudicial.—*Poyner v. State* (Tex. Cr. App.) 376.

In the absence of an attempt to impeach prosecutrix's testimony as to the paternity of the child, the state cannot show that she never charged any one but accused with its paternity.—*Poyner v. State* (Tex. Cr. App.) 376.

INCUMBRANCES.

On homestead, see "Homestead," § 2.

INDEMNITY.

See "Guaranty."

INDIANS.

Marriage between Indians and white persons, see "Marriage."

A purchaser at an execution sale of improvements on public domain owned by a citizen of the Cherokee Nation acquires no title; Comp. Laws 1892, art. 10, § 226, prohibiting such sale.—*Hastings v. Whitmer* (Ind. T.) 967.

INDICTMENT AND INFORMATION.

Effect of variance between indictment and proof, see "Adultery."

For failing to supply separate coaches for white and colored persons, see "Civil Rights."

In prosecutions for rape, see "Rape," § 2.

Requisites and sufficiency of indictment for murder, see "Homicide," § 5.

Sufficiency of description of property stolen, see "Larceny," § 2.

Sufficiency of indictment charging threats, see "Threats."

— for burglary, see "Burglary," § 2.

— for forgery, see "Forgery."

— for receiving deposits after insolvency, see "Banks and Banking," § 1.

— for unlawful assembly, see "Unlawful Assembly."

— for violating local option law, see "Intoxicating Liquors," § 3.
Sufficiency of information for gaming, see "Gaming," § 1.

§ 1. Formal requisites of indictment.

The fact that an indictment found in the Laurel circuit court is headed "Liquor Circuit Court" does not render it invalid, it not being essential for the jurisdictional facts to appear in the caption.—*Mitchell v. Commonwealth* (Ky.) 17.

The conclusion of an indictment need not restate the time or place of the commission of the offense.—*State v. Hudspeth* (Mo.) 483.

§ 2. Requisites and sufficiency of accusation.

An allegation that the offense was committed in "one thousand eight hundred nine seven" shows its commission in 1897.—*Wood v. State* (Tex. Cr. App.) 235.

Evidence that deceased was generally known in the neighborhood by the name alleged in the indictment is sufficient to support the allegation of the name of deceased as contained in the indictment.—*Morrison v. State* (Tex. Cr. App.) 358.

An information under Rev. St. art. 3964 (Pen. Code, art. 289b), must allege that accused is a parent or guardian of children within the scholastic age.—*Dunlap v. State* (Tex. Cr. App.) 392.

An information held not fatally defective which alleged that an election had been held to determine whether the sale or exchange of liquor should be prohibited where the order for the election recited that it was to determine whether the sale should be prohibited.—*Segars v. State* (Tex. Cr. App.) 398.

§ 3. Motion to quash or dismiss, and demurrer.

An indictment will not be quashed because the names of the special grand jury which indicted defendant were handed to the marshal by the regular judge of the criminal court.—*State v. Hudspeth* (Mo.) 483.

The fact that a private prosecutor examined witnesses before the grand jury held not a ground for quashing the indictment.—*Wilson v. State* (Tex. Cr. App.) 916.

§ 4. Amendment.

An indictment held to charge a distinct offense, so as not to justify its substitution for one already filed.—*State v. Welborn* (Ark.) 829.

Under Code Cr. Proc. art. 549, a defendant's name may be changed wherever it occurs in an indictment, on his suggesting his true name.—*Colter v. State* (Tex. Cr. App.) 945.

§ 5. Issues, proof, and variance.

Proof held not a material variance.—*Barfield v. State* (Tex. Cr. App.) 908.

INFANTS.

See "Guardian and Ward."

Contributory negligence on part of children, see "Negligence," § 2.

Custody and support on divorce of parents, see "Divorce," § 3.

§ 1. Contracts.

A person may avoid his deed when he comes of age, though he represented himself of age when he made the deed.—*Ridgeway v. Herbert* (Mo.) 1040.

A warranty deed executed on coming of age held a disaffirmance of a previous transfer to another grantee.—*Ridgeway v. Herbert* (Mo.) 1040.

A person cannot ratify his act as a minor, if he does not know he was under-age when the act was done.—*Ridgeway v. Herbert* (Mo.) 1040.

It is a question for the court whether a deed executed by a person on coming of age is a disaffirmance of a previous transfer to a different grantee.—*Ridgeway v. Herbert* (Mo.) 1040.

If a minor wastes the consideration of his deed, he may disaffirm without restoring it.—*Ridgeway v. Herbert* (Mo.) 1040.

The fact that a person alleged in a pleading that he was of age when he executed a deed does not estop him from afterwards disaffirming for nonage.—*Ridgeway v. Herbert* (Mo.) 1040.

§ 2. Actions.

Affidavit held to be sufficient to authorize prosecution of action by next friend.—*Illinois Cent. R. Co. v. Nall* (Ky.) 147.

In an action against the widow and infant heirs of the purchaser to enforce a vendor's lien on land, a judgment for the sale of land rendered without service of process on the infants must be reversed on their appeal, though a guardian ad litem was appointed to defend for them.—*Wooldridge v. Harding* (Ky.) 162.

INFORMATION.

Criminal accusation, see "Indictment and Information."

INJUNCTION.

§ 1. Nature and grounds in general.

Injunction lies only for a threatened wrong for which no adequate legal remedy is afforded, and a court of equity will not issue an injunction to prevent the performance of an act already consummated.—*Carlin v. Wolff* (Mo.) 679.

§ 2. Subjects of protection and relief.

A lot owner cannot restrain destruction of trees on land dedicated for a public park, where he sustains no special injury.—*Hulse v. Powell* (Tex. Civ. App.) 862.

§ 3. Actions for injunctions.

Where a verified bill is met by a sworn answer, at least one witness is required to sustain the bill.—*Brown v. Daniels* (Tenn. Ch. App.) 991.

§ 4. Preliminary and interlocutory injunctions.

Where the petition was dismissed under a submission for judgment, a temporary injunction was properly dissolved without notice or proof.—*Shackelford v. Williams* (Ky.) 614.

§ 5. Permanent injunction and other relief.

Where plaintiff in partition confesses bill to enjoin the sale, it will be enjoined, though the bill fail as to partition defendants.—*Brown v. Daniels* (Tenn. Ch. App.) 991.

§ 6. Violation and punishment.

Evidence held not to show a violation of an injunction restraining the bringing of certain suits.—*State v. Adcock* (Tenn. Ch. App.) 992.

INSOLVENCY.

See "Assignments for Benefit of Creditors."
Of corporation, see "Corporations," § 3.

INSTRUCTIONS.

In civil actions, see "Trial," § 6.
In criminal prosecutions, see "Criminal Law," § 22; "Homicide," § 11.
In prosecution for larceny, see "Larceny," § 4.
— for rape, see "Rape," § 2.

INSURANCE.

§ 1. Control and regulation in general.

Under Acts 1897, p. 208, § 1, insurance companies in certain cities held authorized to fix

rates of insurance by board of underwriters.—*State ex rel. Crow v. Etna Ins. Co.* (Mo.) 413; *Same v. American Cent. Ins. Co., Id.*

§ 2. Insurance agents and brokers.

Where the company issues a policy upon an application taken by a solicitor, it is estopped to deny his agency, though the agent who employed him had no authority to do so.—*London & Lancashire Fire Ins. Co. v. Gerteson* (Ky.) 617.

Knowledge of the agent who represents the company in the transaction is the knowledge of the company.—*London & Lancashire Fire Ins. Co. v. Gerteson* (Ky.) 617.

A bill by a subagent of the general agent of a life insurance company against the company for services in securing a policy while acting as such subagent held demurrable.—*Moore v. New York Life Ins. Co.* (Tenn. Ch. App.) 1021.

§ 3. Insurable interest.

A creditor to whom the debtor assigns a policy of insurance on his life acquires no interest therein beyond his debt, as he has no insurable interest beyond that.—*Barbour's Adm'r v. Larue's Assignee* (Ky.) 5.

§ 4. The contract in general.

Where an insurance policy admits, without violence, of either of two interpretations, that interpretation will be adopted which will cover the loss, in preference to that which will defeat the claim.—*Mutual Ben. Life Ins. Co. v. Dunn* (Ky.) 20.

Contract of insurance intended to be performed in the state held governed by the laws of the state.—*Sieders v. Merchants' Life Ass'n of United States* (Tex. Civ. App.) 547.

§ 5. Assignment or other transfer of policy.

The assignment of a policy of life insurance to one who has no insurable interest in the life insured is void as against public policy.—*Schlamp v. Berner's Adm'r* (Ky.) 312.

§ 6. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

A company held estopped to repudiate its liability on a policy when insured was induced to make inaccurate statements as to date of inventory and as to former fire in his application by its agent.—*Rissler v. American Cent. Ins. Co.* (Mo.) 755.

§ 7. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

The beneficiary is not estopped by the act of the insured, her husband, in accepting a certificate of extended insurance for a larger amount, but for a shorter term, than that which the net reserve purchased; there being neither allegations nor proof that the insured was acting as her agent.—*Mutual Ben. Life Ins. Co. v. Dunn* (Ky.) 20.

Upon the failure to pay a premium when due, the net reserve, under the terms of a particular policy, was to be applied to the purchase of term insurance for the face of the policy, and not for that amount plus the dividend additions; thus purchasing insurance for a longer term than if it were for the larger amount.—*Mutual Ben. Life Ins. Co. v. Dunn* (Ky.) 20.

The beneficiary named in the policy has a vested interest, not only in current insurance, but in the extended insurance purchased by the net reserve, upon the failure to pay a premium when due.—*Mutual Ben. Life Ins. Co. v. Dunn* (Ky.) 20.

The condition in a policy requiring a watchman to be kept on duty at all hours of the night requires the use of only ordinary care in keeping a watchman.—*London & Lancashire Fire Ins. Co. v. Gerteson* (Ky.) 617.

The company cannot rely on a condition that the policy shall be void if the title is not absolute, or if the property shall cease to be occupied or operated, if it knew at the time it issued the policy that the title was not absolute, or that the property was not to be occupied.—*London & Lancashire Fire Ins. Co. v. Gerteson* (Ky.) 617.

§ 8. Extent of loss and liability of insurer.

The "co-insurance clause" limiting the risk to such proportion of the loss as the sum insured bears to the value of the whole property covered, is valid.—*Pennsylvania Fire Ins. Co. v. Moore* (Tex. Civ. App.) 878.

§ 9. Actions on policies.

Where some of the property embraced in a fire insurance policy belonged to a firm, and other property embraced therein belonged to a single member of the firm, the entire cause of action having been vested by assignment in one plaintiff, he may, in a single action, recover the full amount of the policy.—*Kenton Ins. Co. v. Osborne* (Ky.) 306.

In an action on a policy, which provided that insured should take an inventory annually and keep books showing his daily transactions, testimony as to the value of the property destroyed is competent, though defendant had a right to demand the production of the books.—*Rissler v. American Cent. Ins. Co. (Mo.)* 755.

In an action on a policy which insures two classes of property in designated amounts, a petition which alleges loss of both classes by one fire, and seeks to recover for both, is not open to the objection of having joined two causes of action in one count.—*Rissler v. American Cent. Ins. Co. (Mo.)* 755.

INTEREST.

See "Usury."

Insurable interest, see "Insurance," § 3.

INTERROGATORIES.

To jury, see "Trial," § 7.

INTESTACY.

See "Descent and Distribution."

INTOXICATING LIQUORS.

Validity of statute punishing sale of, see "Constitutional Law," § 4.

§ 1. Local option.

An instruction that the local option law was in force *held* not error, where the county judge's certificate was in evidence.—*Segars v. State* (Tex. Cr. App.) 238.

§ 2. Offenses.

An information *held* not to charge an offense, under the provisions of Pen. Code, art. 405.—*West v. State* (Tex. Cr. App.) 247.

Liquor is not intoxicating, within the local option law, where it does not contain alcohol in such a proportion that it would produce intoxication when taken in such quantities as may be practically drunk.—*Malone v. State* (Tex. Cr. App.) 381.

The mere fact that defendant did not make any profit out of the transaction would not deprive it of the character as a sale of intoxicating liquors, where the other constituent elements are present.—*Ladwig v. State* (Tex. Cr. App.) 390.

A certificate of the county judge *held* not to show a publication of the result of an election for local option under Rev. St. art. 3391.—*Ladwig v. State* (Tex. Cr. App.) 390.

It is unnecessary that an intoxicating liquor be manufactured and sold with intent that it be used as a beverage to come within the prohibition of the local option law.—*Pike v. State* (Tex. Cr. App.) 395.

A sale, in a local option district, except on prescription or for sacramental purposes, as allowed by the statute, is a violation of the law, regardless of the intent or purpose thereof.—*Pike v. State* (Tex. Cr. App.) 395.

§ 3. Criminal prosecutions.

The testimony of a druggist that the regulation requirement of Jamaica ginger is 90 per cent. alcohol and 4 per cent. ginger was sufficient to authorize the jury to conclude that it was intoxicating, if evidence of that fact was required.—*Mitchell v. Commonwealth* (Ky.) 17.

As it is a matter of common knowledge that Jamaica ginger is an intoxicant and a spirituous liquor, it was not necessary to prove that fact.—*Mitchell v. Commonwealth* (Ky.) 17.

An information charging accused with the unlawful sale of intoxicating liquors by means of a "blind tiger," but omitting to state the name of the seller, or that his name is unknown, is defective.—*Segars v. State* (Tex. Cr. App.) 211.

An indictment for violating the local option law *held* sufficient.—*Shilling v. State* (Tex. Cr. App.) 240.

In a prosecution for violating the local option law, the court in its instructions may assume the existence of the law, where there is uncontradicted evidence of its existence.—*Shilling v. State* (Tex. Cr. App.) 240.

In a prosecution for violating the local option law, it is not error to refuse evidence impeaching a prosecuting witness offered while the prosecuting attorney is making his closing arguments.—*Shilling v. State* (Tex. Cr. App.) 240.

In a prosecution for selling intoxicating liquors in a justice's precinct where the sale is forbidden, evidence as to how many votes were cast at the election is harmless.—*Shilling v. State* (Tex. Cr. App.) 240.

Evidence *held* not to support an allegation that defendant gave a prescription for liquor without personally examining the party to whom given and finding him sick.—*McQuery v. State* (Tex. Cr. App.) 247.

An allegation that defendant, "as a regular practicing physician," gave a prescription for liquor, does not charge that defendant was a regular practicing physician.—*McQuery v. State* (Tex. Cr. App.) 247.

In a prosecution for violating the local option law it is error to instruct that the law is in effect, where proof of the publication of the result of the election was made by parol.—*Malone v. State* (Tex. Cr. App.) 381.

In a prosecution for violating the local option law, evidence of a sale by another, five years previously, of the liquor of a similar name, which was intoxicating, *held* inadmissible.—*Malone v. State* (Tex. Cr. App.) 381.

In a prosecution for a violation of the local prohibition law, where it is alleged that the election determining that the sale should be prohibited in the Seventh precinct of Bell county was held in 1892, evidence that local option was in effect in the whole of Bell county under a former election is irrelevant.—*Ladwig v. State* (Tex. Cr. App.) 390.

It will be presumed that a meeting of county commissioners' court, at which an order directing an election to determine whether liquor shall be sold was made, was held pursuant to a special call therefor.—*Ladwig v. State* (Tex. Cr. App.) 390.

An instruction on a trial for violating a local option law *held* not prejudicial to accused.—*Frickie v. State* (Tex. Cr. App.) 394.

In a prosecution for a sale on Sunday, the 7th of a certain month, testimony that the prosecuting witness was seen drunk on a Sunday evening in the early part of the month, with another witness, who testified that he was once with him, and drank liquor which the prosecutor bought of defendant, *held* admissible.—Pike v. State (Tex. Cr. App.) 395.

In a prosecution for selling intoxicating liquor, evidence of other sales of the same compound is admissible on the question of intent.—Pike v. State (Tex. Cr. App.) 395.

Evidence *held* admissible, in a prosecution for selling blackberry cordial in violation of the local option law, on the issue as to whether it was intoxicating.—Pike v. State (Tex. Cr. App.) 395.

A charge defining intoxicating liquor *held* harmless error if inaccurate, since it is unnecessary to define it because commonly understood.—Pike v. State (Tex. Cr. App.) 395.

Evidence *held* to show that liquor sold by defendant was intoxicating.—Pike v. State (Tex. Cr. App.) 395.

§ 4. Civil damage laws.

It is error to charge the jury that plaintiff had ever withdrawn notice to defendant not to sell liquor to her husband, there being no evidence to sustain it.—Tarkington v. Brunett (Tex. Civ. App.) 274.

That a wife either failed to give or withdrew notice to one saloon keeper against selling liquor to her husband does not affect her right of action against other saloon keepers to whom such notice had been given.—Tarkington v. Brunett (Tex. Civ. App.) 274.

Since the very fact that liquor was sold to a husband makes the wife an aggrieved party, under the civil damage law, it is error to raise an issue by an instruction as to her being an aggrieved party, where no grounds of estoppel were shown.—Tarkington v. Brunett (Tex. Civ. App.) 274.

Since a wife has a right of action against a saloon keeper for selling liquor to her husband, if he is an habitual drunkard, regardless of notice given, the implied withdrawal of such notice will not defeat her right of action, in the absence of fraud.—Tarkington v. Brunett (Tex. Civ. App.) 274.

In an action by a wife under the civil damage law, it is error to admit evidence that she had brought suits against other saloon keepers, since she had a right to sue all who had sold liquor to her husband.—Tarkington v. Brunett (Tex. Civ. App.) 274.

ISSUES.

In civil actions, see "Pleading," § 7.
Presented for review on appeal, see "Appeal and Error," § 2.

JEOPARDY.

Former jeopardy bar to prosecution, see "Criminal Law," § 3.

JOINT ADVENTURES.

Evidence showed that plaintiff contributed the money and defendant the skill for their joint benefit in a venture. Plaintiff knew nothing about the business, and entrusted it to defendant. *Held*, that plaintiff is entitled to recover one-half of the profits which accrued from the venture.—Wetmore v. Crouch (Mo.) 738.

Where the conditions are such that an agreement for equal division of the profits in a joint venture is implied, that implication is conclusive, and will not be changed by the interpretation that the parties, by their actions, seemed to put

upon the contract.—Wetmore v. Crouch (Mo.) 738.

Where one party contributed the money and the other the skill for their joint benefit in a venture, the law implies an equal division of the profits, in the absence of an express agreement.—Wetmore v. Crouch (Mo.) 738.

JOINT TENANCY.

See "Tenancy in Common."

JUDGES.

See "Justices of the Peace."

§ 1. Special or substitute judges.

A party cannot object that a *de facto* judge tried the cause in the lower court.—Hamilton v. State (Tex. Cr. App.) 217.

JUDGMENT.

§ 1. Nature and essentials in general.

Personal judgment for costs *held* void, the citation being void on its face, and the judgment being against M., if living, and his heirs if dead, and M. being dead when judgment was rendered, and his heirs nonresidents.—Bumpass v. Anderson (Tex. Civ. App.) 1103.

§ 2. By default.

Entry of order that cause "is continued by consent" does not show sufficient appearance and waiver of service to support a judgment by default.—Flowers v. Jackson (Ark.) 462.

A defendant *held* entitled to the vacation of a judgment by default where his attorney was prevented from making an appearance by reason of sickness.—Southwestern Telegraph & Telephone Co. v. Jennings (Tex. Civ. App.) 288.

§ 3. On trial of issues.

In an action to enforce a contract of sale, wherein both parties allege a sale, but differ as to the consideration, a decree canceling the contract as inequitable is erroneous, not being within the issues.—Hoover v. Binkley (Ark.) 73.

A judgment enforcing a lien asserted by cross petition, which was rendered before service of process thereon, was premature.—Rulo v. Murphy (Ky.) 312; Same v. Beadles, Id.

A judgment which is neither authorized by the pleading nor the verdict *held* erroneous.—Clark v. Clark (Tex. Civ. App.) 337.

§ 4. Entry, record, and docketing.

Where the clerk has failed to enter a default judgment, pursuant to an entry in his minutes, the court may at a subsequent term, without notice to defendant, enter judgment *nunc pro tunc*.—Monarch v. Brey (Ky.) 191.

Where an entry in the clerk's minutes gives the style of the case and the case number, followed by the abbreviation "Judgt.," there is sufficient basis for the entry of a judgment *nunc pro tunc*.—Monarch v. Brey (Ky.) 191.

§ 5. Amendment, correction, and review in same court.

A mistake in a description in a judgment *held* susceptible of correction by *nunc pro tunc* entry of the circuit court.—Elliott v. Buffington (Mo.) 408.

§ 6. Opening or vacating.

A party seeking to set aside judgment obtained by surprise must have asked a continuance to procure evidence to meet the evidence which surprised him.—Robinson v. Davis (Ark.) 66.

Where a petition to vacate a judgment because of newly-discovered evidence does not clearly show that petitioner was without fault,

a demurrer will be sustained, with leave to amend.—*Robinson v. Davis* (Ark.) 66.

Where a judgment in partition is entered without objection, it cannot be indirectly assailed by motion to set it aside after the expiration of the time for appeal.—*Windes v. Earp* (Mo.) 1044.

In a suit to set aside a judgment taken in absence of defendant's attorney, *held*, that a finding that the attorney was not sufficiently diligent could not be disturbed.—*Padgett v. Evans* (Tex. Civ. App.) 513.

§ 7. Collateral attack.

A judgment cannot be collaterally attacked for want of jurisdiction because the petition does not state a cause of action.—*Winningham v. Trueblood* (Mo.) 399.

Defendant in attachment, upon whom notice is served only by publication, which notice is fatally defective by reason of a misdescription of the land in suit, may attack such judgment in a subsequent ejectment suit.—*Winningham v. Trueblood* (Mo.) 399.

§ 8. Construction and operation in general.

An opinion of the supreme court *held* to have determined that a sum fixed by a contract was to be regarded as liquidated damages for a breach thereof.—*May v. Crawford* (Mo.) 693.

Failure of prevailing party to appeal from a part of the decree unfavorable to him, *held* not to affect his rights under the decree.—*Custer v. Russey* (Tenn. Ch. App.) 126.

Decree in an action by one railroad company to compel others to contribute for expense of repairs to depot used jointly *held* to merely declare a joint ownership in the depot, and not in the land.—*East Tennessee, V. & G. Ry. Co. v. Nashville, C. & St. L. Ry. Co.* (Tenn. Ch. App.) 202.

§ 9. Merger and bar of causes of action and defenses.

Plaintiff, after taking judgment for part of the relief sued for, cannot maintain another action for the remainder of the relief sought in that action.—*Gatewood v. Long* (Ky.) 569.

The conduct of a mother in suffering judgment by default to be rendered against her in favor of her daughter for board for the entire time she had lived with the daughter is inconsistent with her claim that her son was liable to her for one-half of the amount thus recovered against her, under an agreement by him and his sister to pay each one-half of her board.—*Duvall v. Duvall* (Ky.) 791.

A judgment determining the title to one piece of property is not conclusive between the same parties as to another piece of property, though the titles be derived in the same way.—*Long v. Louisville & N. R. Co.* (Ky.) 807.

Defendant *held* not entitled to have unsuccessful plaintiff enjoined from further suing on same title.—*Ridgeway v. Herbert* (Mo.) 1040.

Decree of foreclosure *held* not to bar a title acquired by a party to the action during its pendency, but before judgment.—*Rogers v. Southern Pine Lumber Co.* (Tex. Civ. App.) 26.

§ 10. Conclusiveness of adjudication.

Judgment in prior action of unlawful detainer *held* inadmissible in a subsequent suit of the same character between different parties.—*Brown v. Woolsey* (Ind. T.) 965.

Under the law of the Cherokee Nation (Comp. Laws 1892, art. 10, § 226), *held*, that a judgment of the supreme court thereof was not conclusive, as between parties to an action, and those claiming under them, as to the title to an improvement on the public domain of the nation.—*Hastings v. Whitmer* (Ind. T.) 967.

The wife is not bound by a judgment allotting to her husband her share of her deceased father's real estate, where she was not a party to the proceeding.—*Black v. Black* (Ky.) 458.

The estoppel of a judgment is mutual, and if it binds one of the parties so as to prevent him from showing the truth it binds the other.—*Bridges v. McAllister* (Ky.) 603.

A decree in ejectment which dismisses suit as to certain tracts sought to be recovered is not an adjudication of title to such lands.—*Driver v. White* (Tenn. Ch. App.) 994.

Recitals in the order of sale and of confirmation *held* not to preclude persons claiming under the purchaser from questioning the validity of a prior trust deed on the property.—*Rogers v. Southern Pine Lumber Co.* (Tex. Civ. App.) 26.

A judgment for plaintiff, which decreed to him only a part of the land sued for, *held* not an adjudication of the title of the tract sued for except as to the part decreed to him.—*City of Liberty v. Paul* (Tex. Civ. App.) 657.

§ 11. Actions on judgments.

Error in admitting proof of an assignment of a judgment *held* not cured by fact that there was other proof of the assignment.—*Wonderly v. Lafayette County* (Mo.) 745.

An assignment of a United States circuit court judgment is not a judicial proceeding, within Rev. St. 1889, § 4881, and admissible in evidence as such.—*Wonderly v. Lafayette County* (Mo.) 745.

Issuance of writ of garnishment *held* not an execution, so as to prevent a judgment being barred by limitations.—*Shields v. Stark* (Tex. Civ. App.) 540.

§ 12. Pleading and evidence of judgment as estoppel or defense.

A judgment which has been superseded, and from which an appeal is presumed to be pending, cannot be pleaded as a defense.—*Smith v. Farmers' Bank of Vine Grove* (Ky.) 451.

JUDICIAL SALES.

Of property of decedent, see "Executors and Administrators," § 4.

As against plaintiff's lien on realty for services, one who purchased the land at a sale made to satisfy his debt against the decedent has no title, plaintiff not being a party to the action in which the sale was made.—*Thomas v. Feese* (Ky.) 160.

It was error to confirm a sale of land made under a judgment which had been superseded.—*Rulo v. Murphy* (Ky.) 312; *Same v. Beadles*, *Id.*

A judgment confirming a sale of land will not be set aside at the instance of the purchaser on the ground of mistake, where it does not appear that the mistake was mutual, or that there was any casualty or misfortune preventing him from filing exceptions to the commissioner's report.—*Goodman v. Connelly* (Ky.) 427.

JURISDICTION.

Amount in controversy as affecting jurisdiction on appeal, see "Appeal and Error," § 1.

Equitable, see "Equity," § 1.

Of justices' courts in civil cases, see "Justices of the Peace," § 1.

Of particular courts, see "Courts."

Waiver of, by appearance, see "Appearance."

JURY.

Custody and conduct, see "Criminal Law," § 25.

Instructions in civil actions, see "Trial," § 6.

— in criminal prosecutions, see "Criminal Law," § 22.
 Questions for jury in civil actions, see "Trial," § 5.
 — in criminal prosecutions, see "Criminal Law," § 21.
 Taking case or question from jury at trial, see "Trial," § 5.
 Verdict in civil actions, see "Trial," § 7.
 — in criminal prosecutions, see "Criminal Law," § 26.

§ 1. Right to trial by jury.

Where parties submit to arbitration under a statute providing that the award should be made a rule of court, they waive their right to a jury trial on issues raised by a motion to vacate the award.—*Koerner v. Leathe* (Mo.) 96.

§ 2. Summoning, attendance, discharge, and compensation.

The regular panel of the jury for a term consists of 24 persons.—*Stone v. Saunders* (Ky.) 788.

As a juror who is sworn and serves more than one day is entitled to pay, whether he be called a member of the regular panel or a bystander, it must be presumed that the amount ordered by the circuit court to be paid to the jurors in attendance is correct, in the absence of anything to rebut that assumption.—*Stone v. Saunders* (Ky.) 788.

Special veniremen cannot be excused in the absence of defendant.—*Clay v. State* (Tex. Cr. App.) 370.

A failure of the sheriff, in his return of a special venire of 140 jurors, to make a full showing as to diligence to secure service on the 7 not served, is not ground for quashing the venire, since, on proper motion, a more complete return could be obtained.—*Furlow v. State* (Tex. Cr. App.) 938.

It is not error to refuse to issue an attachment for an absent juror, when it appears that such juror is a nonresident, and therefore not liable to serve.—*Furlow v. State* (Tex. Cr. App.) 938.

A juror who has not been summoned cannot be attached for nonattendance.—*Furlow v. State* (Tex. Cr. App.) 938.

Failure of the court to offer to have absent jurors summoned is not error, in the absence of a motion by defendant.—*Furlow v. State* (Tex. Cr. App.) 938.

§ 3. Competency of jurors, challenges, and objections.

Challenge for cause held properly overruled.—*Missouri, K. & T. Ry. Co. v. Elliott* (Ind. T.) 1067.

Ten minutes' time in which to make defendant's challenges to the jury, in a murder case, is an unreasonable allowance.—*State v. Hudspeth* (Mo.) 483.

Where a juror has scruples against the infliction of the death penalty on circumstantial evidence, it is not error for the court to explain circumstantial evidence by means of an illustration, though the illustration states an extreme case.—*Morrison v. State* (Tex. Cr. App.) 358.

If a juror's opinion is based on the truth of rumors and newspaper articles, and he states that, if the evidence presents a different state of facts, he will disregard his opinion, the juror is competent.—*Morrison v. State* (Tex. Cr. App.) 358.

Accused cannot complain of the action of the court in overruling a challenge for cause, whereby he was compelled to exhaust his peremptory challenges, if, after the juror was excused, but one more juror was drawn, and accused accepted him without objection.—*Morrison v. State* (Tex. Cr. App.) 358.

Trial by jury impaneled from a special venire, not all present, cannot be compelled unless summoned as required by law.—*Clay v. State* (Tex. Cr. App.) 370.

Under the statute disqualifying a juror who has a bias or prejudice a railroad employé is disqualified from being a juror in an action against the railroad company.—*Houston & T. C. Ry. Co. v. Smith* (Tex. Civ. App.) 500.

In an action against a bank, under Rev. St. art. 3207, it is not an abuse of discretion to sustain a challenge for cause to jurors who are related to stockholders of the bank within the third degree.—*National Bank of Dangerfield v. Ragland* (Tex. Civ. App.) 661.

JUSTICES OF THE PEACE.

§ 1. Civil jurisdiction and authority.

Under Acts 1876, p. 155, defining the powers and jurisdiction of the justices' courts, providing for what amount such courts shall have jurisdiction in civil matters and in foreclosure of mortgages on personal property, construed with Acts 1876, p. 17, defining the jurisdiction of county courts, a justice has jurisdiction in an action to foreclose a mortgage where the mortgaged property does not exceed the value of \$200, the jurisdiction not being determined by adding the demand and the value of the security.—*Conner v. Jacobs* (Tex. Civ. App.) 640.

§ 2. Procedure in civil cases.

In replevin proceedings in a justice's court, where written pleadings are not required, it is not necessary to specifically plead usury.—*Sparks v. Robinson* (Ark.) 460.

Remittitur of part of amount sued on, filed after appeal from judgment of justice, held not binding on plaintiff in the county court, where judgment was annulled by the appeal.—*Hall v. Miller* (Tex. Civ. App.) 36.

§ 3. Review of proceedings.

On appeal from a justice, defendant can plead as new matter that plaintiff's claim is on contract in restraint of trade.—*S. S. White Dental Mfg. Co. v. Hertzberg* (Tex. Civ. App.) 355.

JUSTIFICATION.

Of homicide, see "Homicide," § 4.

KNOWLEDGE.

Effect of ignorance of cause of action on limitation, see "Limitation of Actions," § 2.

LANDLORD AND TENANT.

§ 1. Creation and existence of the relation.

Facts held evidence of assumption of lease.—*Dulin v. Knechtel* (Tex. Civ. App.) 350.

§ 2. Landlord's title and reversion.

A purchase by the tenant of the leased property under execution against the landlord does not inure to the landlord's benefit, and therefore the landlord is not entitled to rent from the time of such purchase.—*Smith v. Scanlan* (Ky.) 152.

After the title of a purchaser of public land has been forfeited for the nonpayment of interest due the state, a tenant of the purchaser may acquire title.—*Lang v. Crothers* (Tex. Civ. App.) 271.

§ 3. Terms for years.

Tenants assigning their lease held liable for the rental value of a tract included for the whole term sold, they having denied to the landlord that they had sublet this tract, whereby he was induced to refuse possession of it to the transferee.—*Lewis v. Richardson* (Ind. T.) 969.

Evidence *held* to show a certain tract included in the sale of a lease.—*Lewis v. Richardson* (Ind. T.) 969.

A sublease *held* an assignment of the original lease, making the subtenant liable for performance of the covenants.—*Campbell v. Cates* (Tex. Civ. App.) 268.

§ 4. Premises, and enjoyment and use thereof.

A tenant authorized to make improvements to be designated by the landlord, in lieu of rent, is not entitled to credit for improvements made without request.—*Randolph v. Mitchell* (Tex. Civ. App.) 297.

§ 5. Rent and advances.

Where, by agreement, property is taken out of hands of receiver, and defendant put in possession, under agreement to pay rent, and he fails so to do, he, and not the receiver, is liable therefor.—*Reeves v. Reeves* (Ind. T.) 1079.

An action for rent on a lease against an assignee thereof may be brought in the county where the rent is payable.—*Campbell v. Cates* (Tex. Civ. App.) 268.

A lease authorizing a forfeiture for nonpayment of rent does not require a willful nonpayment.—*Randolph v. Mitchell* (Tex. Civ. App.) 297.

A claimant of property held under a distress warrant, who dismissed his bond in the county court, which had jurisdiction, is deemed to have abandoned his claim, unless he has such judgment of dismissal set aside.—*Taylor v. St. Louis Type Foundry* (Tex. Civ. App.) 304.

One instituting action by distress warrant may recover unliquidated damages on petition afterwards filed.—*Fulcher v. West* (Tex. Civ. App.) 342.

Affidavit for distress warrant *held* to state that the amount claimed was due, and that cause existed for issuing warrant.—*Fulcher v. West* (Tex. Civ. App.) 342.

Liability determined of lessee who failed to perform.—*Dulin v. Knechtel* (Tex. Civ. App.) 350.

Evidence *held* not to show that notes were executed with reference to the relation of landlord and tenant between the parties thereto, so as to create a lien.—*Liles v. Price* (Tex. Civ. App.) 526.

LANDS.

See "Public Lands."

LARCENY.

See "Robbery."

§ 1. Offenses, and responsibility therefor.

Under Mansf. Dig. § 1655, *held*, that it was error to convict for the larceny of unbranded cows running at large.—*Dansby v. United States* (Ind. T.) 1083.

In a prosecution for theft from the person, an instruction to acquit if defendant took the property with prosecutor's consent, and afterwards decided to appropriate it, *held* proper.—*O'Toole v. State* (Tex. Cr. App.) 244.

Agreement in indictment for theft as bailee *held* to sufficiently allege contract by defendant under which he obtained the property.—*Elton v. State* (Tex. Cr. App.) 245.

Where a person executed a bill of sale of a steer belonging to another, the title passes to the buyer, so as to render the seller liable for theft, although at the time the bill of sale was executed the steer was running at large upon the range.—*Chowning v. State* (Tex. Cr. App.) 946.

§ 2. Prosecution and punishment—Indictment and information.

A description of the stolen property in an indictment for theft of cattle as "one head of cattle" is sufficient.—*Matthews v. State* (Tex. Cr. App.) 915.

§ 3. — Evidence.

In a prosecution for horse theft, evidence as to what became of the horses after defendant's arrest is inadmissible.—*Clay v. State* (Tex. Cr. App.) 212.

There is a fatal variance where the indictment charges theft of an animal from a certain person, and the evidence shows such person the owner, and that the animal had strayed, and been taken possession of by another, from whom it was stolen.—*Williams v. State* (Tex. Cr. App.) 904.

Defendant's statement as to when he got the property may be disproved by circumstantial evidence.—*Barfield v. State* (Tex. Cr. App.) 908.

Evidence of a witness that he had been employed by defendant to butcher a cow in 1898, and had been requested by defendant to conceal the hide, *held* inadmissible, where there was no evidence that such cow was the animal alleged to have been stolen.—*Wilson v. State* (Tex. Cr. App.) 916.

Under Rev. St. art. 4930, *held*, that an instruction that certified copy of brand of alleged owner of stolen animal, recorded since theft, might be considered on question of ownership, is error.—*Chowning v. State* (Tex. Cr. App.) 946.

That a bill of sale of the stolen property, made by defendant, was not acknowledged or recorded, does not render it inadmissible in a prosecution for the theft.—*Chowning v. State* (Tex. Cr. App.) 946.

That the bill of sale of a stolen animal, executed by defendant, described the brand on the animal as different from the one used by the owner, does not render it inadmissible in a prosecution for the theft, but merely affects its weight.—*Chowning v. State* (Tex. Cr. App.) 946.

Under Rev. St. art. 4980, admission of testimony, in a prosecution for the theft of a steer, that the alleged owner had used a certain brand for 19 years, without limiting it to the question of identity, is error.—*Chowning v. State* (Tex. Cr. App.) 946.

§ 4. — Trial and review.

It was error to give an instruction which might have been construed as authorizing the jury to convict accused of the offense of horse stealing if he received the horse knowing it to be stolen.—*Gilbert v. Commonwealth* (Ky.) 804.

Accused was not entitled to have the jury specially instructed as to the defense that she had found the money alleged to have been stolen, it being sufficient to instruct them that they must believe, in order to convict, that she did feloniously "take, steal, and carry away" the money.—*Hall v. Commonwealth* (Ky.) 814.

In a prosecution for theft of cattle, an instruction to acquit defendant if he bought them *held* sufficient as bearing on his testimony that he traded for them.—*May v. State* (Tex. Cr. App.) 242.

A refusal to admit proof of an explanation of possession, given by defendant when arrested, is not error where defendant's own testimony respecting the explanation is uncontradicted.—*May v. State* (Tex. Cr. App.) 242.

An instruction that possession of stolen property is not of itself sufficient to authorize a conviction of theft is incorrect.—*May v. State* (Tex. Cr. App.) 242.

It is not error to refuse an instruction on the weight of the evidence.—*Edmonds v. State* (Tex. Cr. App.) 393.

An instruction *held* erroneous, as raising an issue not in the case.—*Williams v. State* (Tex. Cr. App.) 904.

A charge on circumstantial evidence *held* insufficient.—*Roebuck v. State* (Tex. Cr. App.) 914.

On a prosecution for theft of cattle, an instruction that, if the jury believed accused won the animal at a game of cards, they must acquit, *held* proper.—*Pace v. State* (Tex. Cr. App.) 953.

LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," § 24.

LEASES.

See "Landlord and Tenant."

LEVEES.

On sale for nonpayment of levee tax under Act Feb. 15, 1893, and amendatory acts, *held* error, where there was no irregularity in the sale, to allow redemption therefrom.—*Banks v. Directors of St. Francis Levee Dist.* (Ark.) 830.

LEVY.

Of attachment, see "Attachment," § 2.

Of execution, see "Execution," § 2.

Of taxes, see "Taxation," § 2.

LIBEL AND SLANDER.

§ 1. Words and acts actionable, and liability therefor.

The words, "You stole a hundred dollars of his money," *held* actionable per se.—*Ledgerwood v. Elliott* (Tex. Civ. App.) 872.

§ 2. Actions.

Where the words are actionable per se, defendant is not entitled to an instruction directing the jury to find for him unless they believe the words were spoken maliciously, as the law imputes malice.—*Jones v. Todd* (Ky.) 452.

A release *held* inadmissible in resistance of plaintiff's cause of action, where it had been previously canceled on the trial of another count in the petition.—*Courtney v. Blackwell* (Mo.) 668.

To justify a slander charging theft, a theft committed in connection with a transaction other than the one charged may be proven.—*Quaid v. Tipton* (Tex. Civ. App.) 284.

A charge, in an action for slander in charging plaintiff with theft, *held* erroneous, as not requiring a finding that plaintiff appropriated the property with felonious intent.—*Quaid v. Tipton* (Tex. Civ. App.) 284.

It is not incumbent on plaintiff to prove the falsity of the slanderous charge.—*Ledgerwood v. Elliott* (Tex. Civ. App.) 872.

The fact that defendant believed a current rumor concerning plaintiff, of the same tenor as the slander, is properly submitted in mitigation of damages.—*Ledgerwood v. Elliott* (Tex. Civ. App.) 872.

The fact that the alleged slander was spoken under provocation by misconduct of the plaintiff may be shown in mitigation of damages.—*Ledgerwood v. Elliott* (Tex. Civ. App.) 872.

LIENS.

See "Mechanics' Liens."

Attachment liens, see "Attachment," § 2.

Landlord's lien for rent, see "Landlord and Tenant," § 5.

Of attorney for compensation, see "Attorney and Client," § 2.

A contract *held* to give a material man a lien, independent of the statute.—*Wilson v. Vick* (Tex. Civ. App.) 45.

Where the lien is given by contract, independent of the statute, the ownership of the land by the person executing the contract, or his authority, need not be shown.—*Wilson v. Vick* (Tex. Civ. App.) 45.

Parol evidence that material agreed to be furnished by written contract had been delivered before the contract was made *held* admissible to show a consideration for the contract.—*Wilson v. Vick* (Tex. Civ. App.) 45.

LIMITATION OF ACTIONS.

See "Adverse Possession," § 1.

§ 1. Statutes of limitation.

A husband threw down on the table several notes and mortgages, and told his wife to take what she wanted, as an inducement to secure a divorce. *Held* not such overpayment by mistake as will take the case out of the statute of limitations.—*Richardson v. Bales* (Ark.) 321.

The 12-months statute of limitation has no application to an action against a city for injury to property.—*City of Louisville v. Seibert* (Ky.) 310.

Under Ky. St. § 2519, providing that no action for relief from fraud or mistake shall be brought 10 years after the making of the contract or the perpetration of the fraud, the court should have sustained a demurrer to an answer seeking relief on the ground of mistake in a deed executed more than 10 years before the answer was filed.—*Elam v. Haden* (Ky.) 455.

Implied trusts are not excepted from the statute of limitations.—*Clarke v. Seay* (Ky.) 599.

An action for relief on ground of fraud is barred after the lapse of five years from the time the fraud could, by ordinary diligence, have been discovered.—*Clarke v. Seay* (Ky.) 599.

The two-years period of limitation *held* not a bar to a counterclaim, in an action on a note, growing out of a partnership settlement.—*Peel v. Giesen* (Tex. Civ. App.) 44.

§ 2. Computation of period of limitation.

Plaintiff's right of action for breach of a contract whereby F. promised that upon the death of himself and his wife plaintiff should have all the property they left did not accrue until the death of F.'s wife, who survived him.—*Thomas v. Feese* (Ky.) 150.

Limitation does not begin to run against the commonwealth until it has consented to be sued.—*Commonwealth v. Haly* (Ky.) 430.

Ky. St. § 2526, providing that a personal representative may sue within one year after his qualification for a personal injury to the intestate, does not apply where the personal representative does not qualify until after the period of limitation has expired.—*Louisville & N. R. Co. v. Brantley's Adm'r* (Ky.) 585.

Ky. St. § 2531, providing for the suspension of the statute of limitations during the debtor's absence from the state, does not apply to non-resident debtors.—*Clarke v. Seay* (Ky.) 599.

Running of limitations *held* terminated by the filing of a replication, though the matters therein were subsequently alleged in an amended petition.—*Courtney v. Blackwell* (Mo.) 668.

Amendment *held* to state a new cause of action, which did not prevent bar of limitation.—*Cotton v. Rand* (Tex. Sup.) 838.

The knowledge of the ancestor that a deed executed by him, absolute in form, was in fact a mortgage, is not imputable to his heirs or devisees, so as to set limitations running against

them before actual knowledge on their part.—*Rice v. Ward* (Tex. Sup.) 844.

An amendment setting up a demand for damages for failure to deliver all the goods contracted for in an action for money overpaid held a new cause of action, and is barred if the statute has run against the claim at the time of amendment.—*Nelson v. Brenham Compress Oil & Mfg. Co.* (Tex. Civ. App.) 514.

Petition held a commencement of the suit in relation to the assumption of a note within the statute, though making no other reference to it than by referring to the recital in the deed by which it was assumed.—*Smith v. Farmers' Loan & Trust Co.* (Tex. Civ. App.) 515.

Absence from state of subsequent grantee of land does not suspend statute, where right depends on enforcement of judgment against immediate grantee.—*Miller v. Anders* (Tex. Civ. App.) 897.

§ 3. Acknowledgment, new promise, and part payment.

The bar of the statute is postponed by an unconditional acknowledgment in writing of the execution and validity of a note and a promise to pay it, executed and delivered before the statute had run.—*Kelly v. Telle* (Ark.) 633.

Payments on a note secured by vendor's lien on land extend the period of limitation, not only as between the parties, but as against a subsequent purchaser of the land in lien.—*Cook v. Union Trust Co.* (Ky.) 600.

Payments on a note secured by a mortgage extend the period of limitation, not only as to the debtor, but as to a subsequent purchaser of the mortgaged land, and as to the wife of the mortgagor, who united in the mortgage, relinquishing her dower.—*Clift v. Williams* (Ky.) 821.

The four-years period of limitation held no bar to an action on a note which had been kept alive under Rev. St. 1895, § 3370.—*Montague County v. Meadows* (Tex. Civ. App.) 556.

LIQUIDATED DAMAGES.

See "Damages," § 2.

LIQUORS.

See "Intoxicating Liquors."

LIVE STOCK.

Injuries from operation of railroads, see "Railroads," § 4.

LOANS.

By associations, see "Building and Loan Associations."

LOCAL LAWS.

See "Statutes," § 2.

LOCAL OPTION.

Traffic in intoxicating liquors, see "Intoxicating Liquors," § 1.

LOGS AND LOGGING.

A contract for the sale of logs construed.—*Tilford v. Dotson* (Ky.) 583.

LUMBER.

See "Logs and Logging."

51 S.W.—75

MAINTENANCE.

See "Champerty and Maintenance."

MALICE.

See "Malicious Prosecution," § 2.

MALICIOUS PROSECUTION.

§ 1. Want of probable cause.

The advice of counsel will constitute probable cause only when reasonable diligence was used to learn the facts on which the advice of counsel was sought.—*Ahrens & Ott Mfg. Co. v. Hoeher* (Ky.) 194.

Certain facts held to be sufficient to constitute probable cause for a prosecution for grand larceny.—*Ahrens & Ott Mfg. Co. v. Hoeher* (Ky.) 194.

§ 2. Malice.

As the motive must be improper or wrongful to constitute malice in malicious prosecution, it was error to instruct the jury that malice means "the intentional doing of a wrongful act to the injury of another, without justification or legal excuse therefor."—*Ahrens & Ott Mfg. Co. v. Hoeher* (Ky.) 194.

§ 3. Actions.

The court should tell the jury what facts constitute probable cause, that being a question of law for the court, and allow the jury to determine whether those facts are proved.—*Ahrens & Ott Mfg. Co. v. Hoeher* (Ky.) 194.

The court should grant defendant's request for an instruction to the effect that he is not liable, although the plaintiff was in fact innocent, unless the prosecution was both malicious and without probable cause.—*Ahrens & Ott Mfg. Co. v. Hoeher* (Ky.) 194.

Any information defendant had tending to connect the plaintiff with the offense is admissible in evidence to show probable cause and absence of malice.—*Ahrens & Ott Mfg. Co. v. Hoeher* (Ky.) 194.

MANDAMUS.

§ 1. Subjects and purposes of relief.

The writ will not issue to compel the circuit court to take jurisdiction of a cause after it has erroneously granted a change of venue therein.—*State ex rel. Herriford v. McKee* (Mo.) 421.

An order granting a change of venue being reviewable on appeal or error, mandamus will not issue to correct it, though the aggrieved party, by failing to except, lost his right to have it so reviewed.—*State ex rel. Herriford v. McKee* (Mo.) 421.

§ 2. Jurisdiction, proceedings, and relief.

A petition for a writ to compel the circuit court to take jurisdiction of a cause in which it had erroneously granted a change of venue held insufficient.—*State ex rel. Herriford v. McKee* (Mo.) 421.

On attack by mandamus on an order of the circuit court granting a change of venue, the order attacked will be presumed to be correct until the contrary appears.—*State ex rel. Herriford v. McKee* (Mo.) 421.

A petition to compel school trustees to enroll petitioner's children in a school census held insufficient, where there were no allegations of a demand and refusal to comply.—*Burrell v. Blanchard* (Tex. Civ. App.) 46.

Mandamus to compel taking of school census held improper, under the pleading.—*Burrell v. Blanchard* (Tex. Civ. App.) 46.

Mandamus will issue on the sworn allegations of the complainant, when they are sufficient, and are met only by a general denial.—*Burrell v. Blanchard* (Tex. Civ. App.) 46.

MANDATE.

See "Mandamus."

MARRIAGE.

See "Breach of Marriage Promise"; "Divorce"; "Husband and Wife."

It was proper to dismiss without prejudice an action to annul a marriage where it appeared that the parties were again living together as husband and wife.—*Hoffman v. Hoffman* (Ky.) 176.

Where an action to annul a marriage was dismissed, pursuant to defendant's motion, on the ground that the parties were living together as husband and wife, the order is to be regarded as dismissing the cause without prejudice.—*Hoffman v. Hoffman* (Ky.) 176.

A marriage between a white man and Indian woman is governed by the law of the state where performed, and not by Indian customs.—*Banks v. Galbraith* (Mo.) 105.

MARRIED WOMEN.

See "Husband and Wife."

MARSHALS.

Of United States, see "United States Marshals."

MASTER AND SERVANT.

§ 1. Master's Liability for injuries to servant—Nature and extent in general.

A railway company held liable for the act of a switchman in moving an engine out of his way, resulting in the killing of an employé who was thereunder, cleaning it.—*Galveston, H. & S. A. Ry. Co. v. Masterson* (Tex. Civ. App.) 1091.

§ 2. — Tools, machinery, appliances, and places for work.

A railroad company is liable to a bridge carpenter employed by it for an injury to his hand resulting from furnishing for his use timbers which were so covered with splinters as to render the handling of them dangerous.—*Louisville & N. R. Co. v. Semonis* (Ky.) 612.

A railroad company is liable for an injury to a brakeman on a train from coming in contact with a mail bag on a mail crane near the track, if the mail crane is erected closer to the track than is reasonably necessary to enable mails to be taken by the levers furnished by the United States government for catching the bag.—*Louisville & N. R. Co. v. Milliken's Adm'r* (Ky.) 796.

An inspection of a freight car held presumed to have been a proper one, in an action by a brakeman for injuries caused by rotten sills.—*Oglesby v. Missouri Pac. Ry. Co.* (Mo.) 758.

A railroad company held not liable for injuries to a brakeman caused by defects in a car that were not revealed by inspection.—*Oglesby v. Missouri Pac. Ry. Co.* (Mo.) 758.

A servant of a railway company held not entitled to recover for injuries, where he was familiar with the work, and the risk was patent, and arose from natural causes, and not from defective appliances.—*Houston & T. O. R. Co. v. Martin* (Tex. Civ. App.) 641.

§ 3. — Methods of work, rules, and orders.

A railroad company is liable to a bridge carpenter for an injury to his hand resulting from its failure to furnish a sufficient number of hands to handle the timber.—*Louisville & N. R. Co. v. Semonis* (Ky.) 612.

§ 4. — Warning and instructing servants.

Where the ballast has been temporarily removed from between the ties at a switch, and cannot be replaced before dark, either notice should be given to servants having occasion to use the track in discharge of their duties, or a light should be placed there to warn them of the danger, and for injury to a brakeman resulting from the failure to take such precaution the company is liable.—*Louisville & N. R. Co. v. Bowcock* (Ky.) 580.

§ 5. — Fellow servants.

Train dispatcher and locomotive fireman held not fellow servants.—*Missouri, K. & T. Ry. Co. v. Elliott* (Ind. T.) 1067.

Defendant railroad company is liable to plaintiff, a laborer on one of its gravel trains, for an injury resulting from the falling upon him of a board on the car, the section boss being negligent in starting the train when the board was insufficiently fastened, the plaintiff having no notice of the danger.—*Louisville & N. R. Co. v. Hawkins* (Ky.) 426.

The negligence of the section boss in starting the train when the board was insufficiently secured was sufficiently indicated by the averment that the injury was caused by the negligence of defendant's servants in running and operating the train.—*Louisville & N. R. Co. v. Hawkins* (Ky.) 426.

A switchman on one engine is not a fellow servant of a switchman on another engine, though in the same yards, where each belongs to a separate crew, under direction of its own foreman.—*Galveston, H. & S. A. Ry. Co. v. Masterson* (Tex. Civ. App.) 1091.

§ 6. — Risks assumed by servant.

The risk of injury to a brakeman from the track not being ballasted to the surface at a switch outside the yards of the company is one of the ordinary risks of the service, provided the track is substantially in the same condition as at similar places along the road.—*Louisville & N. R. Co. v. Bowcock* (Ky.) 580.

The unusual speed of a freight train is not negligence, as to a brakeman.—*Louisville & N. R. Co. v. Milliken's Adm'r* (Ky.) 796.

A brakeman does not absolutely assume the risk of a low bridge, so as to relieve the company of a liability for failure to warn him.—*Ft. Worth & R. G. Ry. Co. v. Kime* (Tex. Civ. App.) 558.

There was no error in charging that a servant assumes all risk "naturally" incident to his employment.—*Missouri, K. & T. Ry. Co. of Texas v. St. Clair* (Tex. Civ. App.) 666.

§ 7. — Contributory negligence of servant.

Though a brakeman injured in coupling cars unnecessarily assumed a position more than ordinarily dangerous, yet if the engineer backed the moving cars at an unusual speed, whereby he caused the injury, when he might, by ordinary care, have known of the dangerous position of the brakeman, the company is liable.—*Louisville & N. R. Co. v. Adams' Adm'r* (Ky.) 577.

Ordinary care required to be used by a brakeman for his own safety is such as may be usually expected of persons of ordinary prudence under like circumstances, considering the perils attendant on the business.—*Louisville & N. R. Co. v. Bowcock* (Ky.) 580.

A brakeman is bound by a rule forbidding brakemen to get between the rails to couple or uncouple cars while in motion, if he knew, or by the exercise of ordinary care ought to have known, it, the company not being required to read the rule to him, but only to give him a reasonable opportunity to learn it, and having a right to presume, especially after he had been for a long time in its service, that he knew how he was required to discharge his duties.—*Louisville & N. R. Co. v. Bowcock* (Ky.) 580.

The fact that an employé's acts, in connection with others, occasioned threatened danger to the employer's property, *held* not to preclude a recovery for death caused in his attempt to ward off the danger.—*Houston & T. C. Ry. Co. v. Smith* (Tex. Civ. App.) 506.

It is the duty of the master to exercise ordinary care to furnish the servant a safe place in which to work, and the servant may assume that the master has performed such duty.—*San Antonio & A. P. Ry. Co. v. Brooking* (Tex. Civ. App.) 537.

A servant is under no obligation to ascertain defects in the place furnished by the master for him to work in. He is only bound to exercise ordinary care in prosecuting his work there.—*San Antonio & A. P. Ry. Co. v. Brooking* (Tex. Civ. App.) 537.

§ 8. — Actions.

Evidence as to precautions taken after servant was injured was competent.—*Champion Ice-Manufacturing & Cold-Storage Co. v. Carter* (Ky.) 16.

As it was not a part of plaintiff's duty to inspect the appliance, the court properly refused to instruct the jury that their verdict must be for defendant, if plaintiff had equal opportunity with defendant to know of the defect; it being sufficient to instruct them that plaintiff could not recover if he knew of the defect, or could have known of it by the exercise of ordinary care.—*Champion Ice-Manufacturing & Cold-Storage Co. v. Carter* (Ky.) 16.

Evidence that the rule was habitually violated with the assent of the company or its officers in charge of plaintiff is admissible, it being then a question for the jury whether plaintiff was in the proper discharge of his duties, and free from contributory negligence, in going between the rails to uncouple cars.—*Louisville & N. R. Co. v. Bowcock* (Ky.) 580.

Whether a brakeman was guilty of contributory negligence in sitting on top of a car, with his feet hanging over the side, was a question for the jury; there being evidence that it is customary for brakeman to occupy that position, because impracticable for them to stand all the time on long runs.—*Louisville & N. R. Co. v. Milliken's Adm'x* (Ky.) 796.

Verdict that a fireman was injured by lurch of engine *held* against preponderance of the evidence.—*San Antonio & A. P. Ry. Co. v. Bolster* (Tex. Civ. App.) 41.

In an action for causing the death of a brakeman, evidence *held* sufficient to justify a submission of an issue whether the conductor was negligent.—*Houston & T. C. Ry. Co. v. Smith* (Tex. Civ. App.) 506.

In an action for causing the death of a brakeman, an instruction to find for the railroad company if deceased failed to keep a lookout *held* misleading.—*Houston & T. C. Ry. Co. v. Smith* (Tex. Civ. App.) 506.

In an action for causing the death of a brakeman, a submission of an issue of defective brake *held* proper, as it might have been the proximate cause of the accident.—*Houston & T. C. Ry. Co. v. Smith* (Tex. Civ. App.) 506.

Charge denying defendant's liability *held* to embrace the idea that, to render it liable, the accident must have been one that might easily

have been anticipated.—*Houston & T. C. R. Co. v. Speake* (Tex. Civ. App.) 509.

Complaint in action for injuries to railroad employé by lumber falling from the car *held* to allow evidence of negligence in running the car too fast.—*Houston & T. C. R. Co. v. Speake* (Tex. Civ. App.) 509.

Evidence *held* not to require a finding that an employé had been adequately warned of the dangers of his work.—*Ft. Worth & R. G. Ry. Co. v. Kime* (Tex. Civ. App.) 558.

Leaving the question of negligence entirely to the jury, *held* not error.—*Missouri, K. & T. Ry. Co. of Texas v. St. Clair* (Tex. Civ. App.) 666.

In an action for personal injury alleged to be due to negligence in leaving a car in an improper position, there was no error in refusing to instruct not to consider evidence as to darkness at the time of the accident to determine negligence.—*Missouri, K. & T. Ry. Co. of Texas v. St. Clair* (Tex. Civ. App.) 666.

Contributory negligence, by failure of a railway company's employé to place a red flag on a car under which he worked, in violation of a custom, *held* a question for the jury.—*Gulf, C. & S. F. Ry. Co. v. Harris* (Tex. Civ. App.) 864.

Negligence of a railway company's foreman, in failing to place a red flag on a car, in violation of a custom or rule, *held* a question for the jury.—*Gulf, C. & S. F. Ry. Co. v. Harris* (Tex. Civ. App.) 864.

MEASURE OF DAMAGES.

See "Damages," § 4.

For breach of contract of sale, see "Sales," § 5.

For false representations, see "Fraud," § 2.

For wrongful attachment of goods, see "Attachment," § 7.

In actions for trespass, see "Trespass," § 1.

MECHANICS' LIENS.

§ 1. Right to lien.

Fixtures erected on land can be affected with a lien for materials furnished to erect them only by operation of the statute.—*Nicholstone City Co. v. Smalley* (Tex. Civ. App.) 527.

An agent unauthorized to improve his principal's realty cannot charge it with a lien for materials furnished him therefor.—*Nicholstone City Co. v. Smalley* (Tex. Civ. App.) 527.

§ 2. Proceedings to perfect.

Failure to give notice of claim in the time and manner prescribed by statute *held* not to defeat a lien of which owner had notice.—*Padgett v. Dallas Brick & Construction Co.* (Tex. Civ. App.) 529.

The requirement of the statute as to the service of a notice of claim is complied with by service on a member of a church building committee of an unincorporated society.—*Padgett v. Dallas Brick & Construction Co.* (Tex. Civ. App.) 529.

§ 3. Operation and effect.

A mechanic's lien, under Rev. St. art. 3294, attaches to buildings erected on the lands thereafter, and takes precedence over a lien for the erection of such buildings.—*Cain v. Texas Building & Loan Ass'n* (Tex. Civ. App.) 879.

§ 4. Enforcement.

The owner of property subject to a mechanic's lien may insist on his nonexempt property being first subjected thereto, before selling his homestead.—*King v. C. M. Hapgood Shoe Co.* (Tex. Civ. App.) 532.

MENTAL SUFFERING.

As grounds for damages, see "Damages," § 1.

MINORS.

See "Infants."

MISREPRESENTATION.

See "Fraud."

MONOPOLIES.**§ 1. Trusts and other combinations in restraint of trade.**

Act March 6, 1899, subjecting insurance companies to a penalty for entering into a combination to fix the premiums, does not apply to combinations effected outside the state, not intended to affect insurance in Arkansas.—*State v. Lancashire Fire Ins. Co.* (Ark.) 633.

A complaint against an insurance company to recover the penalty prescribed by Act March 6, 1899, for combining to fix premiums, *held* sufficient as against a general demurrer.—*State v. Aetna Fire Ins. Co.* (Ark.) 638.

Laws 1893, p. 97, making it an offense for others than agents of a railroad company to sell its tickets, does not create a monopoly.—*Janin v. State* (Tex. Cr. App.) 1126.

MORTGAGES.

Cancellation of building association mortgages, see "Building and Loan Associations."
Of personal property, see "Chattel Mortgages."

§ 1. Requisites and validity.

Evidence *held* to show ratification of mortgage though obtained by duress.—*Loud v. Hamilton* (Tenn. Ch. App.) 140.

Evidence *held* insufficient to show duress in the making of a mortgage.—*Loud v. Hamilton* (Tenn. Ch. App.) 140.

An instrument *held* to be a mortgage, and not a conditional deed.—*Jefferies v. Hartel* (Tex. Civ. App.) 653.

§ 2. Construction and operation.

Evidence *held* to show that the assignee of a vendor's lien mortgage took it with notice that there was other security for the debt, sufficient to satisfy it.—*Interstate Building & Loan Ass'n v. Tabor* (Tex. Civ. App.) 300.

§ 3. Rights and liabilities of parties.

The petition in an action by the mortgagor against the trustee under a trust deed *held* not to show the trustee's liability under an agreement with the mortgagor in relation to the sale.—*Staples v. Shackelford* (Mo.) 1032.

Possession *held* sufficient to charge person taking mortgage on land with notice of title.—*Pride v. Whitfield* (Tex. Civ. App.) 1100.

§ 4. Assignment of mortgage or debt.

The purchaser of notes secured by a trust deed acquires the title under the deed as incident to the notes, without a formal assignment of the deed.—*German-American Bank v. Carondelet Real-Estate Co.* (Mo.) 691.

§ 5. Transfer of property mortgaged or of equity of redemption.

Where land was conveyed by deed whereby the grantee, as a part of the consideration, undertook to discharge certain mortgages executed by the grantor, specifying the amounts, the mortgagees have a lien therefor as for unpaid purchase money, though the mortgages were invalid because the mortgagor, while having the power to sell the land and dispose of the proceeds, had no power to execute a mortgage thereon.—*Dunn v. Shannon* (Ky.) 14.

§ 6. Payment or performance of condition, release, and satisfaction.

A vendor's mortgage on a homestead *held* released as against the wife of the owner by the

purchaser of the mortgage fraudulently inducing her to sign a new mortgage and a release of certain collateral for the debt.—*Interstate Building & Loan Ass'n v. Tabor* (Tex. Civ. App.) 300.

An extension of note secured by a mortgage on land without the consent of a subsequent owner *held* not to release the land from the lien.—*Montague County v. Meadows* (Tex. Civ. App.) 556.

§ 7. Foreclosure by exercise of power of sale.

A sale by the trustee at the request of the maker of a deed of trust after the debt secured by it had been paid *held* to pass the legal title.—*Montague County v. Meadows* (Tex. Civ. App.) 556.

The fact that the tenants of a vendor remained in possession as tenants of a person for whose benefit the land was sold *held* no notice to one who in good faith took a mortgage from the purchaser that he held the title as trustee for such person.—*Montague County v. Meadows* (Tex. Civ. App.) 556.

§ 8. Foreclosure by action.

Mortgagee is not entitled to a receiver, where the value of the property is twice the amount of the debt.—*Rogers v. Southern Pine Lumber Co.* (Tex. Civ. App.) 26.

The appointment of a receiver, at the instance of the mortgagor, in a suit to enjoin foreclosure, *held* improper, under Rev. St. art. 4882.—*Rogers v. Southern Pine Lumber Co.* (Tex. Civ. App.) 26.

An answer in an action to foreclose a mortgage on a homestead *held* to sufficiently allege that plaintiff purchased it with notice of other security for the debt.—*Interstate Building & Loan Ass'n v. Tabor* (Tex. Civ. App.) 300.

§ 9. Redemption.

Trustee *held* not necessary or proper party to an action to redeem.—*Staples v. Shackelford* (Mo.) 1032.

A petition to redeem from a sale under a trust deed *held* not to state a cause of action against the beneficiary or her husband.—*Staples v. Shackelford* (Mo.) 1032.

MOTIONS.

New trial in criminal prosecutions, see "Criminal Law," § 27.

Presentation of objections for review, see "Appeal and Error," § 2.

Relating to pleadings, see "Pleading," § 6.

MUNICIPAL CORPORATIONS.

See "Counties."

§ 1. Creation, alteration, existence, and dissolution.

The provision of the charter of cities of the first class fixing a special limitation of six months as to actions against such cities for injuries to person and property is unconstitutional.—*City of Louisville v. Seibert* (Ky.) 310.

§ 2. Legislative control of municipal acts, rights, and liabilities.

Ky. St. § 3650, providing that all ordinances "now in force" shall remain in force until altered or repealed by ordinance, does not give validity to a void ordinance.—*East Tennessee Tel. Co. v. City of Russellville* (Ky.) 308.

§ 3. Proceedings of council or other governing body.

Under Ky. St. § 2834, providing that at least two weeks shall elapse between the passage from one board of the general council to another of an ordinance of a city of the first class for an original street improvement, such an ordinance passed by the board of council-

men March 17th and by the board of aldermen March 31st is valid.—*City of Louisville v. Selvage* (Ky.) 447; *Selvage v. Lucas, Id.*

§ 4. Property.

Joint resolution March 8, 1879, *held* to limit city of Galveston's control of Pelican Island to public uses.—*Weekes v. City of Galveston* (Tex. Civ. App.) 544.

Act Feb. 2, 1856, conveying Pelican Island to the city of Galveston, *held* in trust for the public.—*Weekes v. City of Galveston* (Tex. Civ. App.) 544.

§ 5. Contracts in general.

A city may execute a note for a just and legal obligation.—*City of Mineral Wells v. Darby* (Tex. Civ. App.) 351.

In an action by a city to annul a lease as ultra vires, *held*, the city should not have been taxed with half the costs.—*Weekes v. City of Galveston* (Tex. Civ. App.) 544.

Where a city made a lease ultra vires, and afterwards revoked it, it was not liable to the lessee's assignee for the sum he had paid for the lease, the city having received none of it.—*Weekes v. City of Galveston* (Tex. Civ. App.) 544.

§ 6. Public improvements.

Civ. Code, § 694, subsec. 3, providing that no sale of indivisible property shall be made until all debts that are a lien thereon are due, does not apply to a proceeding to sell property to satisfy one of several installments of an assessment for street improvements.—*District of Clifton, Campbell County, v. Schneider* (Ky.) 13.

It is the duty of the court to make such correction under a prayer for all general relief.—*City of Louisville v. Selvage* (Ky.) 447; *Selvage v. Lucas, Id.*

Neither the city nor the property owner is liable for costs or interest until the apportionment is corrected.—*City of Louisville v. Selvage* (Ky.) 447; *Selvage v. Lucas, Id.*

Under Ky. St. § 2834, it is the duty of the court to correct an inequality in the apportionment of the cost of footway crossings as between the territory on the two sides of the improvement, and to render judgment for the amounts which should have been assessed.—*City of Louisville v. Selvage* (Ky.) 447; *Selvage v. Lucas, Id.*

To authorize such inequality, the petition must aver that the streets alleged to constitute the boundary of a square existed as such at the time of the passage of the ordinance for the improvement.—*City of Louisville v. Selvage* (Ky.) 447; *Selvage v. Lucas, Id.*

The fact that the ordinance required from the contractor a guaranty to keep the street in repair for five years does not render it void; but the contractor cannot recover to the extent that the assessment has been increased by reason of the guaranty, which is conclusively presumed to be the 10 per cent. of the contract price retained to secure repairs.—*City of Louisville v. Selvage* (Ky.) 447; *Selvage v. Lucas, Id.*

Where property on one side of an improved street is not divided into squares, gross inequality in apportioning the cost of the improvement cannot be permitted.—*City of Louisville v. Selvage* (Ky.) 447; *Selvage v. Lucas, Id.*

A city cannot sue, in its own right, on a contractor's bond, to the benefits of which material men are also entitled, after settlement with the contractor's bondsmen, since the material men are not bound by such settlement.—*City of Bethany v. Howard* (Mo.) 94.

A bond given by a contractor to a city for a city improvement, conditioned to pay the material men for materials furnished in the con-

struction of such improvement, may be enforced by the material men.—*City of Bethany v. Howard* (Mo.) 94.

The legality of a special assessment, illegal because not made on the basis of benefits, may be questioned without showing the amount of benefits.—*Hutcheson v. Storrie* (Tex. Sup.) 848.

Failure to petition the council for the correction of a special assessment, and to apply for an injunction to restrain the levy, *held* not to estop the property owner from questioning the validity of the tax.—*Hutcheson v. Storrie* (Tex. Sup.) 848.

A special assessment on abutting property for local improvement in excess of benefits is a taking of private property for public use without adequate compensation, repugnant to Const. art. 1, § 17.—*Hutcheson v. Storrie* (Tex. Sup.) 848.

A property owner *held* not estopped from questioning the validity of a special assessment on the ground that it was not levied on the basis of benefits.—*Hutcheson v. Storrie* (Tex. Sup.) 848.

A municipality cannot be empowered to assess the cost of a local improvement on abutting property, without giving the property owner an opportunity to be heard on the question of benefits.—*Hutcheson v. Storrie* (Tex. Sup.) 848.

§ 7. Use and regulation of public places, property, and works.

That part of a turnpike road purchased by the fiscal court which lies within the limits of a city must be kept in repair by the city.—*Board of Council of Danville v. Fiscal Court of Boyle County* (Ky.) 157.

Where a city council had, without legislative authority, prior to the adoption of the present constitution, attempted to grant the right to erect telephone poles and wires along and over the streets of the city, the city has the right to compel the removal of such poles and wires erected without the consent of the city council after the adoption of the constitution.—*East Tennessee Tel. Co. v. City of Russellville* (Ky.) 308.

Previous to the adoption of the present constitution, a city council could not, without legislative authority, grant to any person or corporation the right to occupy the streets of the city with telephone poles and wires, that being an additional servitude.—*East Tennessee Tel. Co. v. City of Russellville* (Ky.) 308.

A city is liable for injury to abutting property, caused by an excavation in a street, whereby water is caused to accumulate so as to deprive the owner of access to his premises for an unreasonable length of time.—*City of Louisville v. Seibert* (Ky.) 310.

§ 8. Torts.

Evidence that the defect in a sidewalk had existed for six weeks prior to the injury will sustain a finding by the jury that the city had timely notice of the defect.—*Young v. City of Webb City* (Mo.) 709.

The length of time necessary for the continued existence of a defect in a sidewalk to operate as constructive notice thereof to the city depends upon the facts.—*Young v. City of Webb City* (Mo.) 709.

It is the duty of a city to exercise ordinary care to keep its sidewalks in a reasonably safe condition.—*Young v. City of Webb City* (Mo.) 709.

In an action against a city to recover for an injury due to a defective sidewalk, actual notice thereof must be shown, or that the defect had existed such length of time as to justify the presumption that it had notice in time to have repaired it before the injury.—*Young v. City of Webb City* (Mo.) 709.

§ 9. Fiscal management, public debt, securities, and taxation.

A petition for mandamus to compel a treasurer of a school board to pay certain warrants should allege that such warrants were drawn on funds in the hands of the treasurer, and that he has or has had funds in his possession out of which he could legally pay said warrants, and which have been duly set apart and apportioned by the school board to pay the same.—*Bank of Nocona v. March* (Tex. Civ. App.) 266.

MURDER.

See "Homicide," § 2.

NAVIGABLE WATERS.

See "Waters and Water Courses."

NEGLIGENCE.

Contributory negligence of person injured, see "Carriers," § 6.

Of carrier in transportation of passenger, see "Carriers," § 5.

Of municipalities, see "Municipal Corporations," § 8.

Of servant, see "Master and Servant," § 7.

Of telegraph or telephone companies, see "Telegraphs and Telephones," § 1.

§ 1. Proximate cause of injury.

Negligence of a railway company held the proximate cause of an injury.—*Gulf, C. & S. F. Ry. Co. v. Johnson* (Tex. Civ. App.) 531.

§ 2. Contributory negligence.

A child 17 months old cannot be charged with contributory negligence.—*Galveston, H. & S. A. Ry. Co. v. Clark* (Tex. Civ. App.) 276.

In Texas, negligence of parents will not be imputed to their children.—*Gulf, C. & S. F. Ry. Co. v. Johnson* (Tex. Civ. App.) 531.

§ 3. Actions.

In a negligence case, the court need not in its charge define the word "negligence."—*Sweeney v. Kansas City Cable Ry. Co.* (Mo.) 682.

The principle that subsequent repairs at the place of an accident are not evidence of negligence at the time thereof does not apply to the removal of a car after an accident alleged to be due to leaving it standing improperly.—*Missouri, K. & T. Ry. Co. of Texas v. St. Clair* (Tex. Civ. App.) 666.

Where a witness testified, in an action for an injury alleged to be due to leaving a car standing improperly, that, after the accident, no cars were standing there, evidence that the car had been removed was admissible.—*Missouri, K. & T. Ry. Co. of Texas v. St. Clair* (Tex. Civ. App.) 666.

Evidence of plaintiff's spitting blood, though not pleaded, held competent, under plea of injury to his chest, to show the condition of his chest.—*P't. Worth & R. G. Ry. Co. v. White* (Tex. Civ. App.) 855.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEWLY-DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see "New Trial," § 1.

NEW PROMISE.

Within statute of limitations, see "Limitation of Actions," § 3.

NEW TRIAL.

In criminal prosecutions, see "Criminal Law," § 27.

Necessity of motion for purpose of review, see "Appeal and Error," § 2.

Opening or vacating judgment, see "Judgment," § 6.

§ 1. Grounds.

Defendant was entitled to a new trial on the ground of accident or surprise, where the case preceding his on the docket was suddenly terminated by compromise after the trial thereof began; thus causing his case to be called sooner than he or his counsel reasonably anticipated, whereby he was prevented from being present at the trial.—*Vittetow v. Ames* (Ky.) 1.

New trial will not be granted because of filing of amended petition without notice, where defendant asked for nothing on account thereof until such motion.—*Pride v. Whitfield* (Tex. Civ. App.) 1100.

New trial for newly-discovered evidence cannot be had where no diligence is shown.—*Pride v. Whitfield* (Tex. Civ. App.) 1100.

§ 2. Proceedings to procure new trial.

Under Civ. Code Prac. § 342, providing that application for a new trial must be made at the term at which the verdict or decision is rendered, the court has no power to give time until a day in the succeeding term to make a motion for new trial.—*Farmer v. Bank of Wickliffe* (Ky.) 798.

An order granting a conditional new trial is not void.—*Strait v. Cole* (Tex. Civ. App.) 1092.

NONRESIDENCE.

Effect on limitation, see "Limitation of Actions," § 2.

NONSUIT.

Before trial, see "Dismissal and Nonsuit," § 1.

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

Necessity of notice of dishonor to hold indorser, see "Bills and Notes," § 3.

OBJECTIONS.

Necessity of objections to present questions for review, see "Appeal and Error," § 2.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 3.

OBSTRUCTIONS.

Of highways, see "Highways," § 2.

OFFICERS.

See "District and Prosecuting Attorneys"; "Receivers"; "Sheriffs and Constables"; "United States Commissioners"; "United States Marshals."

Compensation of clerks, see "Clerks of Courts." Court officers, see "Judges."

Power of officers to bind corporation, see "Corporations," § 2.

School officers, see "Schools and School Districts," § 1.

§ 1. Liabilities on official bonds.

Principal in official bond being dead, and his estate insolvent, it is not necessary to make his representative a party to fix liability of his sureties.—*Ferrell v. Grigsby* (Tenn. Ch. App.) 114.

Liability of principal on official bond need not be fixed before recovery against his bondsmen.—*Ferrell v. Grigsby* (Tenn. Ch. App.) 114.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 10.
In criminal prosecutions, see "Criminal Law," § 11.

ORDERS.

Appealability of orders, see "Appeal and Error," § 1.

ORDINANCES.

Municipal ordinances, see "Municipal Corporations," § 3.

PARDON.

Though the control of the state penitentiaries, which was, at the time of the passage of the parole law, vested in the commissioners of the sinking fund, has since been vested in another board, the power to parole convicts remains in the commissioners of the sinking fund.—*George v. Lillard* (Ky.) 793, 1011.

The parole law, conferring upon the sinking-fund commissioners the power to parole convicts, is not unconstitutional, as interfering with the governor's power to commute sentences and grant pardons, or as violating Const. § 253, which provides that "persons convicted of felony and sentenced to confinement in the penitentiary shall be confined at labor within the walls of the penitentiary."—*George v. Lillard* (Ky.) 793, 1011.

Condition permitting revocation of pardon *held* void.—*Taylor v. State* (Tex. Cr. App.) 1106.

PARENT AND CHILD.

Custody of children on divorce, see "Divorce," § 3.

PAROL EVIDENCE.

In civil actions, see "Evidence," § 9.

PARTIES.

Criminal prosecutions, see "Criminal Law," § 1.
Necessary and proper parties on appeal, see "Appeal and Error," § 3.
Persons concluded by judgment, see "Judgment," § 10.
To crimes, see "Criminal Law," § 1.

PARTITION.

§ 1. Actions for partition.

A right of action for mesne profits may be prosecuted with an action for recovery of the land.—*Clarke v. Seay* (Ky.) 589.

Where adverse claimants of the land, who were made defendants, with a prayer that they be enjoined from committing trespass, asserted title by their answer to certain parts of the land, it was proper, before decreeing a partition, to determine the issue between them and plaintiffs.—*Shackelford v. Williams* (Ky.) 614.

Parol evidence *held* admissible to show location of land mentioned in judgment for partition.—*Turner v. Dixon* (Mo.) 725.

A judgment for partition *held* not void certainly with respect to its description of graveyard.—*Turner v. Dixon* (Mo.) 72.

Evidence *held* insufficient to justify tying aside of a sale in partition at the of one of the co-tenants.—*De Ford v* (Tenn. Ch. App.) 999.

Refusal of chancellor to accept a pr of a co-tenant to pay a larger price t^l for which the land had been sold *held* n where the money was not paid into co Ford v. Taylor (Tenn. Ch. App.) 999.

It is not necessary, in partition amo of land inherited, that the wife of one a party, in order to conclude her righ homestead therein.—*Hill v. Jackson* (I App.) 357.

PARTNERSHIP.

See "Joint Ventures."

§ 1. The relation.

Where N. purchased from A., who stallion jointly with B., his half interest use of the stallion for a certain season, a sequently entered into a contract with B. the horse in partnership, N. to pay all e; and to reimburse himself out of moneys c for the services of the horse, the profits, to be divided equally between them, the a partnership.—*Smith v. Brannon* (Ky.)

Evidence *held* to establish a partnership vendors of one of the parties thereto, s bind the other to the terms of sale.—*Bu v. Edwards* (Tex. Civ. App.) 33.

One who furnished another with prop carrying on a business in consideration share of the profits is a partner in the b —*Fouke v. Brengle* (Tex. Civ. App.) 519.

§ 2. Rights and liabilities as to persons.

A partner in a firm formed to cultivate has no implied power to sell the live sto utensils of the firm without the consent co-partner.—*Rutherford v. McDonnell* 1060.

Rights of a partner in a nontrading p ship, where the co-partner had transferr firm's personality in settlement of a mo and foreclosure decree against the firm, mined.—*Rutherford v. McDonnell* (Ark.) 1

As an individual account due from one n of a partnership cannot be set off again account due the firm, one who advanced to B., prior to the partnership, under an ment that he might breed two mares to th lion, cannot set off his claim for the mon vanced against the fees due by him to the nership for the services of the stallion.—*St Brannon* (Ky.) 178.

In commercial partnerships, the extent partner's power to bind the firm is a quest law.—*Farmer v. Bank of Wickliffe* (Ky.)

An agreement with a bank by a parti the tobacco commission warehouse business the firm would pay promptly drafts drawn certain person on the firm if the bank cash them, was within the apparent scope authority, and therefore binding on the f Farmer v. Bank of Wickliffe (Ky.) 586.

A partner feeding cattle under contract his co-partner *held* not entitled to recover for from the sellers of the cattle to t^l partner, who did not know of the partne and retook the cattle for nonpayment.— anan v. Edwards (Tex. Civ. App.) 33.

Failure to deny under oath, as requir *St. art.* 1265, a partnership leged by one party to exist between the party and a third person, is an admission of.—*Buchanan v. Edwards* (Tex. Civ. App.)

A petition *held* not to allege that defendants were partners.—Kessler v. First Nat. Bank (Tex. Civ. App.) 62.

§ 3. Dissolution, settlement, and accounting.

An instruction in an action for partnership settlement *held* not prejudicial to plaintiff.—Herring v. Herring (Tex. Civ. App.) 865.

PART PAYMENT.

Within statute of limitations, see "Limitation of Actions," § 3.

PASSENGERS.

See "Carriers," §§ 4-6.

PAYMENT.

Of part of sum due as release, see "Accord and Satisfaction."

Part payment within statute of limitations, see "Limitation of Actions," § 3.

§ 1. Pleading, evidence, and province of court and jury.

Where complainant merely denies payment as defendant testified, testimony of the latter cannot be supported by a previous consistent statement to another.—Bradley v. Freed (Tenn. Ch. App.) 124.

In support of contention of payment, testimony of witnesses to instances in which complainant had forgotten payments made to him is inadmissible.—Bradley v. Freed (Tenn. Ch. App.) 124.

Party pleading payment on an admitted debt must prove it, and hence a plea is not sustained where it is explicitly denied, both parties being equally truthful.—Ford v. Lawrence (Tenn. Ch. App.) 1023.

PERJURY.

§ 1. Offenses, and responsibility therefor.

To constitute the offense of false swearing, under Ky. St. § 1174, it is not essential that the alleged false testimony should have been material.—Milstead v. Commonwealth (Ky.) 451.

Answer of witness *held* material and assignable as predicate for perjury.—George v. State (Tex. Cr. App.) 378.

§ 2. Prosecution and punishment.

Where a stenographer's report of evidence is relied on in a prosecution for false swearing, evidence that a stenographer in making notes sometimes makes mistakes is not admissible.—Milstead v. Commonwealth (Ky.) 451.

A judgment acquitting accused under an indictment for adultery is conclusive in his favor upon his trial for false swearing, alleged to have been committed by swearing falsely upon the trial under the former indictment that he had not had sexual intercourse with the woman with whom it was alleged he had committed adultery.—Cooper v. Commonwealth (Ky.) 789.

PERSONAL INJURIES.

See "Negligence."

To employe, see "Master and Servant," §§ 1-8.

To person on or near railroad tracks, see "Railroads," § 4.

To traveler on highway, see "Municipal Corporations," § 8.

— crossing railroad, see "Railroads," § 4.

PHYSICIANS AND SURGEONS.

To recover for medical services, it must appear that the physician had a certificate to practice, and that it was recorded.—Wilson v. Vick (Tex. Civ. App.) 45.

PLEA.

In civil actions, see "Pleading," § 2.

In criminal prosecution, see "Criminal Law," § 4.

PLEADING.

Allegations as to fraud, see "Fraud," § 2.

Conformity of judgment to pleadings, see "Judgment," § 3.

Corporate existence, see "Corporations," § 2.

In actions for causing death, see "Death," § 2.

— for personal injuries, see "Master and Servant," § 8.

Indictment or criminal information or complaint, see "Indictment and Information."

In ejectment, see "Ejectment," § 2.

In equitable actions, see "Equity," § 2.

In foreclosure proceedings, see "Mortgages," § 8.

Payment, see "Payment," § 1.

Pleas in criminal prosecutions, see "Criminal Law," § 4.

Sufficiency of allegations in action for damages, see "Damages," § 6.

§ 1. Form and allegations in general.

Under Civ. Code Prac. § 113, a reply alleging that defendant bank either did not mail to plaintiff the money in payment of a check sued on, or, if it did so, it did not register the package, and that one or the other of these allegations is true, and plaintiff does not know which, is good.—Clay City Nat. Bank v. Conlee (Ky.) 615.

The pleading of a conclusion, drawn from facts from which the law implies an agreement, will not be construed to be the pleading of an express contract.—Wetmore v. Crouch (Mo.) 738.

§ 2. Plea or answer, cross complaint, and affidavit of defense.

A pleading reciting that "now comes the plaintiff and denies the amended answer, counterclaim, and set-off and cross petition, filed herein July 30, 1896," does not put in issue the averments of the pleading referred to.—Salzer v. Napier (Ky.) 10.

§ 3. Demurrer or exception.

Objection to a petition on the ground that it does not state the details of a fraudulent conspiracy relied upon must be taken by motion to make more specific, and not by demurrer.—Ingram v. Turner (Ky.) 148.

Objection to a pleading because of a defect of parties is waived unless made by special demurrer.—Becker v. Neasom (Ky.) 446.

§ 4. Amended and supplemental pleadings and replader.

The offer to file an amended answer after the rendition of judgment came too late.—Smith v. Farmers' Bank of Vine Grove (Ky.) 451.

Where plaintiffs are joint obligees in contract sued on, an amendment of petition striking out the names of all plaintiffs except one is not permissible.—Slaughter v. Davenport (Mo.) 471.

An amended pleading takes the place of the original, and allegations of the latter, not carried into the former, are abandoned.—Wilson v. Vick (Tex. Civ. App.) 45.

Appearance on trial supplies want of notice of filing amended pleadings.—Turner v. City of Houston (Tex. Civ. App.) 642.

Exceptions to amended answer which was not filed until the day of the trial, pleading set-off, and seeking to make new parties and have them served with citation, without offering any

excuse for not having done so sooner, are properly sustained.—King County Land & Live-Stock Co. v. Thomson (Tex. Civ. App.) 890.

Trial court may permit plaintiff to file an amendment not necessary to his right to recover, though he had introduced all his testimony.—King County Land & Live-Stock Co. v. Thomson (Tex. Civ. App.) 890.

§ 5. Signature and verification.

A garnishee's attorney who is a notary may swear the garnishee to the truth of statements contained in his answer.—Kosminsky v. Raymond (Tex. Civ. App.) 51.

§ 6. Motions.

An indefinite pleading must be attacked by motion to make more certain, and not by demurrer.—State v. Aetna Fire Ins. Co. (Ark.) 638.

A motion to require plaintiff to elect which of two causes of action he will prosecute must be made before issue is joined on the merits.—Kenton Ins. Co. v. Osborne (Ky.) 306.

§ 7. Issues, proof, and variance.

Where plaintiff sued for damages for breach of a contract by defendant to purchase coal, and the proof showed that defendant was to give plaintiff the contract to furnish the coal if a sample furnished stood the required test, there was a fatal variance.—Frankfort Water Co. v. Gaines (Ky.) 599.

Where a general exception to an amended petition is sustained, and plaintiff declines to amend, the facts set out therein cannot be considered.—Masterson v. Bokel (Tex. Civ. App.) 39.

There is no variance between an allegation that plaintiff was employed to look after certain property and mineral lands and proof that he had only a nominal charge of the mineral lands.—Cotton v. Rand (Tex. Civ. App.) 55.

Variance between pleading and proof held cured by amendment.—Fleming v. Pringle (Tex. Civ. App.) 533.

Evidence that plaintiff held stock as additional security for a debt not set out in the pleadings held inadmissible, where the defendant alleged that it was held as collateral, and that the debt had been paid, without reply filed.—Hurd v. Texas Brewing Co. (Tex. Civ. App.) 883.

If facts exist which entitle the trustee of corporation stock to recover dividends thereon notwithstanding it appears that such dividends have been paid to the cestui que trust, such facts must be alleged.—Hurd v. Texas Brewing Co. (Tex. Civ. App.) 883.

§ 8. Defects and objections, waiver, and aid by verdict or judgment.

Plaintiff, by replying and putting in issue the averments of an answer and counterclaim, waived the objection that the caption did not contain the words "Answer and Counterclaim."—Salyer v. Napier (Ky.) 10.

A verdict for plaintiff in an action to recover money paid cures a defect in the petition in failing to allege a promise to pay, it being averred that the money was paid for defendant at his instance and request, from which the law implies a promise to pay.—Stone v. Hill (Ky.) 184.

The allegations of an answer held not to relieve plaintiff of the necessity of setting up matter in avoidance by plea.—Hurd v. Texas Brewing Co. (Tex. Civ. App.) 883.

PLEDGES.

A release of liens securing debts of creditor members of a corporation does not injuriously affect a pledgee of stock, occupying the position of a stockholder of the corporation.—King County Land & Live-Stock Co. v. Thomson (Tex. Civ. App.) 890.

POLICE P

See "Constitutional Law,"

POLIC

Of insurance, see "Insura

POSSESS

Requisites and sufficiency
verse possession, see "Ad

POWER

§ 1. Construction and

A declaration of trust h
make a power coupled wit
voked by the death of the
clared a trust.—Griffith v.

PRACTI

See "Pleading"; "Process"
In equity, see "Equity."

In justices' courts, see "Ju

§ 2. Procedure in criminal pros

inal Law."

— on review, see "Appeal

PREFEREN

By corporation, see "Corpor

In assignment for benefit o

signments for Benefit of C

In fraudulent conveyance, s

veyances," § 1.

PREMIUM

For insurance, see "Insuranc

PRESCRIPT

Establishment of highways

§ 1.

PRESUMPTI

As to death, see "Death," §

In civil actions, see "Eviden

In criminal prosecutions, se

§ 5.

On appeal or error, see "Appe

PRINCIPAL AND AI

See "Criminal Law," § 1.

PRINCIPAL AND

Admissions by agent, see "Ev

Insurance agents, see "Insura

§ 1. The relation.

Agency held terminated by

the principal, though it was

Cotton v. Rand (Tex. Sup.) 8

Execution of a contract by

ant to a conspiracy to defi

held not to terminate the

Rand (Tex. Civ. App.) 55.

Refusal of principal to

played to sell land to accep

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the agent was to receive a

from proceeds of sales.—Col

Civ. App.) 55.

§ 2. Mutual rights, duties, and liabilities.

Agent *held* entitled to compensation to time he forfeited his contract.—*Cotton v. Rand* (Tex. Sup.) 838.

Agent's salary, to be paid out of sales, *held* payable annually.—*Cotton v. Rand* (Tex. Sup.) 838.

A principal *held* estopped to claim that his agent's cause of action had not accrued, where he offered to pay what was due and pleaded limitations.—*Cotton v. Rand* (Tex. Civ. App.) 55.

A power of attorney reciting, among other things, "and my said attorney is hereby empowered to locate any such certificate in my name, or sell and assign the same," does not authorize the agent to locate a government pension certificate, and also to sell the land after such location.—*Mitchell v. McLaren* (Tex. Civ. App.) 269.

§ 3. Rights and liabilities as to third persons.

One who deals with an agent whose powers he knows to be limited does so at his peril.—*Spalding v. Tucker* (Ky.) 2.

Where an agent to sell a horse entered him at a public sale, the principal is bound by the agent's representations as to soundness, which were repeated by the auctioneer, though there was no custom to warrant at such sales.—*Belmont's Ex'r v. Talbot* (Ky.) 588.

The superintendent of a stock farm owned by a nonresident, having authority to sell a horse on the farm belonging to his principal, had authority to make a warranty.—*Belmont's Ex'r v. Talbot* (Ky.) 588.

A judgment against an agent requiring a ditch to be filled binds the principal so that, upon the reversal of the judgment, he cannot recover damages against the plaintiffs for injury to his property resulting from the filling of the ditch, in obedience to the judgment while it was in force.—*Bridges v. McAlister* (Ky.) 608.

Evidence *held* to show that an agent had authority to fix the measure of damages for a breach of a composition between his principal and another creditor of a common debtor.—*Hill v. Wertheimer-Swartz Shoe Co.* (Mo.) 702.

The presumption of authority to execute a deed from the age of the instrument and long-continued assertion of title may be rebutted.—*Mitchell v. McLaren* (Tex. Civ. App.) 269.

PRINCIPAL AND SURETY.

See "Bonds"; "Guaranty."

Liabilities on bonds for performance of duties of trust or office, see "Officers," § 1; "Receivers," § 4.

— or undertakings in legal proceedings, see "Replevin," § 1.

Liability of surety on bail bond, see "Bail," § 1.

§ 1. Creation and existence of relation.

Where the principal in a note delivered property to defendant to indemnify defendant's wife and her brother against loss by reason of the suretyship of their deceased mother for him, defendant did not thereby become liable for the debt.—*Kerr v. Hough* (Ky.) 818.

§ 2. Discharge of surety.

Sureties on note *held* released by erasure, before delivery, without their knowledge, of the name of a signer.—*Connor v. Thornton* (Tex. Civ. App.) 354.

§ 3. Remedies of creditors.

Defendant in action on note pleading only general denial and suretyship cannot show alteration of note after delivery.—*Connor v. Thornton* (Tex. Civ. App.) 354.

PRIVILEGE.

Of witness as to testimony, see "Witnesses," § 3.

PRIVILEGED COMMUNICATIONS.

Disclosure by witness, see "Witnesses," § 2.

PROBABLE CAUSE.

For prosecution, see "Malicious Prosecution," § 1.

PROCESS.

See "Execution"; "Garnishment"; "Injunction"; "Mandamus."

Service of on corporate officer or agent, see "Corporations," § 2.

— of summons on foreign corporation, see "Corporations," § 4.

§ 1. Service.

Order of publication considered, and *held* a sufficient compliance with the statute.—*Winningham v. Trueblood* (Mo.) 399.

An order of publication which misdescribes the land in suit is fatally defective.—*Winningham v. Trueblood* (Mo.) 399.

A judgment against a resident *held* to have been entered without jurisdiction when the petition was filed and a summons issued against him as a resident, and on a return of non est was published pursuant to an order issued against him as a nonresident without any affidavit.—*Crossland v. Admire* (Mo.) 468.

§ 2. Defects, objections, and amendment.

When, upon motion to quash the citation, plaintiff amends by leave of court, there is no error in overruling the motion, unless defendant was injured by the allowance of the amendment.—*Texas & P. Ry. Co. v. Truesdell* (Tex. Civ. App.) 272.

PROMISE OF MARRIAGE.

See "Breach of Marriage Promise."

PROMISSORY NOTES.

See "Bills and Notes."

PROPERTY.

Taking for public use, see "Eminent Domain."

PROXIMATE CAUSE.

Of injury, see "Negligence," § 1.

PUBLICATION.

Service of process, see "Process," § 1.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 6.

PUBLIC LANDS.**§ 1. Survey and disposal of lands of United States.**

Under Rev. St. 1879, §§ 671, 6205, a deed of swamp land by the commissioner by order of court vests title.—*Elliott v. Buffington* (Mo.) 408.

Proof that a person bought the title to swamp land from a county is tantamount to proof of a sale by the county court.—*Elliott v. Buffington* (Mo.) 408.

§ 2. Disposal of lands of the states.

A state land commissioner has no authority to issue a donation certificate to land, pending a suit by the state to foreclose a tax lien thereon.—*St. Louis Refrigerator & Wooden Gutter Co. v. Langley* (Ark.) 68.

Sand. & H. Dig. § 609, making an after-acquired title of any "person," having executed a deed purporting to convey a fee, pass to the grantee, does not apply to conveyances by the state.—*St. Louis Refrigerator & Wooden Gutter Co. v. Langley* (Ark.) 68.

A donation deed by the state land commissioner is merely a quitclaim, conveying only such title as the state has when it is executed.—*St. Louis Refrigerator & Wooden Gutter Co. v. Langley* (Ark.) 68.

A patent is not void which excludes prior grants without identifying or describing them.—*Breathitt Coal, Iron & Lumber Co. v. Strong* (Ky.) 189.

Fraud in obtaining a grant of land from the state cannot be urged where the grant is not assailed for fraud in the petition.—*Duffield v. Spence* (Tenn. Ch. App.) 492.

A grant based on a valid special entry relates back to and covers the land embraced in the entry.—*Duffield v. Spence* (Tenn. Ch. App.) 492.

Under Act 1829, c. 85, § 1, the state is the only one that can complain that a person obtained more than 5,000 acres under his state grant.—*Duffield v. Spence* (Tenn. Ch. App.) 492.

Under Act March 25, 1897, lands sold by the state can be forfeited for nonpayment of interest theretofore accruing.—*Waggoner v. Flack* (Tex. Sup.) 330.

Failure to comply with Rev. Civ. St. art. 4218j, held not cured by the fact that the land was afterwards classified so that the attempt to comply would, if made later, have been a compliance.—*Gracey v. Hendrix* (Tex. Sup.) 846.

Former classification of agricultural school land at \$2 per acre held not affected by Gen. Laws 1897, p. 184, c. 129, prohibiting such land to be sold at less than \$1.50 per acre.—*Gracey v. Hendrix* (Tex. Sup.) 846.

An inchoate right to a patent for a disputed tract of land may be abandoned by filing new surveys excluding such tract and including another, and obtaining a patent thereunder.—*Wise County Coal Co. v. Phillips* (Tex. Civ. App.) 331.

It is not necessary to tender subsequent installments where the commissioner of the land office has refused the first installment, and rejected the application in favor of a rival applicant.—*Willoughby v. Townsend* (Tex. Civ. App.) 335.

Evidence held to support a finding that a person was a bona fide actual settler on land, and that he desired to purchase it for a home.—*Willoughby v. Townsend* (Tex. Civ. App.) 335.

An affidavit held to comply with a statute requiring purchaser of school lands to accompany his application with an affidavit that he desires to purchase the land for a home.—*Willoughby v. Townsend* (Tex. Civ. App.) 335.

The fact that an affidavit accompanying an application to purchase school lands was made on Sunday does not invalidate the title acquired pursuant to such application.—*Willoughby v. Townsend* (Tex. Civ. App.) 335.

The disability of minority cannot be urged by one seeking to purchase school lands after commissioner has awarded them to a minor.—*Weatherford v. McFadden* (Tex. Civ. App.) 548.

A sale of school survey land by state to T. in 1892 was canceled in 1895, but the land was never placed on market again. J. then settled on it, and applied to purchase it, but his application was rejected and he removed. Held,

that J.'s settlement and application did not amount to a resale, within the meaning of Laws 1897, pp. 113, 160.—*Kurtzman v. Blackwell* (Tex. Civ. App.) 659.

Sale by state, in 1892, of school survey land as isolated, under laws then existing, held validated by Laws 1897, pp. 113, 160, an act validating sales of isolated sections of public lands, although the land sold was not contiguous to its alternate, and not isolated at the time of the sale, but became isolated after sale, and before passage of law.—*Kurtzman v. Blackwell* (Tex. Civ. App.) 659.

One who settled on an isolated section of school survey land before the passage of Laws 1897, pp. 113, 160, validating sales of isolated sections, held not a purchaser of the land, within the meaning of the law.—*Kurtzman v. Blackwell* (Tex. Civ. App.) 659.

A purchaser of school lands may employ an agent to present his application.—*Sweet v. Slough* (Tex. Civ. App.) 854.

Evidence showing that plaintiff, the day before she made application to purchase as an actual settler on state school land, picked out a place for a house, and that no one was occupying the land, and there were no improvements, is insufficient to show that plaintiff was an actual settler when she made her application.—*Renner v. Peterson* (Tex. Civ. App.) 867.

An application to purchase school lands, where in compliance with the act of 1895, is good, under the amendatory act of 1897.—*Abilene Live-Stock Co. v. Guinn* (Tex. Civ. App.) 885.

PUBLIC SCHOOLS.

See "Schools and School Districts," § 1.

PUBLIC USE.

Taking property for public use, see "Eminent Domain."

PUNITIVE DAMAGES.

See "Damages," § 3.

QUASHING.

Indictment or information, see "Indictment and Information," § 3.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 5.

In criminal prosecutions, see "Criminal Law," § 21; "Homicide," § 10.

QUIETING TITLE.**§ 1. Proceedings and relief.**

A bill held properly dismissed by the chancellor without prejudice to bringing a suit in the proper court, though the cause might have been transferred to law docket in accordance with Sand. & H. Dig. § 6121.—*Burke v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 458.

RAILROADS.

See "Street Railroads."

Carriage of goods and passengers, see "Carriers."

§ 1. Control and regulation in general.

Attempted exercise by railroad commission of power not conferred on it held subject to collateral attack.—*Davis v. San Antonio & G. S. Ry. Co.* (Tex. Sup.) 324.

Railroad commission cannot authorize or prohibit issuance of stock, nor annul shares once

issued and delivered.—*Davis v. San Antonio & G. S. Ry. Co. (Tex. Sup.) 324.*

§ 1½. Construction, maintenance, and equipment.

The lien for labor and material expended in constructing a railroad conferred by Rev. St. 1889, c. 102, art. 4, *held* to cover, with the right of way, a company's railroad within the state, whatever the stage of its construction, length of route, or number of counties in which it is located.—*Bethune v. Cleveland, St. L. & K. C. Ry. Co. (Mo.) 465.*

That no provision is made for a lien on the franchise for the labor done on a railroad, and for its enforcement, affords no ground for a refusal to enforce the lien against the company's tangible property, as provided by Rev. St. 1889, c. 102, art. 4.—*Bethune v. Cleveland, St. L. & K. C. Ry. Co. (Mo.) 465.*

The requirement of Rev. St. 1889, c. 102, art. 4, in relation to the special *fi. fa.* authorized thereby to satisfy a lien against a railroad for labor, *held* not to preclude the sale of a railroad as a whole because it is not within the limits of a single county.—*Bethune v. Cleveland, St. L. & K. C. Ry. Co. (Mo.) 465.*

A description of the property in the judgment in an action to enforce a lien on a railroad for labor which complies with Rev. St. 1889, c. 102, art. 4, *held* sufficient.—*Bethune v. Cleveland, St. L. & K. C. Ry. Co. (Mo.) 465.*

In view of Rev. St. 1889, c. 102, art. 4, *held*, that it was proper not to render a personal judgment against the railroad company in action by a subcontractor to enforce a lien.—*Bethune v. Cleveland, St. L. & K. C. Ry. Co. (Mo.) 465.*

Evidence of the value of rents before and after permanent injury to the realty *held* admissible to show depreciation.—*Missouri, K. & T. Ry. Co. of Texas v. O'Connor (Tex. Civ. App.) 511.*

In issue to determine injury from construction of railroad, evidence of effect on property of another from presence of railroad in street *held* inadmissible.—*Missouri, K. & T. Ry. Co. of Texas v. O'Connor (Tex. Civ. App.) 511.*

On issue of damages from construction of railroad, evidence that city had not graded street in front of it on account of the railroad *held* inadmissible.—*Missouri, K. & T. Ry. Co. of Texas v. O'Connor (Tex. Civ. App.) 511.*

Under issue alleging that plaintiffs are joint owners of equal interests it cannot be shown that one owns more than half the land.—*Missouri, K. & T. Ry. Co. of Texas v. O'Connor (Tex. Civ. App.) 511.*

Evidence that plaintiff could get only \$150 for the land immediately after the railroad was built *held* admissible.—*Missouri, K. & T. Ry. Co. of Texas v. O'Connor (Tex. Civ. App.) 511.*

Interest may be allowed from time of injury on the amount by which value of the property is diminished by a wrongful injury.—*Missouri, K. & T. Ry. Co. of Texas v. O'Connor (Tex. Civ. App.) 511.*

§ 2. Sales, leases, traffic contracts, and consolidation.

A contract between a bridge company and various railroad companies construed, and one of the contracting railroad companies *held* to be entitled to recover tolls paid.—*Louisville Bridge Co. v. Louisville & N. R. Co. (Ky.) 185.*

Where several companies were jointly using a passenger depot, evidence *held* not to show that when extensive improvements were made one of the companies, holding a lease, purchased an interest in the depot and land.—*East Tennessee, V. & G. Ry. Co. v. Nashville, C. & St. L. Ry. Co. (Tenn. Ch. App.) 202.*

Where a depot is owned by several companies jointly with right in another to a joint use, one

of them, on ceasing to use it, cannot have it sold, and proceeds divided, or have the whole matter settled as partnership concern.—*East Tennessee, V. & G. Ry. Co. v. Nashville, C. & St. L. Ry. Co. (Tenn. Ch. App.) 202.*

§ 3. Receivers.

Receiver's sale of road on condition *held* not to cancel rights of stockholders so as to prevent a review of judgment enjoining them from voting the stock because illegal.—*Davis v. San Antonio & G. S. Ry. Co. (Tex. Sup.) 324.*

§ 4. Operation.

A verdict for plaintiff for the killing of a horse by an engine *held* not sustained by the evidence.—*Kansas City, Ft. S. & M. Ry. Co. v. King (Ark.) 319.*

Railroad *held* not liable to trespasser on the track, except for negligence after discovering him.—*Gulf, C. & S. F. Ry. Co. v. Bolton (Ind. T.) 1085.*

Evidence *held* not to show negligence in failing to stop a train in time after discovery of trespasser on the track.—*Gulf, C. & S. F. Ry. Co. v. Bolton (Ind. T.) 1085.*

It was error to instruct the jury that it was the duty of defendant to use and exercise "the highest degree of care" in running and operating its trains within the limits of a city.—*Southern Ry. Co. v. Barbour (Ky.) 159.*

Evidence *held* insufficient to show that a railroad company was negligent in running over a man on a bridge.—*Coatney v. St. Louis & S. F. Ry. Co. (Mo.) 1036.*

The destruction of the sight of plaintiff's eye by a cinder which escaped from a passing engine *held* to be due to the company's negligence.—*Texarkana & Ft. S. Ry. Co. v. O'Kelleher (Tex. Civ. App.) 54.*

Testimony of experienced railroad man that fireman on inside of curve would have better view of track than engineer on opposite side *held* competent.—*Galveston, H. & S. A. Ry. Co. v. Clark (Tex. Civ. App.) 276.*

Parents are not hampered in the use of their home by its being near a railroad. Hence they are not negligent in placing their child in its cradle in a place where its clothing might be ignited by sparks from a passing engine.—*Gulf, C. & S. F. Ry. Co. v. Johnson (Tex. Civ. App.) 531.*

RAPE.

§ 1. Offenses and responsibility therefor.

Sexual intercourse with a female of weak mind *held* by force, within Rev. St. 1889, § 3480.—*State v. Williams (Mo.) 88.*

Three persons may be jointly indicted for rape, where two of them assisted the third.—*State v. Harris (Mo.) 481.*

One having carnal knowledge of a child under 14 years old is guilty of rape, though she consented and no force was used.—*State v. Ernest (Mo.) 688.*

Under Pen. Code, art. 608, one may be guilty of an assault with intent to rape a child under 15 years old, though she consented to sexual intercourse.—*Croomes v. State (Tex. Cr. App.) 924.*

One is guilty of an assault with intent to rape a child under 15 years of age, where he has slightly touched her person while intending to have carnal intercourse with her.—*McAvoy v. State (Tex. Cr. App.) 928.*

§ 2. Prosecution and punishment.

In a prosecution for rape, an instruction for the state, which called the jury's attention to evidence bearing on the question whether the offense was committed, though possibly objectionable for singling out specific facts, *held*

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RELEASE.

See "Accord and Satisfaction"; "Payment."
Of mortgage, see "Mortgages," § 6.

§ 1. Pleading, evidence, and province of court and jury.

Evidence *held* sufficient to sustain a cancellation of a release of a cause of action for slander.—*Courtney v. Blackwell* (Mo.) 668.

Evidence *held* not to show an affirmation of a release precluding a cancellation thereof.—*Courtney v. Blackwell* (Mo.) 668.

RELEVANCY.

Of evidence in criminal prosecutions, see "Criminal Law," § 6.

REMAND.

Of cause on appeal or writ of error, see "Appeal and Error," § 26.

REMOVAL OF CAUSES.

Change of venue or place of trial, see "Venue," § 2.

§ 1. Origin, nature, and subject of controversy.

Admission that amendments to a city charter were unconstitutional does not eliminate the question so as to prevent supreme court taking jurisdiction.—*State ex rel. Ridge v. Smith* (Mo.) 713.

RENT.

See "Landlord and Tenant," § 5.

REPEAL.

Of statute, see "Statutes," § 5.

REPLEVIN.**§ 1. Liabilities on bonds and undertakings.**

In the absence of proof of the value of property at the time of trial, its value will be presumed to be the same as when replevied.—*Monday v. Vance* (Tex. Civ. App.) 346.

Plaintiff, having alleged the value of the property, is not entitled to judgment on defendant's replevin bond exceeding the sum alleged.—*Monday v. Vance* (Tex. Civ. App.) 346.

REPORT.

Conclusiveness of referee's report, see "Reference," § 1.

REQUESTS.

For instructions in civil actions, see "Trial," § 6.
— in criminal prosecutions, see "Criminal Law," § 23.

RESCISSION.

Of contract, see "Contracts," § 2.
— for sale of goods, see "Sales," § 3.
— for sale of land, see "Vendor and Purchaser," § 3.

RES GESTÆ.

In civil actions, see "Evidence," § 3.
In criminal prosecutions, see "Criminal Law," § 6.

RES JUDICATA.

See "Judgment," §§ 9, 10.

RESTRAINT OF TRADE.

Contracts in restraint of, see "Contracts," § 1.

RETURN.

Of election, see "Elections," § 3.
Of execution, see "Execution," § 4.
Of garnishment process, see "Garnishment," § 3.

REVENUE.

See "Taxation."

REVIEW.

See "Appeal and Error"; "Criminal Law," §§ 29-33.
Of certiorari proceedings, see "Certiorari," § 1.

REVOCATION.

Of will, see "Wills," § 2.

RIOT.

See "Unlawful Assembly."

RISKS.

Assumed by employé, see "Master and Servant," § 6.

ROADS.

See "Highways."

ROBBERY.

Charge *held* not prejudicial to defendant, though not authorized by the evidence.—*Ford v. State* (Tex. Cr. App.) 935.

Charge that burden was on the state to show falsity of defendant's explanation of possession *held* unnecessary.—*Ford v. State* (Tex. Cr. App.) 935.

SALES.

See "Vendor and Purchaser."
On execution, see "Execution," § 3.
On foreclosure of mortgage, see "Mortgages," § 7.
On order or judgment of court, see "Judicial Sales."
Of property of decedent under order of court, see "Executors and Administrators," § 4.
Receiver's sales, see "Receivers," § 2.
Tax sales, see "Taxation," § 4.

§ 1. Requisites and validity of contract.

A letter from defendant replying to plaintiff's request for quotation of prices for "ten car loads of Mason green jars" was a present offer by defendants, the immediate acceptance of which closed the contract, and defendants could not then withdraw the offer.—*Fairmount Glass Works v. Grunden-Martin Woodenware Co.* (Ky.) 196.

§ 2. Construction of contract.

The stipulation in the acceptance that the goods should be "strictly first quality" did not constitute an addition to the offer.—*Fairmount Glass Works v. Grunden-Martin Woodenware Co.* (Ky.) 196.

It is immaterial that the quantity of each size of the jars was not fixed, as the offer to sell the

different sizes at different prices gave the purchaser the right to name the quantity of each size.—*Fairmount Glass Works v. Grunden-Martin Woodenware Co. (Ky.)* 196.

As the offer was to ship not later than May 15th, the buyer had the right to accept the goods to be delivered on different days prior to that time.—*Fairmount Glass Works v. Grunden-Martin Woodenware Co. (Ky.)* 196.

As the expression "ten car loads" has a definite meaning in the trade, it was a sufficient specification of the quantity sold.—*Fairmount Glass Works v. Grunden-Martin Woodenware Co. (Ky.)* 196.

§ 3. Modification or rescission of contract.

Repudiation by seller of unauthorized conditions entered into by his broker held to authorize refusal of purchaser to accept the goods.—*Jackson v. Butler (Tex. Civ. App.)* 1095.

§ 4. Operation and effect.

Where goods were to be delivered to the buyer at N., their delivery to a carrier, consigned to the buyer at N., did not pass title.—*Miller v. Somerset Cedar Post & Lumber Co. (Ky.)* 615.

Where a crop of corn is sold at a certain price per barrel, and the vendee is to gather, haul, and have it weighed before receiving credit for the price, title does not pass until it has been gathered, weighed, and delivered.—*Parman v. Marshall (Tenn. Ch. App.)* 116.

§ 5. Remedies of seller.

Where the buyer of logs had the right to inspect them when tendered, the title did not pass until the logs were accepted; and the measure of damages for the buyer's refusal to take the logs is the difference between the price agreed to be paid for the logs at the time and place of delivery, and the sum for which the seller could, by reasonable effort, have sold the logs after the buyer failed to take them.—*Singer Mfg. Co. v. Cheney (Ky.)* 813.

§ 6. Remedies of buyer.

The buyer cannot have an abatement of the price for breach of verbal representations made at the time of the sale, where the contract was in writing, and there was no fraud.—*Worland v. Secrest (Ky.)* 445.

SATISFACTION.

See "Accord and Satisfaction"; "Payment."

SCHOOL LANDS.

See "Public Lands," § 1.

SCHOOLS AND SCHOOL DISTRICTS.

§ 1. Public schools.

Under Ky. St. § 1495, there must be a registration of the qualified voters of a city of the fourth class before an election can be held therein to establish a graded school, and levy a tax therefor.—*Bailey v. Figeley (Ky.)* 424.

The county court has no jurisdiction to direct the holding of an election to establish a graded school in a city of the fourth class.—*Bailey v. Figeley (Ky.)* 424.

Under Ky. St. §§ 4464, 4489, a city of the fourth class cannot be included with outlying territory for the purpose of establishing a graded school.—*Bailey v. Figeley (Ky.)* 424.

The averment that a common-school district was, at the time of the execution of the obligation sued on, indebted in excess of the constitutional limit, is not good; it being necessary to allege the amount of the indebtedness and the amount of taxable property in the district, so

that the court may determine whether the limit has been exceeded.—*Perry v. Brown (Ky.)* 457.

The provision of Const. Ky. § 157, that no taxing district shall be authorized to become indebted to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, applies to common-school districts.—*Perry v. Brown (Ky.)* 457.

School trustees are estopped to plead nonliability on their personal guaranty of a debt created by them on behalf of the district, on the ground that the district had no power to create the debt because its indebtedness already exceeded the constitutional limit, as they are conclusively presumed to have known that fact.—*Perry v. Brown (Ky.)* 457.

Railroads cannot be assessed for graded-school purposes by an assessor appointed by the school board.—*Cincinnati, N. O. & T. P. Ry. Co. v. Commonwealth (Ky.)* 568.

Where circuit court finds school tax illegal, it has no power to revise the levy of county court.—*State ex rel. Brumbaugh v. Kansas City, St. J. & C. B. R. Co. (Mo.)* 479.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 4.

SEDUCTION.

§ 1. Criminal responsibility.

Bill of exceptions held to show materiality of evidence.—*Creighton v. State (Tex. Cr. App.)* 910.

Evidence held admissible, as tending to show lack of chastity of prosecutrix.—*Creighton v. State (Tex. Cr. App.)* 910.

SENTENCE.

In criminal prosecutions, see "Criminal Law," § 28.

SEPARATE ESTATE.

Of married women, see "Husband and Wife," § 3.

SET-OFF AND COUNTERCLAIM.

§ 1. Nature and grounds of remedy.

A plea in reconvention that is subject to exception will not prevent plaintiff from taking a nonsuit.—*Peters v. Chandler (Tex. Civ. App.)* 281.

§ 2. Subject-matter.

A claim for corn, which a vendor agreed to deliver to the vendee for interest on a mortgage on the land, may be asserted as a set-off in an action for the price.—*Hoover v. Binkley (Ark.)* 73.

A claim for corn which a vendor agreed to deliver to the vendee for interest on a mortgage on the land is not a counterclaim, under Sand. & H. Dig. § 723, in an action to enforce the contract of sale.—*Hoover v. Binkley (Ark.)* 73.

Where a judgment has been superseded, and an appeal therefrom is pending, it cannot be pleaded as a set-off.—*Yarborough v. Fitzpatrick (Ky.)* 172.

A note executed by S. to W. cannot be set off by S. with a judgment against the wife of W.—*Shields v. Stark (Tex. Civ. App.)* 540.

SETTLEMENT.

See "Accord and Satisfaction"; "Payment"; "Release."

By executor or administrator, see "Executors and Administrators," § 5.
Of bill of exceptions, see "Exceptions, Bill of," § 2.

SHERIFFS AND CONSTABLES.

§ 1. Powers, duties, and liabilities.

The plaintiffs in an execution, in an action upon an indemnifying bond executed by them, in which the property levied on and sold under the execution, by their direction, is claimed by the debtor to have been exempt, are estopped to deny that he was the owner of the property.—*Sharp v. Wood* (Ky.) 15.

It being alleged in the petition, and not denied, that plaintiff was the owner of the property sold under the execution, the action cannot be defeated by proof that his wife owned the property.—*Sharp v. Wood* (Ky.) 15.

Under Ky. St. c. 46, art. 18, which operated to repeal the provisions of the Civil Code of Practice on that subject, the jurisdiction of an action against a sheriff for failure to discharge his duty under an execution is vested in the courts of the county in which the judgment was rendered.—*Ingram v. Turner* (Ky.) 148.

A sheriff holding the proceeds of an attachment sale cannot be adjudged guilty of a wrong for not paying the claim of an attaching creditor until the court orders him to pay and he refuses.—*State ex rel. Burnham v. Hickman* (Mo.) 680.

SLANDER.

See "Libel and Slander."

SPECIAL LAWS.

See "Statutes," § 2.

SPECIFIC PERFORMANCE.

§ 1. Proceedings and relief.

In a suit to enforce a contract for a sale of mortgaged lands, evidence held to show that the consideration was more than a mere assumption of the mortgage.—*Hoover v. Binkley* (Ark.) 73.

Letters written by a vendee to a third person subsequent to the sale held inadmissible to show terms of sale, being no part of the res gestæ.—*Hoover v. Binkley* (Ark.) 73.

SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

STATEMENT.

By witness inconsistent with testimony, see "Witnesses," § 4.

Necessity and sufficiency of statement of facts on appeal in criminal prosecutions, see "Criminal Law," § 31.

Of case or facts for purpose of review, see "Appeal and Error," §§ 8, 9.

STATES.

Public lands, see "Public Lands," § 2.

§ 1. Government and officers.

A joint resolution of the general assembly authorizing a suit against the state is valid.—*Commonwealth v. Haly* (Ky.) 430.

§ 2. Claims against state.

Though a claim was payable out of the military fund for a particular year, yet, as that fund has been exhausted, the payment of a judgment upon the claim must be made out of the general

funds in the treasury.—*Commonwealth v. Haly* (Ky.) 430.

§ 3. Actions.

Under Acts 1847-48, c. 195, the state of Georgia, owning jointly with certain railroad companies a depot in Tennessee, can be sued in the courts of the latter state by the other owners seeking to obtain a sale and division of the proceeds.—*East Tennessee, V. & G. Ry. Co. v. Nashville, C. & St. L. Ry. Co.* (Tenn. Ch. App.) 202.

STATUTES.

Laws impairing obligation of contracts, see "Constitutional Law," § 3.

Of limitations, see "Limitation of Actions," § 1.

Statute of frauds, see "Frauds, Statute of."

§ 1. Enactment, requisites, and validity in general.

Const. art. 3, §§ 29, 30, requiring an enacting clause to all bills, and that no law shall be passed except by bill, do not apply to laws passed by joint resolution.—*Weekes v. City of Galveston* (Tex. Civ. App.) 544.

§ 2. General and special or local laws.

Acts 1897, p. 208, § 1, prohibiting combination of insurance companies for regulating premiums, but excepting companies doing business in large cities, held not violative of Const. art. 4, § 53, inhibiting the passage of any local or special law.—*State ex rel. Crow v. Aetna Ins. Co.* (Mo.) 413; *Same v. American Cent. Ins. Co.*, Id.

Laws 1897, pp. 113, 160, validating sales of certain lands, does not cut off rights of any one accruing subsequent to such sales and prior to its passage.—*Kurtzman v. Blackwell* (Tex. Civ. App.) 659.

Laws 1897, pp. 113, 160, validating sales of certain lands, held not in violation of Const. art. 7, § 4, prohibiting legislative relief to school land.—*Kurtzman v. Blackwell* (Tex. Civ. App.) 659.

§ 3. Subjects and titles of acts.

Acts 25th Leg. p. 130, § 1, is in part invalid, because it does not express part of its subject in its title.—*Roby v. State* (Tex. Cr. App.) 1114.

§ 4. Amendment, revision, and codification.

Joint resolution of March 8, 1879, held not an amendment of Act Feb. 2, 1856.—*Weekes v. City of Galveston* (Tex. Civ. App.) 544.

§ 5. Repeal, suspension, expiration, and revival.

The act of May 2, 1888, known as the "Parole Law," was not repealed by the act of 1898 creating a board of penitentiary commissioners.—*George v. Lillard* (Ky.) 798, 1011.

Act March 25, 1897, relating to forfeiture of public lands, held not to repeal Laws 1895, p. 67, § 11, referring to the same subject.—*Waggoner v. Flack* (Tex. Sup.) 330.

§ 6. Construction and operation.

A statute will not be construed so as to render it unconstitutional in whole or in part, where it can reasonably be given a construction giving it effect in all its parts.—*State v. Lancashire Fire Ins. Co.* (Ark.) 633.

The presumption is that the legislature did not intend its statutes to apply to acts done or contracts made outside of the state, not in any way affecting persons or property in the state.—*State v. Lancashire Fire Ins. Co.* (Ark.) 633.

The construction placed on an act by the attorney general, known to the legislature before its passage, held not conclusive on the question of legislative intent.—*State v. Lancashire Fire Ins. Co.* (Ark.) 633.

Statutes in pari materia must be construed together, and the legislative intention apparent from the whole body of the enactments must be carried into effect.—Board of Council of Danville v. Fiscal Court of Boyle County (Ky.) 157.

When the words of a statute are not explicit, the intention is to be collected from the context, the occasion and necessity of the law, the mischief felt, and the remedy in view.—Croomes v. State (Tex. Cr. App.) 924.

STATUTES CONSTRUED.

UNITED STATES.	
CONSTITUTION.	
Amend. 14, § 1.....	848
Amend. art. 7.....	1076

STATUTES AT LARGE.	
1895, March 1, ch. 145, 28	
Stat. 695	1077, 1078
1898, June 13, ch. 448, 30	
Stat. 448	242

REVISED STATUTES.	
§ 5198	661

ARKANSAS.	
CONSTITUTION.	
Art. 9, § 3.....	319

MANSFIELD'S DIGEST.	
§ 1655	1063
§ 2921, 2955, 2956..	1067, 1068
4754	967
5108	1067, 1068
5148	1076
5246	969
5731. Amended by Laws	
1887, p. 167.....	71
§ 5760	71

SANDEL & HILL'S DIGEST.	
§ 699	68
723	73
§ 743, 3713.....	459
4565	1056
6121	458
§ 6218, 6284.....	1060

LAWS.	
1879, p. 69.....	69
1881, p. 69, § 11.....	68
1887, p. 167.....	71
1887, ch. 64.....	459
1893, p. 24.....	830
1893, ch. 172.....	459
1899, March 6. Monopolies	
633, 638	

INDIAN TERRITORY.	
COMPILED LAWS 1892.	
Art. 10, § 226.....	967

KENTUCKY.	
CONSTITUTION.	
59	430
144	435
157	457
163	308
180	161
218	164
231	430
241	18
253	793

CIVIL CODE OF PRACTICE.	
25	439
72	531, 617, 787
113	615
342	798
426	819

51 S.W.—76

§ 519	162
§ 606	578
§ 694, subsec. 3.....	13
§ 764	151

CRIMINAL CODE OF PRACTICE.	
§ 147	625

GENERAL STATUTES.	
Ch. 39, art. 1, § 1.....	593
Ch. 57, § 3.....	18

STATUTES 1894.	
Ch. 46, art. 18.....	148
Ch. 52	161
§ 82, 88.....	449
212	596
482	431
571	620
631	625
883	620
§ 1130, 1136.....	514
1174	451
1495	424
1833	435
1908	179
2127	15
2243, 2246.....	788
2390, 2396.....	149
2516	585
2519	455
2526	585
2531	589
2834	447
3725	453
3915	624
§ 4464, 4480.....	424
4069	567
4833	163

LAWS.	
1888, p. 115.....	793
1888, ch. 876.....	435
1893, p. 948.....	788
1894, p. 176.....	167, 799
1894, p. 189.....	2
1896, p. 39.....	157
1898, p. 8.....	793

MISSOURI.	
CONSTITUTION.	
Art. 4, § 53.....	413
Art. 6, § 12.....	1051
Art. 6, §§ 30, 37, 40.....	716

GENERAL STATUTES 1865.	
Page 498, § 25.....	751

REVISED STATUTES 1879.	
Ch. 21, art. 9.....	406
§ 671, 6153, 6154, 6205..	406

REVISED STATUTES 1889.	
Ch. 102, art. 4.....	465
§ 543	399
2022	399, 712
2024	399
2114	101
2130	1036
2168, 2243.....	751
2246	1036
2253	678

2262	421
2303	473
2304	679
3470	89
3480	88
§ 4067, 4218, 4219.....	483
4222	462
4864	691
4881	745
6012	680
§ 6092, 6099.....	716
6772	412
§ 7553, 7555, 7557, 7679	98
§ 7731, 7732.....	479

LAWS.	
1895, p. 91.....	1044
1895, p. 93.....	421
1895, p. 162.....	99
1897, p. 208, § 1.....	413

TENNESSEE.	
MILLIKEN & VERTREES' CODE.	
§ 4565	1025

SHANNON'S CODE.	
§ 5598	1025

LAWS.	
1829, ch. 85, § 1.....	492
1845-46, ch. 1.....	202
1847-48, ch. 195.....	202
1869-70, ch. 78, § 2.....	1025

TEXAS.	
CONSTITUTION.	
Art. 1, §§ 17, 19.....	848
Art. 3, §§ 29, 30, 36.....	544
Art. 5, § 21.....	656
Art. 7, § 4.....	659
Art. 16, § 51.....	874

CODE OF CRIMINAL PROCEDURE 1895.	
Art. 226	357
Art. 404	903
Art. 549	945
Art. 621	217
Art. 723	935, 954
Art. 750	375
Art. 768	246
Art. 774	224
Art. 791	935
Art. 823	217, 374
Art. 887	373
Art. 1024a	328, 535
Art. 1094	526

PENAL CODE 1895.	
Arts. 87, 90.....	1108
Arts. 199, 200.....	1119
Art. 289b	392
Art. 309	379
Art. 405	247, 248
Arts. 608, 633, 634.....	924
Art. 652	951
Art. 653	951, 1106
Art. 679	954
Arts. 718, 720.....	1106
Art. 747, subd. 2.....	220
Art. 798	872
Art. 877	245

REVISED STATUTES 1895.

Art. 186, subd. 11.....	858
Art. 200	48
Arts. 331a, 331b.....	261
Art. 635	382
Art. 665	24
Art. 1015	373
Art. 1168	394
Art. 1333. Amended by Laws 1890	330
Arts. 1821, 1822.....	555
Art. 2046	510
Art. 2302	337
Art. 2306	394
Art. 2349	48
Art. 2395	36
Art. 2427	36
Art. 2601. Amended by Laws 1897, p. 52.....	501
Art. 2957	503
Art. 3097	322
Art. 3207	661
Art. 3294	879
Art. 3356	44
Art. 3370	556
Art. 3391	390
Arts. 3909, 3984.....	932
Art. 3964	892

Art. 4218j	846
Art. 4346	1102
Arts. 4584d, 4584g.....	324
Art. 4621	382
Art. 4649	343
Art. 4875	523
Art. 4882	26
Art. 4930	946, 947
Art. 5311	856
Art. 5313	870

SAYLES' CIVIL STATUTES
1888.

Art. 1265	83
-----------------	----

SAYLES' CIVIL STATUTES
1897.

Art. 1188	883
Art. 1239	553
Art. 1382	523
Art. 2302	263
Arts. 2495c, 2495d.....	656
Arts. 3017, 3020.....	1089
Arts. 3964-3970	46
Art. 4617	341
Arts. 5232c, 5232i.....	657

CITY CHARTERS.

Houston. Laws 1897, pp. 72, 73	642
---	-----

LAWS.

1856. Public Lands.....	544
1876, pp. 17, 155.....	640
1887, p. 83, ch. 99.....	659
1889, p. 50, ch. 56.....	659
1893, p. 97.....	1126
1895, p. 63. Amended by Laws 1897, p. 39.....	885
1895, p. 67, § 11.....	330
1897, p. 5.....	223, 229, 373
1897, p. 12, §§ 7, 22.....	353
1897, p. 39.....	885
1897, p. 44.....	46
1897, p. 52.....	502
1897, pp. 72, 73. Houston City Charter	642
1897, p. 113.....	659
1897, p. 130, § 1.....	1114
1897, p. 132, §§ 3, 9.....	657
1897, p. 160.....	659
1897, p. 184, ch. 129.....	846
1897, p. 244, ch. 165.....	502
1897, ch. 39.....	330
1899. Special Issues for Jury	330

STIPULATIONS.

Stipulation construed, and *held* that defendants could not amend their answer thereunder.—*Robinson v. Belt* (Ind. T.) 975.

A statement in a motion to dismiss a writ of error that the plaintiff in error has agreed to pay the costs of prosecuting the appeal and writ of error will not be considered, as the statement is *ex parte*, and not supported by an agreement in writing signed by the plaintiff in error.—*Less v. Ghio* (Tex. Sup.) 502.

STOCK.

Right of corporation to purchase its own stock, see "Corporations," § 2.

STREET RAILROADS.

See "Railroads."

§ 1. Regulation and operation.

It was the duty of the motorman to use the highest degree of care to avoid injury to a wheelman in a public street.—*Louisville Ry. Co. v. Blaydes* (Ky.) 820.

One who was unaccustomed to riding a bicycle was not guilty of contributory negligence in riding in a public street, so as to preclude her from recovering for an injury resulting from a collision with a street car, where she lost control of the wheel, and ran into the street in which the car was moving.—*Louisville Ry. Co. v. Blaydes* (Ky.) 820.

Failure of street-car company to equip its car with a fender which would have prevented the injury complained of is not, in the absence of an ordinance or statute requiring it, negligence.—*Hogan v. Citizens' Ry. Co. (Mo.)* 473.

An instruction *held* erroneous as failing to embody therein the principle that defendant would be liable, if, after the discovery by defendant of the danger in which the child was, it could, in the exercise of ordinary care, have averted the injury, and failed to do so.—*Hogan v. Citizens' Ry. Co. (Mo.)* 473.

It is competent for an experienced motorman to testify that there was nothing more that he could have done to avert the injury that was not done, and such testimony does not preclude

the jury from finding otherwise.—*Hogan v. Citizens' Ry. Co. (Mo.)* 473.

One who alleges negligence in running a street car faster than is allowed by ordinance, on failure of proof on that point, cannot rely on common-law negligence.—*Hogan v. Citizens' Ry. Co. (Mo.)* 473.

Where the complaint alleged negligence in not ringing the bell, and the evidence showed that the bell was rung twice, an instruction that, if the jury found from the evidence that the bell was rung, they must find for the defendant on that issue, is not erroneous.—*Hogan v. Citizens' Ry. Co. (Mo.)* 473.

STREETS.

See "Highways"; "Municipal Corporations," §§ 7, 8.

SUBLETTING.

See "Landlord and Tenant," § 3.

SUBMISSION OF CONTROVERSY.

An order submitting a cause for judgment upon exceptions to a master commissioner's report, and upon the whole case, will be regarded as submitting the grounds for an attachment, there being nothing to indicate an intention to except the attachment from the order of submission.—*Rice v. People's Bank of Adairville (Ky.)* 441.

While defendant might have demanded that the attachment be tried by oral evidence, he waived this right by failing to reserve the question when the order of submission was made.—*Rice v. People's Bank of Adairville (Ky.)* 441.

SUBSCRIPTIONS.

A subscription *held* not binding because not delivered.—*White v. Crosby* (Tex. Civ. App.) 350.

SUMMONS.

See "Process."

Service of on foreign corporation, see "Corporations," § 4.

SURETYSHIP.

See "Principal and Surety."

SURPRISE.

Ground for new trial, see "New Trial," § 1.

SURVIVORSHIP.

Of devisees or legatees, see "Wills," § 3.

SWAMP LANDS.

See "Public Lands," § 1.

SWINDLING.

See "False Pretenses."

TAXATION.

Assessments for municipal improvements, see "Municipal Corporations," § 6.
For school purposes, see "Schools and School Districts," § 1.

§ 1. Liability of persons and property.
Under Rev. St. 1889, §§ 7553, 7555, 7557, 7679, requiring that lands shall be assessed in the name of the owner, the state's lien for taxes cannot be enforced against a lessee thereof.—*State ex rel. Ziegenhein v. Thompson* (Mo.) 98.

§ 2. Levy and assessment.

Two levies may be made in one year, provided they are made for different years.—*Cincinnati, N. O. & T. P. Ry. Co. v. Commonwealth* (Ky.) 568.

Where the statute requires taxpayers to render inventory of their property, it will be presumed a taxpayer furnished the description on the tax roll.—*Turner v. City of Houston* (Tex. Civ. App.) 642.

§ 3. Collection and enforcement against persons or personal property.

The receiver of a railroad and the railroad company may be joined as defendants in an action to recover taxes on the railroad.—*Cincinnati, N. O. & T. P. Ry. Co. v. Commonwealth* (Ky.) 568.

A petition to enforce the state's lien for taxes, directed against the lessee of lands without previous assessment of the leasehold, and no averment in the petition of the nature of the lease, the length of the term, or the liability of the lessee to pay the taxes, is insufficient.—*State ex rel. Ziegenhein v. Thompson* (Mo.) 98.

Under Acts 1897, §§ 3, 9 (Sayles' Civ. St. arts. 5232c, 5232i), *held*, the assessor and clerk were entitled to one dollar each for each year taxes were delinquent.—*State v. Wolfe* (Tex. Civ. App.) 657.

§ 4. Sale of land for nonpayment of tax.

A sale of land to the state, in a suit to foreclose a tax lien, confers no title which can be conveyed by a donation deed until after the expiration of two years.—*St. Louis Refrigerator & Wooden Gutter Co. v. Langley* (Ark.) 68.

Under Manst. Dig. §§ 5731, 5760, as amended by Act March 28, 1887, a delinquent tax list, filed on the first Monday in May, *held* not prematurely filed.—*Boles v. McNeil* (Ark.) 71.

A description in an advertisement for sale of land for taxes *held* sufficient.—*Boles v. McNeil* (Ark.) 71.

The commissioner of state lands had no authority in 1886 to sell land forfeited to the state

for nonpayment of taxes until they were certified to him by the county clerk.—*Muskegon Lumber Co. v. Brown* (Ark.) 1056.

After land has been sold to the state as forfeited for nonpayment of taxes, it is not subject to sale for subsequent taxes.—*Muskegon Lumber Co. v. Brown* (Ark.) 1056.

A sale of lands in 1872 for delinquent taxes, where including costs other than the cost of advertising, was void.—*Muskegon Lumber Co. v. Brown* (Ark.) 1056.

In a suit to enforce the state's lien for taxes, *held*, under Rev. St. 1889, § 2022, the order of publication must describe the land.—*Stewart v. Allison* (Mo.) 712.

Under the charter of city of Houston (Sp. Laws 1897, pp. 72, 73), a judgment against the property owner for the aggregate of the taxes against several parcels of land, with a foreclosure of the lien therefor upon all the property in gross, is valid.—*Turner v. City of Houston* (Tex. Civ. App.) 642.

§ 5. Tax titles.

The act of 1879, "to provide for the redemption of delinquent lands," is unconstitutional, and deeds made under it are void.—*Tupy v. Kocourek* (Ark.) 69.

In a suit to foreclose a tax lien, *held*, the court properly refused to permit a defendant, appearing without service, to withdraw his answer.—*Moss v. City of Rockport* (Tex. Civ. App.) 652.

TELEGRAPHS AND TELEPHONES.

§ 1. Regulation and operation.

A charge which assumes that it is negligence for a company to fail to notify a sender of a message of its inability to deliver it is erroneous.—*Western Union Tel. Co. v. Davis* (Tex. Civ. App.) 258.

Complaint for failure to deliver a telegram, the purpose of which was not disclosed on its face, *held* to state a cause of action.—*Ward v. Western Union Tel. Co.* (Tex. Civ. App.) 259.

Telegram *held* sufficient to notify company that proximate result of failure to deliver would be to deny one to whom it is sent the opportunity to attend his mother's funeral.—*Western Union Tel. Co. v. Wilson* (Tex. Civ. App.) 521.

Telegraph company *held* to have had notice that the purpose of a message was to delay funeral of the wife of the sender until his arrival.—*Jones v. Roach* (Tex. Civ. App.) 549.

Receiver of telegraph line will be presumed to have authority to contract to transmit a message beyond his line.—*Jones v. Roach* (Tex. Civ. App.) 549.

Recovery for delay in transmitting message, whereby plaintiff's wife was buried before his arrival, is not barred on the ground that damages are speculative.—*Jones v. Roach* (Tex. Civ. App.) 549.

TENANCY IN COMMON.

§ 1. Mutual rights, duties, and liabilities of co-tenants.

An agreement with owners of land to pay a co-owner for looking after it *held* not terminated by one owner's selling his interest.—*Cotton v. Rand* (Tex. Civ. App.) 55.

An agreement of cestuis que trustent to pay an agent for looking after their land *held* not terminated by conveyance of the land by the trustee.—*Cotton v. Rand* (Tex. Civ. App.) 55.

§ 2. Rights and liabilities of co-tenants as to third persons.

Where plaintiff held a lien on land of tenants in common for services performed for them, and one of them had a counterclaim, *held*,

that the interest of such one was liable for his proportion, less the counterclaim.—*Cotton v. Rand* (Tex. Civ. App.) 55.

One purchasing the interest of a tenant in common *held* to take it subject to the right of a co-tenant to enforce a claim against the land for services in looking after it.—*Cotton v. Rand* (Tex. Civ. App.) 55.

TERMINATION.

Of agency, see "Principal and Agent," § 1.

TERMS.

Of courts, see "Courts," § 1.

THEFT.

See "Larceny."

THREATS.

An indictment charging threat to inflict bodily injury *held* insufficient.—*Tindale v. State* (Tex. Cr. App.) 373.

TIMBER.

See "Logs and Logging."

TIME.

For taking appeal or suing out writ of error, see "Appeal and Error," § 4.

TITLE.

Estoppel to assert title, see "Estoppel," § 2.
Sufficiency of title of vendor of land, see "Vendor and Purchaser," § 4.
Tax titles, see "Taxation," § 5.

TOOLS.

Liability of employer for defects, see "Master and Servant," § 2.

TORTS.

See "Fraud"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Trespass," § 1.
Civil damages from sale of liquors, see "Intoxicating Liquors," § 4.

TOWNS.

See "Municipal Corporations."

TRAFFIC ARRANGEMENTS.

Between railroads, see "Railroads," § 2.

TRANSITORY ACTIONS.

See "Venne," § 1.

TRESPASS.

§ 1. Actions.

A homestead entryman, who has obtained a receipt from the receiver of the land office, may sue one who caused the land to be washed away.—*Gulf, C. & S. F. Ry. Co. v. Clark* (Ind. T.) 962.

Where defendant caused land entered as a homestead to be washed away, *held*, that the entryman's damage was the value of the land.—*Gulf, C. & S. F. Ry. Co. v. Clark* (Ind. T.) 962.

TRESPASS TO TRY TITLE.

§ 1. Right of action and defenses.

Defendant, specially pleading title in himself, cannot defeat a recovery by proof of an outstanding title, not pleaded.—*Hayes v. Gallaher* (Tex. Civ. App.) 280.

The allegations of an answer not entitling defendants to affirmative relief, a nonsuit was properly granted on motion of plaintiff.—*Peters v. Chandler* (Tex. Civ. App.) 281.

Bond conditioned to make a conveyance on demand *held* not a conveyance which can be pleaded by persons not connecting themselves therewith as an outstanding title.—*Caudle v. Williams* (Tex. Civ. App.) 560.

The court *held* to have jurisdiction to adjust an indebtedness between the parties, although the amount was not within its jurisdiction.—*Kay v. Hathaway* (Tex. Civ. App.) 663.

Defendant cannot defeat plaintiff's right to possession of a house on the land which he was to have on payment of an indebtedness, which he had refused to pay, by asserting a claim of homestead.—*Kay v. Hathaway* (Tex. Civ. App.) 663.

Where plaintiff claims as an actual settler on state school lands, she must rely upon the strength of her own title, and the burden of proof is upon her to show that she was an actual settler at the time she made her application.—*Renner v. Peterson* (Tex. Civ. App.) 867.

§ 2. Proceedings.

Refusal to postpone the hearing of a motion for new trial *held* not error.—*Hayes v. Gallaher* (Tex. Civ. App.) 280.

A cross action setting up plaintiff's fraud in obtaining a deed to the land under an execution sale, and setting up facts in regard thereto which incidentally show defendant's title, *held* not a special plea of title.—*Campbell v. Antis* (Tex. Civ. App.) 343.

In an action to try title to land, a cross action attacking plaintiff's title on the ground of fraud does not waive a plea of not guilty.—*Campbell v. Antis* (Tex. Civ. App.) 343.

A decree awarding each party to a suit an undivided half interest in certain land, though recorded before the partition, *held* admissible to support a title thereunder.—*Campbell v. Antis* (Tex. Civ. App.) 343.

Where the land described in plaintiff's pleadings is not that embraced in her chain of title, it is proper to direct verdict for defendant.—*Sayers v. Davis* (Tex. Civ. App.) 520.

Sureties on a replevin bond given by occupant of land sequestered in trespass to try title, under Rev. St. art. 4875, are not liable for costs of suit.—*Zimmerman v. Pearson* (Tex. Civ. App.) 623.

Sufficiency of evidence to identify original patentee to land determined.—*Graham v. Billings* (Tex. Civ. App.) 645.

Issue of plaintiff's right to possession by reason of defendant's written renouncement thereof *held* improperly submitted, where only the validity of the renouncement is in dispute.—*Graham v. Billings* (Tex. Civ. App.) 645.

Where there is a special answer not pleading collusion between plaintiff and his grantor in the purchase of school lands, such issue cannot be proven under the plea of not guilty.—*Abilene Live-Stock Co. v. Guinn* (Tex. Civ. App.) 885.

In trespass to try title to school lands, it was proper to exclude a lease of the land to plaintiff's grantor, where the grantor had afterwards made an application to purchase.—*Abilene Live-Stock Co. v. Guinn* (Tex. Civ. App.) 885.

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No error is committed in refusing a charge substantially given in the general charge.—*Houston & T. C. Ry. Co. v. Loeffler* (Tex. Civ. App.) 536.

Refusal of special instruction is not prejudicial, where it was impliedly given in the general charge, and was stated to the jury when the evidence was admitted.—*Weatherford v. McFadden* (Tex. Civ. App.) 548.

It is not error to refuse to give a requested instruction when the requested instruction is embraced in the charge given.—*Hitchler v. Boyles* (Tex. Civ. App.) 648.

An instruction *held* properly refused where it was based on a theory not supported by the evidence.—*Gulf, C. & S. F. Ry. Co. v. Williams* (Tex. Civ. App.) 653.

There was no error in refusing special charges substantially embraced in the charges given.—*Missouri, K. & T. Ry. Co. of Texas v. St. Clair* (Tex. Civ. App.) 666.

§ 7. Verdict.

A judgment for slander will not be reversed because the jury erroneously assessed the damages in a lump, as exemplary damages.—*Courtney v. Blackwell* (Mo.) 668.

A request that a jury case be submitted on special issues comes too late after the main charge has been given.—*Galveston, H. & S. A. Ry. Co. v. Cody* (Tex. Sup.) 329.

§ 8. Trial by court.

A finding based on excluded evidence, and a conclusion of law resulting therefrom, *held* erroneous.—*Thompson v. Johnson* (Tex. Sup.) 23.

§ 9. Waiver and correction of irregularities and errors.

Refusal to withdraw an itemized statement of plaintiff's claims from the jury, *held* no ground for complaint, after defendant had consented to the jury taking it.—*National Bank of Dangerfield v. Ragland* (Tex. Civ. App.) 661.

TROVER AND CONVERSION.

Evidence *held* insufficient to show conversion.—*Herring v. Herring* (Tex. Civ. App.) 865.

TRUSTEE PROCESS.

See "Garnishment."

TRUSTS.

Combinations to monopolize trade, see "Monopolies."

Trust deeds, see "Mortgages."

§ 1. Creation, existence, and validity.

The fact that a deed executed by a married woman, conveying her property to another in trust for herself for life, remainder to her children, does not reserve to her the power to revoke, does not render it invalid, where the purpose of the deed was to secure the grantor against the importunities and influence of her improvident husband, who was wasting her estate.—*Middleton v. Shelby County Trust Co.* (Ky.) 156.

Money obtained on an insolvent bank's note does not, where deposited as assets, become a trust fund for guarantors of the note, induced by fraud to guaranty it.—*Storts v. George* (Mo.) 489.

Delivery of a trust deed to the trustee *held* a good delivery to the creditors secured, unless they disclaim in reasonable time.—*Kingman & Co. v. Cornell-Tebbetts Machine & Buggy Co.* (Mo.) 727.

The acceptance of an order, and the receipt of money thereunder, on condition that certain claims against the drawer of the order be paid, *held* to create an enforceable trust in favor of

the owners of such claims.—*Springs v. Cooper* (Tenn. Ch. App.) 997.

§ 2. Construction and operation.

Deed of wife construed, and *held* to convey all her interest in the land.—*Ryland v. Banks* (Mo.) 720; *Jones v. Buford*, Id.

A wife *held* entitled to convey the equitable title to land held in trust for her separate estate, without the trustee joining.—*Ryland v. Banks* (Mo.) 720; *Jones v. Buford*, Id.

§ 3. Management and disposal of trust property.

Where an alienation of a married woman's interest in a trust created for her benefit was incompatible with the purposes of the trust, she has no power to alienate such interest, though not restricted in the trust deed.—*Monday v. Vance* (Tex. Civ. App.) 346.

A deed purporting to convey a moiety of an estate previously conveyed to a trustee *held* not void, but a conveyance of the grantors' remainder.—*Monday v. Vance* (Tex. Civ. App.) 346.

§ 4. Establishment and enforcement of trust.

It was error to sustain a demurrer to the answer of a trustee, pleading the misappropriation by his attorney of the trust fund sued for, though some facts were alleged tending to show defendant's negligence in retaining his attorney after he should have known of the misappropriation of a part of the fund, as these facts may be capable of explanation.—*Stewart's Adm'r v. Carneal* (Ky.) 800.

The fact that laborers sue and obtain judgment against the contractor for their claims does not bar them from afterwards suing to enforce an express trust to pay the claims.—*Springs v. Cooper* (Tenn. Ch. App.) 997.

UNDERTAKINGS.

See "Bonds."

UNDUE INFLUENCE.

Procuring making of will, see "Wills," § 2.

UNITED STATES.

See "United States Commissioners"; "United States Marshals."

Courts, see "Courts," § 3.

Public lands, see "Public Lands," § 1.

UNITED STATES COMMISSIONERS.

A United States commissioner *held* to have jurisdiction of an action for damages for the removal of buildings and fences from lands, where they were erected under an agreement which did not make them fixtures.—*Morrow v. Burney* (Ind. T.) 1078.

UNITED STATES MARSHALS.

Marshal *held* not liable on his bond for the acts of a deputy and posse, where they, without his knowledge, started without a writ in search of a horse thief, and shot an innocent party.—*Chandler v. Rutherford* (Ind. T.) 981.

UNLAWFUL ASSEMBLY.

Indictment for unlawful assembly under Pen. Code, art. 309, *held* insufficient.—*Bradford v. State* (Tex. Cr. App.) 879.

Evidence *held* not to show a meeting to be an "unlawful assembly."—*Holman v. State* (Tex. Cr. App.) 879.

UNLAWFUL DETAINER.

See "Forcible Entry and Detainer."

USURY.

§ 1. Usurious contracts and transactions.

An alleged sale in consideration of a loan held merely a cover for a usurious loan, and void.—*Sparks v. Robinson* (Ark.) 460.

It is error to give judgment for a greater rate of interest than 6 per cent., though usury is not pleaded.—*Vittetow v. Ames* (Ky.) 1.

Under Rev. St. art. 3097, a stipulation that, on failure to repay a loan at maturity, the debtor shall pay for its detention a sum in excess of the legal rate of interest, is void.—*Parks v. Lubbock* (Tex. Sup.) 322.

Where alleged usury consisted in adding interest to the note, which has been paid, parol testimony is admissible to show the amount of interest included in the note.—*National Bank of Dangerfield v. Ragland* (Tex. Civ. App.) 661.

The penalty prescribed by Rev. St. U. S. § 5198, for usurious interest charged by national banks, may be recovered within two years after payment of the interest.—*National Bank of Dangerfield v. Ragland* (Tex. Civ. App.) 661.

A contract to erect a house for a price to be paid in installments held not a contract to loan money, subject to the usury laws.—*Cain v. Texas Building & Loan Ass'n* (Tex. Civ. App.) 879.

VACATION.

Of attachment, see "Attachment," § 4.
Of default judgment, see "Judgment," § 2.
Of judgment, see "Judgment," § 6.

VARIANCE.

Between pleading and proof in civil action, see "Pleading," § 7.
— in criminal prosecutions, see "Indictment and Information," § 5.

VENDOR AND PURCHASER.

See "Sales."

Contracts within the statute, see "Frauds, Statute of," § 2.

Purchasers at sale on execution, see "Execution," § 3.

Specific performance of contract, see "Specific Performance," § 1.

§ 1. Requisites and validity of contract.

Possession of land by one holding under a bond for a title is notice to the obligor's creditors of the obligee's title.—*Strauss v. White* (Ark.) 64.

A contract purporting to be for the sale of land, which provided for the forfeiture of a 5 per cent. cash payment, amounting to \$12,500, in the event the second payment should not be made at the time stipulated, cannot be regarded as a mere option.—*Allison v. Cocke's Ex'rs* (Ky.) 593; Same v. *Preston's Ex'rs*, Id.

§ 2. Construction and operation of contract.

A contract calling for a warranty deed means a perfect title to the purchaser.—*Tupy v. Kocourek* (Ark.) 69.

Where a debtor conveyed land to his creditor, reciting the amount of his debt as the consideration, certain acts of the creditor held to be inconsistent with his claim that there was a parol agreement that, if the land should not sell for enough to pay the debt, the debtor would make up the deficit.—*Shrivner v. Young* (Ky.) 153.

§ 3. Modification or rescission of contract.

In an action to rescind a sale of mortgaged lands, the mortgagee should be made a party, where the vendee had executed a contract with the mortgagee obligating himself to pay the mortgage.—*Hoover v. Binkley* (Ark.) 73.

A vendor of mortgaged lands, conveyed in consideration of the vendee's assuming the mortgage, is not entitled to a rescission on the ground of mistake or fraud, without placing, offering to place, the vendee in statu quo.—*Hoover v. Binkley* (Ark.) 73.

One is not entitled to a rescission of a contract merely because he was old, in feeble health, and in financial trouble when he executed it.—*Hoover v. Binkley* (Ark.) 73.

The existence of a mortgage to secure a debt due in 18 months, without the privilege of payment before maturity, did not justify the purchaser's refusal to accept a deed when tendere, no objection on that account having been offered when the mortgage was discussed prior to that date.—*Allison v. Cocke's Ex'rs* (Ky.) 593; Same v. *Preston's Ex'rs*, Id.

§ 4. Performance of contract.

A contract for the purchase of two separate quarters of land cannot be severed.—*Tupy v. Kocourek* (Ark.) 69.

Where a deed is lost, a quitclaim to replace it, executed to heirs of grantees, is not without consideration.—*Hill v. Jackson* (Tex. Civ. App.) 357.

On a conveyance of 39,800 acres, with 10 days' time to determine whether the field notes contained such number of acres, the vendee, by accepting the deed, takes the risk of the number of acres, and a shortage of 62 acres in such surveys does not authorize damages.—*Kinney County Land & Live-Stock Co. v. Thomson* (Tex. Civ. App.) 890.

§ 5. Rights and liabilities of parties.

A grantee, for value, without notice, in a quitclaim deed, acquires the same rights against an unrecorded deed as any other innocent purchaser.—*Elliott v. Buffington* (Mo.) 408.

Record of a trust deed acknowledged before the trustee is not constructive notice to purchasers.—*German-American Bank v. Carondelet Real-Estate Co.* (Mo.) 691.

Rev. St. 1889, § 4864, making records of improperly acknowledged deeds notice, does not apply to deeds recorded after its passage.—*German-American Bank v. Carondelet Real-Estate Co.* (Mo.) 691.

Persons buying land held chargeable with notice of a vendor's lien note and its assignment where recorded deed refers to the note and recites its assumption.—*Smith v. Farmers' Loan & Trust Co.* (Tex. Civ. App.) 515.

Pre-existing debt will not support claim of bona fide purchaser.—*Pride v. Whitfield* (Tex. Civ. App.) 1100.

§ 6. Remedies of vendor.

Where notes are assigned by the purchaser to the vendor as consideration for land, the lien retained in the deed secures only the implied liability of the purchaser as assignor, and when he is released from such liability the lien is discharged.—*Pritchett v. Hape* (Ky.) 608.

Where C., who held four purchase-money note of D., proposed "to surrender" two of them to the widow of D. for a note in which D. was surety for his father, saying that this would leave two of the notes unpaid, and this proposition was accepted by the widow, who paid of the note in which D. was surety, there was no sale of the two notes to the widow, although they were indorsed by C., and therefore the lien exists for the sole benefit of a bona fide

purchaser of the other two notes.—*Hewitt v. Dodd* (Ky.) 796.

Execution by vendor of deed to correct description in previous deed *held* not to discharge the land from the lien reserved in first deed.—*Smith v. Ojerholm* (Tex. Civ. App.) 37.

In action to foreclose lien, defect of title *held* no defense where fraud was not alleged.—*Knight v. Coleman County* (Tex. Civ. App.) 258.

§ 7. Remedies of purchaser.

Failure of a petition for damages for non-performance of a land contract to allege performance on plaintiff's part is cured by denial of such performance in the answer.—*Ricketts v. Hart* (Mo.) 825.

In an action to recover damages for non-delivery of possession of premises sold, it is not error to permit defendant's former tenant to testify that an agreement to vacate was procured by fraud, where the defense is that plaintiff knew the premises were leased, and also of the agreement to vacate.—*Jaeger v. Biering* (Tex. Civ. App.) 50.

VENUE.

Of criminal prosecutions, see "Criminal Law," § 2.

§ 1. Nature or subject of action.

Service of process in the county in which the action was brought gives jurisdiction to render judgment for the price of logs sued for, and to enforce a lien on the logs, though it be also sought to enforce a lien on real estate situated in another county.—*Tilford v. Dotson* (Ky.) 583.

Standing trees marked and designated and sold in contemplation of immediate severance from the soil are personal property, and an action to enforce a vendor's lien thereon may be brought in a county in which none of the trees are situated.—*Tilford v. Dotson* (Ky.) 583.

Under Civ. Code Prac. § 72, an action against an incorporated building association to recover usury growing out of a loan may be brought in the county in which the contract was made.—*Louisville Savings, Loan & Building Ass'n v. Harbeson* (Ky.) 787.

§ 2. Change of venue or place of trial.

Under Rev. St. 1889, § 2262, as amended by Laws 1895, p. 93, the court need not, before ordering a change of venue because of his disqualification, ask the parties if they will agree on a special judge, or consent to the election of one.—*State ex rel. Herriford v. McKee* (Mo.) 421.

Pleas of privilege to be sued in counties of their domicile *held* waived by defendants.—*Moody v. First Nat. Bank* (Tex. Civ. App.) 523.

Defendants, having waived privilege to be sued in the counties of their domicile, cannot assert privilege of being sued in county where the land involved is situated.—*Moody v. First Nat. Bank* (Tex. Civ. App.) 523.

VERDICT.

Directing verdict in civil actions, see "Trial," § 5.

In civil actions, see "Trial," § 7.

In criminal prosecutions, see "Criminal Law," § 26.

Necessity of conformity of judgment, see "Judgment," § 3.

Operation and effect as curing defects in pleadings, see "Pleading," § 8.

Review on appeal or writ of error, see "Appeal and Error," § 19.

VERIFICATION.

Of pleading, see "Pleading," § 5.

VILLAGES.

See "Municipal Corporations."

VINDICTIVE DAMAGES.

See "Damages," § 3.

WAIVER.

See "Estoppel."

Of defects in pleadings, see "Pleading," § 8.

Of irregularities occurring at trial, see "Trial," § 9.

Of objections to admission of evidence in criminal prosecutions, see "Criminal Law," § 19. — to jurisdiction by appearance, see "Appearance."

Of right to trial by jury, see "Jury," § 1.

WARDS.

See "Guardian and Ward."

WARRANT.

Orders for payment from public funds, see "Municipal Corporations," § 9.

WATERS AND WATER COURSES.

See "Levees."

§ 1. Natural water courses.

One who deflected the current *held* liable to another riparian owner, regardless of any negligence.—*Gulf, C. & S. F. Ry. Co. v. Clark* (Ind. T.) 962.

§ 2. Artificial ponds, reservoirs, and channels, dams, and flowage.

In an action for overflowing lands, a complaint which alleges that plaintiff has been damaged in a specified amount is sufficient, and it need not allege the value before and after the flooding.—*St. Louis Trust Co. v. Bambrick* (Mo.) 706.

In an action to recover for overflowing land, an instruction that the jury may take into consideration the rental value of a quarry in determining its value is not erroneous, as that is one of the criterions by which its value may be determined.—*St. Louis Trust Co. v. Bambrick* (Mo.) 706.

In an action to recover for overflowing plaintiff's land, it is error to give an instruction that the measure of plaintiff's damages is the difference between its value just before the act causing the overflow and afterwards, where there has been no evidence as to its value at such times.—*St. Louis Trust Co. v. Bambrick* (Mo.) 706.

WAYS.

Private rights of way, see "Easements," § 1. Public ways, see "Highways"; "Municipal Corporations," § 7.

WILLS.

See "Executors and Administrators."

§ 1. Contracts to devise or bequeath.

Plaintiff is entitled to a lien upon the real estate agreed to be given or devised to her for the value of her services.—*Thomas v. Feece* (Ky.) 150.

§ 2. Requisites and validity.

Where the names of the testator and the subscribing witnesses to a will were cut therefrom by testator's direction, and in his presence, with the intention to revoke the will, there was a revocation; and as the will was not re-executed,

as required by statute, after certain additions were made thereto, neither the original nor the new will is valid.—*Sander's Adm'r v. Babbitt* (Ky.) 163.

Where a will by which testatrix devised all her property to her husband was drawn by a notary, at the request of her father-in-law, when, so far as appears, she had not expressed any desire to make a will, and was executed by her when in a weak condition, and in the presence of no one but members of the family of her father-in-law, at whose home she was staying, the jury were warranted in finding against the will, there being no other evidence that she desired to make such a disposition of her property.—*Marshall v. Kendrick* (Ky.) 563.

A deed executed by a grantor, but never delivered, will not, after his death, be treated as a testamentary disposition.—*Blackman v. Schierman* (Tex. Civ. App.) 886.

§ 3. Construction.

Under a devise to testator's infant grandson for life, with remainder to the legal heirs of his body, but, if he should have no bodily heirs, then that portion of the estate devised to them "which is remaining" should go to other persons, the grandson is entitled, upon reaching 21 years of age, to the possession of the estate devised, the remaindermen being entitled only to the estate remaining at his death.—*Colliver v. Taylor* (Ky.) 432.

Under a devise of land to testator's wife for life, remainder to his son, with a provision that, "should he die leaving no children or descendants, the said estate must revert to my legal heirs," the son, having survived the widow, takes the fee, as the words "should he die leaving no children" refer to a dying before the death of the life tenant.—*Weakley v. Hanna* (Ky.) 570.

A will held to mean that an undivided one-third of the testator's land should be distributed to the children of his son living when the eldest became of age.—*Thomas v. Thomas* (Mo.) 111.

A will construed, and held that devisee had absolute power to devise or convey the property.—*Watson v. Watson* (Tex. Civ. App.) 1106.

§ 4. Rights and liabilities of devisees and legatees.

Where a widow accepts the provisions of her husband's will, she takes the entire property subject to his debts, and cannot claim either homestead or dower against his creditors.—*Harrison v. Taylor's Adm'r* (Ky.) 193.

Averment in pleading, in action by pretermitted heirs against legatee for contribution, that will was procured by undue influence, is inconsistent with claim for contribution.—*Banks v. Galbraith* (Mo.) 105.

In an action by pretermitted heir against legatee for contribution, joinder in same count of the complaint of allegations showing right to contribution, and allegations claiming undue influence in execution of will, is a commingling of inconsistent causes of action in same count.—*Banks v. Galbraith* (Mo.) 105.

Will construed, and held to charge legacies on the real estate, except the homestead.—*Smith v. Cairns* (Tex. Sup.) 498.

WITNESSES.

See "Evidence."

Opinions, see "Evidence," § 10.

Perjury, see "Perjury."

Testimony of accomplices, see "Criminal Law," § 12.

§ 1. Attendance, production of documents, and compensation.

Defendant held entitled to show the arrangement he had with a witness for his compensa-

tion, where the witness stated, on cross-examination, that he was to receive an exorbitant sum for testifying.—*Gulf, C. & S. F. Ry. Co. v. Mitchell* (Tex. Civ. App.) 662.

§ 2. Competency.

Station agent held competent to testify as to compensation of fireman.—*Missouri, K. & T. Ry. Co. v. Elliott* (Ind. T.) 1067.

Chief train dispatcher held competent to testify as to who was train dispatcher at a certain point.—*Missouri, K. & T. Ry. Co. v. Elliott* (Ind. T.) 1067.

A debtor is not a competent witness for his creditor, who seeks to be substituted to his rights, as to a transaction with a person since deceased.—*Thomas v. Payne* (Ky.) 450.

A child 12 years of age was a competent witness, though she refused to state whether she and her father and mother had agreed upon what they each should state on the trial, the weight to be given her testimony being a matter for the jury.—*Flannery v. Commonwealth* (Ky.) 572.

One to whom a note was given in trust for another by a person since deceased is a competent witness for the cestui que trust to establish the gift.—*Bright's Ex'rs v. Swinebroad* (Ky.) 578.

Under Civ. Code Prac. § 606, either husband or wife, but not both, may testify for the wife in an action brought by her alone; but, if the wife elects to have the husband testify, he may not testify as to transactions with a person since deceased, as the wife herself would not be a competent witness as to such transactions.—*Bright's Ex'rs v. Swinebroad* (Ky.) 578.

The wife of deceased is a competent witness for the commonwealth, to prove the dying declaration of her husband.—*Hilbert v. Commonwealth* (Ky.) 817.

One's diary or memorandum of an account with a person subsequently deceased is inadmissible against his executor, under Acts 1869-70, c. 78, § 2.—*Nance v. Callender* (Tenn. Ch. App.) 1025.

Testimony of a wife as to communication of her husband held incompetent, under Code Cr. Proc. art. 774.—*Williams v. State* (Tex. Cr. App.) 224.

A child of six held to understand the nature of an oath, and hence to be competent.—*Scroggins v. State* (Tex. Cr. App.) 232.

A witness is not incompetent for the state by reason of his having been indicted for the same offense.—*Duncan v. State* (Tex. Cr. App.) 372.

A general manager of a corporation is not a party to an action wherein such corporation is plaintiff, within Sayles' Civ. St. art. 2302, relating to evidence of any transaction with a decedent.—*Colonial & U. S. Mortg. Co. v. Thedford* (Tex. Civ. App.) 263.

Rev. St. art. 2302, held not to apply to an action against executors who are trustees for legatees.—*Clark v. Clark* (Tex. Civ. App.) 337.

In an action against legatees, held not erroneous to permit defendants to testify as to conversations with testator when they were called by plaintiff.—*Clark v. Clark* (Tex. Civ. App.) 337.

A statement of a fact made by a client to his attorney, to be alleged in a pleading, is not a confidential communication between attorney and client.—*San Antonio & A. P. Ry. Co. v. Brooking* (Tex. Civ. App.) 537.

In an action by an executor, testimony as to the contents of a letter written by defendant to deceased held inadmissible, under Rev. St. § 2302.—*Blackman v. Schierman* (Tex. Civ. App.) 886.

§ 3. Examination.

Where evidence as to statements made by a witness inconsistent with his testimony has been admitted, the court should allow him to be recalled, and to state the whole of the conversation referred to, so as to show that there was a misunderstanding, and that what he then said was not inconsistent with his testimony.—*Louisville & N. R. Co. v. Alumbaugh's Adm'r* (Ky.) 18.

On a trial for manslaughter it was error to permit the commonwealth to show upon the cross-examination of accused as a witness that he had been indicted for carrying a pistol and for shooting from ambush.—*Parker v. Commonwealth* (Ky.) 573.

Error in allowing certain cross-examination of an impeaching witness *held* prejudicial.—*Hamilton v. State* (Tex. Cr. App.) 217.

A witness introduced to impeach the prosecutrix by showing her testimony on a former trial cannot be cross-examined by asking him if he believed the testimony of prosecutrix on the former trial.—*Hamilton v. State* (Tex. Cr. App.) 217.

State's attorney *held* properly permitted to read the former testimony of an unwilling witness to refresh his memory.—*Carpenter v. State* (Tex. Cr. App.) 227.

Refusal to permit accused to explain why he had not given certain testimony on a former trial *held* error.—*Turner v. State* (Tex. Cr. App.) 366.

Leading questions may be propounded to an unwilling prosecuting witness whose testimony had been given at a previous trial.—*Duncan v. State* (Tex. Cr. App.) 372.

An accused cannot object to the testimony of a co-principal on the ground that it would tend to incriminate him.—*Duncan v. State* (Tex. Cr. App.) 372.

Under Code Cr. Proc. art. 404, *held* incompetent to cross-examine a witness as to his testimony before the grand jury.—*Christian v. State* (Tex. Cr. App.) 903.

In a criminal prosecution, *held* error to allow the state to cross-examine defendant to show that he refused to produce a bill of sale before the grand jury on the ground that it would tend to incriminate him.—*Wilson v. State* (Tex. Cr. App.) 916.

The constitutional right of the accused to refrain from giving evidence against himself applies to the giving of testimony before the grand jury.—*Wilson v. State* (Tex. Cr. App.) 916.

The right of accused to refuse to give incriminating evidence protects him from being required to produce private papers.—*Wilson v. State* (Tex. Cr. App.) 916.

A witness may refresh his recollection by the testimony taken down by him in the grand-jury room.—*Luttrell v. State* (Tex. Cr. App.) 930.

It is not error to permit a witness to be recalled and testify that he forgot about a certain matter when he first testified, when it has been shown that he has made statements inconsistent with his testimony.—*Texas & P. Ry. Co. v. Goldman* (Tex. Civ. App.) 275.

Allowing leading question where one answered slowly, and appeared not disposed to tell anything he could avoid, *held* not error.—*Missouri*,

K. & T. Ry. Co. of Texas v. Scarborough (Tex. Civ. App.) 356.

§ 4. Credibility, impeachment, contradiction, and corroboration.

A witness cannot be contradicted by showing that he has made statements inconsistent with his testimony, unless he has first been asked as to such statements.—*Louisville & N. R. Co. v. Alumbaugh's Adm'r* (Ky.) 18.

A witness cannot be contradicted by proof that, on a prior occasion, he expressed an opinion at variance with the fact testified to by him.—*Sweeney v. Kansas City Cable Ry. Co.* (Mo.) 682.

It is sufficient predicate for the impeachment of a witness to ask her if she "had not testified before the grand jury on a former occasion" to certain facts.—*Turner v. State* (Tex. Cr. App.) 366.

After defendant takes the stand, and testifies, the state may recall him to lay a predicate for his impeachment, the same as other witnesses.—*Clay v. State* (Tex. Cr. App.) 370.

A charge on the effect of impeaching a witness *held* erroneous.—*Poyner v. State* (Tex. Cr. App.) 376.

Evidence *held* admissible as matter of impeachment.—*State v. Harris* (Mo.) 481.

Evidence of a witness' general reputation for veracity is admissible where testimony has been offered to show that he had been charged with criminal offenses.—*Luttrell v. State* (Tex. Cr. App.) 930.

Cross-examination of defendant's witness *held* relevant, justifying his impeachment by the testimony of an opposing witness.—*Bean v. State* (Tex. Cr. App.) 946.

Where defendant, on trial for theft in connection with a burglary, testified that another pleaded guilty, he may, for purpose of impeachment, be asked if he had not been convicted of the burglary.—*Hargrove v. State* (Tex. Cr. App.) 1123.

Evidence of the arrangement a litigant had with a witness for paying him, offered to contradict his statement, *held* not to impeach such witness.—*Gulf, C. & S. F. Ry. Co. v. Mitchell* (Tex. Civ. App.) 662.

A witness cannot be impeached by showing that he was employed and discharged at an indefinite time by the party against whom he testified.—*Missouri, K. & T. Ry. Co. of Texas v. St. Clair* (Tex. Civ. App.) 666.

It is error to permit the introduction of evidence to impeach a witness as to an immaterial matter.—*Croft v. Smith* (Tex. Civ. App.) 1089.

WRITS.

See "Certiorari," § 1; "Execution"; "Garnishment," § 3; "Habeas Corpus"; "Injunction"; "Mandamus"; "Process."

Writ of error, see "Appeal and Error."

WRONGFUL ATTACHMENT.

See "Attachment," § 7.

WRONGFUL EXECUTION.

See "Execution," § 6.

TABLES OF SOUTHWESTERN CASES

IN

STATE REPORTS.

VOL. 146, MISSOURI REPORTS.

	Page		Page
Abbott v. Gillum (47 S. W. 1067).....	176	Meier v. Hinkson (48 S. W. 447).....	458
Armour Packing Co., State ex rel., v. Stephens (48 S. W. 929).....	662	Mississippi Val. Trust Co. v. McDonald (48 S. W. 483).....	467
Aurora, City of, ex rel. Williams v. Lindsay (48 S. W. 642).....	509	Moore v. Kansas City, Ft. S. & M. Ry. Co. (48 S. W. 487).....	572
Baird v. Citizens' Ry. Co. (48 S. W. 78)...	265	Moore v. Woodruff (48 S. W. 489).....	597
Bramell v. Adams (47 S. W. 931).....	70	Morrison v. Morey (48 S. W. 629).....	543
Bramell v. Cole (47 S. W. 931).....	70	Mountain Grove Bank v. Douglas County (47 S. W. 944).....	42
Bramell v. Collins (47 S. W. 931).....	70	Oakes v. St. Louis Candy Co. (48 S. W. 467)	391
Butler Bldg. & Inv. Co. v. Dunsworth (48 S. W. 449).....	361	Osborn v. Weldon (47 S. W. 936).....	185
Chapman v. Kansas City, C. & S. Ry. Co. (48 S. W. 646).....	481	Powell v. Banks (48 S. W. 664).....	620
Chrisman v. Hough (47 S. W. 941).....	102	Reynolds v. Citizens' Ry. Co. (47 S. W. 895)	126
City of Aurora ex rel. Williams v. Lindsay (48 S. W. 642).....	509	Rothrock v. Cordz-Fisher Lumber Co. (47 S. W. 907).....	57
Collins v. Pease (47 S. W. 925).....	135	Rozier v. Graham (48 S. W. 470).....	352
Crow, State ex inf., v. West Side St. Ry. Co. (47 S. W. 959).....	155	Schulenburg v. Hayden (48 S. W. 472)...	583
Davidson v. Manson (48 S. W. 635).....	608	Snoddy v. Jasper County (47 S. W. 906)...	112
Dunlap v. Griffith (47 S. W. 917).....	283	State v. Adler (47 S. W. 794).....	18
Exter v. Sawyer (47 S. W. 951).....	302	State v. Baker (48 S. W. 475).....	379
Fanning v. Doan (47 S. W. 896).....	98	State v. Bowles (47 S. W. 892).....	6
Garesche v. Levering Inv. Co. (48 S. W. 653)	436	State v. Brinkley (47 S. W. 793).....	37
Greene County Bank v. Gray (48 S. W. 447)	568	State v. Burlingame (48 S. W. 72).....	207
Hunleth v. Leahy (48 S. W. 459).....	408	State v. Carr (47 S. W. 790).....	1
Imhoff v. McArthur (48 S. W. 456).....	371	State v. Copeland (47 S. W. 788).....	5
Jackson County, State ex rel., v. Chick (48 S. W. 829).....	645	State v. Goddard (48 S. W. 82).....	177
Jacobs v. Omaha Life Ass'n (48 S. W. 462)	523	State v. Handy (47 S. W. 793).....	37
Kane v. Kane's Adm'r (48 S. W. 446).....	605	State v. Miller (47 S. W. 907).....	229
Keith v. Ridge (47 S. W. 904).....	90	State v. Mills (47 S. W. 938).....	195
King v. Texas County (47 S. W. 920).....	60	State v. Nelson (48 S. W. 84).....	256
Kitchell v. Manchester Road Electric Ry. Co. (48 S. W. 448).....	455	State v. Pennington (47 S. W. 799).....	27
Langford v. Few (47 S. W. 927).....	142	State v. Todd (47 S. W. 923).....	295
Logan v. Fidelity & Casualty Co. (47 S. W. 948)	114	State ex inf. Crow v. West Side St. Ry. Co. (47 S. W. 959).....	155
McGregor-Noe Hardware Co. v. Horn (47 S. W. 957).....	129	State ex rel. Armour Packing Co. v. Stephens (48 S. W. 929).....	662
Mackie v. Mott (47 S. W. 897).....	230	State ex rel. Jackson County v. Chick (48 S. W. 829).....	645
		State ex rel. Troll v. Brown (47 S. W. 504)	401
		Stevens v. City of Kansas City (48 S. W. 658)	460
		Tooker v. Leake (48 S. W. 638).....	419
		Troll, State ex rel., v. Brown (47 S. W. 504)	401
		Walker v. Ellis (48 S. W. 457).....	327
		Watson v. Alderson (48 S. W. 478).....	333
		Williams, City of Aurora ex rel., v. Lindsay (48 S. W. 642).....	509

VOL. 91, TEXAS (SUPREME COURT) REPORTS.

	Page		Page
A. H. Belo & Co. v. Smith (42 S. W. 850)	221	Hart v. West (42 S. W. 544)	184
Allen v. Tyson-Jones Buggy Co. (40 S. W. 393, 714)	22	Henson v. Byrne (45 S. W. 382)	625
American Nat. Bank of Austin v. Cruger (44 S. W. 278)	446	Hill v. Conrad (43 S. W. 789)	341
Arkansas Building & Loan Ass'n v. Madden (44 S. W. 823)	461	Hoetting v. Dobbin (42 S. W. 541; 43 S. W. 262)	210
Bailey v. Deware (40 S. W. 966)	91	Homes v. City of Henrietta (42 S. W. 1052)	318
Bauman v. Chambers (41 S. W. 471)	108	Houston, E. & W. T. Ry. Co. v. Campbell (45 S. W. 2)	551
Bean v. City of Brownwood (45 S. W. 897)	684	Houston & T. C. Ry. Co. v. McFadden (40 S. W. 216; 42 S. W. 593)	194
Belo & Co. v. Smith (42 S. W. 850)	221	Houston & T. C. Ry. Co. v. O'Neal (47 S. W. 95)	671
Bexar County v. Voght (43 S. W. 14)	285	Houston & T. C. Ry. Co. v. Red Cross Stock Farm (45 S. W. 375)	628
Bicocchi v. Casey-Swasey Co. (42 S. W. 963)	259	Howard v. Smith (38 S. W. 15)	8
Blum v. Moore (42 S. W. 850)	273	Hughes v. Doyle (44 S. W. 64)	421
Board of School Trustees v. City of Sherman (42 S. W. 546)	188	Hume v. Schintz (42 S. W. 543)	204
Bowen v. Lansing Wagon Works (43 S. W. 872)	385	International & G. N. Ry. Co. v. Knight (45 S. W. 556)	660
Boyd v. Beville (44 S. W. 287)	439	Jones v. Risley (32 S. W. 1027)	1
Brackenridge v. Claridge (44 S. W. 819)	527	Joske v. Irvine (44 S. W. 1059)	574
British-America Assur. Co. v. Miller (44 S. W. 60)	414	Kildare Lumber Co. v. Atlanta Bank (41 S. W. 64)	95
Choate v. San Antonio & A. P. Ry. Co. (44 S. W. 69)	406	La Master v. Dickson (45 S. W. 1)	593
City of El Paso v. Conklin (44 S. W. 988)	537	Lindsey v. Cope (43 S. W. 29; 44 S. W. 276)	463
City of San Antonio v. Grandjean (41 S. W. 477; 44 S. W. 470)	430	McFarlane v. Howell (42 S. W. 853)	218
Cobb v. First Nat. Bank (42 S. W. 770)	226	Macmannus v. Orkney (40 S. W. 715)	27
Goe v. Nash (41 S. W. 473)	113	Mann v. Dublin Cotton-Oil Co. (45 S. W. 373)	617
Cooper v. Hiner (45 S. W. 554)	658	May v. Finley (43 S. W. 257)	352
Cooper v. Yoakum (43 S. W. 871)	391	Mealy v. Lipp (42 S. W. 544)	182
County of Galveston v. Ducie (45 S. W. 798)	665	Miller v. Gist (43 S. W. 263)	335
County of Mitchell v. City Nat. Bank (43 S. W. 880)	361	Miller v. Goodman (40 S. W. 718)	41
Cox v. Finks (43 S. W. 1)	318	Missouri, K. & T. Ry. Co. of Texas v. Hannig (43 S. W. 508)	347
Davis v. Texas & P. Ry. Co. (44 S. W. 822)	505	Missouri, K. & T. Ry. Co. of Texas v. Rogers (40 S. W. 956)	52
Demille v. Texas & N. O. Ry. Co. (42 S. W. 540)	215	Missouri, K. & T. Ry. Co. of Texas v. Williams (42 S. W. 855)	255
Dobbins v. Missouri, K. & T. Ry. Co. (41 S. W. 62)	60	Mitchell v. Bloom (45 S. W. 558)	634
Dublin Cotton Oil Co. v. Jarrard (42 S. W. 959)	289	Mitchell, County of, v. City Nat. Bank (43 S. W. 880)	361
Durst v. McCampbell (40 S. W. 955; 41 S. W. 470)	147	Moore v. Blagge (38 S. W. 979; 41 S. W. 465)	151
Earle v. City of Henrietta (43 S. W. 15)	301	Morris v. Cummings (45 S. W. 383)	618
Elder v. First Nat. Bank (44 S. W. 62)	423	Nalle v. City of Austin (44 S. W. 66)	424
El Paso, City of, v. Conklin (44 S. W. 988)	537	Needham Piano & Organ Co. v. Hollingsworth (40 S. W. 787)	49
Eustis v. City of Henrietta (43 S. W. 259)	325	New York & T. Land Co. v. Votaw (42 S. W. 969)	282
Farmers' & Mechanics' Nat. Bank of Fort Worth v. Taylor (40 S. W. 876, 966)	78	O'Connor v. Vineyard (44 S. W. 485)	488
Fort Worth & N. O. Ry. Co. v. McFadden (42 S. W. 593)	194	Oxsheer v. Watt (41 S. W. 466)	124
Foster v. Gulf, C. & S. F. Ry. Co. (45 S. W. 876)	631	Oxsheer v. Watt (44 S. W. 67)	402
Galveston, County of, v. Ducie (45 S. W. 798)	665	Palestine Water & Power Co. v. City of Palestine (44 S. W. 814)	540
Galveston, H. & S. A. Ry. Co. v. Gormley (43 S. W. 877)	393	Pickle v. Finley (44 S. W. 490)	484
Galveston, H. & S. A. Ry. Co. v. Masterson (43 S. W. 875)	383	Pires v. Snodgrass (41 S. W. 68)	105
Galveston & W. Ry. Co. v. City of Galveston (39 S. W. 920)	17	Pryor v. Jolly (40 S. W. 959)	86
Gilbough v. Stahl Bldg. Co. (45 S. W. 385)	621	Randolph v. Farmers' Loan & Trust Co. (44 S. W. 70)	605
Groesbeck v. Crow (40 S. W. 1028)	74	Rayner Cattle Co. v. Bedford (44 S. W. 410; 45 S. W. 554)	642
Gulf, C. & S. F. Ry. Co. v. Beall (42 S. W. 1054)	310	Regan v. Hatch (45 S. W. 386)	616
Gulf, C. & S. F. Ry. Co. v. Johnson (44 S. W. 1067)	569	San Antonio, City of, v. Grandjean (44 S. W. 476)	439
Harrington v. H. B. Claffin & Co. (42 S. W. 1055)	294	Sanger v. Warren (44 S. W. 477)	472
Harris v. Masterson (41 S. W. 482)	171	Scottish Union & National Ins. Co. v. Clancy (44 S. W. 482)	467
Harris County v. Stewart (41 S. W. 650)	133	Seibert v. Bergman (44 S. W. 63)	411
		Smith v. Pate (45 S. W. 6)	596
		Smith v. Wilson (44 S. W. 672)	503

TABLES OF SOUTHWESTERN CASES IN STATE REPORTS.

1213

91 TEX.—Continued.		Page			Page
Sneed v. Falls County (41 S. W. 481).....		168	Trinity & S. Ry. Co. v. Brown (45 S. W. 793)		673
Southern Building & Loan Ass'n v. Brackett (40 S. W. 719).....		44	Trustees, Board of School, v. City of Sherman (42 S. W. 546).....		188
State ex rel. Brown v. Callaghan (43 S. W. 12)		313	Wallace v. Southern Cotton Oil Co. (40 S. W. 399)		18
State ex rel. Dowlin v. Rigsby (43 S. W. 1101)		351	Watkins v. Smith (45 S. W. 560).....		589
Sumner v. Crawford (41 S. W. 994).....		129	Weems v. Watson (40 S. W. 722).....		35
Sutton v. Simon (45 S. W. 559).....		638	Welder v. Lambert (44 S. W. 281).....		510
Taber v. Interstate Building & Loan Ass'n (40 S. W. 954).....		92	Western Union Tel. Co. v. Edmondson (42 S. W. 549).....		206
Terrell v. McCown (43 S. W. 2).....		231	Western Union Tel. Co. v. Luck (41 S. W. 469)		178
Texas & N. O. R. Co. v. Bingle (42 S. W. 971)		287	Western Union Tel. Co. v. Mitchell (44 S. W. 274)		454
Texas & N. O. R. Co. v. Carr (43 S. W. 18)		332	Wheeler v. Tyler S. E. Ry. Co. (43 S. W. 876)		356
Texas & N. O. R. Co. v. Syfan (44 S. W. 1064)		562	Wheelock v. Cavitt (45 S. W. 796).....		679
Texas & P. Ry. Co. v. Eberheart (43 S. W. 510)		321	White v. Frank (40 S. W. 982).....		66
Texas & P. Ry. Co. v. Phillips (42 S. W. 852)		278	Wilder v. McConnell (45 S. W. 145).....		600
Texas & P. Ry. Co. v. Purcell (44 S. W. 1058)		585	Williams v. Planters' & Mechanics' Nat. Bank (45 S. W. 690).....		651
Texas & P. Ry. Co. v. Roberts (45 S. W. 309)		535	Wilson v. Harris (44 S. W. 65).....		427
Travis County v. Jourdan (42 S. W. 543) ..		217	Yarbrough v. Collins (42 S. W. 1052)....		306
			Zanderson v. Sullivan (44 S. W. 484)....		499

11



